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Litigation and Dispute Resolution

Review

EDITORIAL

It is now a year since the implementation of the Jackson reforms and an opportune moment to assess their impact. In this edition, Jason Rix outlines the key reforms for commercial parties and reflects on whether or not they have resulted in a change in culture amongst litigants (and their legal representatives) (see **Jackson Reforms**).

We cover a decision of the Supreme Court, *Cramaso LLP v Ogilvie-Grant, Earl of Seafield & ors* which considered whether a claimant could sue for a misrepresentation made during the course of pre-contractual negotiations to another (non-contracting) party. In this case, the misrepresentation was made to an individual who subsequently set up an SPV to contract with the defendant. The Supreme Court found that in certain circumstances negligent pre-contractual representations were actionable, even though they were made to a person who did not become a party to the contract (see **Contract**).

Finally, we report on an interesting Court of Appeal decision, *Rawlinson & Hunter Trustees SA & ors v Akers & anr* which considered the "dominant purpose" test when seeking to claim litigation privilege over documents. This decision offers important practical guidance for solicitors and those giving evidence of a claim to privilege (see **Privilege**).

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Arbitration

INJUNCTIONS IN SUPPORT OF DISPUTED ASSETS IN THE CONTEXT OF ARBITRATION – A HIGH DISCRETIONARY THRESHOLD

EurOil Ltd v Cameroon Offshore Petroleum SARL [2014] EWHC 12 & 52 (Comm), 6 & 14 January 2014

The court discharged an interim injunction that sought to protect the contractual right of the operator under a joint venture agreement to act as the exclusive representative of the parties in third party dealings related to the joint operations, in circumstances where the extent of those contractual rights was the very matter to be determined by the arbitral tribunal itself. The case is a useful reminder that the courts will be reluctant to grant interim relief in support of contractual rights (even in the period prior to constitution of the arbitral tribunal) where the scope of those contractual rights is the matter for determination by the arbitral tribunal.

Factual Overview

EurOil Ltd (**EurOil**) and Cameroon Offshore Petroleum SARL (**CAMOP**) were parties to a joint operating agreement (**JOA**) in relation to the "Etinde Permit", an exclusive exploration authorisation (constituting a Production Sharing Contract) for hydrocarbons in a 2,300 square kilometres area offshore Cameroon. CAMOP had a 25% interest in the Production Sharing Contract and EurOil held the remaining 75% interest. EurOil was appointed as the Operator under the terms of the JOA, and was responsible for implementing decisions of the management committee (which consisted of a representative of each party).

EurOil wished for the project to move from the exploration phase to the development and exploration phase and, to that end, it had prepared a detailed development and production plan and budget for submission to the Cameroon state authorities in order to obtain the necessary authorisation. At the management committee meeting on 3 January 2014, the parties had jointly resolved to "*unconditionally approve and authorise*" EurOil as operator to submit the application for that authorisation to the relevant Cameroon government body.

Pursuant to the JOA, the Operator was granted the right to represent the parties "*regarding any matters or dealings with the Government or third parties insofar as the same relate to* [the Etinde Permit]*, provided that there is reserved to each Party the unfettered right to deal with the Government in respect of matters solely relating to its own* [interest]".

Following the management committee meeting, CAMOP had written to the relevant Cameroon state authority expressing concern that the authorisation application may not be compliant with the relevant petroleum law provisions of the State of Cameroon. That letter reflected recurrent concerns of CAMOP relating to the capability of EurOil to carry out its functions as Operator under the JOA; the question of the appropriate development strategy for the project; and the necessity for the drilling of additional wells.

In EurOil's opinion, that letter (and any other communications of a similar nature) breached its rights under the JOA as Operator exclusively to represent the parties in communications with the Government.

EurOil sought an urgent injunction from the English court under s44(3) of the Act seeking to restrain

CAMOP from engaging in any correspondence with the Cameroon authorities with respect to the Etinde Permit (so far as those dealings related to the joint operations between the parties) and restrain CAMOP from making any communication with a particular government body.

Injunction initially granted

Section 44(3) of the Act empowers the court to grant such orders as it thinks necessary for the purpose of preservation of "assets".

In *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, the Court of Appeal held that the word "assets" in s44(3) extended to contractual rights and choses in action. Males J held that the contractual right to be the representative of the parties in dealings with the government (insofar as that related to the joint operations) was "an asset" within the meaning of s44(3). While recognising that the "true construction" of those contractual provisions was ultimately for the arbitrators, Males J's view was that there was a "seriously arguable case" that CAMOP's letter would constitute a breach of the JOA.

Further, the balance of convenience was in favour of granting a short interim injunction, as if the result of the communications was to frustrate the application for a development licence or cause a loss of confidence on the part of the Cameroon authorities in the JOA parties as a whole, the consequences could be "*extremely serious financially and may well not be capable of being compensated in damages*". As such, a short interim injunction was granted.

Injunction discharged

In a subsequent judgment delivered on 14 January 2014, the injunction was discharged.

Having heard further argument, Males J concluded that the "asset" the subject of the injunction, being the right to be the exclusive communicant with the Government in matters relating to the Etinde Permit, was an asset "whose existence and scope is disputed", as the precise nature of that right of communication is the "very issue" which the arbitrators will have to determine in the arbitration.

While the judge recognised that the court would have jurisdiction to make an order for the preservation of such a disputed asset (on the authority of *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618), he nevertheless held that the court should be "very cautious" before exercising its discretion in favour of granting an injunction.

Males J concluded that s44(3) is "*more readily to be invoked in the typical case where preservation of assets is being used in a more conventional way, such as in the case of a freezing order, for example, and that, the closer any injunction comes to determining a matter which it is for the arbitrators to decide, the more wary the court should be as a matter of discretion.*"

Given the close correlation between the formulation of the injunction and the scope of the issues for determination in the arbitration, together with the uncertainty that the formulation of the injunction had generated in limiting the extent of CAMOP's undoubtedly permitted interactions with the Cameroon State Government, the injunction was discharged.

Finally, it appeared that a representative of EurOil had misrepresented the effect of the interim injunction to the Cameroon state government. Males J commented that this was an abuse of the court's process, which in itself would have been sufficient to discharge the injunction.

COMMENT

While a key principle underlying the Arbitration Act 1996 is the autonomy of the arbitral process and limiting court intervention, in order to facilitate arbitration, s44 empowers the English courts with limited concurrent jurisdiction to grant interim asset preservation orders in support of arbitration proceedings (among other things). As that power acts as an exception to the general principle of judicial non-interference, there is a tension between the vesting of that power in the courts, and the need to ensure that the outcome of the arbitral process properly rests with the appointed tribunal.

This case demonstrates that where a party seeks to obtain an order to preserve disputed assets, it will be difficult to persuade the court to exercise its discretion

to grant such an order in circumstances where the disputed asset is itself, or approaches, the very matter which is or will be the subject of the arbitration.

As was recognised by the court, however, it remained open to EurOil to seek either a provisional or final injunction from the tribunal once it was constituted.

The case should encourage parties to negotiate and define with greater clarity the scope of their respective rights to communicate with third parties at the outset of such joint ventures, in order to limit the prospect of later disputes.

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COMMERCIAL COURT PROVIDES GUIDANCE ON ABUSE OF PROCESS FOLLOWING ALLEGED COLLATERAL ATTACK ON EARLIER ARBITRAL AWARD

OMV Petrom SA v Glencore International AG [2014] EWHC 242 (Comm), 7 February 2014

In Commercial Court proceedings the defendant sought to rely on points already rejected by an arbitral tribunal in a separate and earlier arbitration between the defendant and a third party. The claimant was not party to the earlier arbitration but nevertheless claimed that certain issues arising in those proceedings should be treated as settled in the present proceedings before the Commercial Court. Blair J held that an abuse of process could exist in such circumstances but that given that serious charges had been levied against the defendant, it was unfair to prevent the defendant from defending itself again in the Commercial Court.

Factual background

The arbitral proceedings

The "*unusual*" facts in this case arose from an unsuccessful arbitration commenced in 2003 against an oil trader, Glencore International AG (**Glencore**) by a commission agent, SC Petrolexportimport SA (**Petex**) (the **Petex Arbitration**). Petex alleged that Glencore was in breach of supply contracts and/or guilty of fraud for not supplying crude oil of the contractual specification. Although the tribunal found Glencore to be in breach, it determined that while Petex did have title to sue (as commission agent), it had suffered no actionable loss. The tribunal was not therefore required to consider Petex's claim in deceit. The tribunal nevertheless went on to consider quantum (noting that it was strictly unnecessary to do so) finding that had Petex suffered actionable loss, it would have been entitled to damages albeit of a lesser sum than the damages claimed.

Petex's challenge of the award before the English courts under s68 of the Arbitration Act 1996 failed. It assigned its rights under the supply contracts to OMV Petrom SA (**Petrom**) who had succeeded Petex's principals and who had allegedly not previously been aware of the facts giving rise to the arbitration. Petrom commenced its own arbitration against Glencore, but the claim was found to be *res judicata* by virtue of the award in the Petex Arbitration.

The Commercial Court proceedings

Petrom commenced English court proceedings against Glencore in April 2008 seeking damages for conspiracy and/or deceit. In Glencore's defence it repeated a number of points that had also been made in the Petex Arbitration. In anticipation of a trial commencing in May 2014, Petrom applied to the Commercial Court in December 2013 to strike out these parts of Glencore's defence as an abuse of process.

Petrom submitted that while its causes of action differed from those determined in the Petex Arbitration, the principal issues raised by Glencore in its defence and the evidence to be adduced in these proceedings were the same as in the Petex Arbitration. As such, it would be manifestly unfair and would bring the administration of justice into disrepute for Glencore to be permitted to challenge the conclusions reached in the Petex Arbitration.

In response, Glencore submitted that it would be unjust and inappropriate to strike out any part of its defence, and that it had a right to defend itself for a second time. The parties to the Petex Arbitration only promised to honour the award between themselves as the arbitration was private and confidential. Glencore also argued, *inter alia*, that it had been prevented from challenging the tribunal's *obiter* findings of fact because it had won, that this was not a case where a party was pursuing issues that it had previously pursued (it was the respondent in the arbitration and the defendant in these proceedings) and that Petrom had not pursued its application in a timely manner.

Judgment

Blair J referred to *Secretary of State for Trade and Industry v Bairstow* [2004] Ch. 1, where it was held that a collateral attack on an earlier decision of a court may be an abuse of the process of the court and that where the parties to the later proceedings were not parties to the earlier proceedings, there will only be an abuse of process if "*it would be manifestly unfair to a party to the later proceedings that the same issues should be re-litigated*" or if "*to permit such re-litigation would bring the administration of justice into disrepute*".[1]

Blair J was not convinced by Glencore's objections related to the private and confidential nature of the Petex Arbitration. Referring to *Michael Wilson & Partners Ltd v Sinclair* [2013] 1 All ER, Blair J held that it could be an abuse of the process of the court to seek to re-litigate in court issues that have been the subject of arbitral proceedings.

Nor was it determinative that Glencore was a defendant/respondent in both proceedings, although it was a relevant factor. It can be an abuse of process for a defendant to seek to reopen issues decided against it as a defendant in previous proceedings (*North West Water Ltd v Binnie & Partners* [1990] 3 All ER 547). An abuse of process can occur where a successful party overall in the earlier proceedings seeks to re-litigate an issue on which it was unsuccessful. That a particular finding was *obiter* was similarly not relevant.

Applying the test in *Bairstow*:

- in favour of Petrom, it was unfair for witnesses to be subjected to further cross-examination on the same facts, a witness had died since the Petex Arbitration and the memories of the witnesses would have diminished as a period of time had passed since the hearing in the Petex Arbitration; and
- in favour of Glencore, it was relevant that if Petrom's application was successful, findings of dishonesty made by the tribunal in the Petex Arbitration would essentially be adopted by the court.

Blair J found the position to be analogous to that in *Conlon v Simms* [2008] 1 WLR 484, where it was held that the court should be slower in preventing a party from continuing to deny serious charges in respect of which he has previously been found guilty, than in preventing such a party from commencing proceedings to re-litigate the issue of whether he was guilty of those charges. In that case, Ward LJ thought it more unfair to prevent a defendant faced with serious charges of fraud from defending himself again, than to require the claimants to prove serious charges of fraud. Blair J found this point to apply here and this was sufficient to deny Petrom's application.

Blair J went on to cite further factors that were detrimental to Petrom's application. First, there was a lack of mutuality as Petrom sought to hold Glencore to parts of the Petex Arbitration award that were disadvantageous to it, while leaving in issue the findings that were in Glencore's favour (namely quantum). This was not compatible with an abuse of process case. Secondly, the application had not been issued until proceedings were well advanced. Petrom had not conformed with the requirement in *Conlon v Simms* that abuse be identified as soon as possible.

Thirdly, Petrom had not satisfied the "*exacting test*" for an abuse of process application (*Calyon v Michailaidis* [2009] UKPC 24). Petrom's proposed amendments to the defence were at best internally inconsistent and at worst would make the amended defence incomprehensible.

A separate application raised by Glencore to enforce the confidentiality of the Petex Arbitration award was not pursued at this stage.

COMMENT

This case provides guidance on the court's approach to abuse of process in general and to collateral attacks on earlier proceedings (a sub-set of abuse of process) in particular.

Blair J noted that it is well established that independent of *res judicata*, it can be an abuse of process for a party to later proceedings to seek to relitigate issues determined in previous proceedings. The judgment reiterates the findings in existing case law regarding collateral attacks on earlier proceedings, while applying those findings to a novel set of facts: an application to the court by a non-party to earlier arbitral proceedings, where the party allegedly making the collateral attack was/is the respondent/defendant in both the earlier and later proceedings.

The judgment affirms that an abuse of process can exist where (i) the earlier proceedings were in arbitration rather than court proceedings; (ii) the earlier proceedings involved a different claimant; (iii) the collateral attack on the earlier judgment/award was made by the defendant (rather than the claimant) in the later proceedings; and (iv) the party making the collateral attack had been successful overall in the earlier proceedings.

The court nevertheless made it clear that in determining whether the test in *Bairstow* regarding non-parties to earlier proceedings is satisfied, it will consider whether it was fairer on the claimant to find abuse of process or on the defendant to reject abuse of process. On the facts of this case, the serious nature of the charges against Glencore necessitated that it be given an opportunity to defend itself.

The judgment of Blair J also contains a number of points of note for practitioners who are considering making an abuse of process argument. It is essential that abuse of process is considered and raised "*as soon as possible*" and not in a last-minute fashion, as occurred in this case. It is also important that where an attempt is being made to strike out portions of a defence or other pleading, those edits are made carefully to ensure the pleading does not become inconsistent or incomprehensible. The court emphasised that the burden is on the party making the application and that there is an "*exacting test*".

The case draws a key distinction between the principles of abuse of process and *res judicata*; while it may be decisive under *res judicata* to identify whether a particular finding was *obiter*, that is not necessarily the case for an abuse of process.

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[1] *Secretary of State for Trade and Industry v Bairstow* [2004] Ch. 1, paragraph 38.

Competition

ECJ RULES COMMISSION CAN RELY ON GENERAL PRESUMPTIONS IN REFUSING TO DISCLOSE CARTEL DOCUMENTS

The ECJ has ruled that, when faced with a request for access to cartel documents under the Access Regulation, the European Commission is entitled to rely on general presumptions that exceptions to the duty to disclose apply. The Commission will be relieved that it does not need individually to examine all documents requested. Potential defendants will gain comfort from the fact that the prospect of a damages action will not be enough to override any refusal to disclose.

Background

In 2007 the European Commission (**Commission**) imposed fines of over EUR 750 million on 11 groups of companies for their participation in a cartel to rig bids, fix prices, share markets and exchange commercially sensitive information in the gas insulated switchgear sector. EnBW Energie Baden-Wurttemberg AG (**EnBW**) requested access to documents in the Commission's file relating to the investigation. Its aim was to obtain information with a view to bringing a claim for damages against the cartel participants.

EnBW's request was made under Regulation 1049/2001 (the **Access Regulation**), which sets out the conditions under which EU institutions must provide access to their documents. The Commission grouped the documents requested into several categories and assessed each category in light of the exceptions to the duty to disclose provided for in the Access Regulation. In rejecting EnBW's request, the Commission relied on several exceptions, ie that to grant access would undermine:

- the protection of the purpose of inspections and investigations;
- the protection of a person's commercial interests; or
- the Commission's decision-making process.

It also found that there were no public interest reasons that should override the application of these exceptions.

EnBW appealed the Commission's refusal to the General Court, which upheld the challenge. In 2012 the Court ruled that the Commission was wrong to rely on a general presumption that all documents in a particular category are covered by an exception in the Access Regulation. It must undertake a specific analysis of each document.

The Commission appealed this ruling to the Court of Justice of the European Union (**ECJ**). The Advocate General's opinion in this case was that the ECJ should annul the General Court's judgment.

ECJ's ruling

On 27 February 2014 the ECJ handed down its ruling. It agreed with the Advocate General and annulled the General Court's ruling.

The Commission is entitled to rely on a general presumption

The ECJ first pointed to judgments in other areas of competition law (including merger control and state aid) in which it ruled that the Commission is entitled to presume that an Access Regulation exception applies to a whole category of documents. The question was therefore: does the same reasoning apply to Commission documents in an investigation under Article 101 of the Treaty on the Functioning of the European Union (ie the provision which prohibits anti-competitive agreements)?

The ECJ's answer was yes.

It ruled that the exceptions under the Access Regulation cannot be interpreted without taking account of the specific rules governing access to documents on the

Commission's file. These are set out in two regulations which manage the Commission's investigative proceedings in antitrust cases (Regulation 1/2003, and Regulation 773/2004, together the **Investigation Regulations**). According to the ECJ it is necessary that each of the Investigation Regulations, as well as the Access Regulation, are applied in a consistent and compatible manner.

The Investigation Regulations contain restrictions on who can access the Commission's file (only the parties under investigation and formal complainants) and what the documents can be used for (only judicial or administrative proceedings relating to the application of Article 101).

The ECJ found that if documents on the Commission's file were disclosed to persons other than those with a right of access under the Investigation Regulations (such as a potential damages claimant), this would undermine the access system set out in those regulations. In particular, it would risk upsetting the balance that the Investigation Regulations seek to draw between on the one hand, encouraging parties to submit commercially sensitive information to the Commission during an investigation and on the other, the right of increased protection for that information.

The ECJ therefore concluded that the Commission is entitled to presume, without carrying out a specific, individual examination of each of the documents on its cartel file, that disclosure of such documents will in principle undermine the protection of commercial interests, the purpose of investigations, and/or the Commission's decision-making process.

But this presumption is rebuttable

The ECJ went on to note that the existence of the general presumption does not prevent an applicant under the Access Regulation from demonstrating that a particular document is not covered by the presumption. Nor does it prevent that applicant showing there is an overriding public interest in disclosure. However, this does not mean that the Commission should examine each document individually – this would "*deprive that general presumption of its proper effect*".

A private damages action is not an "overriding public interest"

In this case, the ECJ found that there was nothing capable of rebutting the presumption. Interestingly, it considered that the general interest in enabling persons suffering loss as a result of anti-competitive conduct to be able to claim compensation is not capable of "trumping" the exceptions to the Access Regulation. The fact that EnBW was requesting access with a view to seeking damages could not constitute an overriding public interest.

Why is the case interesting?

The case forms part of the on-going saga into whether potential claimants can gain access to documents on the Commission's file for the purpose of bringing a private damages action.

The ECJ arguably takes a different approach than in previous rulings relating to access. In *Pfleiderer* (2011) and *Donau Chemie* (2013), which related to private damages claimants seeking access to leniency documents during the course of proceedings, the Court found that there was no blanket presumption against disclosing such documents. It was up to national courts to carry out an individual balancing exercise. In *EnBW*, the ECJ is affording to the Commission a somewhat different standard, by allowing it to rely on general presumptions.

So why the difference in approach? One explanation is that EnBW was requesting access to pretty much all of the documents on the Commission's cartel file, rather than a subset of them (eg leniency submissions). It would arguably not be practical or efficient for the Commission individually to examine each of these documents when considering whether any of the Access Regulation exceptions apply. Another possible explanation is that the Court might see a distinction between private actions that have already started (where documents are being requested as part of that procedure and a more strict individual assessment is required) and those where the applicant for access is merely thinking of bringing a claim (where the application is made under the Access Regulation and broad presumptions may be more appropriate).

Whatever the reason, the ECJ seems to be on the Commission's side, as well as that of potential defendants. It states that "*there is no need for every document relating to a proceeding under Article* [101] *to be disclosed to* [a] *claimant on the ground that that party is intending to bring an action for damages, as it is highly unlikely that the action for damages will need to be based on all the evidence in the file relating to that proceeding*". This will no doubt be read with relief by cartel participants who might otherwise fear the consequences of such far-reaching requests on future private damages actions.

All of this must also be considered in the context of the Commission's draft Directive on damages actions, which was published last summer and is currently being debated between the Commission, European Parliament and Council before adoption. One of the most controversial aspects of the draft is the section on disclosure. This was designed by the Commission to address perceived issues with the ECJ's rulings in *Pfleiderer* and *Donau Chemie*. The draft Directive provides for absolute protection from disclosure for leniency corporate statements and settlement submissions, and temporary protection (to the end of proceedings) for documents specifically prepared for antitrust investigations by parties or the authority. It is certainly not a given, however, that all three EU institutions will agree that national competition law on damages actions should contain these provisions.

But whatever the outcome for the draft Directive, the Commission (and potential defendants) will breathe a sigh of relief that where requests for access to Commission cartel documents are made under the Access Regulation, the onus is on potential claimants to rebut the general presumption against disclosure.

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Contract

NEGLIGENT PRE-CONTRACTUAL REPRESENTATIONS ACTIONABLE EVEN THOUGH MADE TO A PERSON WHO DID NOT BECOME A PARTY TO THE CONTRACT

Cramaso LLP v Ogilvie-Grant, Earl of Seafield & ors [2014] UKSC 9, 12 February 2014

With no previous authority directly on point, the Supreme Court has ruled that a contracting party may be able to claim damages for a negligent misrepresentation which was not made to that contracting party, but to a person who subsequently became its agent. The representor owed both the representee and the contracting party a duty of care as to the accuracy of the representation, which continued until the contract was concluded.

Background

The context of this claim was the negotiations for, and lease of, a grouse moor in Scotland. A representation concerning grouse numbers was made on behalf of the lessor (the **respondents**) to an individual (**Mr Erskine**), which turned out to be a negligent misstatement. However, before this was discovered, Mr Erskine formed a limited liability partnership (the **appellant**) which entered into the lease with the lessor. The respondents had been informed that Mr Erskine would use the limited liability partnership to take the tenancy. When the negligent misstatement was discovered, the appellant sued the lessor. A key issue was whether it

was possible for the appellant to have relied on the misstatement, given that the misstatement had not been directed at the appellant in the first place, but instead to Mr Erskine. There appeared to be no authority directly on point.

The claim

The appellant brought proceedings seeking damages on the basis that it had been induced to enter into the contract by a fraudulent or negligent misrepresentation. At first instance, the Lord Ordinary found that the misrepresentation had induced Mr Erskine to decide to enter into the lease. The issues before the Supreme Court were:

– whether the respondents owed a duty of care in negligence to Mr Erskine; and

– whether the respondents also owed such a duty of care to the appellant.

Although the on facts these were strictly questions of Scottish law, the Supreme Court's analysis was carried out by reference to English law principles.

Judgment

The Supreme Court (Lord Reed giving the leading judgment) held that the respondents owed a duty of care to Mr Erskine because they had a continuing responsibility to ensure that the representation was accurate so long as Mr Erskine remained the prospective contracting party. Where there is an interval of time between the making of a representation and the conclusion of a contract in reliance on the representation, the representation may be treated as having an effect in the mind of the representee which continues until the contract is concluded. The respondents therefore had a continuing responsibility to Mr Erskine for the accuracy of the representation. A misrepresentation would not have a continuing effect if, for example, it was withdrawn, lapsed or the representee discovered the truth before signing the contract.

Further, the Supreme Court held that the respondents owed a duty of care to the appellant for the accuracy of the representation, even though the respondents had made the representation to Mr Erskine (not the appellant) and it was the appellant which had entered into the lease. The court was not referred to any case in which it had considered the liability of a contracting party for a representation inducing the conclusion of a contract by someone other than the original representee. However, in *Briess v Woolley* [1954] AC 33, the House of Lords found that misrepresentations made by a person prior to the commencement of his agency made the principal liable in damages, since the agent had implicitly repeated his earlier misrepresentations after having become an agent. The Supreme Court held that the same principle could apply to the converse situation. Misrepresentations made to a person prior to the commencement of his agency could render the representor liable in damages to the principal if the earlier misrepresentations were implicitly repeated to the agent.

Here, the negotiations between Mr Erskine and the respondents simply continued after the respondents knew that the appellant was to be used as the contracting party to the lease. Neither party disclaimed what had previously been said in the course of their discussions or sought assurances that this could still be relied upon. The respondents' misrepresentation remained in Mr Erskine's mind after he began to act as the appellant's agent and continued until the lease was executed. The court concluded that the respondents implicitly asserted the accuracy of the representation to the appellant in a situation where it continued to be foreseeable that the representation would induce the appellant to enter into the contract. The respondents therefore assumed a responsibility to the appellant for the accuracy of the representation and owed the appellant a duty of care, which they failed to discharge.

COMMENT

This decision is significant for two reasons. First, the Supreme Court consolidated and clarified the various authorities on the effect of pre-contractual representations in finding that a misrepresentation is not necessarily an event whose legal consequences are fixed at the time when the misrepresentation was made – it may instead have a continuing causative effect. Secondly, the Court extended the principle in *Briess v Woolley* to allow a contracting party to rely on a misrepresentation which was not made to it or to its agent, but to someone who later became its agent.

The legal position following this decision is that a negligent misrepresentation is capable of having a continuing effect from the time it is made until the time the contract is concluded where the person who makes the representation, or to whom the representation is addressed, subsequently becomes the agent of the person who enters into the contract.

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Limitation

LIMITATION PERIODS IN CLAIMS FOR FRAUD OR FRAUDULENT BREACH OF TRUST: DO THEY APPLY TO DISHONEST ASSISTERS AND KNOWING RECIPIENTS OR ONLY TO TRUSTEES?

Williams v Central Bank of Nigeria [2014] UKSC 10, 19 February 2014

The Supreme Court has resolved more than a century of debate and conflicting judgments about the meaning and scope of s21 of the Limitation Act 1980. Despite dissenting judgments, the Supreme Court held that there is a six year limitation period for fraudulent breach of trust claims against dishonest assisters and knowing recipients. Section 21(1)(a) does not have the effect of disapplying this limitation period as it only applies to trustees proper, not to dishonest assisters or knowing recipients.

Section 21 Limitation Act 1980 (the Act)

Under s21(3) of the Act, a claim by a beneficiary to recover trust property, or in respect of a breach of trust, cannot be brought more than six years after the cause of action accrues. However, no limitation period applies where the claim is "*in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy*" (s21(1)(a)).

In 1986, Dr Williams transferred USD 6,520,190 to Reuben Gale, an English solicitor, to hold on trust for him. Dr Williams later alleged that he had been induced to act as a guarantor as part of a bogus transaction instigated by Nigerian State Security Services to import food into Nigeria. Under the guarantee the trust money was not to be released until funds in Nigeria had been made available to Dr Williams. Dr Williams alleged that, despite knowing that no money had been made available, Mr Gale paid USD 6,020,190 to CBN and kept the remaining USD 500,000 for himself.

Dr Williams brought his claim against CBN more than six years after these events. No proceedings were brought against Mr Gale. Although there was no question about Mr Gale's liability (he was a trustee who had acted in fraudulent breach of trust (so no limitation period applied (s21(1)(a) of the Act 1980)) Dr Williams felt that he had a better chance of recovering his loss from CBN. The basis of Dr Williams' claim against CBN was that it had been a party to Mr Gale's fraud and so was a "constructive trustee". The case turned on whether s21(1)(a) applied to the claim against CBN, ie whether the normal limitation period of six years was disapplied.

Section 21(1)(a) and constructive trustees

The question of whether and how s21(1)(a) (and its equivalent under predecessor statutes) applies to "constructive trustees" has been debated before the courts since the 19th Century and has led to conflicting,

or apparently conflicting, decisions. Even in this case, there was a robust dissenting judgment from Lord Mance and a partially dissenting judgment from Lord Clarke.

Two questions arose concerning s21(1):

(i) whether a party who dishonestly assists a fraudulent breach of trust or knowingly receives trust property in breach of trust is a trustee for s21(1) purposes; and

(ii) whether s21(1)(a) extends to claims against dishonest assisters and knowing recipients such that they are therefore not subject to limitation.

On the first question, the Supreme Court decided that s21(1) applies only to trustees proper. In the leading judgment, Lord Sumption differentiated between two types of constructive trustee. The first type, "*de facto trustees*", are ones who lawfully assume fiduciary duties in relation to trust property albeit without formal appointment. Lord Sumption described these as effectively "*true trustees*". The second category covers those with "*ancillary liability*". These are people who never intend to assume, and never do assume, the status and obligations of trustees. This includes dishonest assisters and knowing recipients.

A key distinction between the two categories is that "*true trustees*" validly take possession of the trust property, whereas those with ancillary liability have wrongful possession from the moment they acquire trust property. Although people in the second category are accountable in equity as if they were trustees, their categorisation as "trustees" is "*purely remedial*". They are "trustees" as regards certain remedies which are available against them, but this does not make them trustees who had been appointed as such or had become de facto trustees. The Supreme Court held that a second category "trustee" was not a trustee for the purposes of s21(1).

The next question was whether s21(1) applies to claims against parties that are not trustees. Section 21(1)(a) refers to fraudulent breaches of trust "*to which the trustee was a party or privy*". The issue was whether this refers only to claims against trustees, or whether it refers to claims against any party in respect of a fraudulent breach of trust to which a trustee was party or privy. The Supreme Court held the words to mean that only claims against trustees for their own fraudulent activities fall outside the limitation period.

The Supreme Court held that CBN was a constructive trustee of the type in Lord Sumption's second category, ie it had only ancillary liability. CBN was therefore not a "*true trustee*" and s21(1)(a) did not apply. The six year limitation period under s21(3) applied, and Dr Williams' claim against CBN was time-barred.

Dissenting judgments

Lord Mance gave a vigorous dissenting judgment. He believed that dishonest assisters should be treated as trustees under s21(1)(a). He said Lord Sumption and Lord Neuberger had been wrong to distinguish between express and constructive trustees, or between different categories of constructive trustees, for limitation purposes. He focused on why the Act had been passed, and said Parliament had intended to treat dishonest assisters in the same way as fraudulent trustees. He considered a report by the Law Revision Committee in 1936 (which led to the Limitation Act 1939). This said "*the distinction* [between express and constructive trusts for the purpose of the limitation of actions] *should now be abolished, and…the exception…should be expressly made to extend to trustees whether holding, on express or constructive trusts…*". Lord Mance felt that Lord Sumption had ignored the report and had not cited any English authority for his ruling. He questioned the rationale behind the majority's decision that a party that receives trust property honestly and later decides to deal with it fraudulently is a true trustee, but that someone who receives trust property intending to deal with it contrary to the trust is not a true trustee.

Lord Clarke dissented in part. He agreed with the majority that CBN was not within the meaning of the word "trustee" in s21(1)(a) and that a dishonest assister is not a constructive trustee. Where he dissented was in deciding that s21(1)(a) did not apply to claims against a party who was not a trustee. He saw no grounds to believe that the Act was limited to claims against trustees, and felt that the claim against CBN fell within the ordinary meaning of s21(1)(a).

COMMENT

The issue has long been debated and this case provides certainty about whether limitation periods apply to claims for fraudulent breach of trust against parties who are not trustees. It is now clear that, where a beneficiary brings a claim against a dishonest assister of a fraudulent trustee or a knowing receiver of misapplied trust assets, he must do so within the six year limitation period.

Claims against some constructive trustees will not be time-barred, but the constructive trustee must be a "*true trustee*", ie a trustee who validly takes possession of the trust property, as opposed to someone whose possession of the trust property is wrongful from the moment they take possession and who is treated as a trustee only for the purposes of granting appropriate remedies.

On one view, the certainty is welcome. However, one effect is to reduce the ability of victims of fraud to recover from those who helped to defraud them. To Lord Mance and Lord Clarke, it was not clear on the face of it that the words in s21(1)(a) about fraudulent breaches of trust "*to which the trustee was a party or privy*" refer to anything more than a precondition for s21(1)(a) to apply (whoever the claim is against) rather than, as the majority held, requiring the claim to be against the trustee.

Similarly Lord Mance and Lord Clarke could not see a rationale for treating dishonest trustees differently in this respect from people who dishonestly assisted in a breach of trust or dishonestly held property following a breach of trust. Lord Mance cited a well-known judgment by Millett LJ in *Paragon Finance plc v DB Thakerar & co* (a firm) [1999] 1 All ER 400:

> "*A principled system of limitation would also treat a claim against an accessory as barred when the claim against the principal was barred and not before. There is, therefore, a case for treating a claim against a person who has assisted a trustee in committing a breach of trust as subject to the same limitation regime as the claim against the trustee*".

While this was a decision for Parliament, rather than the courts, Lords Mance and Clarke felt there was contemporary evidence that Parliament had *not* intended to make the distinction that the majority of the Supreme Court believed existed.

Having said that, the position is now, finally clear.

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ACCRUAL OF CAUSE OF ACTION IN TORT REQUIRES ACTUAL EXPRESS DAMAGE

British Telecommunications plc v Michelle Luck & ors [2014] EWHC 290 (QB), 17 February 2014

This case considers the point at which a claimant is said to have suffered actual damage as a result of a tortious misrepresentation, such that a cause of action in tort arises and the limitation period starts running. In this pensions dispute, although the claimants became vulnerable to loss when their employment was transferred from British Telecommunications (**BT**) to EPS in 2000, no actual damage was suffered until their membership of the BT pension scheme ceased two years later. The decision suggests that a claimant would normally be expected to have actually suffered loss, or be "financially worse off", before a cause of action will accrue, and the possibility or prospect of such loss is unlikely to be sufficient.

Background

Prior to August 2000, the claimants were employees of BT. In August 2000, their employment was transferred to EPS, a joint venture vehicle between BT and Accenture. Whilst employed by BT the claimants were members of BT's pension scheme. The claimants allege that, prior to the transfer, BT represented to them that the terms of their contract (including pension rights) would be the same following the transfer to EPS and they would continue to be members of the BT pension scheme. Two years later, BT sold its shares in EPS and the claimants ceased to be members of the BT pension scheme on 31 August 2002. The claimants allege that the replacement scheme (a defined contribution scheme) is less beneficial than the BT scheme (a defined benefit scheme) and that they had, therefore, suffered detriment.

The claimants argued that the representations made by BT were false, that BT knew it would withdraw from EPS within three years and that the members would cease to be members of the BT scheme. They argued that, had the representation not been made, they would not have accepted the move to EPS. The claimants commenced proceedings on 27 August 2008 and claimed both contractual and tortious misrepresentation.

The defendants argued that the claims were time-barred. On a strike-out application, Master Leslie ordered that the limitation defence made in relation to the tort claim be struck out (he also struck out the claim in contract). He held that the cause of action in tort accrued on 31 August 2002, which was when the claimants ceased to be members of the BT Scheme. The action was therefore commenced within the relevant six-year period.

The defendants appealed the Masters decision.

When did the claimants suffer damage?

It was common ground that a cause of action in tort does not accrue until actual damage is suffered. In issue was the point at which the claimants had suffered damage.

The claimants argued that they did not suffer loss in August 2000 because they were transferred into EPS on the same terms as they had with BT and remained members of the BT scheme at that time. There was therefore no difference between the position of the claimants as employees of BT or as employees to EPS. They argued that the earliest date on which they suffered loss was 31 August 2002, when they ceased to be members of the BT Scheme.

The defendants argued that claimants suffered damage when they left the employment of BT and became employees of EPS in August 2000. At this point, the employees were exposed to the risk, likelihood or inevitability that BT would leave the joint venture and that the claimants would be removed from the BT Scheme. At the point of the transfer, the employees'

position was worse in that they were, from that point, likely to be removed from the BT Scheme, a vulnerability which they did not have when employed by BT. Relying on the cases of *Shore v Sedgwick Financial Services* [2008] PNLR 874, and *Pegasus Management Holdings v Ernst & Young* [2010] PNLR 438, the defendants argued that the mere possibility of loss was sufficient to show that actual damage had been suffered.

The decision

Teare J highlighted that determining when damage had been suffered was not a simple task and noted the observation in *Axa Insurance v Akther & Darby* [2009] PNLR 455 that the question of whether actual damage has been suffered is a fact specific question.

He acknowledged that, in the broad sense, vulnerability can be described as detriment but agreed with Lord Mance in *Law Society v Sephton* [2006] 2 AC 543 that not every detriment will constitute damage for the purposes of a claim in tort.

Following the House of Lords' approach in *Sephton* on the question of when actual loss was suffered, Teare J dismissed the appeal and found for the claimants. He found that there was no actual loss until 31 August 2002 because:

- there was no change in the legal position of the claimants as a result of the transfer of employment;
- it was not possible to know which of the former employees of BT had actually suffered loss until such time as BT actually withdrew from the joint venture and EPS moved the members (those members who had not already taken their pension rights) into the alternative pension scheme; and
- it was not appropriate to talk of the claimants' pension rights as having suffered loss until those pension rights had actually changed by the claimants being moved into the alternative and less advantageous scheme.

COMMENT

The decision is a useful reminder that a cause of action in tort does not accrue until actual damage has been suffered and that the question of when "actual damage" has been suffered is very much dependent on the facts of each case. The decision acknowledges that vulnerability to loss can constitute detriment but that detriment will not always constitute actual damage. The decision follows the line of reasoning advanced in *Sephton* and suggests that the claimant would normally be expected to actually suffer loss, or be "financially worse off" (the expression preferred by Lord Walker in *Septhon*), before the cause of action will accrue and the possibility or prospect of such loss is unlikely to be sufficient.

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Privilege

LITIGATION PRIVILEGE: COURT OF APPEAL CONFIRMS HIGH BAR FOR DOMINANT PURPOSE TEST

Rawlinson & Hunter Trustees SA & ors v Akers & anr [2014] EWCA Civ 136, 20 February 2014

The Court of Appeal confirms the "dominant purpose" test for litigation privilege remains high – where documents (here, reports commissioned by joint liquidators) are created for a dual purpose, a claim that litigation is the dominant purpose needs to be clearly evidenced.

This question arose as an interlocutory issue in the high-profile litigation brought by the Tchenguiz brothers, and their related companies and trusts, against the Serious Fraud Office (**SFO**) alleging that searches and seizures carried out by the SFO at the brothers' premises in 2011, and the connected arrests and investigations, were unlawful and that the SFO's actions and the publicity surrounding them, caused extensive financial losses and reputational harm.

In obtaining the search warrants in question, the SFO had relied extensively upon five reports which had been prepared by the accountancy firm Grant Thornton (**GT**) on behalf of the joint liquidators of certain companies connected with the brothers. This application was an application for disclosure of those reports by the joint liquidators as third parties to the proceedings under Rule 31.17 of the Civil Procedure Rules (**CPR**) (the Reports not being in the SFO's possession). The joint liquidators objected to disclosure on three grounds; namely, that: (i) the reports were not necessary for the fair disposal of the case or to support the applicant's case or undermine the SFO's case; (ii) the reports were protected by litigation privilege; and (iii) the court had a discretion in ordering the third party disclosure, and it should not be exercised in favour of the Tchenguiz brothers.

Eder J rejected all three arguments at first instance and granted the application for third-party disclosure. Eder J's first instance decision is covered in the October 2013 edition of the Litigation and Dispute Resolution Review. Only the second aspect, relating to litigation privilege, was challenged on appeal.

Test for Litigation Privilege – identifying the "dominant purpose"

Litigation privilege is principally intended to protect communications between lawyers and/or their clients and third parties from disclosure. It attaches to confidential communications between either a lawyer or his client and a third party (eg a witness or expert) made for the dominant purpose of actual or anticipated litigation.

The key issue in this case was whether documents created for dual or multiple purposes were nonetheless created for the "dominant purpose" of litigation. It is well accepted that litigation need not be the *only* purpose for the creation of a document (eg see *Price Waterhouse v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583). However, where there are dual or multiple purposes each purpose will be closely examined by the court to determine which prevails.

Court of Appeal

Giving the leading judgment in this unanimous decision, Tomlinson LJ agreed with Eder J that it is not sufficient to found a claim for litigation privilege if a document is produced for *the purpose* of obtaining information or advice in connection with litigation, or aiding the conduct of litigation; the purpose must properly be characterised as the *dominant purpose*.

Tomlinson LJ noted that the burden of proof is on the party claiming privilege to establish that the dominant purpose test is satisfied. A mere claim in evidence is not decisive. The court will look at purpose from an objective standpoint, looking at all relevant evidence including evidence of subjective purpose, and the evidence "*must be specific enough to show something of the deponent's analysis of the purpose for which the documents were created and should refer to such contemporary material without disclosing the privileged material*."

The court acknowledged that this was not an easy task, particularly in the context of liquidators who owe duties with regard to both the orderly collection of assets and the settlement of liabilities. However, the court helpfully clarified that if the purpose of commissioning a report was to conduct an exercise that the joint liquidators were bound to carry out in any event, irrespective of whether litigation was pending or in contemplation, this would *not necessarily* be fatal to a claim that litigation was the dominant purpose because commissioning such a report was *not necessarily* independent of the possible need to take recovery proceedings.

The Court of Appeal agreed that none of the reports satisfied the "dominant purpose" test and therefore that the reports could not be protected by litigation privilege. Where the purpose of one report was claimed to be "*to assist* [the joint liquidators] *in obtaining strategic advice in the context of*" a particular application, this came "*nowhere near*" to establishing a claim to litigation privilege.

Another report was said to have been commissioned to "[identify] *potential causes of action as well as the defendants to possible claims*" and the Court of Appeal found that such a purpose fell short of the necessary threshold of litigation being reasonably in prospect, even where the joint liquidators stressed the essentially litigious nature of the liquidations.

COMMENT

This decision offers important practical guidance for solicitors and those giving evidence in support of a claim to privilege. It is simply not sufficient to demonstrate that a document is prepared for the purpose of litigation. The party asserting privilege must clearly establish and evidence that this is the dominant purpose. Tomlinson LJ noted in this case that "*in circumstances which call for clarity and precision…*[the witness] *made no effort to grapple with the obvious need to establish which of dual or even multiple purposes was dominant if a plausible claim to privilege was to be made out.*" This will come down to a detailed assessment of the facts of each case and each document over which privilege is claimed.

Further, it is not enough simply to state that a document was produced for the dominant purpose of contemplated litigation; all elements of the test should be addressed fully and contemporaneous evidence should be adduced where possible. As much detail as possible should be provided about the contemplated litigation. This may include identifying the particular litigation that is contemplated and the potential defendants in such litigation (the court did not address that this could be somewhat burdensome in practice). It may also be necessary for parties to deal up front with any apparently unhelpful points; Tomlinson LJ noted that one of the reports was not sent to counsel until almost a year after it had been produced and that litigation had still not been commenced, commenting that "*Neither of these points is conclusive but the failure to deal with them deprives the claim to privilege of plausibility*." It should be remembered that it is also important to consider who is best placed to give evidence as to whether a document is privileged given Eder J's suggestion at first instance that, if a witness was not involved in the commissioning or producing of a report, it would be justifiable to submit the witness' evidence to "anxious scrutiny."

The decision is also a reminder that, when commissioning reports or similar documents, potential litigants and their solicitors should give early consideration to whether a document will attract litigation privilege. If there is any doubt about whether a document is privileged, this should be taken into account in deciding whether to create the document in the first place and in managing the content of any document that is in fact created. Further, if litigation is in contemplation at the time a document is created and the document is created for the dominant purpose of that litigation, parties should consider recording this contemporaneously.

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Real Estate

SUPREME COURT RULES ON WHEN TO GRANT DAMAGES IN LIEU OF AN INJUNCTION TO STOP INFRINGEMENT OF A PROPERTY RIGHT

Coventry & ors v Lawrence & anr [2014] UKSC 13, 26 February 2014

In an important judgment for developers and their neighbours the Supreme Court has ruled that a more flexible approach must be taken when considering whether to grant damages in lieu of an injunction to stop an infringement of a property right. Although the case related to actionable noise nuisance the ruling would similarly apply to cases involving trespass or interference with rights of light. Doubt was cast on recent applications of the test in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287. The starting position will still be that an injunction should be granted where a claimant's rights are being infringed, but judges' discretion will no longer be fettered by an overly strict application of the *Shelfer* tests. The burden will remain on defendants to show why an injunction should not be granted, but they no longer need to satisfy all four of the *Shelfer* tests. The Supreme Court also addressed the circumstances in which a party can lawfully carry out activities which would otherwise amount to a private nuisance.

Background

In the last few years, rights of light have been a difficult area for developers, largely due to the application of *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, in *Regan v Paul Properties DPF No 1 Ltd* [2007] Ch 135 and *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch).

Following *Shelfer*, where a claimant could demonstrate that its rights were being infringed by the actions of the defendant, the *prima facie* remedy was an injunction to stop the action taking place. *Shelfer* established that the courts' discretion to award damages in lieu of an injunction would only be exercised in very exceptional circumstances when (a) the injury to the claimant's right was small; (b) the injury could be valued in money; (c) the injury could be compensated by a small amount of money; and (d) it would be oppressive to the defendant to grant an injunction.

In *Regan* and *Heaney*, the *Shelfer* tests were applied mechanistically, which resulted in injunctions being awarded to parties whose rights of light had been

infringed by neighbouring developments. In both cases the High Court found that a claimant should not be forced to accept compensation for the loss of light. The case of *Heaney* was particularly concerning to developers as an injunction was granted requiring the development to be cut back, even though the development had already been completed, the relevant floor let and the claimant having taken no steps to prevent the development while it was being constructed. This interpretation of the *Shelfer* tests meant that parties with rights of light had a very strong negotiating position to achieve significant settlement figures from developers.

Supreme Court advocates a more flexible approach

The members of the Supreme Court decision in *Coventry* weakens the hand of those with rights of light and encourages the courts to exercise more discretion rather than slavishly following the *Shelfer* tests.

In 2006, appellants bought a house close to a stadium and track where speedway, stock car racing and motocross events took place. The stadium was constructed in 1975 following planning permission for speedway racing. In 1997 the planning authority also permitted stock car racing to take place at the stadium and in 2002 planning permission was given for motocross events. The appellants alleged that the noise from the stadium and track amounted to a nuisance that affected their enjoyment of their property.

A private nuisance is caused by a person doing something on their land, which is usually lawful but becomes a nuisance when the consequences of their acts affect the enjoyment of neighbouring land. A claimant in nuisance proceedings can apply for damages and/or an injunction to stop the nuisance.

In 2008, the appellants brought proceedings for private nuisance, seeking damages for their loss and an injunction to prevent the nuisance continuing. The respondents submitted that the stadium benefitted from a prescriptive right to cause a noise nuisance as a result of the long use of the land as a race track and stadium.

The High Court awarded an injunction and damages to the appellants but this was overturned at the Court of Appeal, where it was held that the respondents' activities did not amount to a nuisance. The case was then appealed to the Supreme Court.

The members of the Supreme Court unanimously found that the respondents' activities constituted a nuisance and that they had failed to establish a prescriptive right to carry out those activities. The injunction awarded at first instance was restored, but stayed as the appellants' house had not yet been rebuilt after a fire.

Injunction v Compensation

In a shift from the previous application of *Shelfer*, the Supreme Court decided that a more flexible approach should be adopted by the courts when considering whether to award damages instead of an injunction. In the leading judgment, Lord Neuberger said that since *Shelfer* judges had been too ready to grant injunctions without fully considering public interest, planning permission and other factors when deciding whether damages should be awarded instead. He went on to say that "*(i) an almost mechanical application of A L Smith LJS's four tests, and (ii) an approach which involves damages being awarded in only 'very exceptional circumstances', are each simply wrong in principle, and give rise to a serious risk of going wrong in practice*".

As such, not all the *Shelfer* tests must be satisfied before a court will award compensation instead of an injunction. The starting position remains that an injunction should be granted where a claimant's rights are being infringed, but judges' discretion would no longer be fettered by overly strict application of the *Shelfer* tests. The burden remains on defendants to show why an injunction should not be granted, but they no longer need to satisfy all four of the *Shelfer* tests. On the issue of planning permission, Lord Neuberger suggested that planning permission would be evidence that the activity causing the nuisance may be for the public benefit, and that such public interest would be relevant and should be taken into account by the court when deciding whether to award damages in lieu of an injunction.

The Supreme Court did not fully consider the issue of damages to be awarded in place of an injunction, but Lord Neuberger did accept that the level of such damages would normally be no more than the value of the reduction in the claimant's property caused by the nuisance. However, he also said that in some cases damages would not be so limited and that "*while double counting must be avoided, the damages might well, at least where it was appropriate, also include the loss of the claimant's ability to enforce her rights, which may often be assessed by reference to the benefit to the defendant of not suffering an injunction*".

Right to commit a nuisance

The Supreme Court also found that:

(a) a party can acquire a right by prescription to commit what would otherwise be a nuisance. However, a party seeking to establish such a prescriptive right would need to show that the activity had amounted to a nuisance for 20 years;

(b) while planning permission authorising an activity that causes a nuisance can be a factor in deciding whether to award an injunction, planning permission should not prevent a party from being able to enforce their private rights or seek a remedy for nuisance; and

(c) it is not generally a defence to show that a claimant "came to the nuisance" by moving to the area after the nuisance had started. However, where the claimant's own activity causes the defendant's actions to become a nuisance, the defendant may have a defence. Lord Neuberger stated that "*it may well be a defence, at least in some circumstances, for a defendant to contend that, as it is only because the claimant has changed the use of, or built on, her land that the defendant's pre-existing activity is claimed to have become a nuisance, the claim should fail*".

COMMENT

While *Coventry* is an important case because it clarifies when a party can have a right to cause what would otherwise be a nuisance, its greater significance lies in the approach taken on the issue of when compensation or an injunction should be awarded in relation to that nuisance and, more widely, in respect of infringement of property rights generally. The previous "slavish" application of *Shelfer* has been set aside in favour of greater judicial discretion to award damages in lieu of an injunction. The upshot is still a level of uncertainty (and possibly therefore the likelihood of more litigation), but overall the shift in approach of the courts caused by the *Coventry* decision will be welcomed by developers. With the threat of obtaining an injunction less powerful, financial settlements may be more forthcoming, thus allowing developments to progress. As the amount of compensation payable will be roughly quantifiable, it can be factored in when budgeting for the costs of a development.

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Regulatory

FCA RISK OUTLOOK AND BUSINESS PLAN 2014 – KEY ENFORCEMENT THEMES

The FCA Business Plan published on 31 March 2014 sets out the FCA's programme of work for the year ahead and is intended to address the risks highlighted in Risk Outlook published the same day. These documents are essential reading in understanding the FCA's priorities for the year ahead. In this article we principally focus on the FCA Business Plan and provide our thoughts on the highlights from an enforcement perspective.

"Executive Summary" and "Achieving our objectives" chapters

The Executive Summary of the Business Plan focuses on three new activities for the FCA:

- ***Consumer Credit***

  Consumer credit will be integrated into the FCA's activities from 1 April 2014, which will affect around 50,000 consumer credit firms. The FCA states that it will be able to carry out more intensive regulation than previous regimes were able to.

  The FCA mentions that it has a programme of specific work that it intends to focus on in 2014/15 relating to consumer credit, including carrying out work on a market study into the credit card market, thematic work and implementing a cap on the cost of high cost short-term credit.

- ***Implementing the measures set out in the Financial Services (Banking Reform) Act 2013***

  Numerous references are made to the FCA's focus on implementing measures in the Banking Reform Act to give effect to the Senior Managers and Certified Persons Regimes. There is no doubt that these changes will have a significant impact on the way the FCA regulates firms and individuals.

  The FCA states that it will introduce "*a Senior Managers Regime in deposit-taking institutions (including banks) to ensure that the most important responsibilities are assigned to specific, senior individuals who can then be held accountable for them. We intend to create a Senior Managers Regime that: encourages and incentivises senior persons to take accountability for their actions, raises the overall standards of governance in firms and strengthens our ability to hold senior managers to account for the conduct in their institution*". The FCA also says that it will introduce a Certified Persons Regime for individuals not included in the Senior Managers Regime but who are performing a role that involves, or might involve, a risk of significant harm to a firm or its customers. There will be consultation on these proposals later this year.

  In relation to approved persons, the FCA also states: "*In 2014/15 we will continue to focus on the accountability of boards and senior people in firms that carry out Significant Influence Functions (SIFs), as well as firms that fail to do what they say they will or are repeat offenders. We will devote resources to tackling those who abuse the market, including through criminal prosecutions*."

- ***New regulator to oversee the UK's payment systems***

  The FCA will start preparing for the operational launch in April 2015 of a new regulator to oversee the UK's payment systems which will be a separate legal entity with its own statutory objectives and board, under the FCA.

In addition to these three new activities, the FCA sets out several other key activities that it will focus on in the coming year:

(a) continuing to advance the FCA's new competition objective and undertaking Market Studies to analyse competition and weaknesses in the markets;

(b) continued use of thematic reviews;

(c) continued "tough and meaningful action" against firms and individuals who fail to follow the FCA rules;

(d) engagement with key international policy development and cooperation with other regulators to pursue cross-border enforcement;

(e) assessment of anti-money laundering processes and controls in major banks and those staff responsible for them. This will be extended during 2014/15 to some smaller firms that might present high levels of money laundering risk, as well as carrying out focused thematic work;

(f) an "increasing" focus on how well firms analyse consumer complaints about PPI; and

(g) consideration of the case for a 15 year time limit on complaints to the Financial Services Ombudsman.

Enforcement priorities

There is also focus on how the FCA will continue to use the full range of its criminal, civil and regulatory powers to support its priority of securing better results for consumers and reinforcing its commitment to ensuring markets function well. Reference is made to the FCA's key enforcement priorities for 2014/15 which includes:

– taking decisive action where firms fail to manage risks effectively or observe proper standards of market conduct;

– removing from the industry the firms or individuals that fail to meet FCA standards;

– continuing to pursue the firms or individuals who abuse UK markets by using the FCA's criminal and civil powers;

– taking action where firms fail to treat customers fairly, penalising those who are responsible and ensuring that effective redress is delivered quickly;

– continuing to pursue major investigations into LIBOR and the FX markets, working with other agencies in the UK and overseas;

– taking robust action against consumer credit firms that do not meet FCA standards; and

taking action against firms that target consumers with unauthorised products

Protecting consumers chapter

This chapter focuses on how the FCA will secure an appropriate degree of protection for consumers. The FCA states that it will focus in particular on the accountability of individuals carrying out significant influence functions in firms, as well as consumer protection, anti-money laundering, anti-bribery, wholesale conduct and market abuse. The FCA will also take over on-going consumer credit enforcement cases from the Office of Fair Trading.

In relation to preventing financial crime, the FCA gives examples of targeting consumer fraud, such as boiler room or carbon credit scams, liaising with the police and other enforcement agencies where necessary. Interestingly, the FCA highlights a trend we have noticed of an FCA focus not only on whether AML processes are followed, but also on the quality of judgements about money laundering risk and the firms' AML culture.

Also worthy of note in this chapter is the statement that the FCA intends to conduct thematic work on protecting client money and custody assets (CASS). Enforcement action is already taking place in this sector and we can expect to see increased levels of enforcement following any thematic reviews.

Enhancing Market Integrity chapter

While the "Protecting Consumer" chapter comes first in the Business Plan, it was market integrity issues that Martin Wheatley chose to highlight in his speech at City Week 2014 on the day the Business Plan was published and it is market integrity issues which have dominated in the press.

Thematic work will clearly be a central part of the FCA's work over the next year. As part of its supervisory work the FCA will carry out thematic reviews to investigate issues in specific products and sectors and enforcement action could follow. Mr Wheatley highlighted in his speech two of the most important wholesale-related reviews announced in the Business Plan:

– thematic work on trader controls around benchmarks (Q4); and

- thematic work on controls over flows of information in investment banks (Q2).

Benchmarking thematic review

There will be a review into control and governance of traders around inputs to benchmarks. Mr Wheatley said that he hoped over the medium to long term there will be a move away from a climate of multi-billion dollar enforcement suits to one where benchmark challenges are dealt with proactively by firms and regulators alike. He raised the following questions: how do firms apply the lessons from LIBOR? What are the behavioural drivers of conduct risk in benchmarks? Do firms manage their conflicts of interest? Are front office controls sufficiently robust? And, just as important, are firms incentivising risk taking through the use of discretionary compensation? The FCA wants firms to be clear about the relationships between benchmarks and trading activity. They need appropriate controls in place and these must be underpinned by the right culture. Further, the FCA expects firms to have considered the lessons from LIBOR and applied these to their use of other benchmarks and to be managing the kind of trader behaviour. The FCA will be asking: do senior executives have enough influence over culture and behaviour? Do they encourage their traders to operate within acceptable standards?

Conflicts of interest in the use of information

As Mr Wheatley said in his speech, the question here is relatively straightforward: are firms properly protecting and managing information, putting their clients' interests in front of their own? In other words, does information flow too easily across Chinese walls? In the second quarter of this year, the FCA will be launching a review into the effectiveness of controls over flows of information, looking at key issues.

Also worthy of note is the FCA's reference to extended AML assessments and enhanced whistleblowing activity:

- ***Extended AML assessments***

  In 2014/15 the FCA will continue its Systematic Anti-Money Laundering Programme (SAMLP) assessments of major banks. It currently conducts "deep-dive" assessments of four banks each year, undertaking detailed testing and extensive interviewing of key staff responsible for implementing AML processes and controls. In 2014/15 it will extend this to some smaller firms that might present high levels of money laundering risk. It will also continue to publish AML thematic work.

- ***Enhanced whistleblowing activity***

  The FCA is keen to promote a culture whereby people feel prepared to speak up about wrongdoing within a firm. Whistleblowing is an important part of this as it gives us a direct insight into practices that are taking place in firms. In 2013, there was a 65% increase in the number of actionable pieces of intelligence the FCA received from whistleblowers. It has put more resources in place and enhanced its processes to deal with this effectively. In 2014/15 the FCA will consider whistleblowing trends and identify under-represented sectors where it can direct an outreach programme to encourage whistleblowers to come forward. It will also provide regular reporting on whistleblowing trends.

Building competitive markets chapter

Not surprisingly given its new competition objective, a whole chapter is devoted to how the FCA intends to build competitive markets. A major part of the answer is through the use of market studies. It is clear that the market studies will be comprehensive, and the sectors covered by market studies will evolve as new issues emerge.

COMMENT

- The 1 April 2014, the first birthday of the FCA, was an important date for the regulator; the responsibility for the regulation of consumer credit transferred from the OFT to the FCA, effectively doubling the number of firms the FCA regulates.
- Despite an even bigger workload, the FCA has indicated that there will be no respite in the number of thematic reviews and market studies being undertaken. Also key in the enforcement arena will be the further increased focus on SIFs and work carried out on the Senior Managers and Certified Persons Regimes, extension of anti-money

laundering assessments and a desire for increased reliance on whistleblowing.

– Looking further ahead, in April 2015 the FCA will become a concurrent competition regulator, meaning that the FCA will be able to enforce competition law in financial services concurrently with the Competition and Markets Authority, April 2015 will also see the operational launch of a new regulator, under the FCA, to oversee the UK's payment systems.

– As always, Europe and the wider international arena will - in the FCA's words - "*continue to heavily influence our work*". In the market integrity chapter the FCA recognises that the integrity of the UK financial markets is heavily reliant on the security and activity of the wider European and international financial system and for that reason influencing international policy is critical, particularly since much of our markets and wholesale regulation is shaped by European policy developments.

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Jackson Reforms

JACKSON REFORMS – WHERE ARE WE NOW?

This article considers three aspects of the Jackson reforms to English civil litigation thought to be most relevant to commercial litigators, almost a year on from their implementation on 1 April 2013.

Cost budgeting

Jackson LJ refined the essence of costs management to the following four elements:

(1) The parties prepare and exchange litigation budgets and, if necessary as the case proceeds, amended budgets.

(2) The court states the extent to which those budgets are approved.

(3) The court manages the case so that it proceeds within the approved budgets.

(4) At the end of the litigation, the recoverable costs of the winning party are assessed in accordance with the approved budget.

An eleventh hour change, just before the implementation of the Jackson reforms last April, meant that, from the outset, the full costs budgeting regime did not apply at all in:

– the Commercial Court; or

– the Chancery Division, the Mercantile Court, or the Technical and Construction Court, in each case where the sums in dispute do not exceed GBP 2 million.

These exclusions were only ever intended to be temporary.

On 25 February 2014 it was reported that Lord Dyson MR and Richards LJ had recommended a GBP 10 million threshold across all courts despite strong opposition from Commercial Court judges.

This has now been confirmed in draft changes to the relevant rules and practice direction (subject to the approval of the Lord Chancellor) which will come into effect on 22 April 2014.

The new costs budgeting regime will apply in all cases except:

(1) where the claim is commenced on or after 22 April 2014 and the amount of money claimed as stated on the claim form is GBP 10 million or more; or

(2) where the claim is commenced on or after 22 April 2014 and is for a monetary claim which is not quantified or not fully quantified or is for a non-monetary claim and in any such case the claim form contains a statement that the claim is valued at GBP 10 million or more.

Even where an exception applies the court has a discretion to order cost budgets to be prepared.

Where cost budgeting applies parties will need to file and exchange a budget of their costs in the form of Precedent H when ordered or at least seven days before the first case management conference. Precedent H is a detailed spread sheet of costs and disbursements both incurred and estimated to which the parties are likely to be held when it comes to recovery of those costs.

As the *Mitchell* case demonstrates (see below), filing a Precedent H late or not at all (where it is required) will give rise to serious consequences.

If the parties are in any doubt as to whether a cost budget is required they will need to make an application to the court as soon as possible and in any event before the expiry of the hypothetical deadline for filing.

The claimant can make the position clear either by claiming an amount over GBP 10 million or by making a statement in the claim form that "*The claim is valued at GBP 10,000,000 or more*". The claim form has a statement of truth. There will therefore need to be evidence in support of this statement.

The parties may put in a consent order that, without prejudice to the defendant's defence on the merits and as to value, the claimant values the claim at GBP 10 million or more and therefore the parties should not be ordered to file and exchange costs budgets in accordance with the rules. It will be a matter for the court whether it approves a consent order of this type and the parties will need to have to hand reasons why costs budgeting is not appropriate.

If one party wants costs budgeting it will be very difficult for the other party to resist cost budgeting.

Where costs budgets have been filed and exchanged the court will make a costs management order unless it is satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made. By a costs management order the court will:

(1) record the extent to which the budgets are agreed between the parties;

(2) in respect of budgets or parts of budgets which are not agreed, record the court's approval after making appropriate revisions. If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs.

The GBP 10 million threshold is reported to be a concession to heavy lobbying by those who feared the English courts would lose out on high value complex international litigation.

A "no nonsense" approach to delay

One of the key aims of the Jackson reforms was to address unwarranted delay and other non-compliance with court orders and rules. The broader objective was to bring about a complete change in culture and attitude.

One of the main CPR mechanisms to support the change was the narrowing of circumstances in which relief from sanctions should be granted (CPR 3.9).

Mitchell

The key decision demonstrating the court's robust attitude towards delay and non-compliance generally is the widely reported Court of Appeal decision in *Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537 (27 November 2013).

The proceedings relate to Mr Mitchell's claim for defamation as a result of an article appearing in *The Sun* newspaper. A CMC was set for 18 June 2013. The costs budget was required to be filed "*...not less than 7 days before the date of the hearing...*". Mitchell's solicitors filed the costs budget on 17 June. CPR 3.14 provides that where a party fails to file a cost budget on time the party is deemed to have filed a budget which is limited to the relevant court fees. The Court of Appeal refused to grant relief from the Master's decision to apply this provision. The essence of this decision is that well-intentioned non-compliance, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial. The Master of the Rolls held "*There will be some lawyers who have conducted litigation in the belief that what Sir Rupert Jackson described as "the culture of delay and non-compliance" will continue despite the introduction of the Jackson reforms. But the Implementation Lectures given well before 1 April 2013 were widely publicised. No lawyer should have been in any doubt as to what was coming. We accept that changes in litigation culture will not occur overnight. But we believe that the wide publicity that is likely to be given to this judgment should ensure that the necessary changes will take place before long.*"

The *Mitchell* approach was reinforced by the Court of Appeal in *Durrant v Avon & Somerset Constabulary* [2013] EWCA Civ 1624, 17 December 2013. The background involved claims against the police including allegations of false imprisonment. The context was an appeal against a decision granting relief from sanctions in respect of extra time sought for serving witness statements. The first instance judge (who did not have the benefit of the decision in *Mitchell*) granted relief from sanctions. The Court of Appeal set aside the order granting relief from sanctions with the effect that the defendant could not rely on witness statements served late. The need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with court rules should have been given greater weight than other factors.

Trends?

We have analysed nearly 50 decisions reported since 1 April 2013 where "Jackson-related" arguments about compliance with rules have been run and have the following observations:

- There has been a significant proportion of cases since 1 April 2013 where a "strict" approach has been adopted (64% "strict"; 26% "liberal"; 11% "just a warning").
- This proportion of "strict" cases has itself increased post *Mitchell* but, perhaps, not quite as much as is being suggested.
- There are a wide variety of Masters, District Judges, High Court Judges and Court of Appeal Judges making these decisions.
- Interestingly, in a possible stemming of the tide, in the Commercial Court, Leggatt J has held in *Summit Navigation Ltd & anr v Generali Romania Asigurare Reasigurare SA & anr* [2014] EWHC 398 (Comm), 21 February 2014, that while the decision of the Court of Appeal in *Mitchell* on the effect of the new CPR 3.9, has rightly been described as a "game changer" (by Lewison LJ in another Court of Appeal decision), "*it is important for litigants to understand, however, how the rules of the game have been changed and how they have not*". The defendants in *Summit Navigation* sought to rely on *Mitchell* to turn to their tactical advantage a short delay by the claimants in providing security for costs which in itself had no material impact on the efficient conduct of the litigation. In Leggatt J's eyes it was in fact the defendant who sought to raise the *Mitchell* point that derailed the proceedings, "*In other words, the reliance placed on Mitchell in this case has had the very consequences which the new approach enunciated by the Court of Appeal in Mitchell is intended to avoid*". Males J reaffirmed this message, that *Mitchell* should not be put to tactical advantage in *Rattan v UBS AG, London Branch* [2014] EWHC 665 (Comm), 12 March 2014, since it "*appears that the message may not yet have been heard*."

Recommended approach

Following the *Mitchell* decision parties will not be granted relief from sanctions unless the default is trivial or there is a good reason for it.

If a deadline is approaching and it is in danger of being missed the party in question should either seek a consent order from court or make an application to court in either case before the deadline expires.

Damages-based agreements (DBAS)

DBAs are contingency fee agreements which contemplate lawyers being paid by reference to damages. However, the current regulations ostensibly permitting DBAs have serious flaws and are not thought to have been widely adopted (if at all). The reasons include the following:

- The way "payment" is defined means that the regulations do not clearly permit hybrid arrangements (eg part standard fee arrangement/part DBA). Nor do they permit much if any flexibility in fee structure.
- Since the lawyer's fee is calculated by reference to sums "ultimately recovered" the lawyer bears the risk of non-payment, including that arising from insolvency, by the defendant.
- DBAs are not available for defendants.

The core issue with DBAs is that if the arrangement is ultimately found to be outside of the regulations it will be unenforceable and the lawyer is not entitled to recover even on a quantum meruit basis.

The UK Ministry of Justice is thought to be reviewing the regulations with a view to a possible amendment.

CONCLUSIONS

By far the most significant reform that has had a noticeable impact on day-to-day commercial litigation is the strict attitude that is being taken in a significant number of cases towards compliance with court rules and orders.

Whether the aim of making litigation more efficient has been achieved is a moot point since a fear of sanction means that parties seek approval from the court which itself has costs implications.

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Forthcoming client seminars

THE QUEST FOR MEANING. AN OVERVIEW OF THE LAW OF CONTRACT PART I – INTERPRETATION

Tue 20 May 2014, 12:30pm – 1:30pm

Presented by: Rainer Evers, Senior Associate – Litigation and Jason Rix, Senior PSL – Litigation

Part 1 of a 2-part series looking at the law of contract. This session focuses on the key recent decisions affecting the interpretation of contracts and how the new rules on express and implied terms may affect your relationship with your counterparties.

WHAT DO WE DO NOW? AN OVERVIEW OF THE LAW OF CONTRACT PART II – TERMINATION AND REMEDIES

Tue 24 June 2014, 12:30pm – 1:30pm

Presented by: Rainer Evers, Senior Associate – Litigation and Jason Rix, Senior PSL – Litigation

Part 2 of a 2-part series looking at the law of contract. This session looks at how you might end a contract, what to be mindful of and what remedies might be available to you.

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Privilege

Litigation privilege: Court of Appeal confirms high bar for dominant purpose test: *Rawlinson & Hunter Trustees SA & ors v Akers & anr* (Apr)

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Key Contacts

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