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Litigation and Dispute Resolution

Review

EDITORIAL

This Edition includes coverage of two interesting decisions involving confidentiality. In the first, *Personnel Hygiene Services Ltd & ors v Rentokil Initial UK Ltd (t/a Initial Medial Services) & anr*, the court considered when a duty of confidentiality has expired. In the second, *Judith Vidal-Hall & ors v Google Inc*, the court considered whether misuse of private information is a tort in its own right (and a cause of action distinct from breach of confidence) (see **Confidentiality**).

We report on two fines levied by the FCA and reflect on the FCA's continuing vigour in pursuing failures by financial institutions to implement adequate systems and controls to prevent money laundering, bribery and corruption. These large fines were levied for failings in respect of overseas introducers and companies connected with politically exposed persons (see **Regulatory**).

Finally, we report on a decision of Richards J (*Fondazione Enasarco v Lehman Brothers Finance SA & anr*) which looks at the interplay between the Insolvency Regulation and the Lugano Convention. In this case, Richards J rejected an application for a stay of English proceedings for declaratory relief under an English law governed derivative contract (with an English jurisdiction clause), notwithstanding the existence of ongoing related Swiss bankruptcy proceedings (see **Conflict of laws**).

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Confidentiality

CONFIDENTIALITY OBLIGATION ENFORCED TO PROTECT TRADE SECRETS

Personnel Hygiene Services Ltd & ors v Rentokil Initial UK Ltd (t/a Initial Medical Services) & anr [2014] EWCA Civ 29, 29 January 2014

The Court of Appeal held that a judge had been entitled to find that a duty of confidentiality, which was expressly provided for by a previous confidentiality agreement, continued during and after a subcontract was entered into even though the subcontract did not expressly police the use of confidential information. The judge's final injunction was upheld. This decision demonstrates that, if a party can establish that information is truly confidential, then it is likely to benefit from wide protection.

Background

In early 2007, UK Hygiene entered into negotiations with a Rentokil company (trading as Initial Medical Services, **Initial**) with a view to subcontracting hazardous waste bin services. In order to assess whether this relationship would work, UK Hygiene entered into a confidentiality agreement with Initial under which customers details could be exchanged. The terms of this Agreement described the purpose for which the information was being exchanged and stated that these terms should continue to apply whether or not the parties concluded a subcontracting arrangement. The parties duly entered into a subcontracting arrangement.

In 2011 Personnel Hygiene Services (**PHS**) bought UK Hygiene. PHS terminated the subcontracting arrangement preferring to deal directly with the ultimate customers. Initial considered that it was entitled to contact the customers to inform them of the PHS acquisition and that Initial's services were going to end. A number of Initial's sales staff embarked on a campaign of contacting UK Hygiene's customers using confidential information about those customers stored on UK Hygiene's database, and which had in part been obtained during the 2007 negotiations but also contained information about new customers. PHS sought and obtained an interim injunction and, after a speedy trial, also obtained a final limited temporal injunction restraining the use of the confidential customer information. This was an appeal against the judge's decision. The appeal did not challenge the judge's finding that the customer list and service requirements were confidential.

Did the obligation of confidentiality expire?

As a result of the manner in which Initial chose to argue its case, the court had to consider whether the obligation of confidentiality expired after the purpose of assessing the possibility of a future business relationship had been determined. Rimer LJ held that it did not. A proper reading of the term in question meant that the obligation continued (both in respect of existing and new customers). Moreover, by virtue of the dictum in *Saltman v Campbell* [1948] 65 RPC 203, the obligation could also be implied: "*If two parties make a contract, under which one of them obtains for the purpose of the contract or in connection with it some confidential matter, even though the contract is silent on the matter of confidence the law will imply an obligation to treat that confidential matter in a confidential way, as one of the implied terms of the contract; but the obligation to respect confidence is not limited to cases where the parties are in a contractual relationship*."

Was the obligation an unreasonable restraint of trade?

If the obligation of confidentiality did not expire, the next issue the Court had to consider was whether any obligation relating to existing and new customers operated as an unreasonable restraint of trade and was therefore void. Initial referred to a recent case, *Caterpillar v Huesca de Crean* [2012] EWCA Civ 156, wherein the Court of Appeal had held that the jurisdiction recognised in *Bolkiah v KPMG* [1998] UKHL 52, to grant "*barring-out*" relief (ie an order not to have any dealing with certain customers), did not extend to the relationship between an employer and a former employee. The court in *Caterpillar* held that barring-out relief could only ever be granted to an employer against a former employee (if at all) in the most exceptional circumstances. Initial was trying to use the *Caterpillar* case to argue that what PHS was seeking was effectively barring-out relief and should not be granted since by analogy the present circumstances were not sufficiently exceptional.

Rimer LJ held that the limitation in the *Caterpillar* was confined to "*barring-out*" which would not be implied in the absence of an express and reasonable covenant. The question of implying an obligation to maintain the confidentiality was a different one and it was proper to imply a term on the present facts. It was perfectly possible for Initial to maintain the confidentiality of the customer information whilst identifying and approaching customers using publicly available sources and it's own independent analysis of who those customers might be and what they might want. In other words the duty to maintain confidentiality did not operate as a barring-out order because Initial could still approach the customers provided it did not use the confidential information in doing so. Lewison LJ (who also gave judgment in *Caterpillar*) noted the essential disagreement in *Caterpillar* between the majority (of which he was one) and Maurice Kay LJ who was in the minority was whether based on the facts there was any real risk that the claimant's confidential information would be misused. The implication was that in the present case there was no such doubt or disagreement, ie there was a real risk that the information would be misused.

PHS was therefore entitled to its injunction.

COMMENT

This case, in itself, is not ground breaking but serves as a useful demonstration that where the information in question is confidential and there is a real risk of its misuse the protection available is extensive. It is also worth remembering, though it would not have worked on these facts, that practical and technical protection of confidential information is frequently as, if not more, useful that relying on strict legal rights. For example, only making available a single hard copy of the confidential information to named persons or using password and other electronic protection.

We are seeing an increasing number of disputes and queries relating to confidential information. Moreover, on 28 November 2013 the European Commission adopted a proposed Directive on the protection of trade secrets and confidential business information, aimed at providing a minimum standard of protection across the European Union.

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MISUSE OF PRIVATE INFORMATION IS A TORT DISTINCT FROM BREACH OF CONFIDENCE

Judith Vidal-Hall & ors v Google Inc [2014] EWHC 13, 16 January 2014

Google challenged the jurisdiction of the English court to hear claims made concerning Google's use of cookies to track users' online activities on the Safari browser. Tugendhat J's judgment contains a novel analysis of, *inter alia*, the nature of a "*misuse of private information*" claim, for the first time considering, and answering in the affirmative, the question whether such a claim is a tort in its own right. Distinguishing such a claim from a "*breach of confidence*" has implications both in terms of gateways for service out of the jurisdiction and damages issues. The case also considered issues such as the extent to which additional grounds for service out of the jurisdiction can be added after the initial application before a Master and the type of damage covered by the Data Protection Act 1998.

Background

The claimants are three individuals who claim to have suffered distress following their discovery that Google was, between Summer 2011 and February 2012, using third party cookies in circumvention of Safari's default browser settings. The cookies were applied to track users' online activities and profile individual users into categories (such as "*football lovers*" or "*current affairs enthusiasts*"). These categories were then marketed to advertisers subscribed to Google's AdSense service as groups to whom advertisements could be specifically targeted. The claimants each claim to have suffered acute distress and anxiety on realising that the specifically targeted advertisements revealed, potentially to third parties using or viewing their Apple devices, personal characteristics about them, which they each allege to be private and confidential.

The claims against Google were for (i) breach of confidence; (ii) misuse of private information; and (iii) breach of statutory duty under the Data Protection Act 1998 (**DPA**). This decision of Tugendhat J concerns Google's challenge to the jurisdiction of the English court. In dismissing Google's application in respect of (ii) and (iii), Tugendhat J's decision covers some interesting points of law.

"Misuse of private information" and "breach of confidence"

In deciding whether the claimants had a good arguable case that their breach of confidence and misuse of private information claims fall within the grounds for service out under paragraph 3.1(9) of CPR Practice Direction 6B (concerning claims in tort) Tugendhat J concluded that "*misuse of private information*" is a tort in its own right within the meaning of paragraph 3.1(9). However, the judge felt bound by previous case law (*Kitechnology v Unicor* [1995] FSR 765) to hold that "*breach of confidence*" is not a tort.

This is an interesting decision because it represents a significant judicial step in defining the cause of action for misuse of private information. There is no over-arching cause of action for "*invasion of privacy*" under English law. As such, traditionally complaints concerning violations of privacy have been brought under the cause of action for breach of confidence, and this had led to something of a division within that cause of action – one strand relating to cases concerning privacy, and the other relating to cases concerning secret ("*confidential*") information.

The judiciary have, however, seemed uncomfortable with this for a number of years. In the famous case of *Campbell v MGN* [2004] UKHL 22 (in which Naomi Campbell sued Mirror Group Newspapers for breach of confidence over published photographs of her leaving a Narcotics Anonymous meeting) it was stated that the cause of action for breach of confidence "*has now firmly shaken off the limiting constraint of the need for an initial confidential relationship*" and that "*in doing so it has now changed its nature*". It was noted that "*now the law imposes a "duty of confidence" whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential*" but that "*even this formulation is awkward*" and the more natural description is that such information is private. The statement was then made that "*the essence of the **tort** is better encapsulated now as misuse of private information*" (emphasis added).

Tugendhat J referred to this case and others (such as *Imerman v Tchenguiz* [2011] Fam 116) and, distinguishing what Google argued to be a contrary finding in the later case of *Douglas v Hello! (No 3)* [2006] QB 125, found that misuse of private information is indeed a tort in its own right. Whereas in the past judges have considered such a cause of action, and referred to it as a tort, this is the first time the question has been specifically addressed and answered.

Implications of misuse of private information as a separate tort

Following this finding it will be interesting to see whether a significant dichotomy arises between the types of actions brought under breach of confidence, and those brought under misuse of private information. In the first instance it seems likely that parties in privacy related actions will continue to bring their claims under both heads but, looking forward, this may be the beginning of a true fork in the road – for these types of claims.

A key further implication for claimants in misuse of private information actions is that they should now be able to claim tortious damages, as opposed to damages being an equitable remedy in the discretion of the judge (which is the case in actions for breach of confidence). Note the well-known case of *Mosely v News Group Newspapers* [2008] EWHC 1777 (QB) in which Eady J held that exemplary damages could not be awarded, a large part of the reasoning for which centred on the fact that breach of confidence is not a tort.

Claimants not debarred from relying on additional gateway for service out

The claimants were not debarred from relying on the ground for service out in paragraph 3.1(9) of Practice Direction 6B in relation to their DPA claim simply because they had not relied on it in relation to that claim in their initial application before the Master. Whereas Google may successfully have argued this in the past, Tugendhat J relied on comments made in *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31 in agreeing with the claimants that this is no longer the law. However, this will not apply in circumstances where the parties should, and have not, had a proper opportunity to put the relevant evidence and submissions of law before the court.

Damages for breach of the Data Protection Act

In relation to the claim for breach of statutory duty under the DPA, the judge called into question previous case law in which it had been found that damages for distress can be recovered under s13 DPA only if pecuniary damage has also been suffered. The judge did not ultimately decide the question as this was something that might arise for decision at trial but gave a preliminary view that "damage" in s13 DPA does include non-pecuniary damage.

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Conflict of laws

WHAT CONSTITUTES AN INSOLVENCY DERIVED CLAIM?

Fondazione Enasarco v Lehman Brothers Finance SA & anr [2014] EWHC 34 (Ch), 16 January 2014

This is an important decision in the context of characterising which claims will fall as insolvency derived claims and thus be subject to separate "*insolvency*" jurisdictional rules. Proceedings before the Swiss court, challenging the rejection by Swiss liquidators of a claim under a derivative agreement in Swiss bankruptcy proceedings, were closely connected with and directly derived from the Swiss bankruptcy proceedings so as to be excluded from the scope of the Lugano Convection. Thus proceedings before the English court to enforce the derivative agreement, which contained an English jurisdiction clause, would not be stayed. Essentially the insolvency derived aspects of the matter were to be determined by the Swiss court who could then be guided by the decision of the English court on English law-governed contractual matters.

Fondazione Enasarco (**E**) had taken an assignment of claims against Lehman Brothers Finance SA (**LBF**) under a derivative agreement (which incorporated the standard ISDA Master Agreement 1992 terms). LBF was subject to Swiss bankruptcy proceedings and E's claim in those proceedings had been rejected. LBF's liquidators asserted that money was owing to LBF. E filed a claim with the Swiss bankruptcy court challenging the claim rejection and the liquidators' position that money was owing to LBF (the **Swiss Proceedings**). Given that the derivative agreement was governed by English law and subject to English jurisdiction, E also commenced separate proceedings in England, claiming that money was owed to it and that no sums were payable by E (or the assignor) to LBF (the **English Proceedings**).

LBF's liquidators sought an order from the English courts that the English Proceedings should be stayed either: (i) automatically pursuant to the Lugano Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2007 (the **Lugano Convention**) (which is the equivalent of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the **Brussels Regulation**) for EEA Member States and in all material respects for this case contains the same provisions) on the basis that the Swiss courts were first seised; or (ii) as a matter of the English court's discretion pursuant to the Lugano Convention or s49(3) of the Senior Courts Act 1981.

LBF's Swiss bankruptcy proceedings had been recognised by the English courts pursuant to the Cross Border Insolvency Regulations 2006 (**CBIR**) in 2009.

Swiss Proceedings fall within insolvency exclusion

Insolvency matters are excluded from the scope of the Lugano Convention in the same way that they are from the Brussels Regulation. The exclusion in Article 1(2)(b) in both pieces of legislation covers "*bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings*".

A key question was therefore whether the Swiss Proceedings were closely connected with and directly derived from the Swiss bankruptcy proceedings. If so then Article 27 (*lis alibi pendens*) of the Lugano Convention, which would require an automatic stay of the English Proceedings, would be inapplicable. Article 27 requires a court second seised of proceedings involving the same parties and same cause of action to stay its proceedings.

Richards J held that the Swiss Proceedings were closely connected with and directly derived from the Swiss bankruptcy proceedings. The Swiss Proceedings therefore fell within the insolvency exclusion, and therefore outside the Lugano Convention, meaning there was no required automatic stay of the English Proceedings under Article 27. Richards J also held there were strong grounds for refusing a discretionary stay of the English Proceedings under either Article 28 of the Lugano Convention or the Senior Courts Act 1981. Accordingly, contractual issues under the English law-governed derivative agreement fell to be determined in the English Proceedings.

What constituted the requisite connection to the insolvency proceedings?

In Richards J's view, the Swiss Proceedings clearly fell outside the Lugano Convention (and by extension, outside the Judgments Regulation) because:

- The proceedings arose, and could only arise, under Swiss insolvency law.
- They formed an integral part of the Swiss bankruptcy proceedings, designed to achieve the primary purpose of such proceedings, namely the distribution of assets to creditors, and had to take place in the court dealing with the liquidation.
- The purpose of the proceedings was not simply to establish whether E had a good contractual or other claim, but to determine the amount and ranking of the claim for the purposes of the liquidation. The ranking of claims was a matter arising exclusively under Swiss insolvency law.
- The determination of the relevant amount depended on more than just the contractual or similar rights of E and LBF. (A good contractual claim could be reduced or even extinguished for insolvency purposes by cross-claims or other matters arising exclusively under Swiss insolvency law.)
- The Swiss proceedings were self-contained and did not purport to finally judicially determine liability between the parties in relation to the underlying contractual dispute on the derivative agreement.

Richards J was also satisfied that there was a very strong case for refusing a stay of the English Proceedings on discretionary grounds because:

- The derivative agreement contained an exclusive jurisdiction clause in favour of the English courts (this was a strong factor in favour of refusing a stay: relying on the Supreme Court in *The Alexandros T* [2013] UKSC 70 (covered in the November/December 2013 Litigation Review).
- It was likely that the Swiss court would be “greatly assisted” by having the judgment of the English court on matters under the derivative agreement, given that it was governed by English law. Richards J rejected the argument that, because the Swiss court could order expert evidence on foreign law and purport to make a determination on issues under foreign law there was a risk of an "irreconcilable conflict" between a decision of the English court and the Swiss court on liability under the derivative agreement since any decision of the English court would itself constitute good evidence of foreign law.
- There were practical considerations in refusing the stay. These included the fact that the relevant contractual documents were complex and stood to be construed in English as a matter of English law. For the Swiss court to reach a decision, the relevant documents would have to be translated and construed in a language which was not that of the contract.
- The merits of having issues under the derivative agreement determined by the English courts had previously been recognised by the liquidators of LBF (not least when they initially consented to lifting the automatic stay under the CBIR in 2011 in respect of earlier litigation to determine the method of calculating the termination amount under the derivative agreement).
- E was not precluded from pursuing the English Proceedings because it had chosen to participate in the Swiss Proceedings. Under Swiss law, E had had no choice but to issue its challenge to the schedule of claims within the 20 days required if it

wished to preserve any right it might have to participate in the distribution of LBF's assets. The true analysis was that it was the liquidators' choice in excluding the claim from the schedule of creditors that had forced E to participate in the Swiss Proceedings.

COMMENT

While the question of whether court proceedings are closely connected with and directly derived from the insolvency proceedings seems quite straightforward, it can be tricky when considering specific fact patterns. As in this case, the issues may be split between those which are clearly insolvency derived and those which are clearly of a contractual nature. In such cases the question has been whether only one Member State's court has jurisdiction over the whole spectrum of the issues involved or whether the issues could be split between the courts? Richards J's decision effectively provides the answer that it is possible for the issues to be split between courts and means that, where a matter has insolvency derived and non-insolvency derived aspects, the courts supervising (or conducting) the insolvency proceedings have jurisdiction over the insolvency derived aspects and could then be guided by a decision of another court in respect of the non-insolvency derived (ie contractual) aspects. This seems to be an eminently sensible and practical solution, although the application to each case will be highly fact based and may require a practical approach from the judge concerned.

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Contract

DAMAGES FOR NON-ACCEPTANCE OF GOODS NOT COVERED BY EXCLUSION CLAUSE COVERING "LOSS OF PROFITS"

Glencore Energy UK Ltd v Cirrus Oil Services Ltd [2014] EWHC 87 (Comm), 24 January 2014

The High Court has clarified that a claim for damages for non-acceptance of goods under s50 of the Sale of Goods Act 1979 is not a claim for loss of profits, but rather for loss of the bargain the seller would have benefited from under the contract. Where parties to a contract wish to exclude claims for damages under s50, the contract must contain clear and specific wording to that effect.

The claimant, Glencore Energy UK Ltd (**Glencore**), and the defendant, Cirrus Oil Services Ltd (**Cirrus**) had entered a contract on 4 April 2012 for the sale of crude oil. When Cirrus refused to accept the oil, Glencore successfully brought a claim for damages under s50(2) and (3) Sale of Goods Act 1979 (the **Act**) for Cirrus' repudiation of the contract. The key issue of interest in this case is the question of whether the seller's claim was excluded by the exclusion wording in the contract.

Section 50 – a reminder

Where ownership of the goods has passed to the buyer at the time of non-acceptance, the seller can make one of two possible claims. The first is a claim for the contract price and the second, a claim for damages for non-acceptance under s50. Most commonly, a claim for the price of goods is preferable because the value of the claim is likely to be higher than the value of a s50 claim. The claimant also will not need to mitigate its loss, which it must do in a s50 claim (indeed, it will be assumed to have done so in an assessment of damages: which will be capped at the difference between the contract price and the market or current price of the goods).

However, where ownership has not passed to the buyer at the relevant time, the seller has no choice. The seller's only recourse is to bring a claim for damages for non-acceptance under s50. This is because the seller has no entitlement to damages for the price of the goods if he still has title to the goods. Difficulty arises where there is uncertainty about whether the property had actually passed to the buyer when the buyer refused to accept delivery. If the seller decides to pursue a claim for the contract price in the belief that the goods had passed to the buyer at the time of non-acceptance, there is a risk that the court would find that the property had not passed to the buyer and the seller's claim would necessarily fail.

A claimant who seeks damages for non-acceptance under s50 must mitigate its loss, for example by reselling the goods at market or current price. A failure by the claimant to resell the goods at all or to resell the goods at their market or current value will be a failure to mitigate and the seller will not be able to recover damages for the difference between a low (or non-existent) resale price and the contract price. If the seller resells the goods at a higher price, damages might be reduced so that the seller only recovers its actual loss (this will depend upon the facts).

Facts

Following an exchange of emails, Glencore had agreed to provide a cargo of oil to Cirrus for onward sale to a third party (**TOR**). Before Glencore delivered the goods, it became clear that TOR was not willing to accept the oil, having discovered that the cargo would consist of a blend of oils from different wells. Cirrus refused to accept the cargo and thus repudiated the contract, resulting in Glencore's claim for damages.

Cirrus argued that this was a claim for loss of profits and that, since the contract excluded claims for indirect or consequential losses or expenses including loss of anticipated profit, Glencore was not entitled to damages. The judge rejected this argument. He stated that a claim under s50 is not a claim for lost profits and that "*no-one who understands the way in which the Sale of Goods Act works, would refer to this measure as a "lost profits" or "loss of anticipated profits*"." He explicitly clarified that the calculation of damages under s50 is not a computation of lost profit, but rather a means of compensating a seller for the loss of the bargain with a buyer.

The claim was successful in spite of the fact that Glencore cancelled its contract with the crude oil supplier without liability, before taking delivery of the crude oil, and so suffered no out of pocket losses from Cirrus' repudiatory breach.

How are damages calculated under s50?

Cooke J describes the measure of damages under the Act as "*designed to compensate the seller for the loss of the bargain with the buyer by computing how much worse off the seller would be, if at the time of the breach, he had sold the goods to a substitute buyer*." Where there is an "*available market*," the amount of damages will be decided by calculating the difference between the contract price and the market or current price at the time the goods ought to have been accepted.

COMMENT

Glencore v Cirrus draws a clear distinction between claims for loss of profits and claims for damages for non-acceptance under s50. Since the judge found that a s50 claim is not a loss of profits claim, a seller who had contracted out of the right to sue for loss of profits would nonetheless be able to bring a s50 claim, as Glencore did. It was on this point that Cirrus' case failed. Cirrus had relied upon a clause in the contract which excluded liability for loss of anticipated profit. Cirrus argued that it followed from the existence of this clause that Glencore could not succeed in a claim for the profit it would have made had Cirrus not repudiated the contract. The judge rejected this argument and explicitly held that the calculation of damages under s50 is not a computation of lost profit, but rather a means of compensating the seller for the loss of the bargain with the buyer.

The case demonstrates that a seller's right to a claim under the section will be widely interpreted. Glencore had not suffered any out of pocket losses and had failed to mitigate the loss it incurred from Cirrus' refusal to accept the goods, yet was successful in its claim for damages under s50.

The case is also a reminder of how strictly the courts will interpret wording which attempts to exclude liability for claims under s50 and of the importance of careful and specific drafting when the parties wish to exclude liability.

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Costs

JACKSON REFORMS BITE: JUDGMENT FOR USD 7 MILLION ORDERED AGAINST NON-COMPLYING DEFENDANTS

Newland Shipping & Forwarding Ltd v Toba Trading FZC: Newland Shipping & Forwarding Ltd v (1) Toba Trading FZC (2) Mr Syed Majed Taheri (3) Mr Hossein Rahbarian [2014] EWHC 210 (Comm), 6 February 2014

Hamblen J has upheld an order against two defendants for failing to produce adequate disclosure, and failing to file witness statements, resulting in judgment being entered against both for over USD 7 million. Hamblen J applied the Court of Appeal's ruling in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 finding that the non-compliance was more than trivial and that there were no good reasons for it.

The claimants claimed for unpaid sums due from the three defendants for oil products. Two separate actions were joined. The defendants were an Iranian company (**D1**), and two individuals (**D2** and **D3**) who were closely involved with it. Trial was scheduled for February 2014. In September 2013 the defendants had produced disclosure ten days late (extension as agreed), but the disclosure had not been provided in separate lists for each defendant, as required by the CPR. The defendants had also not provided any witness statements by the due date of 25 October 2013. One day before witness statements were due to be served the defendants' solicitors, Stephenson Harwood, notified the claimants that they were no longer acting for the defendants. This, it turned out, was due to unpaid fees.

The claimants successfully applied for judgment for non-compliance, which was given against D1 and D3 by Field J on 15 November 2013, during a hearing at which D2 attended (by video link), but was not attended by D1 and D3, who were still unrepresented. Stephenson Harwood were reinstructed on 27 November 2013.

D1 and D3 applied for relief from sanctions under CPR r3.9 and/or for Field J's order to be amended under r3.1(7). Applying *Mitchell* Hamblen J held that as a general rule relief will not be granted unless (i) the non-compliance was trivial or (ii) there was good reason for the default. Although all the circumstances of the case are relevant, they are of less weight than the "*paramount*" considerations which are "*the need (i) for litigation to be conducted efficiently and at proportionate cost and (ii) to enforce compliance with rules, practice directions and court orders*". Compelling circumstances are therefore likely to be required if relief is to be granted for a non-trivial default for which there is no good reason.

Hamblen J was satisfied that there had been serious non-compliance by D1 and D3 by virtue of the inadequate disclosure and lack of timely provision of witness statements, especially given the impending trial date. There were no good reasons for the delay. The lack of legal representation was due to the defendants' failure to pay their solicitors, and the resulting difficulty in filing witness statement without legal representation was a perfectly foreseeable consequence of the choices they had made. It was further noted that the applications for extension of time, adjournment and relief were also made late. No relief should be granted under CPR r3.9. Hamblen J told the defendants that if they wished to challenge whether Field J's ordered should have been made in the first place, they would have to appeal those orders, which was a separate matter to granting (or not granting) relief under r3.9 which was the subject of this application (as r3.9 assumes that the order was properly made in the first place).

Although confident that they were not particularly relevant now, Hamblen J briefly considered the factors to be taken into account under the old CPR 3.9, observing that only one factor had pointed to the granting of relief (no previous non-compliance) whilst all others pointed against the granting of relief.

The defendants' application for Field J's order to be varied under CPR 3.1(7) was also refused save in respect of one issue concerning a mistake as to the amounts payable. Applying *Mitchell* one of the following "*normally*" needs to be satisfied for it to be appropriate for the court's discretion to be exercised, namely:

(1) whether there has been a material change of circumstances since the order was made;

(2) whether the facts on which the original decision was made had been misstated; and

(3) whether there has been a manifest mistake on the part of the judge in formulating the order.

Hamblen J was not convinced that any of these factors were present. Any change in circumstances were within the control of the defendants anyway. Any detailed and complex arguments concerning mistake or misstatement were more properly matters for appeal (as they went to whether the orders should have been made, rather than as to how it should have been formulated).

COMMENT

This case makes it clear that a failure to produce proper disclosure and a failure to serve witness statements, especially when a trial is looming, are not considered trivial matters when it comes to considering whether relief can be granted under r3.9. Nor will a lack of legal representation make such a delay justifiable where there is a dispute over fees. Hamblen J's judgment clarifies how r3.9 and r3.7 operate, and how they are not designed to deal with any arguments concerning whether the order under appeal should have been made in the first place. Hamblen J's consideration of the factors under the old 3.9 seemed to be undertaken reluctantly, however they were considered. Perhaps it was with an eye to a potential appeal that this exercise was undertaken but it does leave some uncertainty as to whether these old factors are still relevant.

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Injunctions

EXCEPTIONS FOR ORDINARY BUSINESS EXPENSES, LIVING EXPENSES AND LEGAL COSTS IN THE CONTEXT OF FREEZING ORDERS

Parvalorem v Olivera & ors [2013] EWHC 4195 (Ch), 2 October 2013

In the context of an existing freezing order, the High Court considered whether the freezing order should include the usual exceptions for ordinary business and living expenses and legal costs. The jurisdictional scope of a freezing order as well as the existence of assets that fall outside of it will be relevant factors for a court when deciding whether or not to include the "*usual*" exceptions in the terms of a freezing order. The court also considered whether the usual cross-undertaking in damages that had been provided by the Applicant in this case should be substantially increased due to the damage that the existing freezing order had caused to the Respondents.

Background

On 13 September 2013, a without notice freezing order was granted over the assets of the First, Second and Third Respondents (together, the **Respondents**) in the United Kingdom as a result of certain relief being obtained against the First Respondent in Lisbon, Portugal (the **Freezing Order**). The Freezing Order was in a sum of over GBP 27 million and it expressly referred to the proceeds of sale of an auction of a number of classic cars and the cars themselves if any remained unsold after the auction took place.

Points in dispute

This case came before the High Court in October 2013 as it was the return date of the application for the Freezing Order against the Respondents. The High Court was required to decide the following disputed points in relation to the Freezing Order:

- Whether the Freezing Order should include the "*usual*" exceptions for ordinary business expenses, living expenses and legal costs.
- Whether there should be any sort of fortification of the cross-undertaking in damages which the Applicant must give in relation to the Freezing Order.

The Applicant's position was that these exceptions should not be included in the terms of the Freezing Order and that no fortification was needed. The Respondents' position was that the usual exceptions should be included in the terms of the Freezing Order and that the Applicant should be made to pay reinforcement of GBP 10 million.

Judgment

The "usual" exceptions

The White Book refers to the "*normal practice*" of including exceptions for ordinary business expenses as well as ordinary living expenses and legal expenses in the terms of freezing orders (paragraph 15-70). In his judgment, Warren J stated that this passage of the White Book should be read in the context of freezing injunctions that cover all, or nearly all, of a defendant's assets.

Warren J proceeded to provide a brief overview of the key authorities relating to the circumstances in which the court may include the "*usual*" exceptions for ordinary business expenses, living expenses and legal costs in the terms of a freezing order, including: *A v C* [1981] 1 B 961 and *Iraqi Ministry of Defence v Arcepey Shipping Co SA* [1981] QB 65. Warren J held that previous authorities relating to the application of an original freezing order also applied to cases like this one which concerned the variation of an existing freezing order.

Taking these key authorities into account, Warren J concluded that the court's jurisdiction as to the terms of a freezing order "*is flexible and heavily fact dependent*". He also clarified that he did not "*dissent from the proposition that ordinarily the* [usual] *exceptions should be included*" in the terms of a freezing order. For example, Warren J stated that:

- where there is a worldwide freezing order over all of a defendant's assets, the starting point must be to include the "*usual*" exceptions. The same could be said in the case of an English defendant with no apparent foreign connection or element in the case; and
- if a freezing order was granted over the English assets of a defendant with known valuable foreign assets not subject to any other injunction or process in another jurisdiction, "*the balance of justice might well come down in favour of there being no exclusions in the English freezing order*".

In the present case, Warren J held that the burden came down in favour of not including the "usual" exceptions in the Freezing Order. He stated that "*in the absence of evidence to the contrary, I am entitled to infer and do infer that the* [Second Respondent] *has free assets from which it can meet its ordinary business expenses or alternatively that assets are available from other sources for that purpose, given the* [First Respondent's] *control over the* [Second and Third Respondents]." Warren J also noted that the Second Respondent had carried on business without the need for the classic cars or the proceeds from their sale. Nonetheless, Warren J allowed the Respondents a short amount of time after his judgment to bring evidence to the court to show that it could not meet its legal costs in relation to this matter from additional funds that it had in the jurisdiction.

However, Warren J cautioned against the blanket application of his decision in this case. He stated that his conclusion in this case should not "*lead to the conclusion that in all cases where there is a freezing order over English assets but no foreign assets and where the defendant does not have foreign assets, the* [usual] *exceptions should not be included*" (paragraph 55).

Notwithstanding the above, Warren J did include a different exception in the terms of the Freezing Order that allowed for the payment of VAT and storage in relation to the classic cars that had been/were to be sold. He justified the inclusion of this exception and distinguished it from other costs that may be incurred in the ordinary course of business on the basis that such costs were attributable to an asset incurred in England and should be met out of the proceeds of sale from the classic cars.

Fortification

Cross-undertakings are an important feature of freezing injunctions. In a private claim, applicants are typically required to give a cross-undertaking in damages to the court to compensate the respondent in the event that it transpires that a freezing injunction should not have been granted and any affected third parties sustain losses as a result of the freezing injunction.

Although cross-undertakings in damages had already been provided by the Applicant in this case, the Respondent requested that this cross-undertaking was fortified by an additional GBP 10 million. The Respondents' position was that the original freezing order had caused it significant damage and that this justified the large amount of fortification requested. In addition, the Respondents also contended that a lower sale price was achieved for the classic cars at auction than would have otherwise been achieved had it not been for the original Freezing Order.

Warren J declined to order this fortification of the cross-undertaking and commented that the Respondents' claim that the Freezing Order had impacted the sale price of the classic cars was "*an entirely fanciful suggestion*". In addition, Warren J noted that the Applicant was a state-owned entity. He acknowledged that this "*does not guarantee that it will always meet its liabilities*" but also stated that the consequences of the Applicant not being able to meet an order for damages in relation to this case (should one be granted in the future) would be a serious reputational matter for it.

COMMENT

This case confirms the usual starting point that the usual exceptions (for ordinary business and living expenses and legal costs) will be included in the terms of a freezing order. However, this case also provides helpful judicial guidance as to the circumstances in which the court may depart from this starting position. Based on the judgment of Warren J, it appears that the jurisdictional scope of a freezing order as well as the existence of assets that fall outside of it will be relevant factors for a court when deciding whether or not to include the "*usual*" exceptions in the terms of a freezing order.

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LIMITATION OF LIABILITY CLAUSE NOT RELEVANT TO ASSESSMENT OF WHETHER DAMAGES WOULD BE AN ADEQUATE REMEDY

AB v CD [2014] EWHC 1 (QB), 3 January 2014

A claimant could not rely on a clause limiting the damages that it could recover for any breach of an agreement by the defendant to show that, if the court refused to grant injunctive relief preventing the defendant from terminating the agreement pending the outcome of an arbitration, damages would not be an adequate remedy. The commercial expectations of the parties were set by the package of rights and obligations contained in the agreement, including the limitation of liability clause. It was therefore not unjust to exclude the effect of that clause when considering whether the claimant should be left with its remedy in damages.

In this decision, Stuart-Smith J considered an application under s44 Arbitration Act 1996 for an injunction preventing the defendant from terminating a licensing agreement pending the outcome of an underlying arbitration in relation to that agreement. In deciding whether to grant the injunction, the judge applied the test laid down in *American Cyanamid v Ethicon Ltd* [1975] AC 396, asking himself three key questions, namely: (a) is there a serious issue to be tried? (b) are damages an adequate remedy? and (c) is the balance of convenience in favour of granting an injunction?

The interesting aspect of the judge's decision was his assessment of whether damages were an adequate remedy. The licensing agreement contained a limitation of liability clause, which provided that "*in no event will either Party be liable to the other Party or any third party for…loss of profits,…or any…indirect, special, consequential or incidental damages…*". The claimant alleged that the damage it would suffer if the defendant terminated the licensing agreement was loss of profit and, given that any claim for loss of profit was arguably excluded by the limitation of liability clause, damages clearly would not be an adequate remedy for the claimant's loss if an injunction was not granted. The key question for the judge, therefore, was whether the contractual limitation on the quantum of damages could be relied upon to establish that damages were not an adequate remedy.

The judge observed initially that "*given the number of times that parties seeking injunctions must have been doing so in circumstances where there is a contractual*

restriction on the quantum of recoverable damages, there is a surprising lack of authority on the point". He also noted that there was a latent ambiguity in the *American Cyanamid* test. It was not clear whether "*adequate remedy*" means a remedy that provides full compensation for what has been lost or a remedy that is regarded as adequate by the law even though it may fall short of providing full compensation. The judge also emphasised that the *American Cyanamid* test provides guidance as to the exercise of a discretionary equitable jurisdiction, rather than a straightjacket of rigid criteria.

Stuart-Smith J then considered the decision in *Bath and North East Somerset DC v Mowlem plc* [2004] EWCA Civ 115 where Mance LJ concluded that, although there was a liquidated damages clause in the contract in question, Bath could rely on the probable higher level of actual loss that it would suffer if no injunction was granted in order to show that it would not be adequately compensated by a claim in damages.

He also referred to two first instance decisions, which appeared to come to a different view. The first was *Vertex Data Science Ltd v Powergen Retail Ltd* [2006] EWHC 1340. In that case, the contract in question had included a clause imposing various limits on recoverable damages. Although *obiter dicta* (as the dispute was ultimately determined on a different point), the judge said that "*it is not immediately obvious to me that it would be unjust for Vertex to be confined to such remedy in damages as is determined to be the extent of the bargain that it struck*." The second decision was *Ericsson AB v EADS Defence and Security Systems Ltd* [2009] EWHC 2598. In that decision Akenhead J said "*I cannot see that it is unjust that a party is confined to the recovery of such damages as the contract, which it has entered into freely, permits it to recover*".

The judge then sought to reconcile the decision in *Bath* with the decision in *Ericsson*. He noted that in *Bath*, the contractual agreement was that Bath's losses would be fully compensated (with the liquidated damages sum being a pre-estimate of those losses), so the court would be entitled to take into account whether the contractual intention of full compensation would be achieved by an award of damages. Conversely in *Ericsson*, the contractual agreement was that the parties should *not* be compensated for certain heads of damage, so the court was entitled to take that into account when deciding whether it was unjust for a party to be confined to its recoverable damages, even if that fell short of full compensation.

In this case, the judge noted that the commercial expectations of the parties were set by the package of rights and obligations contained in the licensing agreement, including the limitation of liability clause. It was therefore not unjust to exclude the effect of the limitation of liability clause when considering whether the claimant should be left with its remedy in damages. The existence of the clause did not lead to the conclusion that damages were not an adequate remedy.

COMMENT

The absence of authority on the impact of contractual limitation of liability clauses on the question of whether damages will be an adequate remedy if an injunction is not granted is indeed surprising. However, whilst this decision provides some welcome clarity on the issue, it appears that it may not be the end of the story. The judge admitted in a postscript to his judgment to "*a degree of unease at the result*". He went on to say "*I have a nagging doubt that the approach I have adopted may be too inflexible in a case such as the present*". The judge therefore granted permission to appeal his decision. In light of this, and pending any decision on appeal, where parties are seeking injunctive relief from the court, or indeed opposing such an application, they may wish to consider arguments based on any contractual limitation of liability or exclusion clause, or a liquidated damages clause.

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Regulatory

SYSTEMS AND CONTROLS AGAINST MONEY LAUNDERING, BRIBERY AND CORRUPTION: RECENT FCA ACTION

Thematic Review: Anti Money Laundering and Anti Bribery Corruption Systems and Controls, October 2013 (**Thematic Review**); Final notice against JLT Specialty Ltd, December 2013 (**JLT Final Notice**); Decision notice against Standard Bank plc, January 2014 (**Standard Bank Decision Notice**).

The findings of the FCA's Thematic Review and two recent sizeable fines levied against JLT Speciality (GBP 1.9 million) and Standard Bank (GBP 7.6 million) demonstrate that the adequacy (or otherwise) of anti money laundering (**AML**) and bribery and corruption (**ABC**) systems and controls is a real risk area for financial institutions. The FCA is systematically scrutinising systems and controls to identify failures by firms. It is also extending its remit to take action in new sectors of financial services, such as commercial banking. This article examines these recent developments.

The Thematic Review

FCA regulatory action has previously been confined to the banking and insurance sectors. The Thematic Review widened the FCA's focus to also include wealth asset management firms, fund administrators and platform firms. After reviewing 22 sample firms, the FCA made a series of findings.

General findings

AML and ABC should be treated on an integrated basis by management and, as such, supervised and monitored through the same committees and similar mechanisms. Management information should be more "*granular*" and director should show more "*management challenge*" when presented with AML and ABC reports at board meetings. In addition, risk assessments were generally found to be both inadequate and infrequent.

Anti-money laundering findings

The review identified two key areas: customer due diligence and transaction monitoring. In both, the performance of the firms reviewed was of a mixed standard.

One example of poor customer due diligence given was a firm where 60% of files had limited evidence of analysis of the beneficial ownership of the funds held. Another firm had failed to refresh its customer information for over ten years. The FCA noted that, while these responsibilities could be outsourced, such outsourcing must be "*adequately monitored and controlled*".

For transaction monitoring, a wide variety of systems were used but a universal feature was poor documentation. For instance, at one firm, an internal alarm was triggered when a customer withdrew GBP 25 million but the FCA could find no evidence as to how the alert was then reviewed and ultimately discounted.

Bribery and corruption controls findings

The FCA noted that firms focused on gifts and entertainment policies. These were of varied quality, with pre-approval limits ranging from GBP 25 at one firm to GBP 500 at another. The FCA noted with approval a graded approval system at one firm – the greater the amount, the more senior the sign-off required.

By contrast, firms failed to focus as much on third party relationships and payments. Generally speaking, more due diligence and oversight was needed as regards third party relationships, particularly where firms' business models were based on agents or introducers. Likewise, more specific controls on third party payments were needed that, when triggered, either blocked or limited money flows to third parties.

JLT Final Notice

Insurance brokers such as JLT often use overseas introducers to attract clients. The broker pays a proportion of the commission generated from a particular client to the overseas introducer responsible for generating the business. The FCA regards overseas introducers as posing the "*greatest risk of bribery and corruption*" to insurance brokers. That risk comes one of two forms: either of the introducer being bribed, or of the introducer bribing the client or a public official. These concerns are borne out through previous enforcement action taken by the FCA. It fined Aon GBP 5.9 million in January 2009 and Willis GBP 6.9 million in July 2011.

Although JLT had "*detailed procedures*" to be followed by employees before establishing overseas introducer relationships, which had been updated in light of the Bribery Act 2010, these systems and controls simply were not implemented in practice:

- The "*detailed procedures*" for establishing overseas introducer relationships were deeply flawed in that they failed to outline specific steps that employees had to take. For instance, employees had to "*identify whether there was a relationship between the introducer and the client being introduced*" but not told how to do this.
- The screening software for relationships with public officials used by JLT was not used effectively (with, for instance, employees failing to enter the names of directors and shareholders for corporate introducers into the system) and was inadequate in any event.
- JLT only conducted risk assessments at the start of each relationship rather than for each piece of business. In other words, JLT failed to assess the bribery and corruption risk in context of each client and each piece of insurance activity.
- No searches were actually conducted for relationships *between* overseas introducers and the relevant clients or public officials.
- There was a failure to conduct enhanced due diligence where JLT was in fact aware that the overseas introducer was owned by a public official or the state.
- The "*alarm bells*" system, introduced following the Bribery Act 2010, was not properly implemented. For instance, in some cases mandatory factors in the system were left blank or filled as "*N/A*" or "*unknown*". In another case, the right number of alarm bells were triggered to merit escalation but no further action was taken.

The FCA concluded that JLT had breached Principle 3 of the FCA's Principles for Businesses by failing to take reasonable care to organise and control its affairs responsibly and effectively with respect to its ABC systems and controls, and fined JLT GBP 1.7 million.

Standard Bank Decision Notice

Standard Bank breached reg.20(1) of the Money Laundering Regulations 2007 in failing to take reasonable care to ensure all aspects of its AML systems and controls were applied appropriately and consistently for corporate customers connected with politically exposed persons (**PEPs**). Standard Bank should have carried out enhanced due diligence for its 282 corporate clients connected to PEPs. However, on reviewing 48 files, the FCA found two failings.

First, Standard Bank failed to carry out adequate enhanced due diligence measures before starting to do business with corporates connected to PEPs. Before April 2009, risk assessments led to "*low*" or "*medium*" ratings solely on the basis of corporates country of incorporation. The information that Standard Bank in fact had on those same clients should have led to a "*high*" rating, thereby triggering enhanced due diligence. After April 2009, Standard Bank implemented a more sophisticated risk assessment that did trigger "*high*" ratings. However, the enhanced due diligence that followed from such a rating was itself inadequate. For instance, corporate structures were not verified and the beneficial ownership of the clients was not identified.

Second, Standard Bank failed to monitor all its business relationships for money laundering on an ongoing basis. The FCA found from the 48 files that, on the basis of the bank's own internal policies, it was "*significantly exceeding*" the deadlines for re-reviewing its files for clients connected to PEPs. A wider analysis by the FCA found this failing to be systemic, affecting 80% of relevant customers.

The size of the fine is partly explained by Standard Bank's turnover for the period. Any percentage of GBP 50 million would have resulted in a large fine. Nonetheless, the FCA viewed Standard Bank's breaches as very serious because the number of PEP-connected clients that Standard Bank had meant that its failings created a "*significant risk that financial crime would be facilitated*." The breaches were also serious because they arose from systemic failings of the AML systems. As such, the FCA imposed the second-largest percentage of annual turnover it could (15%).

COMMENT

The Thematic Review highlighted the general inadequacy of firms' customer due diligence and risk assessments. The Standard Bank Decision Notice, three months later, demonstrates the extent of the regulatory risk associated with failing to improve such basic AML systems. Similarly, in the ABC context, the Thematic Review raised the need for firms to focus more on third party relationships. This should be given renewed emphasis in light of JLT's fine for its failings as regards its overseas introducers. FCA scrutiny is only likely to increase while such failures are identified across the financial sector.

FCA scrutiny in this area is also extending beyond its traditional territory to encompass most forms of regulated activity. This is demonstrated both by the Thematic Review, in which the FCA focused for the first time on asset management firms, fund administrators and platform firms, and the Standard Bank Decision Notice, as the first FCA AML regulatory action taken in the commercial banking sector.

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Service

ADDITIONAL METHODS FOR SERVICE ON DIRECTORS INDEPENDENT OF CPR

Key Homes Bradford Ltd & ors v Rafik Patel [2014] EWHC B1 (Ch), 10 January 2014

Master Marsh held that the defendant had been validly served with a claim at the address listed on the register of directors under s1140 ("*Service of documents on directors, secretaries and others*") of the Companies Act 2006 (CA 2006). The case is important as it is the first reported decision to confirm that s1140 operates as a "*parallel code*" for serving a director with a claim form, which is entirely separate from the provisions for service in the CPR.

Background

The claimants, special purpose vehicles established for the purpose of building student accommodation, issued proceedings against the defendant, the sole director of each of the claimants, alleging that the defendant had diverted investment funds of approximately GBP 20 million for his own benefit. The claimants considered that they had validly served their claim on 13 September 2013 at two addresses, one a residential address in Romford and the other a business premises in Barking. The defendant disputed that effective service had taken place and issued an application on 9 October 2013 seeking to set aside purported service of the claim.

The defendant argued that, by 13 September 2013, he no longer lived in the United Kingdom and neither Romford nor Barking were his "*usual or last known residence*" for the purposes of CPR 6.9(2). The claimants disagreed on the facts but also "*raised a novel point concerning service*" arguing that the claim form had been validly served in accordance with s1140 of CA 2006. The claimant also sought an order for alternative service pursuant to CPR 6.15.

Section 1140 CA 2006

Section 1140 of CA 2006 permits a document to be served on a company director (or secretary) by leaving it or sending it by post to the person's registered address. This applies "*whatever the purpose of the document in question*" (s1140(3)). The registered address is the relevant address in the register of directors (or secretaries) available for public inspection (s1140(4)).

Section 1140(8) provides a qualification that: "*Nothing in this section shall be read as affecting any enactment or rule of law under which permission is required for service out of the jurisdiction*". The defendant, who was living in the United Arab Emirates (**UAE**), argued that s1140 had to be interpreted in line with s1140(8) and the general conflicts rule that a person may not be served at a time when he is not resident within the jurisdiction, unless that absence is temporary.

Decision

Master Marsh held that service of the claim was valid under s1140 of the CA 2006 and the CA 2006 provides a basis for serving a director which is entirely separate from the provisions of service in the CPR. Section 1140 operates as a "*parallel code*" and was "*clearly designed as new manner in which directors could be served*".

In his judgment Master Marsh considered that the wording of s1140 CA 2006 was "*drafted in clear and unambiguous language*" and it could be used for the service of any document. Service was not restricted to purposes arising in connection with the relevant company.

Master Marsh considered that s1140(8) limited the scope of s1140 but only to prevent s1140 "*permitting service of proceedings on a director who has provided a service address outside the United Kingdom*". In his

view, the defendant was at liberty to specify that his service address was in the UAE rather than the Romford or Barking addresses but he did not do so. If the defendant had done so, the claimants would have needed to comply with the provisions of CPR Part 6 and to obtain permission to serve out of the jurisdiction. Master Marsh considered that it was not *prima facie* unfair that a director of an English company who resides abroad, but who gives an address for service in England, should be vulnerable to being served at that address as a choice, or a deemed choice, has been made. Master Marsh noted that searches by both sets of counsel were unable to locate any previous case that considered s1140 of the CA 2006.

Was service effective under CPR 6.9(2) and CPR 16.15?

Although Master Marsh considered that service was effective under s1140, he went on to consider *obiter* whether either of the Romford or Barking addresses could be deemed to be the defendant's "*usual or last known residence*" pursuant to CRP 6.9(2). The Master considered that service of the claim at the Barking address did not amount to service as this was not the defendant's residential address. Equally, applying the test in *Relfo Ltd v Varsani* [2011] 1 WLR 1402, the settled pattern of the defendant's life indicated that the defendants "*usual residence*" was in the UAE and not in Romford. On the facts, however, the claimants were able to demonstrate that Romford was the defendant's "*last known residence*" and service was also effective here for the purposes of CRP 6.9(2).

Master Marsh also considered *obiter* the claimant's application under CPR 16.15(1) and (2) to permit service by an alternative method (email or at the defendant's solicitors address) or for a declaration that the steps taken were effective to serve the defendant. Unlike in *Abela v Baadarani* [2013] UKSC 44, there is a bi-lateral convention between England and the UAE so Master Marsh applied the test in *Cecil & ors v Bayat* [2011] 1 WLR 3086 to determine whether there were "*exceptional circumstances*" that justified permission for alternative service to be granted. Master Marsh considered that there was nothing in particular that: (i) the defendant had lead the claimants to believe that he continued to reside in the UK; (ii) serious issues were raised in the claim and a delay of six to12 months (as advised by the Foreign Process Section of the Royal Courts of Justice) to effect service in the UAE was likely and could be highly and irremediably prejudicial to the claimants; (iii) the belief that the defendant might not cooperate with service under the Hague Convention; and (iv) that any limited interference with the sovereignty of the UAE could be justified when weighted against the aforementioned prejudice to the claimants.

COMMENT

The case is important as it is the first reported decision which considers the application of s1140 of CA 2006. It provides confirmation that s1140 can be utilised as an alternative method for serving a director of a company which is separate from the provisions in the CPR.

The case will be of interest to claimants as a quick and efficient alternative to complying with the requirements for serving out of the jurisdiction in circumstances where a director or company secretary is resident abroad but his address for service on the companies house register remains an English address. Directors and company secretaries who are resident abroad should be aware that any service address they give in relation to a UK company can be used for the service of any document, not just documents relating to that company or his directorship of it. If a director or company secretary is living abroad and does not want to be served with proceedings in England, they should take care to review their address for service on the register and update if appropriate.

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The quest for meaning: an overview of the law of contract Part I – interpretation

Tuesday 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 a party's relationship with counterparties

What do we do now? An overview of the law of contract Part II – termination and remedies

Tuesday 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 considers how a party might end a contract, what to be mindful of and what remedies might be available.

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Service

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