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Litigation and Dispute Resolution

Review

EDITORIAL

In this edition of the Litigation Review we cover six cases, each dealing with a different aspect of contract law. For example, we consider the important Court of Appeal decision in *Barclays Bank v Unicredit* which considered the meaning of "commercially reasonable" in the context of the exercise of a party's discretion in a finance document. We cover *Newland Shipping and Forwarding Ltd v Toba* where Leggatt J considered the interplay between express contractual rights to terminate and those that exist at law. We report on *Geden Operations Ltd v Dry Bulk Handy Holdings Inc* where Popplewell J considered the test for anticipatory breach by renunciation where a party had made it clear (post contract) that its ability to perform the contract was dependent on the actions of a third party. Finally, the decision of Andrews J in *Greenclose Ltd v National Westminster Bank* is a useful reminder to litigators not only of how strictly English courts construe contractual notice provisions, but also, more generally, just how much litigation is generated by these provisions.

Data protection continues to be a big issue for commercial entities. Clients with queries regarding the impact of the CJEU's controversial decision of 13 May 2014 in *Google v AEPD* (the Spanish Data Protection Agency) *and González*, should contact Jane Finlayson Brown or Nigel Parker by email, or any of our other data protection experts. We cover the Court of Appeal's decision in *Efifiom Edem v Information Commissioner & ors*, where the court endorsed the Information Commissioner's guidance on the meaning of "personal data". This decision has implications for employers handling data subject access requests under the UK Data Protection Act 1998.

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CLARITY ON DEADLINE FOR BRINGING UK ANTITRUST DAMAGES ACTIONS

Deutsche Bahn AG & ors v Morgan Advanced Materials plc [2014] UKSC 24, 9 April 2014

On 9 April 2014, the UK Supreme Court ruled that a Commission cartel decision becomes binding upon non-appealing addressees of that decision from the last date upon which the addressee was able to appeal. This is good news for claimants, who can bring antitrust damages claims against non-appealing addressees without having to wait for the outcome of any appeals by other addressees (although they must be wise to the differing time limits in order not to become time-barred). The decision is, however, potentially bad news for whistleblowers and settling cartelists, who may be subjected to early claims.

Background

The cartel

In a 2003 decision (the **Decision**), the European Commission (**Commission**) found that six companies took part in an illegal price-fixing cartel in carbon and graphite products. All but one of those companies received heavy fines. Under Commission leniency rules, one of the cartelists, Morgan Advanced Materials plc (formerly Morgan Crucible plc) (**Morgan Crucible**), escaped financial penalty by acting as the whistleblower.

Other than Morgan Crucible, all of the other companies appealed the Decision before the EU courts, contending that the Decision should either be set aside or that the fines should be substantially reduced. Their appeals failed, with the effect that, from 18 December 2008, no further appeals were allowed.

The private action

On 15 December 2010, a group of around 30 claimants in the rail sector from both the UK and Europe filed a claim for follow-on damages before the Competition Appeal Tribunal (**CAT**) against all of the cartelists. The claimants were seeking damages in respect of the overcharge they suffered on the cartelised products during the life of the cartel. Morgan Crucible, as the only UK-domiciled company out of the cartelists, was used as the "anchor defendant" for jurisdiction purposes, so that the claimants were able to "anchor" the claim in the UK against all of the defendants, even though most of them were non-UK domiciled companies. The claimants relied on Article 6(1) of the Brussels Regulation, which provides that, where a person is one of a number of defendants, they may be sued in a Member State where any one of them is domiciled, so long as the claims are closely connected.

The timing issue

A claim for follow-on damages must be brought within the time limits prescribed under s47A of the Competition Act 1998, ie two years from when a Commission decision becomes binding against an addressee of that decision: the date on which it is no longer possible for that addressee to appeal.

Morgan Crucible submitted to the CAT that, since it did not appeal, the Decision became binding on it from 13 February 2004, and that the claimants, therefore, had two years from that date to file their claim. Accordingly, the claimants, having filed their claim on 15 December 2010, were out of time.

The claimants argued that they had to wait until <u>all</u> of the appeal proceedings against the Decision were exhausted (or time-barred for further appeals) before they were able to bring an action for follow-on damages. They contended that this date was 18 December 2008, meaning that the claims brought on 15 December 2010 were within the two-year time limit.

Although the CAT agreed with Morgan Crucible that the claims were brought out of time, the Court of Appeal overturned the CAT's decision and ruled in favour of the claimants. The Supreme Court has now restored the CAT's judgment and ruled in favour of Morgan Crucible.

The judgment

The Supreme Court found that, in interpreting the time limits provided for in s47A, the court must necessarily have regard to European law. The Court of Appeal had erred in deciding that the time limit prescribed by s47A was solely a matter of domestic law, because s47A contains "critical cross references to a matter determined by European law". An infringement decision by the Commission is a decision that is binding on domestic courts and tribunals as a matter of European law, and not merely by virtue of s47A. That being so, in order to understand the nature of the Decision, it is necessary to consider European law and not just domestic law.

Most importantly, the Supreme Court held that a Commission decision finding an infringement of Article 101 TFEU is to be regarded as a series of individual decisions against each addressee separately. Consequently, the relevant date on which a decision becomes binding on a non-appealing addressee is the date on which any such non-appealing addressee is no longer able to appeal the original decision. The fact that other addressees to the decision may choose to appeal is of no immediate relevance to the culpability of a non-appealing addressee, even if such appeal was successful: "*A successful appeal by one addressee, establishing that there was no cartel, has no effect on the validity and effects of the Decision determining that there was such a cartel and levying a fine as against another addressee who has not appealed.*"

The Supreme Court also disagreed with the Court of Appeal's reasoning that there were practical considerations rendering it more sensible to postpone follow-on damages claims until there was a "final decision". Issues relating to the scope of the cartel that are appealed, such as causation and quantum, have no direct effect on non-appealing addressees; they will be bound by the findings of the original Commission decision. Only where issues of contribution are appealed may it directly affect a non-appealing addressee, in that it may affect the number of contributing parties responsible for any follow-on damages liability. The Supreme Court thought that, in practice, it might be appropriate to adjourn determination of contribution proceedings until all appeals have been determined.

In short, therefore, the Supreme Court found that the claims against Morgan Crucible were brought out of time.

Ramifications

Legal certainty

The Supreme Court judgment has brought legal certainty to an issue that has seen a judicial see-sawing of opinion.

The picture was muddied further by a follow-on damages claim filed in 2007, also off the back of the carbon graphite cartel, but brought by a different set of claimants (the **Emerson Claimants**). In this case, the CAT took the complete opposite approach on the issue of time limits to the approach it took in the rail claims.

The CAT held that the Emerson Claimants had to seek special permission from the CAT before it could bring the claims against Morgan Crucible, because the time limit to bring a follow-on damages claim against Morgan Crucible had not yet begun. The CAT held that this was due to the (then) ongoing appeals by the other cartelists. This divergence of opinion, within the CAT itself, was one of the reasons why an appeal to the Court of Appeal was granted, and this latest Supreme Court decision brings welcome certainty to a hotly contested issue.

Some of the claims must fall away

In the present case, the question of whether or not the claim against Morgan Crucible was made in time was also central to whether or not the non-UK claimants had a valid claim in the UK against the other (non-UK domiciled) cartelists. With this ruling, the non-UK claimants now no longer have a jurisdictional "anchor" to pursue their claims in the UK, meaning that they will no longer be able to rely on Article 6(1) of the Brussels Regulation.

Impact on whistleblowers?

The judgment highlights the potential for whistleblowers to be the first target for follow-on damages claims by victims of cartels, as whistleblowers are unlikely to appeal Commission decisions. Where other addressees bring appeals before the European courts, which may take several years to decide, claimants may seek out the whistleblower as the party from whom damages would be the quickest to extract. This could, in theory, leave the whistleblower bearing the full liability for a follow-on damages claim (although it may later be able to seek contribution orders from the other cartelists, should their appeals fail).

A key question is whether this is really a ground-breaking development. Even before this ruling, we would expect claimants to target their actions against whistleblowers, and this exposure was an important factor for companies to consider when deciding whether to apply for immunity. The judgment does, however, bring clarity in relation to the timing for these actions. It means that claimants must be alive to the differing limitation periods applying to each defendant to ensure that they do not leave themselves time-barred.

In any event, should the proposed EU antitrust damages directive be adopted, any effect this judgment may have on whistleblowers should be mitigated. The proposed directive provides that the immunity applicant is jointly and severally liable to its own direct or indirect purchasers only, unless other victims are not able to obtain full redress from other cartel members. There is also some limited protection provided for SMEs where, subject to some provisos, companies with less than 5% market share will be responsible for compensating their own direct or indirect purchasers only. This can be seen as the Commission attempting to balance two important policy considerations; the Commission has to safeguard the effectiveness of its leniency programme by providing incentives for whistleblowers to come forward, but at the same time ensuring that victims of cartels have the maximum possible number of avenues from which to obtain sufficient redress.

What about settling parties?

The current trend is for the majority of EU (and UK) cartel cases to result in parties entering settlement agreements with the authority. Settling companies are much less likely to appeal the substance of the infringement decision and, therefore, may also be a primary target for damages claimants, certainly in cases where some but not all parties have settled. But unlike whistleblowers, parties which choose to settle will not receive the same protections from full joint and several liability under the proposed EU damages directive. It will be very interesting to see whether, and to what extent, the ruling will affect the willingness of parties to settle cartel cases.

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PRIVATE ANTITRUST DAMAGES ACTIONS: EUROPEAN PARLIAMENT APPROVES DIRECTIVE

Despite internal European Parliament politics and diverging views on substance, the Commission's proposal for a private antitrust damages actions Directive is very nearly signed and sealed. The Parliament has approved a compromise text, and the final step – EU Council of Ministers' approval – will be just a formality. Once implemented, the Commission is confident the Directive will deliver victims of anticompetitive behaviour easier access to compensation, without any damage to its essential public enforcement tools.

The need for legislation

The European Commission's (**Commission**) public enforcement objective is to punish and deter antitrust infringements. However, for a number of years now, it has also been striving to facilitate private enforcement.

At present, very few victims of anti-competitive conduct actually manage to obtain compensation – the Commission estimates that only 25% of its antitrust infringement findings in the last seven years have been followed by damages actions, and in only a fraction of these has redress been granted. Inadequate rules on procedure, evidence and disclosure has littered the path to civil redress with practical difficulties and legal uncertainty as to how public and private enforcement interact. The Commission is concerned that SMEs, and individuals in particular, cannot effectively access compensation. And, with a lack of consistency in national laws across the European Union, it is concerned that a victim's chances of success depend too much on the Member State in which they are located (to date most actions have been started in the UK, Germany and the Netherlands).

But, this may all change. The European Parliament has voted to approve the final compromise text of a proposed Directive on private antitrust damages actions that should remove a number of these practical obstacles and smooth out some of the discrepancies.

The rules facilitating private enforcement

Summary of key provisions

Disclosure	– Absolute protection for leniency corporate statements and settlement submissions. – Temporary protection for documents specifically prepared for antitrust investigations by parties or authority, and withdrawn settlement submissions. – No protection for all other documents.
Limitation period	– Five+ years (suspended until at least one year after authority's infringement decision or the end of the appeals process).
Joint & several liability	– Not for immunity recipients (only liable for harm to their own customers), but back-stop where claimant otherwise unable to obtain full compensation. – Not for certain SMEs.
Passing-on	– Indirect purchasers can claim (enjoying a rebuttable presumption of harm).

	– Passing-on defence available.
Quantification of harm	– Rebuttable presumption that cartel infringements lead to harm. – Quantification of a job for national courts.
National competition authority decisions	– Automatic proof before courts of same Member State that infringement occurred. – At least *prima facie* evidence of infringement before courts of other Member States.
Consensual Dispute Resolution	– Greatly facilitated.

Absolute protection from disclosure for leniency/settlement submissions

This has been one of the most controversial and fiercely contested issues. To what extent should private damages claimants be able to access documents on an antitrust authority's investigation file, in particular documents submitted by companies applying for leniency or looking to settle?

The Commission has been unmoving in its position – leniency statements and settlement submissions should not be disclosed to claimants. To do otherwise could jeopardise the effectiveness of "essential" public enforcement instruments, leniency and settlement programmes. Companies would be discouraged from voluntarily approaching antitrust authorities for fear that documents confessing anti-competitive conduct could be used against them in national courts. And the European Parliament has largely been supportive of the Commission's legislative route, despite the EU courts often taking a divergent approach. (The European Court of Justice has ruled (in the *Donau Chemie* case) against an absolute ban on disclosure of leniency documents; instead, it concluded, national courts should weigh up the interests in favour of disclosing, or protecting, the documents on a case-by-case basis.)

The Directive provides strict protections:

1. National courts can never order disclosure of:

   a) Leniency statements (where a company or individual sets out its knowledge of a cartel and its role and seeks immunity or a reduction in fines under a leniency programme).

   b) Settlement submissions (where a company admits its infringement and in return seeks an expedited or simplified investigation and a reduction in fine).

   For these purposes, national courts should be able to access claimed leniency and settlement documents to ensure their contents do not go beyond true leniency statements/settlement submissions.

2. Certain documents are temporarily protected from disclosure, and access can only be granted after the competition authority has closed its proceedings (it would appear that protection will not be extended to cover any appeals of a decision to the EU or national courts):

   a) Documents specifically prepared by parties for the purpose of the antitrust investigation, eg replies to the authority's requests for information and witness statements.

   b) Documents the antitrust authority has created during its investigation and sent to the parties, eg statement of objections.

   c) Settlement submissions that have been withdrawn.

These protections also apply to the extent that parties to the investigation obtained copies of the above documents during the "access to file" process. Claimants cannot, therefore, circumvent the ban on disclosure by seeking to obtain these materials directly from the defendants.

Documents falling outside the two categories can be disclosed to claimants at any time (subject to the protection of confidential information). This would apply, for example, to pre-existing evidence of anti-competitive conduct (such as emails) which were not created as part of the investigation process. However, courts should not order disclosure of these documents in such a way so as to risk revealing what is on an authority's file ("fishing expeditions"). Claimant's requests for disclosure should be proportionate, and specify categories of evidence as precisely and narrowly as possible on the basis of reasonably available facts and evidence presented in a "reasoned justification". Otherwise they may be able to "unravel" the authority's investigation strategy, and parties under investigation may be unwilling to supply evidence.

Five+ year limitation period

Victims of antitrust infringements will be given **at least five years** to bring an action. This starts to run after the infringement ends, and after victims become aware of the infringement, the harm, and the identity of the infringer. Where an antitrust authority opens an investigation into a suspected infringement, the limitation period is suspended or interrupted until at least one year following a final "infringement decision" (a decision of a competition authority or review court that can no longer be appealed).

By setting this period, it is hoped injured parties will be given a reasonable opportunity to seek compensation for their loss, but without compromising legal certainty for potential defendants.

No joint and several liability for immunity recipient

The general principle is that companies which have infringed competition law should be jointly and severally liable for the harm caused. However, the Directive elevates immunity applicants to a special position: a company which has been granted immunity from fines under a leniency programme should only have to pay damages for the harm caused to its own customers.

The reasoning behind this is again to preserve the effectiveness of leniency regimes. Immunity applicants are less likely to appeal an infringement decision, meaning that their proceedings are made "final" long before those of infringers who appeal the decision. They are, therefore, often primary and preferred targets of damages actions. The Commission does not want this to discourage potential immunity applicants from coming forward and blowing the whistle.

But this does not mean that claimants might lose out. As a last "very unlikely" resort, the immunity recipient will still be fully liable should the claimant be unable to obtain full compensation from the other infringers (for example because all of them went bankrupt).

No joint and several liability for certain SMEs

The Directive also provides an exception to joint and several liability for certain small or medium-sized enterprises (**SME**). The recently-included carve out applies if the SME's market share remained below 5% at all times during the infringement, if the application of the normal rules of liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value, and also if it is not a leader or coercer of the infringement and it is not a repeat offender.

Passing-on defence allowed

The Directive recognises that both direct and indirect customers of an infringing entity should be able to seek compensation for harm – actual loss and lost profits plus interest – suffered. Indirect purchasers are those at the next and subsequent levels of the supply chain to those buying direct from the infringer. This is all good for claimants, but what about defendants who could be hit with damages claims from customers, customers' customers, etc? The Directive gives them some comfort in enabling them to rely on the passing-on defence. This means that a defendant has a defence where it can show that the claimant has reduced his actual loss (eg an overcharge from cartel conduct) by passing it on (wholly or partly) to subsequent customers.

Presumption of harm for cartel conduct

There will be a (rebuttable) presumption that cartel infringements lead to harm in the form of a price effect (often an overcharge). This will be a key incentive for claimants to bring an action. But the Directive does not go as far as to quantify the harm presumed. Quantification is a matter for national rules and national courts. To make this task easier, the Commission has

published non-binding Communication and Guidelines to give guidance to national courts on calculating damages, including practical tips on methodology and techniques.

The relevance of national decisions

The Commission had hoped to prevent national courts from taking damages decisions that ran counter to any national authority's infringement findings. This would have avoided defendants re-litigating the same issues during a subsequent damages action, and would have put national authority decisions on the same footing as those of the Commission.

However, the provision proved controversial and the extent to which any national authority's infringement findings are binding has been watered down during the passage of the Directive.

A final infringement decision of a national competition authority will only automatically constitute proof before courts of the same Member state that the infringement occurred. In actions before courts of other Member States, claimants will merely be able to present such decisions as at least *prima facie* evidence of the infringement.

Consensual dispute resolution is encouraged

Recognising that victims of anti-competitive conduct may be equally compensated through out–of-court settlement (often faster and at less cost), the Directive incentivises and increases the effectiveness of consensual dispute resolution mechanisms. For example, it suspends limitation periods and pending proceedings where parties are engaged in settlement discussions. It also clarifies the effect of partial consensual settlements on subsequent actions for damages, setting out how the remaining claim should be determined, against whom it can be made and how settling and non-settling co-infringers should contribute. And, interestingly, the Directive now provides that where an infringer has paid compensation as a result of a consensual settlement, a competition authority may consider this as a mitigating factor when setting the fine for that infringer.

What next?

The Directive must now be formally approved by the Council. But even then the new rules will not have immediate effect – Member States have two years to implement the provisions in their legal systems. In some cases this could require radical changes.

The Directive seeks to strike a balance – removing (or at least lowering) barriers for claims on the one hand, and on the other protecting key interests of defendants, particularly those benefiting from leniency and, increasingly, settlement programmes.

But the Commission does not expect the Directive to completely iron out the hurdles for victims seeking redress, or level the playing field across the EU. The Directive itself requires a report four years following implementation on, amongst other things, how the payment of fines following public enforcement and the "*prima facie* evidence" status of national competition authority decisions impact on the ability of victims to actually obtain compensation. And it is likely that the accelerating trend for antitrust damages actions will remain concentrated in certain jurisdictions, such as the UK, as they forge ahead with national even-more-claimant-friendly rules.

The Commission will undoubtedly remain committed to ensuring its enforcement tools are not compromised, but will it continue to give such pro-active support to private enforcement right across the EU?

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Contract

COURT OF APPEAL INTERPRETS "COMMERCIALLY REASONABLE" IN COMPLEX FINANCE TRANSACTION

Barclays Bank plc v UniCredit Bank AG & anr [2014] EWCA Civ 302, 20 March 2014

The Court of Appeal has held "commercially reasonable", in the context of an obligation to determine consent to an early termination provision in a guarantee in a "commercially reasonable manner", to require *Wednesbury* reasonableness (ie not to be irrational) and no more.

Background

As reported in the February 2013 Litigation Review, UniCredit entered into three synthetic securitisations of loan portfolios with Barclays, embodied in three deeds of guarantee. The term of the longest of the guarantees was 19 years. At the time of execution, Barclays entered five years' fees as profit in its books. There were optional early termination clauses in each guarantee in the event of a regulatory change resulting in less favourable capital treatment of the guarantee, provided that UniCredit obtained prior consent from Barclays "*such consent to be determined by* [Barclays] *in a commercially reasonable manner*". UniCredit sought early termination under this provision and Barclays refused to give its consent unless it was paid the five years' fees.

UniCredit claimed Barclays had unreasonably refused consent and discontinued payment under the guarantees. Barclays maintained that the guarantees had not been terminated and remained in force. At first instance, Mr Justice Popplewell held that the contractual requirement for a discretion to be exercised in a "*commercially reasonable*" manner was to be assessed against an objective standard of reasonableness, and not against the more limited standard set out by Rix LJ in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] Bus LR 1306. However, even on the higher objective standard, a commercial party may still favour its own interest to the exclusion of its counterparty's and be acting commercially reasonably. On the facts Barclays was entitled to the five years' fees. UniCredit appealed.

The appeal

The principal matters on appeal were whether Barclays was entitled to:

1. give precedence to its own commercial interest; and
2. demand the five years' fees.

"Commercial reasonableness" generally

Longmore LJ, who gave the leading judgment, noted that there had been much debate as to whether the clause in question was to be regarded:

1. as conferring a contractual discretion on Barclays so that the principles of contractual discretion cases applied as exemplified in the *Socimer* case so that a discretion must be exercised honestly and in good faith for the purposes for which it was conferred and not in a way that is capricious or arbitrary or so outrageous in its defiance of reason that it can properly be categorised as perverse;
2. as equivalent to conferring a discretion to which the principles of *Wednesbury* reasonableness apply, namely that the exercise of the discretion is not "*so unreasonable that no reasonable authority could ever have come to it*";
3. as analogous to landlord and tenant cases where, while a landlord need usually consider only his own relevant interests, there may be cases where there is such disproportion between the benefit to the landlord and the detriment to the tenant if the

landlord withholds his consent to an assignment, that it is unreasonable for the landlord to refuse consent; or

4. as subject to an objective determination of what was "*commercially reasonable*"?

Longmore LJ concluded that he did not see much to be gained from this type of analysis but, nonetheless, felt that the provision fell within category 2 (ie *Wednesbury* reasonableness). He also noted that the Socimer case indicates there is, in any event, little difference between categories 1 and 2.

Longmore LJ went on to attempt an overall test while acknowledging how hard this was: "*It is not easy to express a test for commercial reasonableness for the purpose of this (let alone any other) contract but I would tentatively express it by saying that the party who has to make the relevant determination will not be acting in a commercially reasonable manner if he demands a price which is way above what he can reasonably anticipate would have been a reasonable return from the contract into which he has entered and which it is sought to terminate at an early date*."

On the facts

The Court of Appeal held that:

1. Barclays could take account of its own interest in preference to the interest of UniCredit;
2. the price demanded for consent was not commercially unreasonable; and, accordingly
3. the guarantees had not been validly terminated or come to an end.

COMMENT

The Court of Appeal has upheld the decision of the High Court in finding that Barclays had not unreasonably refused to give its consent where required to act in a "*commercially reasonable manner*" by demanding five years' fees in return for consenting to early termination of some guarantees. In doing so, it has set the threshold for acting commercially reasonably at a low level: in essence not acting irrationally. The court was at pains to stress that this was a finding on these particular facts; nonetheless, it is hard to imagine debating what is commercially reasonable without reference to this case. One potential anomaly of the decision is captured by what the judge at first instance noted, "*The presumption is that by using express words, the parties were seeking to achieve some greater restriction than would have applied if no words had been used*". And yet, the effect of the Court of Appeal decision would appear to elide the meaning of "*commercially unreasonable*" with the limits on exercising a discretion in *Socimer* and *Wednesbury* which apply in any event (even if the contract is silent).

In submissions, the parties referred to the definition of "*Close-Out Amount*" in the ISDA 2002 Master Agreement which provides that "*Close-Out Amount*" is to be *"…determined by the Determining Party (or its agent), which will act in good faith and use commercially reasonable procedures in order to produce a commercially reasonable result*". The court refused to be drawn into this debate stating that it was not by any means inevitable that the construction put on the words in this case will necessarily apply in those other contexts, which may anyway use slightly different words.

If parties want the term "*commercially reasonable*" to elicit a particular behaviour from a drafting perspective they are best spelling this out. In the ISDA 2002 Master Agreement, for example, the definition of "*Close-Out Amount*" goes on to give examples of what "*commercially reasonable procedures*" may include as well as, separately, spelling out certain things the Determining Party will consider unless certain circumstances do not apply. In many circumstances, the use of the term "*commercially reasonable*" is also a useful check against parties' behaviour during the life of a contract, pre-litigation. In other words, a party will usually, and would be well advised to, think twice about doing something where it must be "*commercially reasonable*".

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TERMINATION OPTIONS: GENERAL LAW OR CONTRACTUAL RIGHT

Newland Shipping and Forwarding Ltd v Toba Trading FZC [2014] EWHC 661 (Comm), 12 March 2014

Leggatt J considered the interplay between express contractual rights to terminate an agreement and the rights to terminate that arise under the general law. A party which has a right to terminate both under a contract and the general law may exercise both of those rights provided there is no inconsistency in doing so. If it would be inconsistent to exercise both rights, the party must elect which right it wishes to exercise. The party seeking to terminate must clearly communicate which right is being exercised (or that both rights are being exercised), otherwise the communication may not be sufficiently certain for there to have been an effective termination.

Background

Newland and Toba entered into a contract for the sale and carriage of gasoil. Clause 7 of the contract gave Newland the right to cancel the contract if Toba failed to pay for the goods within a set period and provided that Toba would be obliged to compensate Newland for all associated losses. Clause 12 sought to limit Newland and Toba's liability for loss or damages of any kind, except as expressly provided in the contract.

Newland duly shipped the goods and pressed for payment. An extension was agreed by the parties but Toba still failed to pay. Newland therefore served a notice purporting to terminate the contract and claimed Toba was liable to compensate Newland for losses connected with its failure to pay. Toba argued, *inter alia*, that Newland had failed to exercise a right to terminate pursuant to clause 7, but instead had purported to accept an alleged repudiatory breach of the contract. Toba further argued that if there had been a repudiatory breach of contract and Newland had accepted that breach, it was not liable to pay the sums claimed, as clause 12 operated to exclude liability for damages.

Leggatt J found that Newland had been entitled to terminate the contract under clause 7 and/or in accordance with its rights under the general law to terminate on account of Toba's repudiatory breach. A key issue was whether Newland's notice was effective to terminate the contract:

a. under clause 7;

b. by way of acceptance of a repudiatory breach; or

c. as a simultaneous exercise of both forms of termination right.

Inter-play between contractual right to terminate and termination under the common law

The judge observed that the "inter-play" between contractual termination rights and termination rights under the general law was "an area which is not free from difficulty". He noted that an express termination clause will not exclude the right to terminate under the general law unless the contract clearly says so. Leggatt J also confirmed that there is *generally* no inconsistency in opting to terminate both on the basis of an express contractual term and on the basis of a repudiatory breach. So, where both are available, a party can elect to exercise both at once. However, there may be an inconsistency in the exercise of these rights if the consequences of their exercise conflict. In the *Dalkia* case[1], contractual termination and acceptance of a repudiation would have had "*markedly different consequences*" as the former allowed the defaulting party to retain possession of the energy plant in question (provided it paid a termination sum) whereas the latter would have entitled the innocent party to take it back. In these circumstances the judge in *Dalkia* found that the single termination notice could not be taken to have produced two "*diametrically opposing consequences*" and held that there had been a contractual termination only.

Therefore in cases where the consequences of exercising one termination right are inconsistent with the consequences of exercising the other, the party with the right to terminate cannot exercise both rights and must elect between them. Leggatt J, however, made a distinction between these cases and cases where the consequences of exercising the two rights are merely different, but not inconsistent. He also emphasised the fact that, if a party does need to make an election, for that election to be valid he must clearly communicate his choice to exercise one right rather than the other. In summary:

- in cases where the consequences of contractual termination and termination under the general law are identical, termination will be valid even if the innocent party declines to specify which right he is exercising;
- if the consequences of each termination right are different (but not inconsistent) termination will only be effective if the innocent party specifies which right is being exercised, or alternatively specifies that both rights are being exercised otherwise there is not sufficient certainty for the termination be effective;
- where the consequences of exercising one termination right are inconsistent with the consequences of exercising the other, the innocent party must elect between the two rights and must clearly communicate his choice for termination to be effective.

Newland's termination – consequences were "different" but not inconsistent

If Newland had validly terminated under both clause 7 and the general law, then it would have a right to compensation under clause 7 and would (in principle) also be entitled to claim damages under the general law (subject to Clause 12). Leggatt J discussed the consequences of exercising each termination right and concluded that they were different. The sums that Toba would be obliged to pay under clause 7 were not the same as the sums that would be recoverable following termination for repudiatory breach, as clause 12 expressly excluded any damages that would be available under common law. In fact, the judge noted that termination for repudiatory breach would "*add nothing of value. But that is no reason why it could not be done*". The consequences of the exercise of the termination rights were therefore different, but in spite of this the judge still did not consider that they were necessarily inconsistent.

Accordingly, Newland would have been permitted to exercise both termination rights simultaneously.

Which termination right(s) had Newland exercised?

To determine whether Newland had exercised its contractual termination right or its termination right under the general law (or both), the judge considered the mixed language of Newland's termination notice. In it, Newland stated that it recognised Toba's breach "*as a repudiatory breach*" entitling it to damages. At the same time the notice quoted the salient provisions of clause 7 and claimed compensation available pursuant to that clause. Unsurprisingly, Leggatt J held that the explicit references to "*repudiatory breach*" and "*damages*" were a clear exercise of Newland's right to terminate under the general law. The judge also held that having quoted the terms of clause 7 (and the specific recovery rights afforded by that clause), Newland's notice was also a clear exercise of its contractual termination right. Furthermore, Leggatt J noted that the notice had to be read against the background of earlier correspondence in which Newland had threatened to terminate in accordance with clause 7; Newland was only doing what it had previously threatened to do.

The judge noted that if, contrary to his view, it was not possible for Newland to exercise both termination rights concurrently, then by having failed to elect between the two rights Newland would have failed to validly exercise either. However, the judge noted that Toba's response to the notice did not treat the contract as having been terminated; on the contrary it asserted that there had been no breach and that the contracts remained valid. Moreover, to the extent that the contract had not already been validly terminated under both bases when the notice was served, Leggatt J found that a subsequent without prejudice e-mail sent by Newland (which was expressed to be "*formal notice to terminate the contract as per contractual terms*" if settlement was not forthcoming) was an "*unequivocal election*" to terminate under clause 7.

One way or the other, the judge therefore concluded that Newland had successfully exercised its termination right and was entitled to compensation in accordance with clause 7.

COMMENT

Parties are reminded to take care when deciding whether to accept a repudiatory breach of contract or to use an available contractual termination mechanism. It is important to determine carefully which methods of termination can be relied upon and, if more than one is available, whether it is possible to exercise both consistently or whether an election must be made. Even in cases where there would be no inconsistency between the consequences of exercising each termination right, the way in which the rights are exercised must be carefully considered. It should always be borne in mind that if the consequences of exercising each right are different, unless both rights are clearly exercised a judge may well conclude that the innocent party has failed to terminate at all.

The method(s) of termination to be relied on should therefore be stated clearly and unambiguously in the termination notice . If there is any doubt as to which method(s) the innocent party is seeking to rely on then it seems that (in Leggatt J's view) prior conduct may be used as a guide.

Recipients of a notice to terminate should likewise carefully assess whether a notice of termination is an effective exercise of termination rights under the contract and/or the general law before responding to the notice or taking any other steps in relation to it.

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[1] *Dalkia Utilities Services plc v Celtech International Ltd* [2006] EWHC 63 (Comm).

DEFINITION OF SHARES IN A CHARGE INCLUDED RIGHTS UNDER SHAREHOLDER LOAN AGREEMENTS

Fons HF (in liquidation) v Corporal Ltd & anr [2014] EWCA Civ 304, 20 March 2014

The Court of Appeal has overruled the first instance decision and held that the true construction of the definition of shares in a charge document extended to rights under shareholder loan agreements. Such agreements were "*debentures*" within the definition, and the phrase "*other securities*" did not limit this interpretation. This decision emphasises the importance of precise drafting to ensure that charge documents clearly identify the assets that are and are not caught by them.

The claimant Fons HF (**Fons**) purchased shares in the first defendant Corporal Ltd (**Corporal**). In October 2007 and February 2008 respectively, Fons provided funding to Corporal under two shareholder loan agreements (**SLAs**).

As at September 2008, Fons owed ISK 2.5 billion to Kaupthing Bank Luxembourg SA (**Kaupthing**) on an unsecured basis. By way of security for this debt, Fons gave Kaupthing a first legal charge (the **Charge**) over all of the shares it owned in Corporal. Subsequently, both Fons and Kaupthing went into liquidation.

The benefit of the Charge is now with Pillar Securitisation SARL (**Pillar**), the second defendant in the proceedings.

Pillar argued that the benefit of the SLAs fell within the definition of "*Shares*" in the Charge document as either "*debentures*" or "*other securities*" such that they were subject to the Charge. Fons argued that the definition of "*Shares*" did not extend this far.

Corporal played no part in the proceedings, being joined as a party to ensure that it was bound by the decision only.

At first instance, Cawson J found in favour of Fons and held that the definition of "*Shares*" did not extend to the SLAs (see the September 2013 Litigation Review). This decision was appealed by Pillar.

Definitions within the Charge Documentation

The Charge given to Kaupthing by Fons was titled "*Legal Charge over shares*".

Clause 3.1, "*The Charging Clause*", created a first legal charge over "the *Shares*" as defined by clause 1.1, to the benefit of the Chargor.

Clause 1.1 defined "*Shares*" as "*All shares (if any) specified in Schedule 1 (shares), and also all other stocks, shares, debentures, bonds, warrants, coupons or other securities now or in the future owned by the Chargor in Corporal from time to time or any in which it has an interest*".

Pillar's arguments

Pillar argued that the rights of Fons under the SLAs were charged either as "*debentures*" or as "*other securities*" under clause 1.1 of the definition of "*Shares*."

Previous case law demonstrates that the words "*debentures*" and "*securities*" can have more than one meaning, dependent upon the context of the agreement.

Fons' arguments

Fons argued that none of the descriptive terms included in the definition of "*Shares*" can properly, in the context of the Charge, be read as including a mere unsecured debt due under the SLAs. Each of the terms denotes a species of asset identifiable by the instrument itself and constitutes something more than a simple obligation to pay money.

Further, and alternatively, the use of examples such as "*stocks*", "*shares*", "*debentures*" and "*bonds*" in conjunction with the phrase "*other securities*" in the definition of "*Shares*" shows an intention to limit "*securities*" to a bearer or transmissible instrument.

Fons argued that, to include any unsecured loan due from Corporal to its shareholders in the meaning of "*Shares*" in the Charge could catch a very wide range of debts with possibly serious consequences for the parties to those arrangements.

Judgment on the true meaning of "Shares"

Patten LJ highlighted the objective approach taken by the courts to contractual construction. As with Cawson J at first instance, Patten LJ did not consider that the words in the definition of "*Shares*" were ambiguous.

After considering several cases, Patten LJ held that "*there is…no hard and fast definition*" for the term "*debenture*", but that "*the term can apply to any document which creates or acknowledges a debt*." On this basis, Patten LJ held that the SLAs are debentures.

Patten LJ then turned to whether the phrase "*other securities*" narrows the interpretation of "*debentures*" in the Charge, and found no reason from the perspective of the reasonable observer for that phrase to mean that the SLAs would be excluded.

Patten, Sharp and Gloster LJJ, therefore, allowed the appeal and declared that the SLAs are included within the Charge.

Gloster LJ added that, where there has been no disbursement of funds (and so the agreement arguably does not create but merely acknowledges a debt), an "*unnecessarily technical*" approach should be avoided and such instruments should be considered as "*both creat*[ing] *and acknowledge*[ing] *the relevant debt*" for the purpose of their designation as "*debentures*".

COMMENT

The effect of this decision was significant in the present case as it permitted the charge holder access to any sums owed under the two SLAs on the basis that these debts constitute "*debentures*".

The Court of Appeal confirmed the court's robust approach to the interpretation of contracts and underlined that the court will, as far as possible, seek to give words their natural and ordinary meaning derived from the context of the agreement.

The decision underlines the importance for commercial parties of considering the breadth of the clauses in their agreements and, in particular, to ensure that only the assets intended to be caught by a definition are included within it. The term "*debentures*" should be used with care in charge documents, as there is now Court of

Appeal authority that this term can capture instruments creating and acknowledging a debt unless there are other provisions of the relevant agreement inconsistent with this.

Patten LJ was not swayed by the argument that a very wide range of debts could now be covered as a consequence of this interpretation, and preferred to focus solely on the SLAs in the case before the court. Therefore, at the drafting stage a party may wish to distinguish whether debts other than shareholder loan agreements fall within the term "*debentures*" under a charge document. This decision is likely to be persuasive authority for anyone seeking to argue that shareholder loan agreements fall within this term.

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IMPORTANCE OF STRICT ADHERENCE TO CONTRACTUAL NOTICE PROVISIONS

Greenclose Ltd v National Westminster Bank plc [2014] EWHC 1156 (Ch), 14 April 2014

The High Court has found that the notice provisions in Section 12(a) of the 1992 ISDA Master Agreement are mandatory. Accordingly, a failure to follow them by sending notice by email (which was found not to be one of the permitted methods) rendered the notice ineffective. While this was a decision in relation to the 1992 ISDA Master, it serves as a reminder of the importance of following, to the letter, the notice provisions in any contract.

Background

Greenclose was a family business which owned and operated three luxury hotels. The majority shareholder and managing director was Mr John Leach who was described by the court as "*an astute and sophisticated businessman*". In practice he was in overall charge of running the business with the assistance of, among others, the finance director Mr David Reynolds. Greenclose entered into a collar transaction with NatWest under the 1992 ISDA Master Agreement (the **Collar**). The Collar was for five years, which NatWest could extend by "*giving notice to*" Greenclose by 11am on 30 December.

Section 12(a) of the 1992 ISDA Master Agreement provides that notices "*may be given in any manner set forth*", namely in writing delivered in person, or by telex, fax, registered mail or "*electronic messaging system*", except for notices under Section 5 and Section 6 which "*may not be given*" by fax or "*electronic messaging system*".

The contact details in the Schedule, to which notices were to be sent, gave Greenclose's office address and telephone number and the contact as its finance director.

NatWest purported to give notice of extension by email to Mr Leach at 9.45am on 30 December. The email was followed by a voicemail on his mobile telephone at 9.59am. Mr Leach claimed he did not read the email, or listen to the message, until after 11am. Greenclose claimed that no valid notice had been given.

Mandatory or permissive

The key issue was whether the methods of notice set out in Section 12(a) were mandatory or permissive and whether the phrase "*electronic messaging system*" embraced emails. Greenclose claimed that the methods were mandatory and did not extend to notice by emails.

It was common ground that if, on its true construction, the contract mandated the methods by which such a notice to extend was to be given, then NatWest would have to give notice by any prescribed method, and it would have to follow the contractual requirements

strictly. Failure to do so would render the notice ineffective to extend the Collar. As the court observed, there is ample authority to support that approach: for example Lord Hoffmann's famous example in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 776:

> "*If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease*."

Out-of-office

Over ten pages of the judgment were devoted to whether Mr Leach had in fact seen the email or heard the voicemail in question until after 11am on 30 December. Ultimately it was found that he had no actual knowledge of the notice before the time to extend had passed. This serves as a reminder of the scrutiny to which these matters will be subject and the importance that can attach to what may at the time seem insignificant. If at all possible records should be kept of all communications relating to the sending of contractual notices.

May … may not

Counsel for NatWest stressed the use of "*may*", as opposed to "*must*", in Section 12(a), in arguing that the methods of notice set out were not mandatory. However Andrews J held that "*may*" in context meant that that the person serving the notice had a choice between those prescribed methods but no others. She found support for this construction from the contrast with the methods that expressly "*may not*" be used (ie notices under Section 5 and Section 6), the fact that notice is to be given "*to the address or number or in accordance with the electronic messaging system details provided*", that the change of address provision in Section 12(b) refer to "*details at which notices or other communications* ***are to be given to it***" and the fact that in Section 13 "*the parties irrevocably consent to the service of process given* ***in the manner provided for notices***" in Section 13 (emphasis added).

User's Guides to the ISDA Master Agreements

Mrs Justice Andrews was "*fortified*" in her interpretation by the strong indications that ISDA itself regards Section 12(a) as mandatory. These indications were gleaned by an examination of the User's Guides to both the 1992 and the 2002 Master Agreements.

Counsel for NatWest argued that it should be impermissible for the court to have regard to the modifications to the Master Agreement suggested by ISDA in 2001 and implemented in the 2002 ISDA Master Agreement, even though those modifications were made before the Collar was entered into. The court did not accept this argument noting that it would be wrong in principle for the court to ignore any evidence that sheds light upon how ISDA (or the market) interpreted the 1992 Master Agreement at or before the time when the Collar was entered into, and the evidence about changes that were suggested by ISDA and eventually made to Section 12(a) of the 1992 Agreement and the reasons for those changes was plainly helpful in that regard.

The court also referred to the views of various commentators including from Allen & Overy who were of the view that the provisions were mandatory and from Clifford Chance and Linklaters who advanced a permissive construction.

"Electronic messaging system"

The court held that "*electronic messaging system*" did not include email. It held that email was not common in 1992 and it was not possible to say the meaning of the term had evolved. Moreover the ISDA definition of "*Confirmation*" drew a distinction between email and electronic messaging system. The court felt that the term was more consistent with the use of SWIFT (an example advanced by counsel for Greenclose).

Conclusion

NatWest had an absolute and unqualified right to extend the Collar. However, the express terms of the 1992 ISDA Master Agreement and the Schedule mandated the ways in which the Bank could give notice to Greenclose. The notice it sent by email was ineffective; it was sent by a method that was not permitted, to an address that was not specified, and it was not seen by Mr Leach prior to 11am on 30 December 2011.

COMMENT

The cautionary tale is that when it comes to serving notices under the ISDA Master Agreement, or any contract for that matter, parties must do exactly what the contract says. There are significant financial consequences to not following the letter of the provisions in question.

The facts are interesting in that Greenclose was aware before the deadline that NatWest was proposing to exercise the option and had had debates with NatWest to try and dissuade it from doing so. This was not a case where the notice was a surprise so there was no prejudice to Greenclose. It was just that NatWest had not complied with the strict formalities.

At a first glance there is, perhaps, an appearance of inconsistency in that the judgment upholds the mandatory observation of the strict letter of the notice provisions, but it seems to suggest that if notice is sent to someone other than the person named in the Schedule, the notice can still be effective as long as the actual recipient is a person with authority. The counter argument to this would be that one can distinguish between these two aspects: the mandatory methods of service and receipt by a "*responsible employee*" and that this is the sort of balancing exercise that judges are required to do, in order to achieve the right result in the case.

Given that the principal reasons for the judgment were lack of compliance with one of the mandatory methods in Section 12, it is slightly unusual that the judge placed a good deal of weight on her finding of fact that Greenclose had no actual notice of the exercise before the deadline (notwithstanding the email, voicemails and fax sent).

The only potential exception to compliance with the mandatory notice provisions, in the case of the 1992 ISDA Master Agreement, at least, which requires "*that transmission is received by a responsible employee of the recipient*", would seem to be where the defaulting party is deliberately evading service, for example by turning off its fax machine.

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ANTICIPATORY BREACH BY RENUNCIATION AND THIRD PARTIES

Geden Operations Ltd v Dry Bulk Handy Holdings Inc ("The Bulk Uruguay") [2014] EWHC 855 (Comm), 28 March 2014

The English Commercial Court has considered the correct test for anticipatory breach by renunciation when a party makes it clear that its ability to perform is wholly dependent on the actions of an independent third party. The Commercial Court held that the actions of a third party, in these circumstances, may not be enough to satisfy the test for anticipatory breach by renunciation and that it is necessary to also consider the benefit that the other party to the agreement may be deprived of if the independent third party acts in a way which does not enable performance under the agreement. In particular, it will be necessary to assess the benefit that the other party may be deprived of and whether this constitutes "*substantially the whole benefit of the contract*" in question.

Background

This dispute arose in relation to a charterparty entered into in July 2010 between Geden Operations Ltd (the **claimant**) and Dry Bulk Handy Holdings Inc (the **defendant**) under which the claimant agreed to charter a bulk carrier, the M/V Bulk Uruguay (the **Vessel**) (the **Charterparty Agreement**).

The Charterparty Agreement contained two specific clauses: a "Conwartime 2004" clause and an amended "BIMCO Piracy Clause". The latter had been amended by the deletion of certain clauses and reflected market practice for charterparties where it was intended that the Vessel could transit the Gulf of Aden (the **GOA**) without first obtaining the defendant's consent. The inclusion of the amended BIMCO Piracy Clause in the Charterparty Agreement meant that the Vessel could be marketed as "GOA OK" which gave her a competitive advantage over other vessels (which often required the owner's prior consent to transit the GOA). The claimant made it clear to the defendant that the Vessel having "GOA OK" status was a "deal breaker" for them in negotiations prior to them entering the Charterparty Agreement. However, the Head Charter Agreement (the **Head Charter**) which was between the defendant and the owners of the Vessel required permission from a third party (the **Head Owners**) to be sought in order for the Vessel to transit the GOA.

The Head Owners initially refused the claimant permission to transit the GOA. Subsequently, the Head Owners granted the claimant permission to transit the GOA for the Vessel's maiden voyage. However, in doing so, the Head Owner made it clear to the claimant that permission to transit the GOA was granted for this voyage only and was not to form a precedent for other voyages.

The Dispute

The claimant took the view that the defendant's insistence that Head Owner had to give prior consent for each GOA transit constituted a repudiatory breach of the Charterparty Agreement, which the claimant purported to accept as terminating the Charterparty Agreement. The defendant accepted the purported termination itself as a breach of the Charterparty Agreement.

The parties originally referred their dispute to be determined by arbitration. By a majority the arbitral tribunal (the **Tribunal**) held that:

- the Charterparty Agreement did not make GOA transit subject to the defendant's consent;
- the defendant was not in anticipatory breach;
- the claimant was not entitled to terminate the Charterparty Agreement;
- the claimant's purported termination of the Charterparty Agreement was itself a repudiation which had been accepted by the defendant; and
- the defendant was entitled to damages of USD 6.5 million (the **Award**).

Commercial court

The claimant appealed the Award under s69 (an appeal on a point of law) of the Arbitration Act 1996.

A key issue on appeal was the application by the tribunal of the following legal test to determine whether the defendant's actions entitled the claimant to terminate the Charterparty Agreement:

> *"(a) Did the [Defendant] by their words or conduct evince an intention not to perform, or expressly declare that they would be unable to perform, their obligations under the Charterparty [Agreement]?*
>
> *(b) If so, did such a refusal have the effect of substantially depriving the Claimant of the whole benefit which it was the intention of the parties that they should obtain from the contract?"*

Neither party disputed that this was the correct test to apply in the circumstances. The Commercial Court held that the test had been correctly applied by the Tribunal and rejected the claimant's appeal. In particular, Popplewell J held in respect of limb (a) of the legal test that the defendant had not evinced an intention not to perform under the Charterparty Agreement. The test of whether an intention was sufficiently evinced by conduct was whether the renouncing party had acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract. In accordance with the findings of the Tribunal, Popplewell J found that the defendant's position regarding consent for GOA transit was not to be understood as meaning that it would be unwilling to perform under the Charterparty Agreement if and when the claimant requested permission to transit the GOA. Popplewell J also noted that there was no principle of law whereby a party who had made his performance

dependent on a discretion to be exercised by a third party was deemed to be evincing an intention not to perform.

However, and in any event, Popplewell J found that the claimant's arguments on this point were "*an attempt to appeal a finding of fact by dressing it up as an issue of law*". The Tribunal's finding that the Defendant did not mean to be understood as being unable or unwilling to perform under the Charterparty Agreement if and when the claimant requested a GOA transit was a conclusion of fact and, as a result, was not reviewable by the court on appeal under s69 of the Arbitration Act 1996 anyway.

In light of his conclusion in respect of limb (a) of the legal test referred to above, Popplewell J considered that the question as to whether there was an error of law in respect of limb (b) of the legal test set out above did not arise. However, in any event Popplewell J summarised on an obiter basis why he believed that the Tribunal had taken the correct approach dealing with this issue. The Judge stated that the correct approach was to identify the benefit which the claimant would have been deprived of under the Charterparty Agreement (because anticipatory breach must be of a condition or innominate term which goes to the "*root of the contract or deprives the innocent party of substantially the whole benefit of the contract*"). Popplewell J added that this determination should be made prospectively as at the time of the alleged anticipatory breach. In this case, Popplewell J stated that the benefit that the claimant would have been deprived of was the long-term chance to market the Vessel as "GOA OK" (ie that it could transit the GOA without the defendant's consent). However, in accordance with the findings of the majority of the Tribunal, Popplewell LJ stated that various factors (including the fact that the claimant did not intend to use the Vessel for GOA transit in the near future, the competitive disadvantage of the claimant being unable to market the Vessel as GOA OK, the value the claimant put on that competitive disadvantage and the ability to trade the Vessel elsewhere) supported the factual conclusion that the claimant was "*not deprived of substantially the whole benefit of the Charterparty*".

COMMENT

In this case, Popplewell J made it clear that words or conduct which gave rise to the uncertainty of future performance of a contract (the contingency of which rests on the conduct of a third party) will not necessarily be enough for a party to claim that another party to the contract demonstrated an intention not to be bound by a contract and that there is no general principle of law that means that a party who has made his performance dependent on a discretion to be exercised by a third party is deemed to have evinced an intention not to perform a contractual obligation. However, it is possible that the outcome of this case (or the decision of the Tribunal) could have differed if, for example, the Head Owner had a history of refusing consent for GOA transits or that the "GOA OK" status of the Vessel had been found to be substantially the whole benefit derived by the claimant under the Charterparty Agreement.

Although this case focuses on a situation which arose due to the relationship between the defendant and the Head Owner in a shipping context, the principles established as a result of this case could arise in other situations. For example, they could apply where performance of a contract depends on the conduct of a third party which is a parent company or another member of a group of companies.

In addition, the Commercial Court's decision in this case reinforces the position that courts dealing with appeals of arbitration awards will carefully consider whether the issue they are required to consider is one of fact or law (as the court can only consider an issue on appear that falls into the latter category). Courts will be unsympathetic to claimants who attempt to "dress up" factual matters as questions of law.

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Damages

LOSS OF A CHANCE AND REMOTENESS

Wellesley Partners LLP v Withers LLP [2014] EWHC 556 (Ch), 11 March 2014

In a negligence claim, when considering loss of a chance, there is a distinction between causation and quantification of loss. The High Court has provided guidance on where to draw the line between the two. Where there is concurrent liability in tort and contract, a claimant is entitled to rely on the less restrictive tortious test for remoteness.

Background

The defendant law firm was engaged by the claimant headhunter to draft a partnership agreement (the **Agreement**) in connection with the admission of new partners into the partnership. The new partners included an investment bank (the **Bank**), which made a significant capital contribution and acquired a 25% interest in the claimant. The Agreement gave the Bank an option to withdraw half of its capital contribution, which the Bank later exercised. The timing of the Bank's exercise of the option caused unwelcome financial implications for the claimant and so it brought a negligence claim against the defendant in relation to its drafting of the Agreement. Part of the claimant's alleged loss were losses resulting from the loss of a chance to generate more profits by recruiting more consultants in London, and opening an office in New York.

Decision

Nugee J found, in part, for the claimant. The defendant had been negligent in drafting the option because it had changed the drafting of the timing for exercise of the option without instructions to do so.

The judge awarded the claimant damages for: (i) loss of the profits it would have generated had it recruited more consultants in London and opened a New York office, which it was prevented from doing because the Bank withdrew its capital; (ii) losses flowing from the diversion of time away from revenue generation into dealing with its dispute with the Bank; and (iii) legal costs incurred in the Bank dispute, to be assessed.

In reaching his decision, when considering the claimant's claim for loss of profits it would have made had it opened a New York office, the judge made some useful observations on the principles of loss of a chance and remoteness of damage.

Loss of a chance

Nugee J recognised that despite *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 being the leading authority for nearly 20 years, the law on loss of a chance continues to cause real difficulties of classification and application. The judge summarised his understanding of this area of law.

There is a difference between the questions of whether a loss has been caused by the wrong complained of and, if it has, the quantification of that loss. While the fact that there is a distinction is, in principle, clear it is not always clear where the line should be drawn.

Sometimes what the claimant has lost was only ever an opportunity to obtain something else, for example the opportunity to take part in a competition or to litigate. Such an opportunity is a valuable right in itself, and what the claimant proves, on the balance of probabilities, is that he has lost that right. The assessment of the value of the right depends on the chances of success because what has been lost is, by definition, the loss of a chance (see *Vasiliou v Hajigeorgiou* [2010] EWCA Civ 1475).

Allied Maples and *Vasiliou* are different types of cases. In an *Allied Maples* case, the claimant has not lost a valuable right, but he has lost the opportunity of gaining

a benefit, albeit one that depends on a third party acting in a particular way. In such a case, the claimant does not need to prove that the third party would have acted in that way, only that there was a real and substantial chance he would. This is a question of causation. If the claimant establishes that there was such a real and substantial chance, then when it comes to quantification, damages will be assessed at the appropriate percentage having regard to his chances of obtaining it. In cases where the chance is found to be, say 30%, the requirement that the claimant only need show that he has lost a real and substantial chance is beneficial to him (as if he had to prove how the third party would have acted on the balance of probabilities, he would recover nothing). In other cases, however, where the chance is assessed at say 70%, he is only able to recover 70% of the damages he otherwise would. The claimant, however, cannot choose whether to adopt the *Allied Maples* approach; if the case is an *Allied Maples* type of case, this is the appropriate way to approach the issues of causation and quantification.

As *Vasiliou* and *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486 illustrate, however, there are other cases where the claimant instead claims he has lost the opportunity to trade generally, and claims the loss of profits he would have made. In such a case, it seems the court must first decide whether the claimant would have traded successfully. It is not entirely clear if this is part of the question of causation and a separate exercise from quantification; or whether it is to be regarded as part of the quantification exercise.

On either view this is clearly a different type of exercise to that undertaken in an *Allied Maples* case. The court is not required to find that there was a real and substantial chance of a third party acting in a particular way; but to determine whether trading would have been profitable or not. This is a simple yes/no question, ie "would the trading have been profitable?", to be decided on the balance of probabilities.

It is clear from *Parabola* and *Vasiliou* that if the court finds that trading would have been profitable, it then makes the best attempt it can to quantify the loss of profits taking into account all the various contingencies which affect this. This neither requires any particular matter to be proved on the balance of probabilities nor has anything to do with the loss of a chance as such. The assessment of the loss will itself include an evaluation of all the chances, great or small, involved in the trading. Once the judge has assessed the profits in this way, any further discount is, therefore, inappropriate.

In applying these principles to the facts, Nugee J found that if the Bank had been unable to withdraw its capital from the partnership, the claimant would have opened a New York office. Had the claimant opened a New York office it would have had a real and substantial chance of being awarded at least part of a large-scale recruitment mandate with a client looking to build its U.S. business (the **Mandate**). On the evidence, the judge was unable to conclude that the claimant would have been profitable in the U.S. had it not won at least part of the Mandate. The claimant could, therefore, only recover damages for loss of profits in the U.S. on the basis that it had lost the opportunity of winning the Mandate. This turned on the actions of a third party and was to be assessed on the *Allied Maples* basis, ie by considering the claimant's chances of winning the Mandate, and by awarding a percentage of the profits accordingly. The judge found that the claimant had a 15% chance of it being awarded the sole Mandate and a 45% chance of it being awarded half of the Mandate.

Remoteness

In situations where there is concurrent liability in contract and tort, Nugee J was strongly attracted to having one test for remoteness of damage and considered it should be the contractual test. He accepted, however, that concurrent liability had been established at the highest level and so the position could only be changed by a higher court. The judge therefore held that the claimant could rely on the tortious test for remoteness.

Obiter Nugee J was not satisfied damages would be recoverable in contract. The Mandate was a very particular opportunity that did not exist when the partnership agreement was drafted and it could not reasonably have been contemplated at that time.

COMMENT

The *Allied Maples* principle – that in cases where causation of a given loss depends on the hypothetical

actions of a third party, an award for loss of a chance is generally appropriate – has been widely applied to a broad range of factual scenarios in the years since it was established. Such cases have included, for example, a claim in deceit for loss of hypothetical profits (*Parabola*); the loss of a chance of promotion as a result of personal injury (*Doyle v Wallace* [1998] PIQR Q146); and the loss of hypothetical sales due to a breach of confidence (*Jackson v Royal Bank of Scotland plc* [2000] CLC 1457). This judgment, however, provides useful guidance on this complex area of law, in particular, where the line between issues of causation and quantification of loss may be drawn.

The case also serves as a reminder that where there is concurrent liability in contract and tort the claimant is entitled to rely on the less restrictive tortious test for remoteness of damage. While the judge was of the view that there are good reasons for this not to be the case, only a higher court could change the law.

This case is now pending appeal, so it will be interesting to see if the Court of Appeal is asked to assess Nugee J's understanding of these principles.

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Employment

COURT OF APPEAL ENDORSES INFORMATION COMMISSIONER OFFICE GUIDANCE ON MEANING OF PERSONAL DATA

Efifiom Edem v Information Commissioner and Financial Services Authority [2014] EWCA Civ 92, 7 February 2014

The Court of Appeal has ruled that third party names requested under the Freedom of Information Act 2000 (**FOIA**) could be withheld on data protection grounds. More significant is the court's acceptance that "personal data" should be interpreted in accordance with Information Commissioner Office (**ICO**) Guidance and that its landmark *Durant* ruling should be confined only to limited cases. This ruling has wider implications for employers handling data subject access requests under the Data Protection Act 1998 (**DPA**).

Data subject access requests: challenges in practice

Under s7(1) of the DPA, individuals (data subjects) can request access to personal data which an organisation (data controller) holds about them on payment of a maximum GBP 10 fee. Data subject access requests are often used by lawyers acting for employees as a nuisance tactic, to obtain information earlier than required by litigation disclosure, to conduct a "fishing expedition" to explore potential claims, or simply to put pressure on employers who must respond to requests within 40 calendar days.

In *Durant v Financial Services Authority* [2003] EWCA Civ 1746, the Court of Appeal appeared to narrow what should have to be disclosed in response to an "everything naming me" request. The Court of Appeal's view was that an employer should only have to disclose data which is of biographical significance (eg going beyond a mere mention of an individual's name in a

matter which has no personal connotations, such as a meeting request e-mail) and which has the individual as its focus, being information that affects his or her privacy, whether in a personal or business capacity.

However, the EU's data protection advisory committee (the "Article 29 Working Party") issued an opinion on the concept of personal data[2] protected under the Data Protection Directive (95/46/EC) in 2007. This identifies three central concepts of how data may relate to an individual in a way which makes it personal data – purpose, content and result – and endorses a broad interpretation of personal data in clear contrast to the restrictive interpretation in *Durant*. Although the Working Party's opinion is not binding, it provides a basis for the interpretation of the Directive by data controllers and national data protection authorities. The ICO then issued its own Technical Guidance[3] which essentially follows the opinion and advises that Durant should only be considered where data is not "obviously about" an individual or clearly "linked to" them.

This has left employers grappling with case law and stricter ICO Guidance when deciding how robustly to push back on broad employee requests where data is not about an individual. The Court of Appeal has helpfully revisited this subject in *Edem* clarifying how they should be reconciled going forward.

Edem: It's all in the name

Under s1(1) of the FOIA, individuals can request access to information that is held by UK public authorities, unless an exemption applies. Third party personal data is exempt from disclosure under s40(2) of the FOIA if its disclosure would contravene any of the data protection principles in the DPA.

The case concerned Mr Edem's FOIA request for information to the (then) Financial Services Authority (**FSA**) about the handling of his earlier complaint that it had failed correctly to regulate Egg PLC. The FSA provided some information but refused to provide the names of three junior employees who had worked on the complaint because they were personal data and so were exempt from disclosure.

The First Tier Tribunal (Information Rights) (**FTT**) ordered disclosure of the names, concluding that they were not personal data because the way in which they were used did not satisfy the Durant biographical significance or focus tests. This decision was reversed by the Upper Tribunal (Administrative Appeals Chamber) and by the Court of Appeal.

The Court of Appeal had no difficulty in finding that the names were personal data, on the basis that a name is always personal data provided that the context in which it appears is sufficient to identify the named individual. Here, the context – the individuals' employment in a particular capacity by the FSA at the relevant time – was sufficient to identify them. In contrast, the request in *Durant* had been for documents in which Mr Durant was merely mentioned by name.

Importantly, the court confirmed the approach in ICO Guidance that the biographical significance and focus tests should be confined to particular factual scenarios like *Durant* where information requested is not "obviously about" an individual or clearly "linked to" them. On the facts in question, it was straightforward that the names were personal data, and the FTT had wrongly applied the tests when there was no reason to do so.

Impact

The court's endorsement of the broader ICO interpretation of personal data may mean that, in practice, FOIA applications involving disclosure of third party information are less likely to succeed. However, the ruling does not mean that references to a third party name will automatically be personal data – context is key. In *Edem*, the names were not referred to in isolation. They revealed the positions of the employees within the FSA and this had a bearing on how Mr Edem's complaint was dealt with. In contrast, where someone is simply copied on an email which gives no other information about them, this is unlikely to constitute their personal data.

This ruling also has wider implications for employers and other data controllers handling data subject access requests. Tribunals and courts are less likely to accept a broad application of *Durant* as a justification for narrowing the scope of disclosure. This is in line with the ICO's position that *Durant* should be considered

only in limited cases. Employers should take the DPA and ICO Guidance as their starting point when identifying what information must be disclosed. If information is "obviously about" someone (such as their name) or clearly "linked to" them, it is personal data and they cannot look to *Durant* to push back on requests. They can, however, rely on *Durant* in borderline cases to justify withholding information which is not "obviously about" someone or clearly "linked to" them.

Allen & Overy's iPad App "Access Assist" is designed to help users assess and respond to subject access requests (in England and Wales). The App has recently been updated to reflect recent ICO guidance and case law, including *Edem*, and is available for download free of charge.

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[2] WP 136: Opinion 4/2007 on the concept of personal data: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136_en.pdf.

[3] *Determining what is personal data:* http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx

Evidence

LEGAL RISKS WHEN USING PRIVATE INVESTIGATORS

The use of Private Investigators (**PIs**) is widespread and, in most cases, entirely legitimate. However, a client can incur secondary liability as a result of using a private investigator who has acted unlawfully. The Information Commissioner's Office announced in February that it would pursue search orders against 11 clients of unscrupulous private investigators for breaches of, or criminal offences under, the Data Protection Act. This article examines the context for this increased focus on clients of PIs, and how clients can manage this risk.

PIs are instructed for a range of lawful and legitimate purposes. For a bank, corporate, insurer or law firm, for example, PIs can be a valuable and efficient means to gather or verify information including due diligence on third parties, employee background screening, and investigating fraud.

Political climate

There has been increasing public and political scrutiny of PIs, focused principally on the Leveson Inquiry and the subsequent and ongoing criminal proceedings against journalists involved in the use of PIs, such as Glenn Mulcaire. Concurrently, the Home Affairs Select Committee conducted an inquiry into the role of PIs, expressing a number of concerns about their role and their potentially unlawful activities. In response, the government confirmed that it will be regulating the sector by requiring individual PIs to be licenced by the Security Industry Authority later this year. Tony Imossi, President of the Association of British Investigators, told Allen & Overy that he welcomed this development and would like it to go even further to include business licencing:

"The Association of British Investigators has long lobbied for statutory regulation to create a compliant, legal, moral and accountable parity with the high standard adhered to voluntarily by its members.

Business licensing will, if implemented, protect and gain the public's confidence whilst moving the industry forward to become a profession. The licensing of individual practitioners is a welcomed first step towards that goal."

Legal risks

The most problematic legal risks associated with using PIs are those arising out of the Data Protection Act 1998 (**DPA**), which regulates the use of personal data about individuals. Serious breaches of the DPA which are likely to cause substantial damage or distress can incur fines of up to GBP 500,000. Further, unlawfully obtaining or disclosing personal data (such as "blagging"[4]) without the data controller's consent is a criminal offence punishable by an unlimited fine.

In practice, the most common way in which the DPA is likely to be breached in the context of PI investigations is "processing" (eg collecting, using, disclosing) an individual's personal data without being transparent and providing him or her with fair processing information, which is likely to commit a breach of the first principle. Fair processing information should include: (i) the identity of the entity who will be processing the individual's personal data; (ii) why their personal data is being processed; and (iii) any other information required to enable processing to be fair, such as information about disclosures to third parties. There are exemptions to this duty: where it is **necessary** to process data for the prevention or detection of crime or to comply with a rule of law or in connection with legal proceedings, exercising or defending legal rights or obtaining legal advice.

There are also risks of criminal offences under other legislation. Under the Fraud Act 2006, it is an offence dishonestly to make a false representation (including as to identity) with the intention of making a financial gain. Under the Bribery Act 2010, it is a crime to receive or give a bribe, and companies can be liable for the criminal offence of "failure of commercial organisations to prevent bribery" by a person associated with the company, even if it is without the knowledge or direction of a company. It is therefore a strict liability offence. Both the Fraud and Bribery Act offences carry maximum sentences of ten years' imprisonment. Under the Regulation of Investigatory Powers Act 2000, it is an offence for a person to intentionally, and without authority, intercept any communication in the course of its transmission. Under the Computer Misuse Act 1990, it is an offence to gain unauthorised access to computer material. Both of these offences carry maximum sentences of two years' imprisonment. In the past couple of years, PIs have been convicted of fraud offences and for breaching the DPA by unlawfully obtaining or disclosing personal data. For example, in January of this year, members of ICU Investigators were convicted and fined for a range of offences which included tricking organisations such as utility companies, GP surgeries and TV licencing companies into providing personal data about people they were trying to trace. The PIs were prosecuted by the Information Commissioner's Office (**ICO**), the public authority tasked with enforcing the DPA. The ICO emphasised that ICU's clients were not prosecuted because there was no evidence of criminality and the information requested could have been obtained legitimately.

The focus on clients

However, the focus on PIs' clients is intensifying. For two years, the Serious Organised Crime Agency (now the National Crime Agency) carried out an investigation into blagging by PIs, culminating in the conviction of four PIs in 2012. Despite collating a list of over 100 PIs' clients who could have potentially had knowledge of, or been involved in, unlawful activity, it was only when SOCA came under pressure from the Home Affairs Select Committee that it handed this information over to the ICO. Having reviewed this information, the ICO determined in February of this year that it would seek search orders against 11 of these clients in relation to suspected breaches of, or criminal offences under, the DPA. The FBI has been called in to investigate eight U.S. companies.

Managing legal risks for clients

Where a client has not carried out the unlawful activity itself, it can have secondary liability, for example, if it can be proved that the client encouraged the commission of the offence by the PI. As noted above, however, the offence of failure of a corporate to prevent bribery does not require any proof of encouragement. In fact, the company will only have a defence if it can prove that it had adequate procedures in place to

prevent bribery. To mitigate these and other risks associated with the use of PIs, clients should consider the following starting points:

1. Use a consistent process for hiring PIs. As noted above, it is expected that the government will require individual PIs to be licenced with the Security Industry Authority later this year. In the meantime, it is recommended that clients should select a PI who is accredited with a professional body. For example, the Law Society has endorsed the Association of British Investigators. Also, as a matter of good corporate governance, clients should ensure that suitably senior members of their staff are informed how, when and why PIs are instructed and, if practicable, sign off on the engagement itself.
2. Consider whether the proposed use of PIs is necessary and proportionate. Seek to ensure that PIs do not gather any information which is not strictly required for the purpose they are commissioned.
3. Establish standard terms of engagement with PIs. If the PI insists on using its own standard terms, ensure that any essential clauses from the client's standard terms (such as compliance with all laws in the UK or any other jurisdiction) are incorporated.
4. Monitor the engagement. Review the information provided by the PIs and consider the methods that they may have used. Is the information publicly available? Is there any evidence of potential deception or blagging? (As noted in the ICU case, the ICO did not prosecute ICU's clients because the information requested could typically have been obtained legitimately, and there was no evidence clients were aware the data had been obtained by illegal means).
5. If any concerns arise about the methods used by the PIs, escalate those concerns to a suitably senior member of staff or, if applicable, to a compliance officer.

For further information regarding the ways in which these legal risks can be managed, or for any other queries on this area, please do not hesitate to contact Allen & Overy LLP's team of experts.

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[4] The practice of deception by impersonating someone else with a view to obtain confidential information from an unsuspecting third party.

Regulatory

PARTIES MAY NOT CLAIM ADDITIONAL DAMAGES IN COURT FOLLOWING ACCEPTANCE OF AN FOS DETERMINATION

Clark & anr v In Focus Asset Management & Tax Solutions Ltd [2014] EWCA 118, 14 February 2014

The Court of Appeal has overturned a decision of the High Court that had held that Mr and Mrs Clark (the **Respondents**) could claim additional damages by way of a civil claim despite the fact they had already accepted a favourable determination by the Financial Ombudsman Service (**FOS**). The Court of Appeal held that the Respondents could not pursue civil claims in court for damages over and above those received as a result of an FOS decision.

Background

Focus Management & Tax Solutions Ltd (the **Appellant**) advised the respondents to invest significant sums in endowment policy plans. The respondents' investments did not perform well and the respondents alleged that they suffered losses in excess of GBP 500,000 as a result of their investments.

In November 2008, the respondents complained to the FOS and claimed that the investment advice given to them by the appellant was inappropriate. The respondents sought a determination from the FOS that they should be awarded compensation which would return their capital and also allow them to repay money they had borrowed in order to invest additional sums in the endowment policy plans.

The FOS determined the complaint in the respondents' favour and recommended that the appellant should compensate the respondents for their losses so as to put them back in the position they would have been in had they not been given the inappropriate advice by the appellant. The FOS acknowledged that this measure of compensation may result in an amount that was greater than GBP 100,000 plus interest (which, at the time, was the statutory limit for FOS awards pursuant to s229(4) of the Financial Services and Markets Act 2000 (**FSMA**)).

The respondents accepted the FOS determination. Although the FOS determination was stated to be binding and final, when the respondents wrote to confirm their acceptance of it, they wrote that they reserved "*the right to pursue the matter further through the civil courts*".

In accordance with the FOS determination, the appellant paid the respondents GBP 100,000 plus interest but declined to follow the non-binding recommendation made by the FOS that it should compensate the respondents for their losses over and above the (then) statutory limit for FOS awards.

In June 2010, the respondents issued proceedings in the county court for their alleged additional losses in excess of the GBP 100,000 they had already received as a result of the FOS determination. The appellant succeeded in striking out the respondents' claim in the county court (which held that acceptance of an FOS determination prevented a person from bringing separate civil proceedings in respect of the same facts).

The respondents appealed the order to strike out their claim to the High Court. The High Court overturned the county court's decision and held that individuals who accept a favourable FOS determination are not precluded from claiming damages in court which are in addition to the award that they received from the FOS. In its judgment, the High Court focused on the doctrine of merger and found that this did not apply to FOS determinations that have been accepted by the relevant parties.

The High Court's decision introduced a considerable amount of uncertainty into this area of law (not least

because it directly conflicted with another High Court decision on the same point, *Andrews v SBJ Benefit Consultants* [2010] EWHC 2875 (Ch)). It also caused firms to be concerned that they may face civil action, even where an FOS determination has been accepted by the relevant parties and that individuals may use the FOS process to obtain funds and favourable evidence that may then be used in subsequent civil proceedings.

Court of Appeal

The appellant appealed the High Court's decision to overturn the county court's strike out order to the Court of Appeal.

In deciding this case, the Court of Appeal considered two key points:

1. First, whether the doctrine of *res judicata* (that, generally speaking, a matter may not be re-litigated once it has been judged on its merits) precludes a claimant from commencing legal proceedings in order to pursue complaints that had already been decided by the FOS.
2. Secondly, whether s228(5) of the FSMA excludes the operation of *res judicata*. Section 228(5) of the FSMA states that if a complainant notifies the FOS that he accepts its determination, it is binding on the complainant and respondent and is final.

The Court of Appeal allowed the appellant's appeal for the following reasons and held that an individual who complains to the FOS and accepts a favourable determination may not pursue separate civil proceedings relating to the same cause(s) of action in order to recover additional damages.

Application of res judicata

When the Court of Appeal turned to consider the application of *res judicata* to this case, it had to decide whether an FOS decision is a decision of a judicial body for the purposes of the doctrine of *res judicata* and whether (and, if so, under what conditions) complaints to the FOS and causes of action relied on in subsequent proceedings are the same.

The Court of Appeal held that an award made by the FOS constitutes a judicial decision for the purposes of the requirements of *res judicata*. In support of this decision, Arden LJ (who delivered the leading judgment) noted that the FOS process "*involves giving the parties an opportunity to state their case*"and that decisions made by the FOS are not simply administrative in their nature. The FOS also intervened in this case at the Court of Appeal stage and accepted that it makes judicial decisions for the purposes of *res judicata*.

Arden LJ acknowledged that an FOS complaint may consist of, or include, facts that constitute a cause of action. Where this is the case, the Court of Appeal held that a person who has accepted an FOS decision may not pursue separate civil proceedings based on the same facts or cause of action.

Application of s228(5) of the FSMA

Section 228(5) of the FSMA states that if a complainant notifies the FOS that he accepts its determination, it is binding on the complainant and respondent, and is final. Notwithstanding the statutory description of an FOS determination as being binding and final, the High Court held that allowing persons who accepted FOS decisions to pursue separate civil claims based on the same facts was not inconsistent with the statutory scheme set out in FSMA (including s228(5)) that governs the operation of the FOS.

The Court of Appeal disagreed with the High Court on this point. Arden LJ held that although the High Court was "*clearly right to consider the relevant provisions in the context of consumer protection and to seek to further Parliament's purpose in that regard through the judicial process of interpretation" the High Court had given "insufficient regard to the limit on* [FOS] *awards and to the fact that the legislation applied only to complaints so far as that limit was not exceeded*". In addition, Arden LJ also noted that: "*If Parliament had intended that the complainant should be able to recover loss in excess of the current limit, it is difficult to see why it would have imposed that limit in the first place. By setting up a scheme for resolving disputes… Parliament manifested its intention that consumer protection did not go beyond the* [FOS] *scheme*".

As a result, the Court of Appeal found that s228(5) of the FSMA did not preclude the application of the

doctrine of *res judicata* to FOS decisions and the appellant's appeal was allowed.

COMMENT

The Court of Appeal's decision in this case has provided some much-needed clarity in relation to the issue of whether persons who complain to the FOS can pursue separate legal proceedings to recover additional sums after accepting a favourable FOS determination. The comments made by Arden LJ in her leading judgment help to reinforce the FOS process as an alternative procedure for resolving consumer complaints to pursuing claims in the civil courts and one which may help disputes to be "*resolved quickly and with minimum formality*" (s225(1) of the FSMA).

However, the basis for the Court of Appeal's decision in this case (the application of the doctrine of *res judicata*) is somewhat surprising. Although the Court of Appeal gave reasons as to why FOS decisions constitute judicial decisions for the purposes of *res judicata*, it should be remembered that the FOS process is still very different to the process followed in typical judicial proceedings (ie civil litigation).

Although the Court of Appeal held that persons who complain to the FOS cannot pursue separate legal proceedings to recover additional sums after accepting a favourable FOS decision, Arden LJ expressly acknowledged that this would depend on whether the substance of the proceedings before the courts are the same as those which were considered by the FOS. As a result, it is possible that persons who have accepted a favourable FOS determination may still attempt to pursue separate civil claims to recover additional sums and argue that their civil claims are based on a separate causes of action to the ones that were originally argued before the FOS. However, it is likely to prove difficult for most claimants to successfully take this approach in practice.

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Key Contacts

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