ALLEN & OVERY

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Litigation and Dispute Resolution

Review

EDITORIAL

In the first 2015 edition of the Litigation Review we look back on the last twelve months and set out our selection of the most noteable decisions for finance parties in 2014 (see **Top ten finance litigation and regulatory decisions of 2014**). In addition, we cover some interesting decisions handed down at the end of 2014, including Blair J's decision in *The Hut Group Ltd v Oliver Nohabar-Cookson & anr* which considered when time starts to run in a contractual warranty claim arising out of a share purchase agreement. We also cover *Bank of Tokyo-Mitsubishi UFJ Ltd v Owners of the MV Sanko Mineral* which involved a claimant that failed to preserve its claim where a potential defendant entered foreign insolvency proceedings (see **Limitation**). A third case covered in this Review also considers limitation issues: *Nayif v The High Commission of Brunei Darussalam*. In this case the Court of Appeal allowed a personal injury claim to be pursued in the High Court, even though a claim based on the same facts was time-barred in the employment tribunal (see **Employment**).

The revised (**Recast**) Brussels Regulation now applies to proceedings commenced on or after 10 January 2015. The dictionary definition of "Recast" is "put into a new form, improve arrangement of". Undoubtedly, the Recast introduces some improvements. In particular the effectiveness of exclusive jurisdiction clauses is enhanced with the introduction of a new rule giving the chosen court priority even when it is second "seised". Opportunities were missed, however. The Recast fails to grapple with *Owusu* issues comprehensively, meaning that there remains unhelpful uncertainty as to the approach of Member State courts to third state jurisdiction clauses (indeed the position is perhaps further complicated by the introduction of a new international *lis pendens* rule). If you are a client and would like a copy of our bulletin on the Recast, please contact us.

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Contents

Contract

STANDARD OF REASONABLENESS IN CONTRACT WITH PUBLIC BODY: *WEDNESBURY* NOT APPLIED

David Krebs v NHS Commissioning Board (As successor body to Salford Primary Care Trust) [2014] EWCA Civ 1540, 21 December 2014

The NHS Commissioning Board (**NHSCB**) had not acted unreasonably in terminating a contract for securing dental services. The use of the word "reasonable" in the contract should not be read in a strict public law sense, as laid down in *AP Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, even where a public body was party to the contract. The dentist's public law claims were rejected and he was confined to contractual private law remedies. The court also held that he had failed to show that any goodwill associated with his practice constituted a "possession" for the purposes of Article 1 of Protocol 1 to the European Convention on Human Rights (**ECHR**).

Dr Krebs, a dentist, appealed against a first instance ruling that the NHSCB was entitled to terminate his contract for providing dental services.

Clause 10 of the contract said that the NHSCB "must act reasonably and in good faith and as a responsible public body". Clause 11 said that clause 10 did "not relieve either party from the requirement to comply with the express provisions of [the] contract and [that] the parties are subject to all such express provisions". Clause 197 said that Dr Krebs must comply with the requirements of the National Clinical Assessment Service (**NCAS**).

The NHSCB initially raised concerns in 2008 about Dr Krebs' performance, in particular regarding: (i) poor diagnosis, treatment and treatment planning; (ii) poor record keeping; and (iii) excessive claims for remuneration. In 2012, the NHSCB terminated the contract as Dr Krebs had failed in his obligation to co-operate with an assessment of his practice by the NCAS. However, the NHSCB then wrote to him in November 2012 (the **November Letter**) saying that it did not intend to terminate his contract until the dispute had been resolved. In April 2013, the NHSCB issued a termination notice following his refusal to undergo the NCAS assessment.

Dr Krebs brought proceedings against the NHSCB seeking a private law remedy for breach of contract and a public law remedy, and/or a remedy under Protocol 1, Article 1 to the ECHR which provides for the right to peaceful enjoyment of possessions. At first instance the judge found against him. In his appeal, Dr Krebs submitted that:

- the November Letter had cancelled the termination, meaning that, unless a fresh termination notice was served, the contract was still legally alive. There could be no fresh termination as Dr Krebs had subsequently agreed to an NCAS assessment or, alternatively, that the dispute had been resolved;
- the notice of termination was in breach of the NHSCB's obligation to act reasonably and as a responsible public body. It was perverse of the NHSCB to terminate his contract on the basis that he had initially declined to co-operate in an assessment;
- he was entitled to pursue public law remedies because the NHSCB was a public body that had acted unreasonably and disproportionately; and
- he could rely on Article 1 of Protocol of the ECHR because the goodwill attached to his practice was a possession of which he had been wrongly deprived.

Appeal dismissed

His appeal was dismissed. The Court of Appeal held that the parties had agreed that the contract had come to an end in October 2012. In the November Letter, the NHSCB agreed to postpone Dr Krebs' termination until the dispute was resolved. The effect was no more than a concession that the NHSCB would, temporarily, not act on the termination. In any event, the NHSCB had issued a "remedial notice" requiring Dr Krebs to give it access to his records. This notice had not been complied with and the NHSCB had been entitled to, and did, terminate on the grounds of non-compliance by way of a fresh notice of termination served in April 2013.

Clause 11 of the contract made clear that a contracting dentist had to comply with the express provisions of the contract, and clauses 10 and 11 together meant that Dr Krebs had to co-operate with NCAS even if he considered that its action was unreasonable or in bad faith or not in accordance with a responsible public body's duties.

Longmore LJ said that if contracts between private parties require either party to act reasonably in a particular respect, the courts were traditionally reluctant to import principles of public law as a guide to construction. The courts therefore assessed reasonableness in such contracts without regard to *Wednesbury* considerations. Whether, as Dr Krebs alleged, the NHSCB acted unreasonably or other than as a responsible public body in seeking to terminate his contract raised the question of whether the breach of the obligation under clause 10 had to be assessed using the *Wednesbury* test. In effect, this would have meant deciding whether the NHSCB had to be assessed as having acted in a way no responsible or reasonable public body would, or whether "reasonably" could imply a different standard.

Longmore LJ held that the word "reasonable" in clause 10 did not have to be read in a *Wednesbury* sense even though the contract was with a public body and even though clause 10 referred to the concept of a responsible public body.

On the facts, the NHS had not acted unreasonably. Indeed, Dr Krebs himself had belatedly accepted the need for an NCAS assessment. This showed that the NHSCB had been right to require him to co-operate with an NCAS assessment in the first place.

The same findings of fact satisfied the requirements of proportionality. It followed that Dr Krebs was confined to his private law remedies. If he could not show a breach of contract by the NHSCB, that was the end of the matter – there could be no relevant remedy under the ECHR for a contract which had been legitimately terminated.

COMMENT

The concept of reasonableness is central to English law in, for example, crime, tort and in many contracts (for example obligations to use "reasonable endeavours"). It is also assumed to be the hallmark of the "man on the Clapham omnibus".

However, it is a word of highly variable meaning – for example, in self-defence, the standard relates to decisions made "in the agony of the moment"; in the context of decisions made by company directors, it relates to what a director with his or her particular experience and qualifications might reasonably decide. In contract, "reasonable endeavours" has a specific, judge-made definition. Elsewhere it may be a more objective standard of rationality, but in civil cases it is, ultimately what is reasonable in the eye of a particular beholder – the judge.

In this case, the court acknowledged the distinction between the specific, and stringent, standards of the test of reasonableness in the *Wednesbury* sense, and those applicable to contract.

The courts are prepared to dilute the *Wednesbury* test where the context dictates and also to differentiate between the meaning of reasonableness in a private law context and its meaning in the *Wednesbury* sense, which applies to actions by bodies subject to public law. In this context, the Court of Appeal's decision may seem surprising, as the contract specifically stated, in clause 10, that the NHSCB had to act as a "responsible public body". However, this did not relieve Dr Krebs of his obligations under clause 11 to comply with the express provisions of the contract. The court recognised that the interaction between clauses 10 and 11 was a "difficult"

and "important" question, but, as the NHSCB had followed the termination provisions correctly, questions of reasonableness did not arise. The court's thinking on whether a public, or private, law standard of reasonableness would be applicable to the contract, is not entirely clear. Its conclusion seems to have been that, as the NHSCB had acted properly in accordance with the contract, there was no need to consider potentially different tests for reasonableness.

The apparent oddity of Dr Krebs being obliged to comply with his obligations when, if he was right, the NHSCB had wrongfully purported to terminate the entire contract was resolved, in the specific circumstances, by the fact that there had been an order that the contract was to be treated as continuing until the matter had gone to trial. It is unclear whether the court would have reached the same decision if Dr Krebs had not been allowed to continue in practice.

In this instance, the court was reluctant to import principles of public law into contracts between private parties as a guide to construction unless public concepts are deliberately introduced into the contract. However, it may not always be entirely clear, when a contract is being negotiated, whether the public or private law test should apply. On this basis, a party which is contracting with a body which may be subject to both private and public law regimes may want to ensure that the criteria by which reasonableness and proportionality will be assessed are clearly specified.

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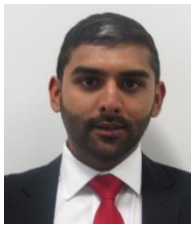

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Costs

PART 36 OFFER TAKEN INTO ACCOUNT ON COSTS EVEN THOUGH BEATEN AT TRIAL

Sugar Hut Group Ltd & ors v AJ Insurance [2014] EWHC 3775 (Comm), 19 November 2014

Eder J applied the court's general discretion to decide on the appropriate costs payable to a successful claimant. CPR Part 44 was applied to take into account the circumstances of a Part 36 offer, albeit the offer had been narrowly beaten at trial. It had been "unreasonable" for the claimants to reject the Part 36 offer and pursue a trial for quantum. This case is specifically not a validation of a "near-miss" Part 36 offer, but demonstrates the application of discretion to apportionment of costs.

On 13 September 2009 there was a fire at a well-known nightclub, the "Sugar Hut" in Brentwood, Essex. The club was effectively unusable for almost a year, until it eventually reopened on 25 August 2010. A dispute arose between the owners (**claimants**) and the insurers (**defendant**).

The parties agreed liability by a consent order agreed immediately prior to the liability trial. The terms of the consent order provided that the defendant would pay an agreed 65% of the claimants' losses. This judgment was therefore concerned with quantifying that amount, interest, and liability for costs.

Eder J upheld the claimant's claim for business interruption losses and interest, totalling the claimants' entitlement to damages and interest to the sum of GBP 1,090,021.02 from the defendant. The principal amount due was GBP 568,670 gross for business interruption. The defendant's previous payments on account of GBP 383,000 and GBP 430,000 left an outstanding balance due from the defendant of GBP 277,021.02. This narrowly beat a Part 36 offer by the defendants in May 2014 to pay GBP 250,000 on top of the previously paid sums on account (**Part 36 Offer**).

Costs where claimant is/was partially successful

Under CPR 44.2 the court has a general discretion as to costs, including whether costs are payable by one party to another, the amount of such costs, and when they are to be paid. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party (CPR 44.2(2)(a)). The claimants were clearly the successful party overall, however, certain discrete claimed losses were unsuccessful and quantified at nil.

There is no rule that requires an automatic reduction of a successful party's costs if he loses on one or more issues. The claimants pleaded that "to allow any reduction would be to chop too finely and to fail to give proper real weight to the fact that the claimants were the successful parties".

However, these were discrete and important matters on which the claimants failed completely, and an order was made for a discretionary 30% reduction in costs to which the claimants would otherwise be entitled. Eder J readily accepted that this percentage was broad brush, but arrived at by accounting for the nature and volume of the factual evidence required for such matters, and the costs that would have simultaneously been borne by the defendant for these matters.

Effect of beaten Part 36 offer

The Part 36 Offer had included a breakdown, which stated a GBP 600,000 gross figure for losses.

The Part 36 Offer was a "near-miss", just shy of the claimants' interest inclusive recovery of GBP 277,021.02, despite the Part 36 Offer's quantification for total losses exceeding the judgment's GBP 568,670 gross for

business interruption. A "near-miss" cannot trigger the Part 36 regime.

However, the defendant argued that the Part 36 Offer was relevant with regard to the exercise of the court's discretion as to costs within CPR 44. Under CPR 44.2(4)(a) in deciding what order to make about costs, the court will have regard to all the circumstances including the conduct of all the parties. The gross figure in the Part 36 Offer was in excess of the losses awarded to the claimants in the final quantum judgment, and the defendants submitted that if the claimants had accepted this offer, they would have obviated the need for a three-day hearing and associated expenditure.

It was apparent that the claimant's choice to pursue particular allegations was because of their insistence that the figure for losses was higher than the GBP 600,000 offered by the defendant in the Part 36 Offer. This was set out in follow-on correspondence between the parties. The judge held that it was not reasonable for the claimants to pursue their claim, as they did, for GBP 862,024 (figure disclosed in the correspondence).

The judge specifically stated that this decision was not based on any "near-miss" Part 36 analysis, firmly rejected as an unhelpful concept by Ramsey J in *Hammersmatch Properties (Welwyn) Ltd v Saint-Gobain Ceramics and Plastics Ltd and anr* [2013]. Eder J distinguished that judgment, noting that in this case he had the benefit of "full information" surrounding negotiations, all relevant correspondence having been disclosed to the court, where the claimants insisted on a much higher figure than that offered by the defendant. Eder J's judgment was therefore informed rather than speculative, and reliant on the parties' failure to negotiate as opposed to any "near-miss" analysis.

Was insistence on the higher amount unreasonable? CPR 44.2(5)(d) expressly provides that the conduct of the parties which the court will have regard to under CPR 44.2(4)(a) includes whether "a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim". The judge described this case as a "paradigm example" of such exaggeration.

Furthermore, the claimants "dragged their heels" on disclosure and eventually the defendant was obliged to make a disclosure application to secure quantum documents which even then were only provided on a piecemeal basis. The defendant incurred additional costs in taking appropriate precautions to protect its position.

Despite the claimants being the successful parties overall, they were denied their costs for the assessment of quantum from 14 June 2014 (21 days following the Part 36 Offer) and the defendant was awarded costs on a standard basis from that date. However, the claimants did not lose their recoupment of costs for the quantification of interest: the claimants beat this aspect of the Part 36 Offer and were therefore awarded costs, to be assessed.

COMMENT

We are all acutely aware of the pitfalls that can be encountered when making the important tactical step of a Part 36 offer to settle. This case highlights additional points to consider, such as the way in which the offer is drafted and whether it is important to break down your offer into its component parts. If you have severable claims or aspects of a claim, particularising your offer fully may assist if you are beaten at trial on some aspects but not others. If you do particularise your offer, be prepared to have to justify your calculations. An evidently well thought through offer may be more persuasive to the other party. If you have an offer of discrete parts with calculations which you are prepared to stand by, place your markers so that a judge can use such figures for guidance.

Breaking down your offer is by no means always advisable: some Part 36 offers are more appropriately phrased as a global settlement, pitched predominantly to persuade the other party not to continue with litigation.

However, rather than blurring the lines of when a Part 36 offer is and is not beaten at trial, this case actually rested more on the claimants' pursuit of and conduct in the litigation: they had exaggerated their claim and drawn out the litigation through their conduct,

incurring unnecessary costs on both counts. The case gives a helpful insight into the factors applied by the courts in relation to CPR 44.2 and the importance of behaving in accordance with the furtherance of the overriding objective.

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Employment

CLAIM WHICH WAS TIME-BARRED FROM CONTINUING IN THE EMPLOYMENT TRIBUNAL MAY STILL BE PURSUED IN THE HIGH COURT

Nayif v The High Commission of Brunei Darussalam [2014] EWCA Civ 1521, 27 November 2014

The Court of Appeal has allowed a personal injury claim to be pursued in the High Court, even though a discrimination claim based on the same facts was time-barred in the employment tribunal. The Court of Appeal held that the doctrine of *res judicata* did not apply on the basis that there had been no substantive consideration of the merits of the claim by the employment tribunal. In addition, Elias LJ commented that the doctrine of *res judicata* was applied so as to deny a claimant the right to have the merits of their claim determined without "good cause"; this would be a disproportionate interference with the claimant's right under Article 6 of the European Convention on Human Rights.

The appellant brought a race discrimination claim against the respondent – his former employer, the High Commission of Brunei – and alleged that he had suffered psychiatric injury as a result of the way he was treated at work over a number of years.

Such claims are required to be brought within the period of three months beginning when the act complained of occurred. The employment tribunal has discretion to consider claims brought out of time "if it considers that it is just and equitable to do so".

The appellant brought his claim to the employment tribunal after the three-month time period had expired. The employment tribunal considered whether in the circumstances it was just and equitable to hear his claim in any event. For this purpose, the employment tribunal considered documents adduced by the appellant, heard submissions as to the circumstances of his complaints, and considered his explanation as to why his claim had been brought out of time. However, having considered these factors, the employment tribunal declined to exercise its discretion to consider the appellant's claim out of time.

When considering whether to hear the appellant's claim out of time, the employment tribunal did not in any way engage with the substantive merits of the case, although the judge did observe that it was "still not clear from the claim form why the claimant says that the cause of his bullying was his race".

High Court claim

In December 2012 (over a year after he had first issued his claim in the employment tribunal) the appellant issued proceedings in negligence and breach of contract against

the respondent in the High Court and sought damages for personal injury arising out of the same facts that formed the basis of the race discrimination claim in the employment tribunal. He accepted that the issues before the High Court were the same as those which had been before the employment tribunal.

The High Commission applied for the appellant's claim to be struck out on the basis that it arose out of the same matters as his claim in the employment tribunal, which had been dismissed. The application for strike out was allowed but, in doing so, Master Leslie noted that he felt uneasy doing so as it appeared to him that a genuine claim was to be stopped from proceeding on "narrow procedural/jurisdictional grounds".

Master Leslie gave permission for the appellant to appeal to the Court of Appeal, which remitted the decision to the Queen's Bench Division of the High Court. The High Court dismissed the appellant's appeal. The appellant appealed the High Court's decision to the Court of Appeal.

Res judicata

This case turns on the doctrine of *res judicata* – the principle that, generally speaking, a matter may not be re-litigated once it has been judged on its merits. The respondent argued that the appellant should not be permitted to re-litigate matters which he had already brought before the employment tribunal.

Court of Appeal's decision

In the leading judgment, Elias LJ considered the doctrine of *res judicata* and the impact of Article 6 of the European Convention of Human Rights (**ECHR**) on the dispute.

Res judicata

Elias LJ accepted the underlying principle of the doctrine of *res judicata*, that "there should be finality in matters which have been litigated, or would have been but for a party being unwilling to put them to the test". However, Elias LJ could not see any justification for applying the doctrine of *res judicata* to prevent the appellant's claim proceeding in the High Court because there had been no actual adjudication of any issues before the employment tribunal, nor had either party consented (either expressly or by implication) to having conceded the issues in dispute by choosing not to have the matter formally determined. Rather, the only proceedings that had taken place before the employment tribunal in this matter had related to whether the appellant's claim should be allowed to proceed, notwithstanding the fact that it had been made out of time. As a result, Elias LJ found that no action had been taken before the employment tribunal that was "enough to bring the principle of *res judicata* into play" and allowed the appeal, thereby allowing the appellant to pursue his case in the High Court.

However, in coming to his decision, Elias LJ distinguished the situation where a claimant had issued proceedings in the employment tribunal, subsequently withdrawn them and then sought to pursue a separate claim based on the same facts in the county court (*Lennon v Birmingham City Council* [2011] IRLR 826). In *Lennon*, the claim which was brought before the county court was struck out on the basis that the doctrine of issue estoppel prevented the claimant from putting essentially the same case again to another tribunal.

Article 6 ECHR

The appellant claimed that denying him his right to bring proceedings in the High Court would constitute a breach of Article 6 as it would deny him a right of access to a competent tribunal. Elias LJ rejected this argument on the basis that the appellant would have been able to bring his claim before the employment tribunal, had he brought his claim in time.

However, Elias LJ noted that if the doctrine of *res judicata* was applied so as to deny a claimant the right to have the merits of their claim determined without "good cause", this would be a disproportionate interference with the claimant's Article 6 right. On this basis, Elias LJ held that it would be unjust to deny the appellant the opportunity to pursue his claim in the High Court, simply because he had brought his employment tribunal out of time. Since the law must be construed, where possible, in a way which is compatible with the ECHR, Elias LJ held that this view reinforced the conclusion he had already reached in relation to the application of the doctrine of *res judicata*.

COMMENT

The Court of Appeal's decision in this case and its application of the doctrine of *res judicata* relies on the fact that no substantive action had been taken before the employment tribunal which meant that *res judicata* did not apply. This decision is likely to be unhelpful to employers who may experience an increase in the number of employees who, having been time-barred in the employment tribunal, decide to pursue a separate case based on the same facts before the courts. In an employment context, this may not be a rare occurrence as the same facts may give rise to both a statutory claim such as discrimination in an employment tribunal, and also a breach of employment contract claim or personal injury claim brought in the High Court.

However, in this case the Court of Appeal does not appear to have considered whether the fact that the appellant had issued his claim in the employment tribunal out of time may implicitly amount to the appellant choosing not to have his claim formally determined. If this was the case then there is a chance that a court may find that *res judicata* does apply so as to prevent a claimant from pursuing a separate claim before the courts based on the same facts.

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Limitation

CONTRACTUAL WARRANTY CLAIMS: WHEN DOES TIME BEGIN TO RUN?

The Hut Group Ltd v Oliver Nohabar-Cookson & anr [2014] EWHC 3842 (Comm), 20 November 2014

In this contractual warranty claim, the interpretation of a limitation of liability clause imposing a time limit on the buyer for serving notice of a breach of warranty claim was critical to whether the buyer had an actionable claim. The question before the court was whether time starts to run when the buyer becomes aware of factual grounds that may amount to a claim, or only at the point at which the buyer knows there is a proper basis for bringing a claim.

The dispute arose following the acquisition by the claimant, The Hut Group Ltd, of an online business (Cend Ltd) owned by the defendants. In consideration for the share purchase, the defendants received a combination of cash consideration and shares in The Hut Group. Post-completion, each party brought claims for breach of warranty under the Share Purchase Agreement (the **SPA**). The Hut Group claimed that the defendants had breached their warranty as to the accuracy of the Cend Management Accounts, while the defendants counterclaimed for The Hut Group's breach of its warranties as to the accuracy of its accounts (the latter breaches were admitted to by The Hut Group, though it sought to limit its liability under the SPA).

Faced with The Hut Group's breach of warranty claim, the defendants argued that notice of this claim had not complied with the limitation of liability clause in the SPA imposing a time limit on notifying claims to

the other party (**the time limits clause**), which provided that:

> "*The Sellers [the defendants] will not be liable for any Claim unless the Buyer [The Hut Group] serves notice of the Claim on the Sellers (specifying in reasonable detail the nature of the Claim and, so far as practicable, the amount claimed in respect of it) as soon as reasonably practicable and in any event within 20 Business Days after becoming aware of the matter*."

Establishing the meaning of the buyer "becoming aware of the matter" was key to determining whether notice had been given within the relevant time limit and therefore whether, even if there had been a breach of warranty by the defendants, such breach was actionable.

Further issues in this case, though not considered here, arose from the defendants' counterclaim for breach of warranty. Such issues included a detailed statement and application of the principles of quantification of damages, and a decision that the fraud of the buyer's financial controller should be attributed to the buyer with the effect that a liability cap in the SPA should be disapplied.

What does it mean to become "aware of a matter"?

The Hut Group argued that "matter" should be read to mean "claim" and refers back to the use of "Claim" earlier in the clause. The clause thus required the buyer to be aware that there was a proper basis for putting forward a claim for breach of warranty. In contrast, the defendants submitted that "matter" refers to the factual matters forming the basis for a claim, and that the relevant moment in time was therefore the buyer becoming aware of factual grounds for a breach of warranty claim, and not when the buyer knew there may be an actionable claim. The defendants' interpretation would have the effect of starting the clock running far earlier in time for the purposes of satisfying the time limits clause.

In deciding this point of construction, Blair J did not find it necessary to consider the rule of *contra proferentem*, since the contract imposed similar time limits on both parties. Nor did Blair J find that the tightness of the timelines was a relevant factor, given that parties are entitled to negotiate limitations on what can be costly breach of warranty claims.

Blair J was ultimately persuaded by The Hut Group's construction of "awareness of the matter", on two main grounds. First, "aware of the matter" was found to refer back to awareness of "the Claim" in the earlier part of the clause, rather than being read as having a different meaning. Secondly, with an eye to the need for commercial sense and certainty, Blair J did not favour the defendants' construction since this would have the effect of starting time running when the relevant individuals became aware of underlying facts, even if they were unaware they may give rise to a claim. Instead, Blair J held that a party could not be said to be aware of the matter before it is aware that there is a proper basis for putting forward a claim:

> "*As a matter of commercial sense, without knowing that a claim has a proper basis, a party to a share purchase agreement would not expect to (or wish to) have to notify the other party of it*."

Having found that the test was when The Hut Group became aware that there was a proper basis for a breach of warranty claim, the court had to decide what factual events could amount to this moment of awareness. Were internal discussions about the need for adjustments to the Cend Ltd management accounts sufficient to indicate knowledge of a breach of warranty claim? Or was the preparation of an internal memo for the legal department, summarising the issues in order for The Hut Group's lawyers to seek external advice as the process for bringing a warranty claim, the decisive moment?

Blair J found that neither of these events started the clock running. Even the internal memo, though it identified the adjustments that would eventually form the basis of the claim, did not commit as to whether there was such a claim because the author believed further external advice was needed as to whether there were grounds for a claim. The point of instructing external advisers (in this case, forensic accountants at PwC) was not sufficient: it was only the point at which such advice was received for the purposes of the time limits clause that the clock started running. On this basis Blair J found The Hut

Group had given notice within the time limits and therefore had an actionable claim for breach of warranty.

Ultimately, each party succeeded in its respective breach of warranty claim (and the defendants' claim was not capped under the SPA by reason of the fraud by the claimant's financial controller).

COMMENT

The conclusion in this case was that the time limit for giving notice of a claim only began to run once the relevant party had an awareness of the proper basis for bringing a claim. The decision confirmed that when interpreting notice clauses the court will be look to achieve an outcome that makes good commercial sense, and will also be willing to leave parties to negotiate tight time limits as between themselves in breach of warranty contexts and not be predisposed towards interpreting tight deadlines in favour of the party obliged to give notice.

The decision also provides helpful indications as to the sorts of events that may amount to mere preparatory work to identify possible grounds for a claim, and those that will be held to amount to awareness of the proper basis for a claim (and therefore start the clock running for notice purposes). The line drawn in this case is a helpful one for the claimant, with awareness only being attributed to them at the point at which external advice was received indicating that there was a basis for a claim, and earlier internal discussions disregarded. Parties should nevertheless be mindful of the point at which they may be deemed to be straying into the territory of the latter when discussing potential claims both internally and with external advisers.

Inevitably, being a matter of construction, this decision was rooted in the precise wording of the clause in question, one particularly relevant factor being the earlier reference to "Claim" in the clause, which added weight to the buyer's argument that the later reference to "matter" ought to be understood to be referring back to "claim".

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EFFECT OF CROSS-BORDER INSOLVENCY ON CONTRACTUAL TIME BAR

Bank of Tokyo-Mitsubishi UFJ Ltd v Owners of the MV Sanko Mineral [2014] EWHC 3927, 28 November 2014

As a matter of English law, a claimant should have commenced arbitration within 12 months, in accordance with contractual provisions, in order to preserve its claim even when the debtor was subject to foreign insolvency proceedings. In such circumstances, whether the claim would be accepted in the foreign insolvency proceedings was a matter for the law governing those insolvency proceedings.

Glencore Limited (**Glencore**) was the owner of cargo contracted to be carried by the MV Sanko Mineral (the **Vessel**). The contract for carriage contained an arbitration clause that required an arbitrator to be appointed within 12 months of final discharge of the cargo and that any claim would become time-barred if this was not complied with.

The defendant, the former owner of the Vessel, was placed into Japanese reorganisation proceedings (the **Reorganisation Proceedings**). The Reorganisation Proceedings were recognised by the English courts as "foreign main proceedings" pursuant to the Cross-Border Insolvency Regulations 2006 (the **Regulations**). Glencore submitted claims in respect of the contract of carriage (both secured and unsecured) in the Reorganisation Proceedings but did not commence arbitration proceedings within 12 months of the cargo's discharge as required by contract.

The claimant bank held a mortgage over the Vessel. Pursuant to the mortgage, the Vessel was ordered to be sold by the English courts, however Glencore applied for the issue of a caution against the release of the proceeds of the sale arguing that it held a security interest over the Vessel under Japanese law, pursuant to its rights under the contract for carriage. The defendant applied for the strike out or withdrawal of the caution on the basis that, as a result of the non-compliance with the arbitration clause, Glencore's claim was contractually time-barred.

Context: effect of insolvency on contemplated or pending litigation

The key issue for the court was whether a contractual time bar which requires a claimant to commence arbitration within a particular time frame is displaced by a debtor's foreign insolvency proceedings (or the recognition of those proceedings under the Regulations).

The Regulations implement the UNCITRAL Model Law on Cross-Border Insolvency in Great Britain. The Regulations allow the English courts to recognise certain foreign insolvency proceedings and, as a result of such recognition, provide certain relief in aid of those proceedings.

Under the Regulations, upon the recognition by the English courts of "foreign main proceedings", an automatic stay arises which, among other things, prevents the commencement or continuation of actions or proceedings concerning a debtor's assets or liabilities. The court order recognising the Reorganisation Proceedings confirmed that the automatic stay would prevent the commencement of arbitration proceedings. Article 20(4) of the Regulations provides that the automatic stay does not affect the right of a creditor to commence proceedings to the extent necessary to preserve a claim against the debtor. Further, it is possible to seek the permission of the English court to commence or continue proceedings which would otherwise be barred by the automatic stay.

Glencore argued that the submission of its claims in the Reorganisation Proceedings meant that its claim had not become barred because of the non-compliance with the arbitration clause. Glencore argued that the existence of foreign insolvency proceedings had displaced the agreed dispute resolution procedure.

Decision

Teare J held that where a contractual time bar provision requires arbitration to be commenced in order to preserve a claim, failing which the claim is absolutely barred, that provision must be complied with. The opening of foreign insolvency proceedings does not displace this obligation and neither does the recognition of those foreign insolvency proceedings by the English court, pursuant to the Regulations, as foreign main proceedings. It was held that the English court's recognition of foreign insolvency proceedings as foreign main proceedings did not displace a contractual time bar as, despite the existence of the automatic stay on proceedings, Article 20(4) of the Regulations permits proceedings to be taken to the extent necessary to preserve a claim. As such, under the Regulations, Glencore could have commenced arbitration proceedings in London in order to comply with the contractual dispute resolution provisions. Further, if Article 20(4) did not allow arbitration proceedings to be commenced (which the court was of the view was not the case) then Glencore could have applied to court for leave to commence the arbitration proceedings.

It was held that, absent the recognition of the Reorganisation Proceedings in England under the Regulations, the decision that the claim was absolutely barred would lead to an order for the payment of the proceeds of the sale to the trustee in the Reorganisation Proceedings (the **Trustee**). However, given the recognition of the Reorganisation Proceedings, the English court would not make an order which may hinder the proper working of the Reorganisation Proceedings. As Glencore had filed a claim in the Reorganisation Proceedings it was a matter of Japanese law whether such a claim was valid and would be accepted in the Reorganisation Proceedings and this fact needed to be respected by the English court. Accordingly, as under Japanese law it was possible that Glencore had a claim in respect of the proceeds of the sale of the Vessel, the English court would only order payment out on the agreement that the Trustee kept the proceeds of the sale in a separate account and held to the order of the Japanese court.

COMMENT

This case provides a warning to creditors of the importance of adhering to contractual dispute resolution procedures in order to protect claims, even where the debtor has been placed into foreign insolvency proceedings. The existence of the foreign insolvency proceedings (and any recognition of those proceedings in England) may mean that there is a stay on bringing the relevant legal proceedings in England, therefore, advice should be sought to determine whether this is the case and whether there is a procedure for lifting the stay to allow proceedings to be commenced.

Further, while the filing of a claim in the foreign insolvency proceedings may mean that non-compliance with the relevant contractual provisions does not lead to the claim being extinguished, whether the claim is extinguished will be determined by the law governing the foreign insolvency proceedings and so relevant local law advice should be obtained.

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Procedure

SUPREME COURT CONFIRMS THAT MERITS OF A PARTY'S CASE ARE GENERALLY IRRELEVANT TO ENFORCEMENT OF CASE MANAGEMENT DECISIONS

Prince Abdulaziz v Apex Global Management Ltd & anr [2014] UKSC 64, 26 November 2014

The Supreme Court has confirmed that the merits of a party's case are generally irrelevant in case management decisions, save perhaps in cases where the case is strong enough to obtain a summary judgment. The Supreme Court dismissed an appeal, by a majority of 4-1, against a Court of Appeal decision that upheld a default judgment for USD 6 million against the defendant, who had refused to personally sign a disclosure statement as required by court order.

The case arose out of a disputed joint venture between Apex Global Management Ltd (**Apex**) and Global Torch Ltd (**Global**) partly owned by Prince Abdulaziz (the **Prince**). Under the joint venture, Apex and Global set up an English company, Fi Call Ltd, and subsequently quarrelled. Global and Apex brought claims against each other seeking relief against the unfairly prejudicial conduct of Fi Call's affairs. The various claims were serious and included allegations of money laundering, financial misappropriation, and the funding of terrorism. Apex's claim against the Prince was for just under USD 6 million plus interest, but the Prince denied the claim on the grounds that the sum had already been paid into various accounts of Fi Call Ltd at Apex's request.

Case management decisions

A case management conference took place in July 2013 before Vos J. One of the directions ordered was that each party to proceedings (which included Prince Abdulaziz) should file and serve a disclosure statement, certified by a statement of truth and signed personally (the **Personal Signature Order**). The Prince did not object to the Personal Signature Order when it was proposed, but, on the following day, his counsel argued that he ought not be required personally to sign the disclosure statement on the grounds that, as a member of the Saudi Arabian Royal Family, he was forbidden by "protocol" from taking part in litigation proceedings in a personal capacity.

These arguments were rejected by Vos J, who stated that the Prince had to be treated in the same way as any other litigant. Subsequent to the Personal Signature Order, other judges:

- Ordered that the Prince's defence would be struck out unless he complied with the Personal Signature Order.
- Entered judgment in default against the Prince for USD 6 million plus interest.
- Refused to vary the Personal Signature Order to enable the Prince's solicitor to sign on his behalf.
- Dismissed an application to stay the judgment, and refused relief against sanctions (together the **Orders**).

The Prince appealed each of the Orders, but the Court of Appeal dismissed the appeals (*HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd & anr* [2014] EWCA Civ 1106), finding that evidence on this point had emerged piecemeal late in the day and was contradicted by the actions of another prince from the same country. The effect of the Court of Appeal's decision was that the judgment in default against the Prince in the sum of USD 6 million plus interest stood. The Prince appealed to the Supreme Court.

Supreme Court decision

The Supreme Court dismissed the Prince's appeal by a majority of 4-1, with Lord Neuberger giving the lead judgment and Lord Clarke dissenting.

Lord Neuberger agreed that the view taken by Vos J, and the Court of Appeal, that a direction requiring personal signing of a disclosure statement reflected the normal practice (CPR 31.10(6) and (7), and PD 31A.4). Lord Neuberger considered that as it was a case management decision, it would be inappropriate for an appellate court to reverse or otherwise interfere with it, unless it was plainly wrong in the sense of it being outside the generous ambit accorded to case management decisions of first instance judges. Lord Neuberger concluded that the earlier case management decisions at first instance were "unassailable".

The Prince argued that the Orders were disproportionate, as they deprived him of the opportunity to maintain a defence on a substantial claim simply because he had failed to comply with an order to sign a document. Although Lord Neuberger acknowledged that there was "undoubtedly attraction" in this contention, the argument did not stand up to analysis and there were no "special factors" to persuade the court to reconsider the Orders. The Prince had been given every opportunity to comply; he had failed to give a convincing explanation for the failure and it was he who had (through a company of which he was a major shareholder) invoked the jurisdiction of the court in the first place. Lord Neuberger stressed that "the importance of litigants obeying orders of court is self-evident. Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect which they ought to have".

The Prince also argued that he had a very strong case and this should be taken into account by the court and should have resulted in him being able to defend his claim. Lord Neuberger said that "the strength of a party's case on the ultimate merits is generally irrelevant when it comes to case management issues". Further, it would be undesirable if the court had to assess the strength of the parties' respective cases every time it was considering giving directions or imposing a sanction. Lord Neuberger conceded that the one possible exception could be where a party has a case whose strength would entitle him to summary judgment. On the facts of this case, however, the prince would have no higher than good prospects of establishing that the USD 6 million had already been paid (and this did not engage the exception to the general approach).

Lord Clarke, dissenting, was of the view that the Prince's appeal should have been allowed. He said that justice required that the Prince be allowed to defend the claim against him.

COMMENT

The Supreme Court has been robust in ensuring that Prince Abdulaziz's Royal status should not entitle him to any exemption from normal procedure and the decision once again sends a strong message to litigants about the importance of complying with orders of the court.

The Supreme Court's comments on whether a direction requiring personal signing of a disclosure statement reflected the normal practice are noteworthy. It is also interesting that a majority of the judges held that the merits of a party's case should not affect the nature or the enforcement of directions and case management decisions.

The Supreme Court is generally reluctant to consider case management decisions and all the judges agreed that the Supreme Court should be very diffident about interfering with the guidance given or principles laid down by the Court of Appeal in relation to case management and application of the CPR. All the judges also made a point of saying that nothing in this judgment was intended to impinge on the Court of Appeal decisions in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 (covered in the November/December 2013 Litigation Review) or *Denton & ors v TH White & anr* [2014] EWCA Civ 906 (covered in the June/July 2014 Litigation Review) in relation to relief from sanctions.

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Public procurement

REVIEW OF AUTHORITY'S DECISION TO CANCEL TENDER PROCESS

Croce Amica One Italia Srl v Azienda Regionale Emergenza Urgenza [2014] EUECJ Case C-440/13, 11 December 2014

The European Court of Justice has ruled that EU Member States can grant public authorities broad discretion to exclude tenderers from procurement processes and cancel tenders. In addition, national courts and tribunals have extensive powers to review the lawfulness and expediency of procurement decisions by public authorities.

Background

In December 2010, an Italian public authority (**AREU**) (Regional Emergency Services Agency) announced an open tender for a contract to supply specialist transportation services. Four companies participated in the tender, but the bids of three companies were rejected on technical grounds. Croce Amica One Italia Srl (**Croce Amica One**) was the only company remaining in contention and was provisionally awarded the contract. However, after conducting a further review of Croce Amica One's tender, AREU concluded that it was anomalous. In the same period, preliminary criminal investigations were being conducted into the Croce Amica One's legal representative for fraud and making intentionally false statements in connection with the tender.

AREU subsequently decided not to proceed with awarding the contract to Croce Amica One and cancelled the entire tender procedure. AREU's reasoning was that "apart from the anomalous nature of the tender, the AREU [could] not in any event, for evident reasons of expediency and reasons connected with the principle of sound administration, proceed to award the services contract to the tenderer Croce Amica One…nor, given the vital nature of the services in question, [could] it postpone the award of the contract pending the outcome of the criminal proceedings or even the conclusion of the investigations currently under way".

Croce Amica One challenged AREU's decision, seeking the annulment and provisional stay of the decision, as well as making a compensation claim for damage sustained as a result of the decision. The Lombardy Regional Administrative Court decided to stay the proceedings and referred four questions to the European Court of Justice (**ECJ**) for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union. The ECJ re-framed the reference as two questions:

(a) whether Article 45 of Directive 2004/18/EC precluded the adoption by a contracting authority of a decision not to award a contract for which a procurement procedure had been held and not to proceed with the definitive award of the contract to the sole tenderer remaining in contention to whom the contract had been provisionally awarded where the conditions for the application of the grounds for exclusion set out in Article 45 were not fulfilled; and

(b) whether a competent national court can conduct a review of a decision of a contracting authority in the exercise of its unlimited jurisdiction, that is, a review enabling it to take account of the reliability and suitability of the tenderers' bids and to substitute its own assessment for the contracting authority's evaluation as to the expediency of withdrawing the invitation to tender.

European Union public procurement rules

Directive 2004/18/EC (31 March 2004) governs the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Article 45(1) provides that any tenderer who has been convicted by final judgment for participation in a criminal organisation, corruption, fraud or money laundering is excluded from participation in a public contract. Article 45(2) provides that any economic operator may be excluded from participation in a contract where: they have been convicted by a judgment which has the force of *res judicata* for any offence concerning their professional conduct; they have been guilty of grave professional misconduct proved by any means which the contracting authority can demonstrate; or they are guilty of serious misrepresentation in supplying information for the tender. The Directive was transposed into Italian law with the inclusion of a power for the contracting authority to withdraw, suspend or modify its own decisions.

Directive 89/665/EEC (21 December 1989) governs the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. Article 1(1) provides that Member States must ensure that decisions by contracting authorities can be reviewed effectively, and be capable of being annulled if they infringe EU public procurement law or national rules transposing that law.

Decision not to award the contract and cancellation of the tender

The ECJ noted that AREU's decision not to award the contract to Croce Amica One and cancel the tender was different to a decision relating to the exclusion of a tenderer under Article 45 of Directive 2004/18/EC. Article 45 envisions a tenderer being excluded either before the provisional award of the contract or after a criminal conviction, not after provisional award but before conviction as occurred in this case. However, the Court held that EU law did not preclude Member States from providing in their legislation for the possibility of withdrawing an invitation to tender where none of the provisions in Article 45 was fulfilled. The basis for such a decision could be (among other things) an assessment as to whether it was expedient in the public interest to conclude an award procedure given a change in the economic context or factual circumstances, the needs of the contracting authority, or there being an insufficient degree of competition where it was considered that only one tenderer was qualified to perform the contract. The Court concluded that AREU could decide not to proceed with the definitive award of the contract to Croce Amica One and not to award the contract at all.

Ability of a national court to review the decision of a contracting authority

The ECJ found that Article 1(1) of Directive 89/665/EEC required an ability to review the lawfulness of decisions by contracting authorities, for the purpose of ensuring that the relevant rules of EU law or national provisions transposing those rules were complied with. Such a review could not be confined to a simple examination of whether the decisions of contracting authorities were arbitrary. However, in the absence of specific EU legislation in the field, it was open to national legislatures to grant national courts and tribunals more extensive powers to review whether decisions of contracting authorities were expedient.

COMMENT

Public procurement rules at EU and national level are designed to protect both contracting authorities and tenderers. Tendering for a major contract can be very costly, so bidders (and their financial backers) have a significant interest in tenders being conducted in a transparent way, contracts being awarded fairly, being treated equally with other bidders, and being able to take action against contracting authorities if contracts are not awarded fairly or if tenders are cancelled arbitrarily. The criteria for rejecting tenderers in the Public Contracts Regulations 2006 (in England, Wales and Northern Ireland) and Public Contracts (Scotland) Regulations 2006 are in similar terms to Article 45 of Directive 2004/18/EC.

The ECJ's decision gives public authorities substantial discretion to exclude tenderers and cancel tenders, enabling them to protect themselves from suppliers before entering into procurement contracts and to react to changing circumstances. Once Directive 2014/24/EU (which repeals Directive 2004/18/EC) has been

transposed into national laws, this situation will be governed by Article 57(5), which allows contracting authorities to exclude bidders at any time during the tender process (not just at the pre-qualification stage) and in view of acts committed or omitted before or during the tender process. Subcontractors and consortia members can also be excluded throughout the procurement process. The UK government has stated its intention to transpose Directive 2014/24/EU into national law in early 2015, and transposition by EU Member States is required by April 2016. Nevertheless, this decision will reinforce the breadth of the discretion given to contracting authorities by Article 57(5) and will provide further comfort to them in deciding to exclude tenderers. This decision also clarifies the scope given to national courts and tribunals to review the merits of decisions by authorities in the context of public procurement.

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Regulatory

NEW SENIOR INSURANCE MANAGERS REGIME

The Prudential Regulation Authority (**PRA**) and the Financial Conduct Authority (**FCA**) have issued separate consultation papers on the new Senior Insurance Managers Regime (**SIMR**), key elements of which are due to apply in time for the implementation of the Solvency II regime (**Solvency II**) from 1 January 2016. The SIMR proposals will result in substantial changes to the existing approved persons regime (**APR**) and follow the PRA's and FCA's joint consultation in July 2014 on the introduction of a senior managers regime that will replace the existing approved persons regime for banks and investment firms during the course of this year.

The SIMR proposals take into account the changes that will be introduced to the senior managers regime for banks and investment firms, as well as implementing the "fit and proper" requirements of Solvency II.

The PRA's proposals

The PRA recognises that good governance is central to the prudential soundness of the firms it regulates and to the achievement of its statutory objectives. Key to this is the appropriate and transparent allocation of oversight and management responsibilities within each firm and group. This is intended to enable proper decision-making, avoid conflicts of interest, and ensure sound management of the undertaking.

Under the PRA's proposals:

– The SIMR identifies a granular, role-specific set of "controlled functions" (**CF**) or "senior insurance manager functions" (**SIMF**), including – by way of example – the chief executive function, chief risk function and chief finance function. Supervisory pre-approval is required for any appointment to a CF or SIMF. The "director function" and "non-executive director functions" (which are controlled functions under the APR) are not necessarily CFs or SIMFs

under the SIMR. The SIMR also introduces a requirement for firms to make their own evaluation of fitness and propriety in relation to persons who do not occupy a CF or SIMF but who are nonetheless "key function holders". A "key function holder" is a person who is responsible for a "key function".

- The list of "key functions" includes an insurer's risk management, compliance, internal audit and actuarial functions, but is not exhaustive, so firms accustomed to working with a prescribed list of controlled functions will have to consider who they identify as "key function holders". These key function holders may exist outside of the board room, possibly capturing individuals at a lower level of management than currently within the scope of the approved persons regime. The SIMR establishes more stringent notification and governance arrangements, including a new rule which would require insurers to compile and maintain a **Governance Map**, recording the positions of those that effectively run the firm, along with individuals in key functions within the firm. The document will record the allocation of significant management responsibilities and reporting lines for each of the senior persons, reflecting a focus on personal accountability.

Supervisors are likely to refer to Governance Maps, including information on the scope of individual responsibilities in a number of scenarios, including:

- during the initial assessment for PRA approval, where information provided on the scope of an individual's responsibilities will be used to highlight the areas which the candidate will be responsible for managing and to help the PRA to assess their ability to do so;
- in daily supervision, where the PRA expects to use them to:
  - identify relevant individuals to whom specific regulatory queries should be directed;
  - understand how the allocation of responsibilities to individuals has changed to reflect changes to the insurer's business model or as a result of changes in the external environment;
  - clarify which individuals are ultimately responsible for certain actions which supervisors expect the insurer to take; and
  - in enforcement cases, as evidence of individual responsibility for the area in which an alleged breach occurred.
- In addition, the PRA proposes to revise the conduct standards which are set out in the APER Part of the PRA Rulebook, along the lines of the conduct rules proposed for individuals working for banks and investment firms. This will enable a suitable alignment of the conduct standards for individuals at both insurers and banks. These conduct standards will include three generic standards that are relevant to all those individuals performing a key function, together with a set of further conduct standards that are relevant specifically to senior insurance managers and key function holders (other than NEDs). These three generic standards would comprise acting with integrity, due skill, care and diligence, as well as dealing with the PRA and other regulators in an open and cooperative way, effectively embedding principles of regulatory candour and cooperation as management responsibilities.

  These conduct standards will all be applied directly through the PRA Rulebook to those individuals, who are either in a CF or SIMF and subject to pre-approval by the PRA, or who are approved by the FCA for a CF that is deemed to be a "relevant senior management function". The PRA proposes that the revised conduct standards described above will apply from the date on which the full SIMR is commenced. For the period from 1 January 2016 until then, it is proposed that the current conduct principles in the APER Part of the PRA Rulebook will remain in place.

The PRA expects to publish a further consultation on the role of NEDs in the SIMR in early 2015, taking into account the context of both the insurance and banking regimes.

The FCA's proposals

The FCA also proposes amendments to its own APR for Solvency II firms. The key proposals are:

- Those executives and certain other CFs which the PRA is proposing not to maintain are to be FCA Significant Influence Functions (SIFs) and therefore subject to the FCA's pre-approval. This is to ensure that individuals who can significantly impact the

FCA's objectives remain in-scope of conduct regulation. This proposal means that senior individuals would be subject to different regimes.

– Apply to the FCA and PRA-approved persons new FCA Conduct Rules mirroring those proposed in the "Strengthening accountability in banking: a new regulatory framework for individuals" consultation paper. These rules build on the existing APER, with two additions. First, individuals would be explicitly required to pay due regard to the interests of customers and treat them fairly, mirroring existing obligations on firms. Secondly, there is a specific requirement on those in positions of particular responsibility to take reasonable steps to ensure that any delegation of their responsibilities is to an appropriate person and that they oversee the discharge of that delegated responsibility effectively. This aims to strengthen senior accountability for activity in the area of business for which they are responsible but which they are not personally managing.

– Also of note is that the FCA does not propose to bring across certain aspects from the proposed Senior Managers Regime for banks, such as the presumption of responsibility for the purposes of establishing misconduct by senior managers and the Certification Regime which requires banks to certify certain bank employees as being fit and proper.

Responses

The consultation period for both proposals closes on 2 February 2015.

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For more information on Allen & Overy LLP's contentious regulatory investigations and corporate insurance practices, see Allen & Overy's website.

Top ten finance litigation and regulatory decisions of 2014

This is a summary of the most interesting banking litigation and regulatory decisions from 2014. The selection is necessarily subjective and draws from a wide range of cases and developments that are of direct relevance to finance parties.

Effectiveness of contractual terms to protect banks

Contractual terms successfully exclude liability for negligent advice: *Crestsign Ltd v National Westminster Bank plc and Royal Bank of Scotland plc* (October/November 2014 Litigation Review)

Liability for negligent advice provided by banks in respect of interest rate swaps sold to a retail customer was

successfully disclaimed by the contractual terms of business which stated that the banks had a non-advisory role. This was despite the advice pre-dating the parties entering the swap. *Obiter* the court ruled that whilst the banks did not have a "duty to educate", they did have a duty to give full and accurate information on products which the banks chose to present. The ruling is interesting for its confirmation that, when acting in a non-advisory role, banks do not have a duty to (a) explain other products that a client might want to purchase or (b) explain the obvious. A bank must, however, correct any obvious misunderstandings and answer any reasonable question. Any information that a bank provides must be accurate and not misleading. This decision is subject to an appeal.

Warranty as to capacity protects bank where swap counterparty asserts incapacity: *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103

A warranty as to capacity in an English law-governed ISDA Master Agreement was construed so as to give rise to a claim in damages when a Dutch housing association later asserted that it lacked capacity, as a matter of Dutch law, to enter into certain swap transactions. The association had capacity to enter into an English law ISDA Master Agreement, but had lacked capacity, as a matter of Dutch law, to enter into certain subsequent swap transactions (ostensibly under the Master Agreement) on the basis that they were speculative rather than true hedging transactions. Andrew Smith J ruled that the effect of the capacity provision was that the association had either (i) agreed in the Master Agreement that it would only enter into valid (intra-vires) transactions, which gave rise to a contractual estoppel preventing it from relying on or asserting the invalidity of transactions or (ii) made a contractual warranty to that effect and so was liable for damages for breach of warranty. The case demonstrates an innovative approach from the English court using the contractual master agreement structure of the ISDA to overcome the so-called "boot-straps" problem in relation to capacity which applies in standard contracts, where if a party does not have capacity to enter into an agreement it cannot have capacity to represent that it does have capacity in that same agreement. This decision is subject to an appeal.

Representation and warranty provisions insufficient to protect bank where bribes have been paid: *UBS AG (London Branch) & Anor v Kommunale Wasserwerke Leipzig GMBH* [2014] EWHC 3615

In contrast, oral and written representations and warranties were insufficient to help the bank in a successful claim by a German municipal water company to rescind a single tranche collateralised debt obligation (STCDO) as the underlying transaction was voidable by reason of bribery and/or conflict of interest by the water company's intermediary financial advisers, which were found by the court to have an agency relationship with the bank. This despite the bank being unaware of the bribes having been paid. The representations and warranties had no "independent life" so were unable to help the bank. The case shows how an agency relationship can arise without any formal contract or arrangement, and is a cautionary tale for banks. This decision is subject to an appeal.

Contractual interpretation

Court of Appeal interprets "commercially reasonable" in complex finance transaction: *Barclays Bank plc v UniCredit Bank AG & anr* (May 2014 Litigation Review)

The Court of Appeal has held "commercially reasonable" to require *Wednesbury* reasonableness (ie not to be irrational) and no more. The bank 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. The court has set the threshold for acting commercially reasonably at a low level. 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. If parties want the term "commercially reasonable" to elicit a particular behaviour from a drafting perspective they are best spelling this out.

Opposing judicial views on meaning of clause in collateralised loan obligation: *Napier Park v*

Harbourmaster Pro-Rata CLO 2 BV & ors [2014] EWCA Civ 984

The High Court and Court of Appeal came to diametrically opposed conclusions on the interpretation of the words "have not been downgraded below their Initial Ratings" in the reinvestment criteria for cash proceeds of Class A1 Notes issued as part of a collateralised loan obligation (**CLO**). The Class A1 Notes had initially been rated AAA; they were then downgraded to AA but were later upgraded back to AAA. The Chancellor of the High Court concluded that the reinvestment criteria could no longer be satisfied, essentially because the ordinary meaning of the clause referred to a past event, not a continuing state of affairs. The Court of Appeal stressed that interpretation of a tradable financial instrument requires an "iterative process" to place the "rival interpretations of a phrase within their commercial setting and investigate their commercial consequences" and favoured a continuing state of affairs interpretation. To find otherwise, Lewison LJ held, would have raised the effect of a historic downgrade of the Class A1 Notes "to a level of pre-dominance which it was not designed to have in a context where, if given that level of pre-dominance, it conflicts with the basic scheme" of the CLO. Allen & Overy LLP acted for one of the defendants.

Jurisdiction and standing

Jurisdiction issues in mis-selling claim: *McGraw Hill International (UK) Ltd v Deutsche Apotheker Und Arztebank EG* [2014] EWHC 2436, 18 July 2014 (October/November 2014 Litigation Review)

This was a mis-selling claim by investors who bought Constant Proportion Debt Obligations (CPDOs) arranged by the then ABN Amro Bank NV, and rated by Standard & Poor's (**S&P**). The English court accepted jurisdiction over S&P's claim for a negative declaration against both the investors and the Bank. The ruling considered issues which arise in claims for negative declaratory relief (which are often used as a way of forum shopping) against multiple defendants. It highlights the importance of there being a genuine *lis* (ie a serious issue to be tried) between the claimant and each of the defendants, and that a particular defendant should not just be added in order to establish a basis for jurisdiction in a forum favourable to the claimant. Further, if written marketing materials contain misleading information, in a tortious claim, the harmful event will, for the purposes of Article 5.5 Brussels Regulation, be held to be where the materials were delivered and received, not where they were created. This fact is perhaps not likely to affect how marketing is carried out, but it is perhaps a point to remember when deciding where potential investor claimants are likely to mount legal action in the event of a mis-selling claim.

Corporate has no right of action under s150 FSMA: *Bailey v Barclays Bank plc* [2014] EWHC 2882 (QB), 27 August 2014 (October/November 2015 Litigation Review)

The High Court struck out and summarily dismissed a claim by a company in relation to the alleged mis-selling of an interest rate swap by the bank. The decision confirms that a body corporate (such as the second claimant in this case) does not constitute a "private person" and as a result does not have rights of action under s150 Financial Services and Markets Act 2000 (FSMA).

Dispute over who can sue for loss caused by negligent underlying property valuation in non-recourse securitised loan: *Titan Europe 2006-3 plc v Colliers International UK plc (in liquidation)* [2014] EWHC 3106 (Comm), 30 September 2014 (October/November 2014 Litigation Review)

The transferee of a non-recourse securitised loan, rather than the noteholders, was the proper claimant in a claim against a valuer for losses caused by the negligent valuation of the underlying commercial property (which had been carried out for the original lender). The presence of a contractual obligation for the transferee to pass on proceeds of a successful claim to the noteholders, coupled with the loss suffered when the transferee purchased the loan for more than it was worth, were persuasive factors supporting the transferee's right to bring a claim. In finding that Titan was a proper claimant, Blair J noted that the complexity of securitisations meant that "the distribution of loss can be difficult to pin down". For those involved in securitisations, disputes like this can perhaps be most easily avoided by ensuring that there are agreed and clear provisions in the documents which

identify parties with a right to claim. As regards noteholders – who actually bear any economic loss – the case highlights the practical problems they may have in recovering damages unless the documents make clear who is entitled to claim. The decision is subject to an appeal.

Regulatory

Assignment of FSMA claims by private persons: *Connaught Income Fund, Series 1 v Capita Financial Managers Ltd & anr* [2014] EWHC 3619 (Comm) (December 2014 Litigation Review)

The High Court has allowed the assignment of claims by private persons under s138D Financial Services and Markets Act 2000 (**FSMA**). The confirmation by the court of the ability to assign claims brought under s138D FSMA raises important considerations for financial institutions. It suggests that private persons who would otherwise have been prohibited by difficulty and cost are allowed to assign their claims and therefore gain redress indirectly. Assignment was not expressly limited to liquidators so a "private person" could, in theory at least, assign his or her claim to anyone willing to bring litigation against the relevant authorised person in question. This decision therefore highlights the possibility of retail customers who do not wish to incur the considerable time and expense of litigation, selling their investment and the claims arising from that investment to third parties. Those third parties, whether hedge funds or litigation funders for example, might use this as a mechanism to collect a number of claims and seek to bring proceedings against a financial institution for breach of their statutory obligations.

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 (May 2014 Litigation Review)

The Court of Appeal 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. 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. 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 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.

And finally, not a decision, but an important new European Regulation that came into force in July 2014 that will affect all banks operating in the EU:

Freezing bank accounts across Europe: The new Regulation establishing a European Account Preservation Order (**EAPO**)

The Regulation came into force on 17 July 2014 and will be applied by participating Member State courts from 18 January 2017. This instrument represents a new tool in a claimant's armoury, allowing it to freeze monies in a defendant's bank accounts across Europe. The UK and Denmark have not opted into this Regulation and, accordingly, are not bound by it. However, UK and Danish account holders in participating Member States will be impacted, as will banks operating in participating Member States. The legislation imposes extensive obligations on banks, which will have to "freeze" accounts subject to an EAPO "without delay". Banks may also have to carry out certain searches in respect of a defendant's bank accounts. The Regulation involves a complicated interplay between national and European law, with the practical effect that banks will not be able to adopt a uniform pan-European response to this legislation and instead may require specific local law advice as to its implementation and impact in different Member States. On Thursday 15 January 2015, Mona Vaswani, Partner,

Litigation and Sarah Garvey, Counsel, Litigation, spoke to clients about this new legislation providing for a pan-European Freezing Order. Mona and Sarah explained the key provisions and assessed the risks posed by this instrument for commercial parties and banks. The UK Government has not opted in to this Regulation but for commercial parties (especially banks) operating across Europe, with bank accounts in Member States, this new legislation (effective from 2017) may introduce new litigation risks and (for banks) significant administrative burdens.

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Forthcoming client seminars

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(All events in A&O office at Bishops Square unless otherwise stated)

RECENT DEVELOPMENTS IN BANKING AND FINANCE LAW

Thursday 12 March 2015, 12.30 – 1.30pm

Presented by: Richard Hooley, Consultant (Allen & Overy LLP)

Update on developments in banking and finance law and practice in the last six months.

Registration and buffet lunch will take place from midday; the seminar commences at 12.30pm.

Key contacts

If you require advice on any of the matters raised in this document, please call any of our Litigation and Dispute Resolution partners, your usual contact at Allen & Overy, or Sarah Garvey.

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