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Review

EDITORIAL

1 October 2015 marks a significant date for legal developments. First, the rules relating to the new Financial List, Financial Markets test case scheme, and the Short and Flexible Trials Pilot Schemes come into effect. Secondly, various CPR changes are introduced including a new jurisdictional "gateway" in respect of breach of confidence or mis-use of private information claims. Thirdly, the Hague Convention on Choice of Court Agreements comes into force between Member States and Mexico. Fourthly, the new class action regime introduced by the Consumer Rights Act 2015 also comes into force. This new regime facilitates collective proceedings in the Competition Appeal Tribunal (the **CAT**) for breaches of competition law. Changes include the introduction of a U.S. style "opt-out" collective claim for UK claimants and the removal of the current restriction that a CAT collective action must be a "consumer claim". The CAT will also now be able to make aggregate awards of damages, collective settlement orders and grant injunctions. We assess the potential impact of these developments.

In this edition we also cover a number of decisions relevant to the drafting and interpretation of commercial contracts. We analyse the decision of Mr Justice Edwards-Stuart in *Portsmouth City Council v Ensign Highways*. In this case the judge rejected an argument that there was an implied duty of good faith when exercising discretion under a service points regime in a long term PFI contract, despite the existence of good faith obligations in other parts of the contract. We also consider *Bunge SA v Nidera NV* in which Lord Sumption provided guidance on the interplay between contractual damages clauses and common law principles.

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Contents

Class actions

THE NEW UK CLASS ACTION REGIME – AN OVERVIEW

There has been considerable speculation as to whether the new class action regime introduced by the Consumer Rights Act 2015 (the **CRA**), which facilitates collective proceedings in the Competition Appeal Tribunal (the **CAT**) for breaches of competition law, will lead to a surge of U.S.-style class actions in the UK. The new regime will come into force on 1 October 2015 and new CAT Rules have now been laid before Parliament. The most significant changes introduced by this new regime are as follows:

- The CAT can hear collective proceedings and make collective settlement orders.
- A U.S.-style "opt-out" collective claim will be possible for claimants within the UK.
- A collective action can now be brought by someone who "*will fairly and adequately act in the interests of class members*" rather than just certain specified bodies.
- The current restriction that a CAT collective action must be a "consumer claim" will be removed, allowing businesses to be part of a collective action.
- The CAT can hear stand-alone claims as well as "follow-on" claims.
- The CAT can grant injunctions.
- There is a fast track procedure for smaller claims.
- Limitation will be brought into line with the High Court, with a transitional period.
- The CAT will be able to make an aggregate award of damages rather than having to assess individually the amount of damages recoverable by each class member.

Claimants already have the ability to avoid the need to prove a breach of competition law by bringing a "follow-on" claim in the CAT based on an existing finding by the UK or European competition regulators. The above changes should provide further encouragement to bring collective actions in this context.

However, the retention of the "loser pays" principle leaves the claimants (or the class representative in collective actions) liable for the defendant's costs if the claim is unsuccessful and could put a brake on claims. The prohibition on exemplary damages and damages based agreements for collective actions will also have a chilling effect on claim volumes. Furthermore, significant uncertainties remain, in particular as to the circumstances in which the CAT will consider opt-out collective actions to be appropriate, the CAT's approach to class certification and how an aggregate award of damages could be calculated in circumstances where each individual claimant's loss might vary widely.

For these reasons, it remains to be seen whether the new regime will bring a flood of class actions, or whether claimants will wait for the further changes set out in the EU Damages Directive, which will be implemented in the UK by the end of 2016. This should improve the position of claimants still further, including by introducing a rebuttable presumption of harm where there has been a regulatory finding of a cartel infringement, and giving the court or tribunal the power to estimate loss where it is excessively difficult to prove the amount of loss.

Basis of claims

Claims can be brought by any person who has suffered loss or damage, including both consumers and businesses. Claims will be based on:

- an alleged infringement of competition law (referred to as "stand-alone cases"); or

- a competition law infringement decision of the Competition and Markets Authority (**CMA**), the CAT (on appeal from the CMA) or the European Commission (referred to as "follow-on cases").

The relevant competition law infringements are agreements which prevent, restrict or distort competition within the UK or the EU, or abuse of a dominant position affecting trade within the UK or between EU member states.

The CAT regime

Currently, stand-alone cases cannot be brought in the CAT and must be brought in the High Court. This will change from 1 October 2015, and the CAT will have jurisdiction to hear stand-alone cases. In follow-on cases (currently and under the new rules) the CAT is bound by an infringement decision of the CMA, the CAT or the European Commission once it has become final.

Follow-on cases are limited to the infringements found by the regulator, and the CAT then only needs to decide the issues of causation (which is likely to be critical in many cases) and quantification of loss. In addition, in both follow-on and stand-alone cases, the CAT is bound by findings of fact made by the CMA in the course of conducting an investigation which is relevant to an issue in the proceedings, unless the CAT directs otherwise. Findings of fact which are directly relevant to a decision as to infringement are normally regarded as binding, but the CAT may direct that a peripheral or incidental finding of fact is not binding.

The new procedures

The CRA will come into force on 1 October 2015. The regime created by the CRA will be complemented by new CAT Rules, including a section dealing with collective proceedings. The new regime expands the jurisdiction of the CAT significantly.

The CAT now has the power to grant collective proceedings orders, and to grant collective settlement orders. This is the foundation of the CAT's new "class action" type jurisdiction.

The CAT will also be empowered to grant injunctions under the new regime, and a fast track procedure has been introduced for smaller, simpler claims. Under the fast track, a claim will be actively case managed through to a hearing within 6 months of its commencement. Notably, injunctions in fast track cases will not necessarily require a cross undertaking in damages. This is consistent with the legislative aim to make redress for competition claims quicker, cheaper and easier to obtain for private parties.

Procedure for claims

Collective proceedings are commenced by a proposed class representative filing a collective proceedings claim form with the CAT. The claims sought to be included in collective proceedings must "*raise the same, similar or related issues of fact or law*" in order for the CAT to make a collective proceedings order. In addition, they must be "suitable to be brought in collective proceedings", which requires the CAT to consider the costs and benefits of continuing the collective proceedings, the size and nature of the class, whether it is possible to determine for any person whether they are a member of the class, and other factors set out in the CAT rules. The collective proceedings can also combine existing CAT proceedings, with the consent of the claimants in those proceedings.

The CAT, not the claimants, decides the description of the class of persons whose claims are eligible for inclusion in the collective proceedings. Two types of collective proceedings can be brought:

- Opt-in proceedings, on behalf of each class member who opts in by notifying the class representative that their claim should be included in the proceedings; and
- Opt-out proceedings, on behalf of each member of the defined class domiciled in the UK who opts out by notifying the class representative. Class members who are not domiciled in the UK must opt in to be included in the proceedings.

In determining whether the collective proceedings should be opt-in or opt-out, the CAT will take into account the strength of the claims and whether it is practicable for there to be opt-in collective proceedings, having regarding to the estimated amount of damages that individual class members may recover. Opt-out

collective proceedings, which are a feature of U.S. class actions, were not previously permitted in the UK.

Under the new regime, the limitation rules have been relaxed, subject to a transitional phase. The previous two-year limitation period for CAT claims has been brought into line with the High Court. However, for claims arising before 1 October 2015 the previous limitation regime will apply, which will reduce the impact of the new regime at the outset.

Resolution of claims

A judgment or order given in the collective proceedings is binding on all parties represented by the class representative. There is a right of appeal to the Court of Appeal on a point of law. If a claim is successful, the CAT can make an aggregate award of damages without first assessing the amount of damages recoverable in respect of each individual class member. In practice, the method of calculating damages will need to be considered in the early stages of a case with the assistance of economists and/or accountants, and this may determine whether opt-out proceedings are appropriate. Unlike in the U.S., the CAT cannot award exemplary damages or "treble damages". Damages-based agreements (where the claimants' lawyers are paid a proportion of the damages awarded to the claimants) will be unenforceable in relation to opt-out collective proceedings. In contrast, similar arrangements are common in U.S. class actions. The purpose of this rule was to avoid a 'litigation culture' in the UK, provide a safeguard against weak claims or speculative litigation, and avoid creating an incentive for claimant lawyers to focus on the largest cases. However, 'no win, no fee' conditional fee agreements and after the event insurance are permitted.

In the U.S., the usual rule that each side bears its own costs, even if the claim is unsuccessful, removes a significant disincentive to bringing class actions. However, under the new UK regime, the usual "loser pays" rule is retained. If a claim is unsuccessful, the claimants in opt-in proceedings will usually be liable for the defendants' costs, and the class representative bears the costs risk.

Collective settlements are possible for both opt-in and opt-out proceedings. These are subject to approval of the settlement by the CAT in the case of opt-out proceedings.

EU Damages Directive

The EU Damages Directive (2014/104/EU) applies to claims relating to infringements of competition law and must be implemented in the UK by 27 December 2016. The Directive will assist claimants in collective proceedings in the CAT, and provided that limitation issues do not arise, potential claimants may choose to wait for the UK implementing legislation before commencing their claims. In particular, it requires EU Member States to ensure that a final infringement decision of a national competition authority or review court of any EU Member State is deemed to be "*at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties*".

Further, the Directive provides for a rebuttable presumption that cartel infringements cause harm, and national courts must have the power to estimate the amount of harm caused if it is practically impossible or excessively difficult precisely to quantify the harm suffered. However, claimants cannot recover compensation to the extent that they have passed on to their customers any overcharging resulting from the infringement by the defendant.

COMMENT

Although they have not yet been tested, the new class action rules will change the litigation landscape for potential claimants and their lawyers, as well as for defendants. It will be easier for claimants to bring collective actions for breaches of competition law, share and minimise their legal fees, and benefit from a successful result or settlement. Those who have breached competition law can expect an increased likelihood of a class action being brought against them, with increased liability arising from opt-out collective proceedings. Firms conducting internal investigations or being investigated by regulators for breaches of competition law will also need to consider whether

taking a step during the investigation might harm their position in any future class action.

However, the new rules provide some important controls in relation to the award of damages and costs which should prevent the rapid growth of class action litigation, as has occurred in the U.S. Much will depend on how broadly or narrowly the class is defined, the merits of each claim, and the risk appetite of defendants either to settle or defend the case to its conclusion. The CAT's first few decisions will be vital in shaping the development of UK class action practices and determining whether claimants will seek to bring increasingly large and complex cases.

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See page 33 for details of our client seminar on these changes.

Conflict of laws

IS ONE ENGLISH CREDITOR ENOUGH FOR ENGLISH COURT TO SANCTION SCHEME OF ARRANGEMENT FOR A FOREIGN COMPANY?

Re *Van Gansewinkel Groep BV & ors* [2015] EWHC 2151 (Ch), 22 July 2015

The English court has jurisdiction under Regulation (EU) 1215/2015 (the **Recast Regulation**) to sanction a scheme of arrangement for a foreign company under the Companies Act 2006 (the **CA**). The decision of Snowden J is significant, as it was held that the domicile of just one creditor in England and Wales may be enough to meet the "sufficient connection" with the jurisdiction test, for the purposes of sanctioning a scheme of arrangement. The scheme of arrangement regime is not available in many countries, making England an appealing place to seek such a scheme.

The court considered whether Regulation (EC) 1346/2000 (the **Insolvency Regulation**) or the Recast Regulation restricted the English courts' jurisdiction to approve a scheme of arrangement for a foreign company. For the Insolvency Regulation, the court held it did not impose any such limitation.

Previous position: 50% of creditors domiciled in England

Under the predecessor to the Recast Regulation (Council Regulation (EC) 44/2001), the English court had determined that it jurisdiction to sanction a scheme of arrangement for a company that did not have its centre of main interest (**COMI**) in England, or any establishment or significant assets in England, as long as: (i) there was exclusive English jurisdiction conferred by the dispute resolution provisions of the finance documents affected by the proposed scheme; and (ii) at least 50% of the creditors under those finance documents were domiciled in England.[1] In *Van Gansewinkel* the question was whether the English court had jurisdiction to sanction such a scheme under the Recast Regulation.

Van Gansewinkel Group scheme

The Van Gansewinkel Group (the **Group**) consisted of waste disposal companies incorporated, and carrying on their business, in Belgium and the Netherlands. Under the terms of the Group financing arrangements, each Group company had agreed to the exclusive jurisdiction of the English courts for any disputes relating to the financing.

The Group suffered financial difficulties and, following restructuring negotiations, proposed to re-organise by way of scheme of arrangement under English law. The proposal was approved by the requisite number of creditors and the English court's sanction of the scheme was sought. The Group submitted that the scheme was necessary to avoid liquidations in Belgium and the Netherlands, as there was no equivalent procedure available under the laws of those Member States. Could the English court sanction the scheme?

Can the English court sanction a scheme for a foreign company?

Applying *Re Rodenstock*, the court found the creditors affected by the scheme could be regarded as "defendants" for the purpose of Article 8(1) of the Recast Regulation.[2] The court held that, on the assumption that the Recast Regulation applies, Article 8(1) would potentially be engaged, provided that: (i) at least one creditor is domiciled in England and Wales; and (ii) it is expedient to hear the "claims" against all the other scheme creditors together with the "claim" against that creditor.

As the number of creditors affected by the scheme domiciled in England was deemed "not insignificant", the court held that the second limb of the test was also

satisfied and therefore it was entitled to regard all creditors as falling under the jurisdiction of the English court under Article 8(1), for the purposes of exercising scheme jurisdiction.

The court rejected an alternative argument concerning the exclusive jurisdiction agreements in the financing agreements. Although the borrower had submitted to exclusive jurisdiction, the creditors affected by the scheme had not. Therefore, without more, such a clause would not provide a sufficient connection with the jurisdiction of England and Wales.

COMMENT

Snowden J's decision has clarified several points in relation to schemes of arrangement in the context of the Recast Regulation:

(1) There is now English authority for the proposition that the Recast Regulation does apply to schemes of arrangement of non-UK domiciled companies before English courts (ie it is not covered by the insolvency exclusion).

(2) A single UK domiciled scheme creditor may be sufficient to confer jurisdiction on the English courts under Article 8(1) of the Recast Regulation, if the creditor's holding is "*not insignificant*", though the court did not address whether there was a percentage threshold to meet this requirement. The test put forward in *Re Rodenstock* requiring 50% of the creditors to have a domicile in the jurisdiction was not followed in *Van Gansewinkel*, and so it remains to be seen how the court will apply its jurisdiction in future cases.

(3) An exclusive jurisdiction clause in a financing agreement in its usual form (ie with only the borrower(s) submitting to jurisdiction) will not, without more, be sufficient to bring a proposed scheme within the jurisdiction of the English court for the purpose of a scheme of arrangement, as it does not bind the creditors to the jurisdiction. However, such a clause may be indicative of, and help to prove, a "sufficient connection" with the jurisdiction.

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[1] *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch).

[2] Article 8(1) (Article 6(1) of the old Brussels Regulation) provides that a person domiciled in a Member State may also be sued where he is one of a number of defendants "in the courts for the place where any one of theme is domiciled provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".

Contract

PFI CONTRACTS: ARE SERVICE POINTS REGIMES SUBJECT TO GOOD FAITH?

Portsmouth City Council v Ensign Highways [2015] EWHC 1969, 14 July 2015

The High Court held that there was no implied duty on a public body to act in good faith when exercising its discretion under a service points regime in a long-term PFI contract. It had only to exercise its discretion honestly and on proper grounds, and not in a manner that was arbitrary, irrational or capricious. Service points regimes are a common feature of long-term PFI contracts and this case is the second (following *Mid Essex Hospital Services NHS Trust v Compass Group* [2013] BLR 265) to make clear that no obligations of good faith will be implied into their operation.

In 2004, Portsmouth City Council (**PCC**) entered into a 25-year public finance initiative contract (the **PFI Contract**) with Ensign Highways Ltd (**Ensign**) for the long-term rehabilitation, maintenance and operation of PCC's highway network. The PFI Contract was split into two phases. During the first five years Ensign was required to bring the highway infrastructure up to a defined standard, and in the second 20-year phase Ensign was to be responsible for the maintenance and cyclical renewal of the highway.

Mechanism for penalising breaches

The PFI Contract contained a mechanism which allowed PCC to penalise Ensign for breaches. The mechanism allowed PCC to award service points for certain "default events" by Ensign. The Contract specified a "Maximum Event Value" of between 1 and 10 points for each such default event. If Ensign accrued certain numbers of service points in a 12-month period PCC could take certain actions, up to and including a right for PCC to terminate the PFI Contract if Ensign accrued 250 service points in a 12-month period.

Up until the end of 2013, the service point regime operated to both parties' satisfaction. PCC treated the Maximum Event Value as a maximum, and awarded less than the maximum number of service points for less serious examples of particular default events. PCC also assessed and awarded service points on a monthly basis. However, from the beginning of 2014, PCC began awarding the Maximum Event Value for every default. It also stored up and "ambushed" Ensign with many months' worth of accrued service points. Ensign referred PCC's new practices in awarding service points to expert determination, which found that PCC had acted in bad faith, without mutual co-operation and unfairly. PCC applied to the High Court for declarations on the proper interpretation of its rights and obligations with regard to the award of service points under the terms of the PFI Contract.

The High Court faced two questions. First, whether the service points mechanism gave PCC a meaningful discretion in the awarding of service points. Second, to what extent was PCC constrained in exercising that discretion?

Was there a discretion in awarding service points?

This question turned on whether the heading "Maximum Event Value" connoted the top of a range of service points that could be awarded for a particular default, or a fixed number of service points to be awarded for each type of default. Edwards-Stuart J followed the approach to the interpretation of a contract in *Rainy Sky v Kookmin Bank* [2011] 1 WLR 2900, namely to look for and adopt the interpretation that most accords with commercial common sense. Applying that approach, he found that the heading "Maximum Event Value" connoted the top of a range of service points that PCC had a discretion to award, and were not fixed tariffs.

Accordingly, the service points regime gave PCC a meaningful contractual discretion.

Should the discretion be exercised in good faith?

Ensign argued that PCC must exercise that discretion in good faith. Ensign relied on clause 44 of the PFI Contract, which was concerned with the parties' obligations in assisting PCC to comply with its "best value" duty under s3 of the Local Government Act 1999. That clause required PCC and Ensign to "deal fairly, in good faith, and in mutual co-operation with one another and Interested Parties". Ensign argued that this contractual duty of good faith applied to all of the parties' dealings under the PFI Contact. It also argued that the long-term nature of the PFI Contract put it within the class of relational contracts identified by Leggatt J in *Yam Seng Pte Ltd v International Trade Corp* [2013] 1 All ER (Comm) 1321, into which a duty of good faith may be implied.

PCC contended there is no general duty of good faith in English contract law and that there was nothing in the PFI Contract that stated that the good faith obligation had a wider ambit than clause 44. PCC also noted that there were further express duties of good faith or obligations to use reasonable endeavours in other clauses of the PFI Contract, indicating that the parties had not intended there to be any overarching duty to deal in good faith in all aspects of the PFI Contract, but only in certain specific clauses. It argued that the exercise of its discretion was only constrained by an implied term that it must "be taken on proper grounds and for proper purposes, and without dishonesty or deceit."

Edwards-Stuart J agreed with PCC that the obligation to act in good faith in clause 44 of the PFI Contract did not apply to the rest of the PFI Contract. In doing so he relied on the decision of the Court of Appeal in *Mid Essex Hospital Services NHS Trust v Compass Group* [2013] BLR 265, which declined to read a more widely drafted contractual obligation to act in good faith as applying to specific provisions of a PFI contract concerning a comparable service points regime, and declined to apply the *Yam Seng* analysis to that PFI contract.

However, Edwards-Stuart J declined to find that the term to be implied in relation to the exercise of PCC's discretion to award service points was that contended for by PCC. Instead he applied the line of authorities culminating in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] 1 Lloyd's Rep 558 (that had also been considered by the Court of Appeal in *Mid Essex*) to find that the discretion conferred on PCC was constrained by an implied term that it would "act honestly and on proper grounds and not in a manner that is arbitrary, irrational or capricious".

COMMENT

Service points regimes (often referred to as service default points or service deficiency points) are a common feature of long-term PFI contracts and we now have two major decisions on their application. In *Mid Essex* the Court of Appeal declined to imply a term into the clause, empowering the NHS Trust to award service points on the basis that it interpreted the clause as setting out precise rules for calculating how many service points were incurred, and therefore there was no meaningful exercise of discretion; the NHS Trust either applied the contractual provisions correctly or it did not and there was no need to imply a term to give the clause effect. By contrast, Edwards-Stuart J in this case found that the relevant service points regime did confer discretion on PCC, and that the exercise of that discretion was constrained by the standard implied term from case law as to the exercise of a contractual discretion. In both cases the courts declined to find that the relevant public authority was under any obligation of good faith. The case law is now reasonably clear that:

(a) where a service points contractual regime is precisely set out in the relevant PFI contract, no term need be implied as to the operation of that regime, as there is no true discretion whose exercise needs to be constrained;

(b) where the operation of a service points regime confers a meaningful discretion on the public body, a term will be implied into the PFI contract that the discretion must be exercised honestly, and not arbitrarily, irrationally, or capriciously; and

(c) a duty of good faith is unlikely to be read into the operation of a service points regime unless the express words of the contract are clear that the public body must act in good faith in the exercise of its obligations under that regime.

By their nature PFI contracts set out a long-term relationship between two parties in a significant degree of detail. The interpretation of a PFI contract will dictate whether and the extent to which investors will receive a return on their capital investment in an asset; lenders will be repaid amounts they advanced to build or renew an asset and service providers will be paid for their services. These cases on service points can be equally applied to the exercise of other discretions under PFI contracts.

Before the High Court, Ensign sought to rely on evidence that had been given by a number of employees of PCC in the expert determination proceedings as to the practical operation of the contract. It argued that, although evidence as to the performance of a contract is ordinarily inadmissible as an aid to its interpretation, such evidence ought to be admitted here as evidence of what would constitute commercial common sense in the operation of such contracts. The evidence that PCC employees had operated the service points regime on the flexible basis Ensign contended for was ultimately one factor in the Court's decision that the heading "Maximum Event Value" connoted the top of a range of service points and were not fixed tariffs. Whilst Mr Justice Edwards-Stuart was cautious in relying on this evidence, his judgment may be a useful tool for parties in interpretation disputes where their counterparty has changed position and is arguing for the contract to be interpreted in a manner contrary to how it has performed it to date.

Practical consequences

The conclusions that investors, lenders and public bodies that are (or about to become) parties to PFI contracts should draw from this new case law are set out below:

(a) normal rules of contractual interpretation continue to apply and views of Lord Hoffmann in *AG for Belize v Belize Telecom* [2009] UKPC 10 amongst other cases were referred to – that is, interpretation involves discerning the meaning that the contract in question would convey to a reasonable person having all the background knowledge which would reasonably be available;

(b) the terms of a contract are extremely important and the courts will be reluctant to interpret them in a manner that departs from the intention of the parties or commercial/business common sense. It is critical therefore that the service points regime is analysed from both a legal and commercial perspective;

(c) it is important for a service points regime to be drafted properly. The judge criticised the drafting as the schedule in question did not provide for a timetable in accordance with which service points may be issued. The lack of one in this case allowed PCC to award service points cumulatively so that they could be imposed in a manner which proved to be overwhelming for Ensign;

(d) if the PFI contract contains a negotiated set of points awardable for each default, it is important to clearly state whether the points awardable for each default are in the nature of a fixed tariff or a range capped at the specified number and if a maximum cap how particular events would result in deductions at below the maximum;

(e) if the intention of the parties is to apply an umbrella duty of good faith in all dealings between the parties (or in the application of a performance regime), then the contract must explicitly state this so that courts will otherwise refrain from implying such a duty into cherry-picked clauses; and

(f) the court also criticised the drafting of the disputes procedure to be followed in relation to default events that were not specifically assigned a Maximum Event Value or when different authorities are empowered to award a quantum of service points. It is imperative that such procedures be detailed and unambiguous as otherwise the court will interpret them to accord with commercial business sense, which may not align with the original intention of the parties.

Clearly the overarching lesson for PFI contractors contracting with public sector bodies is that they should

be aware that if a right is reserved contractually to the public sector to do something, then they should price bids and ensure they have drafted contractual provisions on the assumption that those rights will be exercised. Warm words of partnership and collaboration during a bid process count for very little in the cold light of a court room.

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INNOCENT MISREPRESENTATION: DAMAGES ONLY AVAILABLE IF RESCISSION IS POSSIBLE TOO

Geoffrey Alan Salt v Stratstone Specialist Ltd [2015] EWCA Civ 745, 16 July 2015

In a claim for innocent misrepresentation, the Court of Appeal has held that a court will only be able to award damages under s2(2) of the Misrepresentation Act 1967 as an alternative remedy to rescission if rescission itself is also available as a remedy. This ruling brings some clarity in an area where there have been inconsistent lower court rulings on the issue. The Court of Appeal has further confirmed that a lapse of time may serve as a bar to rescission, but only where the lapse of time is reasonable such that it would be inequitable in all the circumstances to grant the rescission. What is reasonable will require close attention to the specific facts of the case.

This case concerned the interpretation of s2 of the Misrepresentation Act 1967 (the **Act**). s2(2) empowers a court to award damages in lieu of rescission as a remedy for innocent misrepresentation. A court also has the power under s2(1) of the Act to award damages for fraudulent or negligent (ie non-innocent) misrepresentation.

A "brand new" car

In September 2007, Geoffrey Alan Salt (**Mr Salt**), the claimant, bought over the telephone a luxury car from Stratstone Specialist Ltd (**Stratstone**), which described the car as "brand new".

A number of defects began to emerge following Mr Salt's purchase of the car and in September 2008, Mr Salt tried to return the car and obtain a refund. Stratstone refused and in March 2009 Mr Salt started proceedings in the Milton Keynes County Court complaining that the car was not of merchantable quality and seeking damages. During disclosure it was revealed that the car had been manufactured in 2005 (rather than 2007) and was not in fact brand new, as described by Stratstone; rather it had, at the point of sale, no registered owner. Mr Salt amended his particulars of claim in May 2011, claiming misrepresentation and rescission.

Lower court proceedings

At first instance, the county court held that rescission of the contract was not possible because the parties could not be put back into their pre-contractual positions. This was because: (i) the car had now been registered and could not be returned as an unregistered car; (ii) a considerable amount of time had elapsed since the sale; and (iii) the court did not have sufficient evidence to

calculate the amount repayable taking into account the depreciation in the value of the car. Instead, the Court awarded damages of GBP 3,250. This award represented the difference between the value of the car had it in fact been brand new and the actual value of the car at the time of purchase, together with GBP 250 in damages for the inconvenience the defects caused to Mr Salt.

On appeal, His Honour Judge Charles Harris QC overturned the County Court decision holding that rescission was possible and ordering Stratstone to repay the purchase price in return for the car. Stratstone appealed to the Court of Appeal.

Court of Appeal

Damages under s2(2) of the Act

As a preliminary matter, the Court of Appeal held that a court will only have the power under s2(2) to award damages in lieu of rescission as a remedy for innocent misrepresentation if rescission itself is also available as a remedy (ie it is possible to put the parties back into their pre-contractual positions). Previously there had been no Court of Appeal authority on this point.

Was rescission available?

The Court of Appeal held that it was possible to restore the parties to their pre-contractual positions because:

(1) registration of the car is a legal concept which did not physically change the car;

(2) there had not been a reasonable lapse in time as to make rescission inequitable, mainly because Mr Salt was only made aware of Stratstone's misrepresentation during document disclosure in the first instance proceedings; and

(3) Stratstone could be compensated for the depreciation in the value of the car. The onus was on Stratstone to assert and prove its entitlement to compensation, which it did not do.

Rescission as the normal remedy

Delivering the lead judgment, Lord Justice Longmore (citing, with approval, the decision in *British and Commonwealth Holdings v Quadrex* [1995] CLC 1169, 1199-1200) noted that rescission is the normal remedy for misrepresentation and should be awarded if possible, particularly in circumstances in which a defendant makes no attempt to prove it had reasonable grounds to believe its representation was true.

Stratstone's appeal was dismissed.

Lapse of time: what is reasonable?

Mr Justice Roth commented that a lapse of time will only operate as a bar to rescission in circumstances where the lapse of time is reasonable such that it would be inequitable in all the circumstances to grant rescission. Determination of what is reasonable will require close attention to the facts of the case.

COMMENT

This case clarifies that, in a claim for innocent (as opposed to fraudulent or negligent) misrepresentation, damages under s2(2) of the Act may only be awarded, as an alternative remedy to rescission, where rescission itself is also available (ie where it is possible to put the parties back into their pre-contractual positions). There has been a divergence of views on this in lower courts.[1]

The case confirms that rescission is the normal remedy for misrepresentation and that, where possible, a court should award this remedy rather than damages. In deciding whether to award damages in lieu of rescission under s2(2), the court will favour the remedy that is most equitable, exercising a broad discretion which includes considering the likely effect on both parties of permitting the contract to continue.

Where rescission is available, "practical justice" may entitle a representor (in this case Stratstone) to compensation for the depreciation in the value of property returned as a result of the rescission (in this case the car). The onus is on the representor to assert and prove such an entitlement.

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[1] See, for example, the decision in *Alton House Garages (Bromley) Ltd v Monk* (1981) (Unreported) in which the court held that damages under s2(2) were not available if rescission was barred, and the decision in *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All E R 573, in which the Court took the contrary view.

TIME AND METHOD FOR CALCULATING DAMAGES

Bunge SA v Nidera BV [2015] UKSC 43, 1 July 2015

The Supreme Court has clarified how damages are to be calculated when a party wrongly repudiates a contract but, in doing so, does not cause the other party loss because of events happening after the repudiation was accepted. It has also given useful guidance on how to interpret clauses which specify how damages are to be calculated when such clauses do not provide for all possible situations. In particular, it has re-stated the rule that damages should normally take account of events which happen after breach of contract, and that common law provisions about how to calculate damages should be applied when contracts are silent about how to deal with specific circumstances.

Nidera BV (**Nidera**) contracted with Bunge SA (**Bunge**) to buy 25,000 tonnes of Russian wheat, to be shipped in August 2010. The contract incorporated GAFTA Form 49, which was a standard form sale contract for grain and food.

The Contract/GAFTA Form 49

GAFTA Form 49 contained two key relevant clauses:

Clause 13 PROHIBITION "*In case of prohibition… by or on behalf of the country of origin of the goods… any such restriction shall be deemed by both parties to apply to this contract and to the extent of such total or partial restriction… this contract or any unfulfilled portion thereof shall be cancelled*."

Under clause 20 a party which was not in breach of contract was given the right to sell or buy the wheat, as the case might be and thereby establish a "default price". Disputes about the default price were to be settled by arbitration under which "*damages… shall be based on, but not limited, to the difference between the contract price and either the default price… or upon the actual or estimated value of the goods on the date of default*".

On 5 August 2010, Russia introduced an embargo on the export of wheat, to run from 15 August 2010, and on 9 August 2010 Bunge told Nidera of the embargo and purported to cancel the contract. Nidera treated the cancellation as a repudiation which they accepted on 11 August 2010. On the next day, Bunge offered to reinstate the contract on the same terms as before, but Nidera refused and began arbitration, claiming USD 3,062,500 – this was the agreed market price of the promised cargo on 11 August 2010.

The first arbitral tribunal held that there had been a repudiation because Bunge's cancellation had been premature. The embargo might have been lifted before the time for delivery under the contract was reached. However, the tribunal held that Nidera had suffered no loss because, in the event, the embargo was never lifted. This meant that the contract would inevitably have been

terminated anyway, in accordance with its terms, without the sellers incurring any liability.

On appeal, the GAFTA Appeal Board accepted that, if Bunge had not repudiated on 9 August 2010, the contract would nonetheless later have been cancelled because of the embargo. But it reversed the first tribunal's decision, and awarded Nidera the damages claimed on the grounds that they represented the difference between the contract, and market, prices on 11 August 2010, ie when Nidera accepted the repudiation. The appeal board considered this was the approach required by clause 20.

Andrew Smith J subsequently gave permission to appeal against the award and the case was considered in due course by the Court of Appeal. The Court of Appeal also held that normal common law rules were displaced by clause 20, and that the buyers were therefore entitled to damages of USD 3,062,500, based on clause 20.

Supreme Court: date for establishing market price

In his judgment, Lord Sumption noted that "an accepted renunciation gives rise to particular problems when it comes to assessment of damages". The starting point for any damages award is to put an injured party "so far as money can do it…in the same situation as if the contract had been performed" (*Robinson v Harman* [1848] 1 Exch). In a contract for sale where there is an available market, the damages can normally be fixed by comparing the contract price agreed between the parties, with the cost of comparable goods or services in the market at, or as soon as reasonable after, the date the contract was breached.

However, Lord Sumption noted that determining a date for establishing the "market price" was not straightforward where repudiation is accepted before the time for delivery of the relevant goods or services has arrived. The *prima facie* approach here is that, where an available market exists, the appropriate date is the contractual delivery date – ie a date after the repudiation (though the buyer necessarily cannot know, at the time of repudiation, what the later market price will be), unless the buyer should have mitigated by going to market earlier.

Events following repudiation should be taken into account

A further question arises about whether, and if so how, events following repudiation should be taken into account where those events would have reduced the value of performance – even without a breach – had the contract continued in being. This question had been answered by *The Golden Victory* [2007] 2 AC. If events after repudiation showed that a contract would not, in fact, have been performed, or that the value of any performance would have been reduced, this had to be reflected in any award of damages.

Contractual damages clause v common law

In this case, where there was a clause dealing with damages, it was "*inherent in the clause that it* [might] *produce a different result from the common law*… [but] *a damages clause may be assumed, in the absence of clear words, not to have been intended to operate arbitrarily, for example by producing a result unrelated to anything which the parties can reasonably have expected to approximate to the true loss*". Thus, such bespoke clauses must also be construed in accordance with rational commercial expectations. Further, "*such clauses are not necessarily to be regarded as complete codes for the assessment of damages… it is a question of construction whether… it must have been intended to do so exhaustively*".

In this case, clause 20 did not provide for what was to happen where subsequent events intervened (for example, an embargo) such that the contract would never have been performed. As it was not a comprehensive code dealing with all questions of non-performance, it did not necessarily oust common law principles in all cases. Further, it provided that damages were to be payable "based on, but not limited to" the difference between the contract and market prices. It therefore did not exclude "*every other consideration which* [might] *be relevant to determine the injured party's actual loss*". It was thus consistent with a finding that an event after repudiation meant that the same loss would have been suffered even if there had been no repudiation.

The Supreme Court thus concluded that Nidera had suffered no loss as a result of the repudiation, because of the later embargo on wheat exports.

COMMENT

Lord Sumption referred in his judgment to the "so-called "breach-date" rule". This is the commonly made, but potentially highly misleading, statement that damages for breach of contract are based on the loss as computed at the date the contract was breached. Such a rule, if it existed, might massively under- or over-compensate an innocent party. Such an approach works reasonably well for commodities where the party not in breach has ready access to identical goods etc – for example, quoted shares. It does not necessarily work at all for unique or highly illiquid goods such as buildings or large and complex equipment. The correct date for assessing damages is, ideally, the date judgment is given, or as close to that date as reasonably practical.

In this case, the Supreme Court firmly upheld the common law principle, which has existed – not always without challenge – since at least the nineteenth century, that damages must be assessed with the benefit of knowledge of events which happened after the breach. This is consistent with the compensatory principle that underpins damages. The basis for damages is to try to put an innocent party in the position he would have been in if a contract had been performed. That may mean that no damages are awarded where, as here, a breach proved, in the event, not to have caused loss.

In this case, even if the seller had not repudiated the agreement, it would never have been in a position to perform its side of the bargain once the date for performance had arrived – the Russian embargo would have made performance illegal. Thus, the buyer would have been left with nothing, and no claim, even if the seller had not wrongfully repudiated.

The Supreme Court's judgment – and the chequered findings in lower courts and tribunals – suggests that there was some difficulty reconciling the contractual provision for damages with the requirements which would apply under common law. However, the Supreme Court found sufficient areas of silence, and sufficient scope for latitude in the contractual basis for calculating damages, in clause 20 to allow the common law presumption to prevail.

As a general point, a party faced with an apparent repudiation is often in a difficult position. First it has to decide whether the other party is indeed in fundamental and wrongful breach. If so, it must decide whether to accept the repudiation and, if appropriate, seek damages, or whether to refuse to accept the repudiation and continue with any remaining performance obligations of its own. If it wrongly decides that a contract has been repudiated, and so decides not to continue with its own performance obligations, it may itself risk an action for breach of contract. In this case, the difficulty was compounded by the fact that the buyer failed to take sufficient account of the possibility that the seller could repudiate without liability. This was perhaps understandable, given that the application of clause 20 was uncertain.

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BUYER'S LOSS CAUSED BY PRE-SALE MISSELLING OF INSURANCE NOT COVERED BY INDEMNITY

Andrew Wood v Sureterm Direct Ltd & Capita Insurance Services Ltd [2015] EWCA Civ 839, 30 July 2015

The Court of Appeal, overturning a High Court decision, held that an indemnity in an agreement for the purchase of shares in an insurance broker did not allow the buyer to recover loss due to customer compensation, caused by misselling insurance, in the absence of claims or complaints by customers to the Financial Services Authority (**FSA**). An interesting judgment for those involved with drafting such indemnity clauses in share sale agreements.

After purchasing the shares of an insurance broker (the **Company**), Capita found that, prior to the purchase, the price of some policies sold by the Company had risen between quotation and sale, leading to customers paying more than they had expected. Capita reported its findings to the FSA and was told to pay compensation to customers affected by this misselling. Capita paid GBP 1.35 million (less interest and costs) in compensation.

Capita sought to recover the compensation from the appellant seller of the Company under an indemnity clause in the share sale agreement. The clause was an undertaking from the seller to indemnify Capita against:

> "*…all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred, and all fines, compensation or remedial action or payments imposed on or required to be made by the Company following and arising out of claims or complaints registered with the FSA* […] *against the Company, the Sellers or any Relevant Person* […] *pertaining to any misselling or suspected misspelling* […]."

The issue was whether the indemnity applied to Capita's losses, given that they arose from the Company's referral of itself to the FSA and not as a result of a customer making a claim or registering a complaint. At first instance, Popplewell J found that a claim or complaint to the FSA was only a requirement to cover the losses enumerated in the part of the clause beginning "*all fines, compensation* […]" and therefore that the indemnity applied. Commercially, Popplewell J saw no good reason why the happenstance of what triggered an FSA investigation should determine a seller's obligation to indemnify. Mr Justice Popplewell supported his decision with some linguistic and syntactical points (eg the comma after "incurred" and the fact that the interpretation put forward by the seller would provide the tautologous "*claims* […] *arising out of claims*").

Natural construction

On appeal, Christopher Clarke LJ said that (contrary to Popplewell J's interpretation) on a natural construction of the clause, both categories of loss – that beginning "*all actions* […]" and that beginning "*all fines* […]" – were subject to the requirements that followed.

Nevertheless, he recognised that the exercise of construction was a unitary, iterative one, in which the court would look to see where different constructions led. A balance had to be struck between the indications given by the natural language used and the implications of rival constructions, and the court would be willing to depart from the natural construction if the alternative more accurately represented the parties' intentions.

Clause must specify against whom an indemnifiable action has to be made

The Court of Appeal noted under Popplewell J's interpretation of the clause, where there was an "action" by a customer not involving a claim or complaint registered with the FSA or other regulator, there would have been no part of the clause which specified against which entity that action must have been brought. Christopher Clarke LJ thought that the words "*arising out of claims or complaints registered with the FSA […]*

against the Company, the Sellers or any Relevant Person" were necessary in all cases, as this was the only way the scope of the indemnity was limited.

The Court of Appeal noted that on Popplewell J's construction, the words "*following and arising out of claims or complaints registered with the FSA* […] *against the Company, the Sellers or any Relevant Person*" would have been in effect surplus usage so far as claims and complaints against the Company were concerned. On the contrary construction (which the Court of Appeal preferred), the words fulfilled a function not provided for elsewhere, namely to delineate against whom the claim must be brought for the indemnity to apply.

Linguistic and syntactical points were relatively unimportant

In response to Popplewell J's point on the use of commas supporting his interpretation, Christopher Clarke LJ observed that there were no set rules for the use of the comma and, therefore, its erratic use could not be taken as any real guide to meaning. Similarly, the tautology caused by "*claims* […] *arising out of claims*" did not impugn his view of the natural interpretation; tautology in commercial contracts was not unknown, and inherently more likely where there was a degree of "verbal exuberance".

The buyer had an alternative route of recovery

From a commercial standpoint, Christopher Clarke LJ thought it was important that, in addition to the indemnity, the buyer had the benefit of two warranties, breach of which was highly likely as a result of the misselling or suspected misselling. The buyer's entitlement to recover was not dependent on the indemnity.

Furthermore, when viewed in the context of those other warranties, Christopher Clarke LJ thought it was not surprising that recovery under the indemnity be restricted in the way suggested by the seller. The fact that such a deal may have been a poor one from the buyer's perspective was not a significant consideration.

Buyer's losses not covered

The Court of Appeal concluded that the buyer's losses were not covered. All relevant factors considered, the natural construction was to be preferred. In order for the indemnity to have applied, any losses had to have been following or arising out of a claim against the Company or a complaint registered with the FSA.

COMMENT

This case follows recent case law on the process of interpretation, most notably *Arnold v Britton* [2015] UKSC 36 (June 2015 Litigation Review). As with *Arnold*, the process here was an iterative exercise – the Court of Appeal looked to see where different constructions led and how they fitted in with the other contractual provisions, what obstacles were met on the way and what results were reached. The coherence of the clause when read as a whole was important, and the Court of Appeal was reluctant to adopt an interpretation that created superfluous language. In producing such a result, the court was willing to accept the erratic use of the comma and an element of tautology. Commercial context remains important, although – again following *Arnold* – it was acknowledged that it was not the court's role to improve a businessman's bad bargain.

The decision also provides an interesting comparison to *PA(GI) Ltd v GICL 2013 Ltd & anr* [2015] EWHC 1556 (Ch) (July 2015 Litigation Review) where the Companies Court decided that misselling liabilities for PPI remained with the seller of an insurance business transferred pursuant to a business transfer scheme.

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Disclosure

E-DISCLOSURE

In the matter of Atrium Services Ltd: In the matter of Kimberley Scott Services Ltd sub nom (1) Robert Derek Smailes (2) Stephen Blandford Ryman v (1) John McNally (2) George McClean [2015] EWHC 1755 (Ch) Ch D (Companies Ct), 22 June 2015

The claimant breached its disclosure obligations because relevant documents for disclosure were missed during the process of scanning hard copy documents, and then running keyword searches on them. The ruling is relevant to the English courts' approach to the use of modern technology to cope with vast quantities of potentially disclosable documents. The use of such technology, whilst acknowledged not to be "fail safe", has been accepted by courts in other jurisdictions (and by some English judges) as being a proportional way of limiting costs associated with disclosure.

Various issues arose during the disclosure process in this case. After the claimants initially provided an inadequate list of documents, Henderson J ordered that a fresh search be conducted. He also penalised the claimants in costs for embarking on a unilateral approach to disclosure, without sufficient collaboration with the defendants.

Following this order, new advisors for the claimants proposed to the respondents' advisors that an e-disclosure provider (Unified) be used to scan (using Optical Character Recognition – **OCR**) and upload the hard copy documents, which involved "millions" of pages, to their platform for scanning and coding. It was agreed that Unified would undertake this task.

The disclosure exercise was eventually concluded and a new list (the **List**) produced.

Defective List?

The respondents argued that the List was defective because of shortcomings in the way in which Unified's coders had described documents in the database (eg "title" fields left blank; "author" fields blank; documents undated, generic descriptions such a "spreadsheet").

HH Judge Pelling found that "*the omission of an appropriate concise description in breach of…CPR part 31 was serious and significant because the failure to comply would have added significantly to the time needed to carry out… a competent inspection exercise*".

He noted that the position was mitigated because the documents had been made available on the shared platform in any event and declared that, although serious, he would have granted relief from sanctions on this point alone.

Failure to carry out a reasonable search?

The respondents alleged that the claimants had failed to carry out a reasonable search. Keyword searches were conducted over the scanned material to determine which documents should be reviewed for relevance and disclosure. Those to be disclosed were to be made available for inspection by uploading them to a further database to which all parties had access. The court was informed that, to render scanned documents keyword searchable, they first had to be subjected to a process whereby OCR was applied.

HH Judge Pelling was not impressed by the OCR process – stating that it produced "*electronic versions of the documents that were seriously inaccurate*".

Despite considering the evidence of an industry expert from Unified, HH Judge Pelling held that the fact that potentially relevant documents will have been missed as a result of the "OCR issue" was a serious and significant

breach and amounted to a failure to carry out a reasonable search.

The expert explained the function of OCR and the tests that were carried out by the liquidators and their advisors to validate the selection of documents for further review, based on the OCR process. HH Judge Pelling was of the view that the evidence omitted sufficient detail for him to conclude that the shortcomings of the OCR had been rectified by other means (such as targeted sampling of documents that had not responded to the key word searches).

The judge suggested that a physical examination of a further 86,055 documents (the result of not being able to rely on the OCR) would be no more expensive or difficult than it was to examine the 94,247 documents that were physically reviewed in the first place.

Did Practice Direction 31B (electronic disclosure) apply?

No, because the documents were held by the party in paper form and only converted to electronic form for the purpose of carrying out the disclosure exercise, they did not constitute electronic documents.

COMMENT

OCR is not a new technology, it has been around for over 30 years. It can never be relied upon to give a 100% accurate rendition of a scanned document. What it is intended (and generally accepted) to do is to give a steer as to the words contained in a document. It is only as good as the quality of the scanned document and it cannot be conclusive, as, for example, it is not able to read manuscript or graphics at all and sometimes struggles with figures. The only way to be certain of what is contained in scanned documents is for a person to manually review each page – effectively a "leave no stone unturned" approach. This is rarely an appropriate way to conduct a disclosure exercise. OCR is generally regarded as a defensible way of interrogating large volumes of scanned material in a proportionate manner, accepting that its limitations mean that some documents containing key words may be missed. There is an important difference between missing a document and suppressing its disclosure.

There are references in the judgment to "documents being **converted** into an electronic format", "electronic versions of the documents that were seriously inaccurate" and "the garbled way in which the OCR process **converted scanned documents into electronic format**". OCR is however not a format of document, but, rather, a process that is run over the document. The source document does not change format at all as a result of OCR being run over it.

The court's finding that an established and mature process (ie OCR) had resulted in a significant failure (in that it caused potentially documents to be missed), highlights uncertainties concerning the courts' approach to innovative Technology Assisted Review (**TAR**) techniques and products such as predictive coding. These processes have court endorsement in both the U.S. and Ireland[1] even though, like OCR, they are not fail safe.

The judge's comments concerning the adequacy of the document descriptions in the list is also interesting The amendments to CPR 31.5 introduced as a result of the Jackson Reforms provide the option of dispensing with Lists of Documents altogether. Given the trend whereby, almost invariably, parties require inspection of all material in any event, expending considerable time, effort and expense on manually perfecting the entries in the List may in certain circumstances be considered a disproportionate expense.

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[1] *Irish Bank Resolution Corporation Ltd & ors v Sean Quinn & ors* [2015] IEHC 175.

Enforcement

EQUITABLE EXECUTION OVER TRUST ASSETS JUST AND CONVENIENT

JSC VTB Bank v Skurikhin & ors [2015] EWHC 2131 (Comm), 21 July 2015

The High Court appointed a receiver by way of equitable execution over the assets owned in equity by the first defendant, a judgment debtor. The court found that the first defendant was the beneficial owner of certain LLP membership interests. As he had de facto control over those interests, they were property subject to trust and regarded in equity as his assets. Applying the principles set down in recent case law, the court held that it was just and convenient for equitable receivers to be appointed over those assets. The appointment was necessary to meet the demands of justice that prior judgments of the court be complied with and enforced in circumstances where the first defendant was in breach of a worldwide freezing order.

Difficulties in enforcing judgments

The claimant, JSC VTB Bank, applied under s37 Senior Courts Act 1981 for the appointment of receivers by way of equitable execution over certain interests of the second defendant, Pikeville Investments LLP, of which the first defendant, Mr Skurikhin, was said to be the beneficial owner.

The claimant had obtained numerous final judgments from the Russian courts following the failure of the first defendant to pay out under personal guarantees he had given as security for loans made by the claimant to companies of which he was chairman. The claimant subsequently sought and obtained common law judgments in England based on the Russian judgments. This was on the basis that the first defendant had a beneficial interest in the membership shares of the second and third defendants, both companies incorporated in England. However his ongoing attempts to enforce those judgments had been unsuccessful. The first defendant had failed to disclose his assets in breach of a worldwide freezing order, had not attended the oral examination of his assets that had been order under CPR Part 71, and was subject to an order for immediate imprisonment.

***De facto* control of assets**

The claimant argued that the first defendant was the true beneficial owner of certain LLP membership interests in the second defendant, which were registered in the UK to nominees. The appointment of equitable receivers over those interests would enable the receivers to sell valuable properties in Italy that were registered in the name of the second defendant and realise the proceeds for the claimant.

The first defendant had previously asserted that the true beneficial owner of the LLP membership interests was a Liechetenstein foundation, and that his interest in the assets was only that of a discretionary beneficiary under the foundation.

Having reviewed the evidence, the court concluded that it was more likely than not that the first defendant had a right to call for the assets to be transferred to him and that he therefore had *de facto* control of them. The court took into account a number of matters, including evidence that the assets were part of a trust structure that appeared to have been designed to transfer monies out of Russia in an attempt to make them difficult to trace. The first defendant had failed to provide proper disclosure of his assets, or to produce evidence to show that the assets were not under his control.

The documentation that was available indicated that the first defendant was the economic founder of the Liechenstein foundation, that he and his family were alone in being able to enjoy the benefit of the assets of the foundation, including rent-free use of the Italian properties, and that he was likely to be able to instruct the board of directors of the foundation to transfer interests out of the foundation into his own name or that of others.

When can a receiver be appointed?

Section 37 Senior Courts Act 1981 allows the court to appoint a receiver in all cases in which it appears to the court to be just and convenient to do so, and extends to the appointment of a receiver by way of equitable execution.

The principles relevant to the appointment of equitable receivers were established by the Court of Appeal in *Masri v Consolidated Contractors (UK) Ltd (No 2)* [2009] QB 450 (and distilled further in the recent case of Cruz City 1 *Mauritius Holdings v Unitech & ors* [2014] EWHC 3131 (Comm) which was covered in the November 2014 Litigation Review).

As these cases make clear, the demands of justice are the overriding consideration. Justice demands that judgments of the English court and English arbitration awards should be complied with and, if necessary, enforced. The court's jurisdiction is not however unfettered. Relevant considerations in determining what is "just and convenient" in the circumstances include a requirement for there to be some hindrance or difficulty in the normal processes of execution, and for the court to be satisfied that the appointment of a receiver is not fruitless.

Justice demands equitable execution

Three issues arose for determination in this case by Christopher Butcher QC, sitting as a Deputy High Court judge. These were: (i) over what assets may a receiver by way of equitable execution be appointed?; (ii) did the LLP membership interests fall into that category?; and (iii) was it just and convenient in the circumstances for receivers to be appointed?

The judge accepted the claimant's submissions that property subject to trust would be regarded in equity as assets of a judgment debtor if he had the legal right to call for those assets to be transferred to him or had *de facto* control over the assets. On the facts, the judge was satisfied that the membership interests in the second defendant fell into that category and that it was open to the court to appoint a receiver over them.

The judge further found that it would be just and convenient for equitable receivers to be appointed. The demands of justice required that the judgments of the English court be complied with and, if necessary, enforced, and there was no other obvious practical or realistic means of executing the judgments open to the claimant. There was a real prospect that the appointment of receivers would serve a useful purpose, and the judge was not satisfied that the appointment would be fruitless.

Allowing the application, the judge appointed receivers over the LLP membership interests by way of equitable execution.

COMMENT

This case applies the principles laid down in *Masri v Consolidated Contractors (UK) Ltd (No 2)* [2009] QB 450 and in *Cruz City 1 Mauritius Holdings v Unitech & ors* [2014] EWHC 3131 (Comm) in assessing whether or not to appoint receivers by way of equitable execution under s37 Senior Courts Act 1981. The key question here was whether the assets in question, which were held through a complex trust structure, could be regarded in equity as assets of the judgment debtor. The judge was satisfied, on the balance of probabilities, that the judgment debtor either had the right to call for the assets to be transferred to him, or had *de facto* control of the assets such that he could be regarded as the beneficial owner.

In considering whether the demands of justice (the overriding principle in determining the scope of the court's jurisdiction), meant that it was just and convenient to appoint a receiver by way of equitable execution, the court took into account the lengths to which the judgment debtor had gone to avoid

enforcement of the judgments against his assets, including a failure to make proper disclosure of his assets in breach of the terms of a worldwide freezing order. The claimant was left with no other obvious practical or realistic means of executing the judgments. Applying the principle that the demands of justice include the promotion of the policy of English law that judgments of the English court and English arbitration awards should be complied with and, if necessary, enforced, the court found that it was just and convenient to appoint receivers by way of equitable execution over the relevant assets.

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Equity

PRIVY COUNCIL MAKES TRACING PROPERTY RIGHTS EASIER

The Federal Republic of Brazil v Durant International Corp [2015] UKPC 35, 3 August 2015

The Privy Council has made tracing property rights much easier by recognising an exception to two previous limits to the doctrine – "backwards tracing" and the "lowest intermediate balance rule". The new exception applies where the various steps taken by a wrongdoer are part of a "coordinated scheme". This decision significantly enhances the ability of victims of fraud to bring proprietary claims and thus gain priority over other creditors in liquidations and administrations.

Tracing in a nutshell

Tracing allows a claimant to assert that one form of property interest has been substituted for another. Both legal and equitable proprietary rights can be traced. However, at law, it is not possible to trace through mixtures of money. This leads to problems where a claimant's money has been mixed up with other money, for example in a mixed bank account.

The law of tracing largely comprises a series of evidential presumptions. For example, where money belonging to a claimant is mixed with other money, and the claimant seeks to trace his equitable title:

- Where the claimant's money is mixed with the wrongdoer's money, and then some of that money is dissipated, the claimant can elect to: (i) rely on the presumption that the wrongdoer spent his own money first, or; (ii) rely on the presumption that the wrongdoer spent the claimant's money first.
- Where two innocent parties' money is mixed, the starting point is that the money first paid in is the first paid out, though this is often displaced in favour of a presumption that losses are shared proportionately.

However, before *Brazil v Durant*, it was thought that these evidential presumptions could never be used to contradict the evidence. This led to, *inter alia*, two bars to tracing:

- The "lowest intermediate balance rule". This is best explained by an example: where (i) an account balance was GBP 1,000 once the claimant's money was paid in, (ii) subsequent withdrawals took the account down to GBP 500 (ie the lowest intermediate balance), before (iii) a fresh deposit took the account to GBP 1,500, the claimant's proprietary claim is limited to GBP 500.

- Backwards tracing. Tracing from asset to asset must follow a chronological order. For instance, a party may take out a loan to acquire property, but then discharge that loan using the claimant's money. The bar on backwards tracing means that the claimant cannot trace "back" into the property acquired by the loan – instead, the claimant's proprietary interest is extinguished along with the loan.

The recent decision of the Privy Council in *Brazil v Durant*, however, creates an important exception to these two bars.

Background – bribes and public contracts

In *Brazil v Durant*, the sometime mayor of Sao Paulo, Mr Paulo Maluf, received USD 10.5 million in bribes in connection with a major public road building contract. These payments eventually ended up in an account held by the defendant (a company under the effective control of Mr Maluf). The claimant (the municipality of Sao Paulo) brought a proprietary claim for the full USD 10.5 million; on appeal to the Privy Council, the defendant sought to rely on the lowest intermediate balance rule and the bar on backwards tracing to limit this amount to USD 7.7 million. The bar on backwards tracing/lowest intermediate balance rule applied, argued the defendant, because the account had been drawn down in part following payment in of the proceeds of bribery before then being topped up again by other payments.

Privy Council recognises tension in current rules

Lord Toulson, giving the board's advice, found that the claimant was entitled to claim for the full USD 10.5 million.

His Lordship recognised the authority in support of both bars: "it is always necessary to begin with the original property interest and study what has become of it. If it has ceased to exist, it cannot metamorphose into a later property interest". Lord Toulson rejected a broad acceptance of backwards tracing in English law that would allow a claimant's money, used by a defendant to repay a loan, to be traced into whatever was acquired with the loan funds. There was no reason for claimants relying on the tracing doctrine to always enjoy priority in an insolvency at the expense of unsecured creditors.

In tension with this principle, however, Lord Toulson also recognised the force of the claimant's submission that "the court should concentrate on the substance of the transaction and not the form". He said, "The development of increasingly sophisticated and elaborate methods of money laundering, often involving a web of credits and debits between intermediaries, makes it particularly important that a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect."

New coordinated scheme exception

To reconcile these competing considerations, therefore, Lord Toulson recognised an exception to both bars: where the steps in question are "*part of a coordinated scheme* [or]… *deliberate part of the choreography*", it should be possible to trace into the property in question notwithstanding these bars.

Proof of such a coordinated scheme will need to be inferred from proved facts, as the testimony of the holder of the property, if available, will seldom be of value.

Furthermore, the bars should not apply to where they would otherwise be engaged by "the incidents of the banking system", eg where, on a cheque being paid in, a presenting bank credits an account in anticipation of a credit from the paying bank through the banking system.

The Privy Council concluded that the lower courts were right to find on the facts in *Brazil v Durant* that there was such a "coordinated scheme" and that therefore the claimant was entitled to claim for the full USD 10.5 million. Unfortunately, the Privy Council did not expand on the reasons for upholding the decisions of the lower courts. Further guidance is needed but will not come until the exception is applied at first instance level.

COMMENT

This decision provides victims of fraud with significantly more scope to bring proprietary claims to recover their property. In broad terms, therefore, the decision in *Brazil v Durant* is to be welcomed. Two important consequences should be noted.

First, fraud cases are often brought against insolvent entities or persons. The ability to assert a proprietary right over assets in the insolvent estate is very valuable. It means that such claimants will be able to stand in priority to unsecured creditors and recover more, or possibly all, of their losses – thereby reducing the pool of assets available to pay back unsecured creditors.

Secondly, it also widens the pool of claimants who, rather than bringing a personal claim, chose to trace into property that has subsequently risen in value. The courts will have to be careful not to allow this new exception to be exploited in order to gain unjust windfalls.

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Evidence

JUDGE NOT BOUND TO ACCEPT "UNCHALLENGED" EVIDENCE

Various claimants v Giambrone & Law (a firm) & ors [2015] EWHC 1946 (QB), 7 July 2015

A judge is not bound to accept as a matter of fact general evidence in a witness statement that has not been specifically challenged on cross-examination.

This was a sample of claims in a complex multi-party action by English and Northern-Irish buyers, in the English High Court, against their Italian lawyers for allegedly negligent advice given about failed off-plan property developments in southern Italy.

This article focuses on Foskett J's comments on the assessment of unchallenged evidence.

Unchallenged evidence – the general rule

It is a well-established principle that, in general, a party must challenge in cross-examination the evidence of any witness of the opposing party if he/she wishes to argue that evidence given on a particular issue should not be accepted (*Browne v Dunn* (1894) 6 R. 67, HL). Failure to cross-examine a witness on a particular important point may lead the court to infer that the cross-examining party accepts the witness' evidence, and it will be difficult to suggest that the evidence should be rejected.

The evidence in this case largely focussed on the property developments that were of direct concern to the claimants, however, other more general evidence was also given in one of the defendants' witness statements. This general evidence suggested that many other similar property developments had been completed in the region successfully in recent years, with few of the problems that arose in this case.

The defendants, appearing to rely on the rule in *Browne v Dunn*, argued that the general evidence was unchallenged by the other side. The judge rejected the contention that he was necessarily bound to accept evidence that had not been specifically challenged by the other side in cross-examination.

Assessment of unchallenged evidence – the judge's observations

Matters outside scope of dispute

Foskett J found that the "unchallenged" evidence concerned matters that were outside the scope of the proceedings. The evidence related to other property developments, not the developments that were the subject of the proceedings. The judge was in no position to decide whether or not the evidence was correct. There had been no investigation into these points to see if the

evidence was correct which meant that, in reality, there had been no way in which the evidence given could have been meaningfully cross-examined.

Proportionality and credibility

Had every potential issue of fact or opinion in dispute been the subject of sustained challenge in cross-examination, the trial would have taken much longer than it did, with the risk that the increased associated costs would not be recoverable by the claimants even if they succeeded on the merits of the case (because of uncertainty over the defendants' insurance cover), or that the individual defendants could be held personally liable for the costs. A "measured and proportionate" view must be taken and the general credibility and reliability of a witness who says something particularly, though not exclusively, of a general and expansive nature, which is "unchallenged" needs to be taken into account when assessing the value of that evidence.

Meaning of documents

Where the meaning of a document or a series of documents is in dispute, interpretation is rarely, if ever, helped by cross-examining the drafter of the document(s) or by seeking the potentially self-serving opinion of someone closely associated with the importance of the meaning of the document(s). The answer is normally found by looking at the words used in context. Equally, where inferences are open to be made on the basis of the totality of the evidence, the mere fact that a particular inferred conclusion was not put to a witness does not mean that it has been accepted by the other side, or that the judge must accept it.

Judge not bound to accept unchallenged evidence

Simply because it was not specifically put to a witness that what was said in his witness statement was untrue (or misguided) does not mean that a judge is bound to accept what was said. It is important to be fair to a witness, particularly if the honesty and integrity of a witness is being challenged and there may be other areas of his or her evidence that need to be challenged head-on, "but the days of the "I put it to you" cross-examination on other matters have long since gone".

In any event, it should be borne in mind that, where the court is assessing the "collective position" of "the firm" or "the practice" on an issue, putting matters to an individual, even a senior person, will not necessarily assist the court in deciding on that issue.

Expert evidence

Separately, Foskett J noted that, as in any case, he did not see it as his duty either to accept the whole of a reputable expert's opinion, or not to accept it at all because "as with any witness, an expert can be right about most things but wrong on others".

COMMENT

This general rule in *Browne v Dunn* is directed at advocates, rather than at judges, and should be considered in light of the "overriding objective" to deal with cases justly and at a proportionate cost under the Civil Procedure Rules. Foskett J's observations serve as a helpful reminder that the courts have discretion in their powers to control evidence depending on the circumstances of the case. In any event, from both a tactical and an ethical perspective, it remains a fundamental principle that all significant points that form a party's case must be put to the other side's witnesses in cross-examination.

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Insurance

OBJECTIVE TEST OF MATERIALITY

Brit UW Ltd v F&B Trenchless Solutions Ltd [2015] EWCA 2237 (Comm), 31 July 2015

Insurers avoided a public liability policy for material non-disclosure and misrepresentation by the insured. The court emphasised that the subjective views of the insured, or the underwriter, are not relevant when assessing the materiality of a fact, and that the test for materiality is objective.

This case concerned an insurance policy for a "micro-tunnel" under a railway line. The insured is a specialist tunnel construction company, F&B Trenchless Solutions Limited (**F&B**). Tunnelling beneath railway lines typically causes the overlying track to "settle", or lower slightly. Network Rail guidelines require all estimates for under-track tunnel crossings to show no more than 5mm of track settlement.

F&B, who carried out the works, were aware of the 5mm requirement in the Network Rail guidelines, and expressly estimated that settlement as a result of the work would be 2-4mm.

Tunnelling commenced on 11 June 2013, and during July 2013 F&B became aware of track settlement up to 18mm, well in excess of the estimate, and the Network Rail guidelines. On 8 August 2013, a void appeared in a road close to the line under which the micro-tunnel was being constructed. F&B visited the site and inspected the void, but concluded that the cause was work that had been done by Severn Water in that area, not the micro-tunnel.

On 19 August 2013, F&B renewed its public liability insurance with Brit UW Ltd (the **claimant**). The risk details that F&B provided to its broker confirmed, amongst other things, that F&B did not, and would not in the future, carry out works underneath active rail lines. The railway line had been closed by Network Rail on 19th July 2013, some time after the work had begun, in order to enable re-signalling work to be carried out, but the line was reopened to freight trains on 26 August 2013.

On 27 August 2013, a freight train derailed whilst passing over a level crossing in the area where the micro-tunnel had been constructed. It was common ground that the derailment was caused by severe settlement of the railway tracks. F&B sought cover under its policy for liability incurred as a result.

Insured's duties

The principles governing non-disclosure and the duty of utmost good faith in respect of insurance contracts are well established. Information is "material", and must be disclosed prior to policy inception, if it would influence the judgment of a hypothetical "prudent insurer" in fixing the premium or determining whether to take the risk. It is not settled by current practice or the subjective opinion of a particular insurer. A material non-disclosure by the policyholder allows an insurer to avoid the policy.

The principles governing misrepresentation are also well established. A material misrepresentation made by the insured to the insurer prior to policy inception also entitles an insurer to avoid the policy. "Materiality" has the same meaning as for non-disclosure. If it would influence the judgment of a hypothetical "prudent insurer" in fixing the premium or determining whether to take the risk, it is material.

Material non-disclosure

The judge held that F&B's failure to disclose the settlement of the rail lines, and the appearance of a void in the nearby road, were material non-disclosures. The settlement was significantly in excess of the 2-4mm estimate, and in excess of the 5mm allowed by Network

Rail in its guidelines. The degree to which actual track settlement deviated from expected track settlement would have been important to a prudent underwriter, and no-one knew when it would stop increasing.

Second, and separately, the exposure of the insured to a claim arising from the void in the nearby road was evident from the moment it appeared, absent a full investigation ruling out liability on the part of F&B (which was not conducted).

The court made clear that F&B's own subjective view of the importance of these issues did not relieve them of materiality. The question was whether, on an objective assessment, the facts that F&B knew were themselves material.

False representation

Similarly, the statement that the line was inactive was a material, and false, representation. The expert evidence was unanimous that a prudent underwriter would be likely to consider that tunnelling under active railway lines would attract a higher excess or premium than tunnelling taking place under inactive lines. The risk was presented as a good one – namely that F&B would not be tunnelling under active rail lines. If that had not been the case, on an objective basis it would have made a difference to both the terms on which the insurance was written and the premium, and the insurer was entitled to avoid the policy.

COMMENT

Under the Insurance Act 2015, which comes into force in August 2016, insurers' ability to avoid policies in circumstances such as these will become more constrained. A negligent non-disclosure or misrepresentation that, if made, would only have resulted in an increase of the premium, or a change in the terms, will no longer give rise to the right to avoid. The insurer will be entitled to a reduction in the claim, proportionate to the increase in the premium, or to the benefit of the improved terms. The remedy of avoidance is limited to cases of deliberate or reckless non-disclosure or misrepresentation, or to instances where the facts, if known, would have led the insurer to decline the risk altogether. Thus, the Insurance Act 2015 rebalances risk on policy renewal significantly in favour of the policyholder, and will make the draconian remedy of avoidance even rarer.

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Procedure

CPR CHANGES: INCLUDING NEW FINANCIAL LIST AND SHORTER AND FLEXIBILE TRIAL PILOT SCHEMES

New CPR changes come into force on 1 October 2015. A new Financial List will mean that complex financial cases will be heard by docketed judges, experienced in resolving complex financial disputes. Within this List a new Financial Markets Test Case Scheme will be piloted. There will also be two new case management pilot schemes in the Rolls Building courts.[1] The Shorter Trials Scheme will provide for an accelerated procedure for straightforward cases, which should result in a substantive judgment in little over a year. The Flexible Trials Scheme will allow parties to opt into a simplified procedure. There are also other changes to the CPR, as summarised below.

Financial List initiative

The creation of a Financial List endeavours to lift complex financial disputes out of the general court processes and into a specialist List where cases are heard by experienced Financial List judges (who will be Chancery Division or Commercial Court judges). Each Financial List case will be allocated one judge who will hear the dispute from start to finish.

This initiative has many attractions. Specialist judges who have familiarity with the relevant markets, products and case law should be able to efficiently deliver technically resilient judgments. The docketing of one judge to a case should also make for more efficiently managed cases both in terms of interlocutory applications being decided speedily and case management issues being tightly controlled.

Inevitably, the efficacy of these proposals depends on their detailed implementation. We outline the initiatives in more detail below.

Definition of "Financial List claim"

A "Financial List claim" may be:

"…any claim which

(a) principally relates to loans, project finance, banking transactions, derivatives and complex financial products, financial benchmarks, capital or currency controls, bank guarantees, bonds, debt securities, private equity deals, hedge fund disputes, sovereign debt, or clearing settlement, and for more than £50 million or equivalent;

(b) requires particular expertise in the financial markets; or

(c) raises issues of general importance to the financial markets."

A Financial List claim may be started in that List or ordered onto it. Although the monetary threshold is high (GBP 50 million) there appears to be considerable flexibility within the definition as to what type of action might be brought in that List. It is unclear what happens when a claim falls within the definition but the parties choose not to have their claims heard in that List. As a Financial List judge has the power (on his own initiative or on application) to order proceedings to be transferred to (or from) that List, it may be that such a claim will be allocated to the Financial List, even where that goes against the wishes of the parties.

Financial Markets Test Case procedure – pilot scheme

A Financial Markets Test Case Scheme is to be piloted to allow issues of "general importance" to the financial markets which require "immediately relevant authoritative English law guidance" to be heard in the Financial List without the usual requirement of a present cause of action between the parties.

In cases of particular importance or urgency, proceedings may be heard by two judges (one of which may be a Lord Justice of Appeal).

The piloting of such a scheme (until 30 September 2017) will allow practitioners and court users an opportunity to assess its processes and ascertain its utility. It may be that the procedure will be rarely used given that questions of contractual interpretation usually arise in a particular factual context, meaning there is usually the necessary "cause of action" for normal procedures to apply. Further, existing Part 8 procedures already cater for disputes where there are limited facts in dispute. Interested non-parties are also already able to apply for permission to intervene in proceedings under existing rules, with trade bodies frequently doing so.

Under the new procedure, care will need to be taken to ensure that opposing arguments are properly aired given that there will be no actual cause of action before the courts. For a case to proceed under this scheme, the judge must be satisfied that the arguments of all those with opposing interests in relation to the issues in question will properly be put before the court. However, the court may be unaware of certain interests. It will, therefore, be important that such test cases are sufficiently publicised within the relevant markets. There remains some uncertainty about aspects of this scheme including whether it will be possible for affected parties (particularly those who were previously unaware of the test case) to appeal any resulting decision.

Unnecessary complexity?

Financial List claims will be issued in either the Chancery Registry or the Admiralty and Commercial Registry using a new Financial List claim form (which will differ depending on the registry of issue). Given that the procedure thereafter is the same and the distinction between issuing claim forms in different divisions is not always appreciated by litigants, it may have been simpler to issue a Financial List claim straight into the Financial List.

Further, the new rules and the guidance governing the new procedures are to be found in multiple locations (a new CPR Part, two new Practice Directions, a new Guide and new forms which will all interrelate with existing rules (particularly those relating to the Commercial Court) and (according to the draft Financial List Guide) the Commercial Court and Chancery Guides). Disparate sources have the potential to confuse litigants and may give rise to technical disputes. In time, perhaps a more "user friendly" approach to the collation of this material may be found.

Shorter and Flexible Trial Pilot Schemes

The Shorter and Flexible Trial Schemes are also aimed at facilitating the more efficient resolution of commercial disputes. The headline innovation is that cases in the Shorter Trial Scheme should receive a judgment in little over a year of issue. Although the English court can already order many, if not all, of the case management measures outlined by the schemes, the packaging of these measures into "ready-made" schemes should raise awareness of these streamlined procedures amongst litigants (and judges) and encourage greater uptake. Both schemes are to be piloted until 30 September 2017.

Shorter Trial Pilot Scheme

This scheme allows straightforward disputes started in the Rolls Building courts to follow a streamlined procedure managed by docketed judges who should deliver judgment in little over a year of issue.

Suitable cases

This scheme is aimed at relatively simple disputes. Its new Practice Direction provides that it will not normally be suitable for cases involving "an allegation of fraud or dishonesty" or "that are likely to require extensive disclosure and/or reliance upon extensive witness or expert evidence". There is, therefore, scope for parties to disagree as to whether or not a case is suitable for the scheme. Further, some confusion and delay may result if cases that are initially designated as being within the scheme later fall out of its scope (for example, if complex factual issues later arise which require extensive evidence or allegations of fraud or dishonesty are made at a later stage). It will be important that a degree of flexibility is maintained so that cases are not derailed, with parties presumably having to retrace their procedural steps to comply with the usual litigation procedure (such as disclosure).

Length of proceedings (including appeal)

The expectation that a substantive judgment will be handed down in little over a year of proceedings being issued is clearly attractive. The new Practice Direction says the Court of Appeal will "take into account the fact that a case was in the Shorter Trials Scheme and the desire for expedition in deciding when applications for permission to appeal will be considered and when appeals will be listed". It remains unclear if it is envisaged that an appeal from a Shorter Trial Scheme will be able to "leapfrog" over other lodged appeals. If that is not the case, delays in the appeal process may undermine the central objective of resolving disputes efficiently.

Disclosure

Crucially, in order to allow for the expedited trial procedure, disclosure is limited. The default disclosure rule in civil litigation is that a party must only disclose documents on which it relies and documents (or classes of documents or documents relating to a particular issue) requested by the other party which it either agrees to produce or is ordered by the court to produce.

As standard disclosure does not apply as the default position, the accompanying duty to search for such disclosure also does not apply (CPR 31.7). However, where there is a dispute as to whether a party's requested disclosure should be provided, the court will consider any search required when making such an order.

The new rules do not give guidance as to how the scheme will impact upon a party's document preservation duties (and the duties of its representative). What happens where limited disclosure was given under the Shorter Trial Scheme, but the case is then transferred out of the scheme with standard disclosure being ordered? Discloseable documents may have been destroyed in accordance with a party's ordinary document retention policy.

Flexible Trial Pilot Scheme

The Flexible Trial Scheme allows parties "by agreement" to adapt court procedures to suit their case and encourages the use of simplified and expedited procedures. It contains default directions for a streamlined process for disclosure (standard disclosure but with no duty of search plus any specific disclosure agreed or ordered), witness and expert evidence as well as submissions at trial.

COMMENT

Overall, we welcome these reforms. The English civil justice system operates in an increasingly globalised and competitive market, with international businesses seeking not only robust enforceable decisions, but also efficiently delivered ones. These reforms represent a practical and commendable attempt to address certain criticisms that have been levied in recent years against the English civil justice process. As ever, much will turn on the extent to which these reforms are embraced and implemented by the courts. We will be monitoring developments closely.

Other CPR changes: Service out of the jurisdiction (PD 6B)

Welcome changes have been made to the gateways for service of English court proceedings on a defendant abroad. They are:

- a new gateway for further claims made against the same defendant which arises out of the same or closely connected facts;
- a new gateway for breach of confidence or mis-use of private information claims;
- the tort gateway has been amended to cover future damage;
- the "property within the jurisdiction" gateway has been broadened to include not just claims which relate wholly to property within the jurisdiction but also those which relate principally to such property; and
- the gateways for claims about trusts are amended.

Other CPR changes

There have also been changes concerning:

- costs budgets;
- a new bill of costs pilot scheme;
  - the court's case management powers regarding Early Neutral Evaluation.
  - the transfer of certain competition cases to the Competition Appeal Tribunal.

For further detail please see:

- SI (amends the rules): http://www.legislation.gov.uk/uksi/2015/1569/contents/made.

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[1] The Rolls Building houses the combined High Court business, property and commercial capability of the Chancery Division, the Commercial Court, the London Mercantile Court and the Technology and Construction Court.

Forthcoming client seminars

Client seminars can be viewed online at www.aoseminars.com.

If you missed "Forum selection – should recent developments change your approach?" by Sarah Garvey on 9 September 2015 and/or would like a copy of the slides, please email sarah.garvey@allenovery.com.

We also offer a full range of bespoke seminars in our General Client Seminar Menu, Corporate Client Seminar Menu and Financial Services Client Seminar Menu from which clients can choose a seminar topic of interest which will be delivered by Allen & Overy LLP specialists at a client's premises. If you are a client and have a query in relation to this, please contact Sarah Garvey on +44 20 3088 3710 or sarah.garvey@allenovery.com.

(All events mentioned below are held in A&O's office at Bishops Square unless otherwise stated).

FCA Enforcement – Themes And Trends

Wednesday 7 October 2015, 8:30am - 9:30am

Presented by: Calum Burnett, Partner – Litigation (Banking, Finance & Regulatory); Philip Annett, Counsel – Litigation; and Sarah Hitchins, Associate - Litigation

We are continuing to see the development of clear themes and trends in terms of areas in which the Financial Conduct Authority (FCA) is taking enforcement action, as well as the types of enforcement action being taken and how the FCA approaches enforcement cases. In this seminar, we will highlight the key enforcement themes and trends which we have seen across the financial services industry and also look at how these may develop in the future.

Registration and buffet breakfast will take place from 8am; the seminar commences at 8.30am.

Recent Developments In Banking And Finance Law

Monday 12 October 2015, 12:30pm - 1:30pm

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

An 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.

Class of 2015: Your Guide to the New Regime for Collective Competition Claims

Wednesday 14 October 2015, 8:30am - 9:30am

Presented by: Arnondo Chakrabarti, Partner – Litigation; Jonathan Hitchin, Partner – Litigation; Luke Streatfeild, Senior Associate – Litigation; and Philip Mansfield, Partner - Corporate

The UK government, in hand with the EU, is encouraging private parties to bring claims against antitrust infringers. The Consumer Rights Act 2015, scheduled for October 2015, ushers in a regime for quicker, broader redress for businesses and consumers affected by competition breaches – including U.S.-style "opt-out" collective proceedings and collective settlements. The EU Damages Directive, in force in the UK next year, will add to claimants' armoury.

At a breakfast seminar Jonathan Hitchin, Arnondo Chakrabarti and Luke Streatfeild from our Competition Disputes team and Philip Mansfield from our Competition team will discuss the issues you should be aware of, and how to manage your risk in the changing landscape.

Registration and buffet breakfast will take place from 8am; the seminar commences at 8.30am.

PITFALLS IN CONTRACTING WITH GOVERNMENT BODIES

Wednesday 11 November 2015, 12:30pm - 1:30pm

Presented by: Andrew Denny, Partner – Litigation; James Neill, Counsel – Litigation; and Maeve Hanna, Associate - Litigation

Contracting with public bodies in the UK carries specific risks. Public law issues can affect the lawfulness of a decision to enter into a public contract, including compliance with EU procurement and state aid rules and whether the entity is acting within its specific powers. Contractors also need to be careful to comply with rules on gifts and entertainment, lobbying and post-employment restrictions on the hiring of public officials. Furthermore, the obligations of a public body under freedom of information legislation affects the extent to which a counterparty can protect any commercially sensitive material which it has shared with the public body.

At a lunchtime seminar, Andrew Denny, James Neill and Maeve Hanna will discuss the issues that a contractor needs to consider when dealing with public bodies and how best to mitigate those risks.

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

UPDATE ON PROSECUTORIAL TRENDS AND LEGAL DEVELOPMENTS IN WHITE COLLAR CRIME – A PAN-EUROPEAN OVERVIEW

Wednesday 18 November 2015, 12:30pm - 1:30pm

Presented by: Arnondo Chakrabarti, Partner – Litigation; Aurélien Hamelle, Partner – Litigation (Paris); Blair Keown, Senior Associate – Litigation; Borja Fernandez de Troconiz Robles, Partner – Litigation; and Hendrik Jan Biemond, Partner – Litigation

There continues to be an increasing appetite amongst authorities around the world to investigate corporates and banks for a range of criminal offences. Governments are also introducing new criminal offences aimed at corporate conduct. Penalties are increasing and law enforcement authorities are becoming more aggressive. White collar practice is becoming increasingly important for practitioners and in-house counsel around the globe. In this seminar, we draw together key issues for in-house practitioners in relation to corporate crime including prosecution trends, developments in investigation practice and new offences of corporate and financial crime discussed by a panel of our lawyers from London, Paris, Amsterdam and Madrid.

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

Litigation Review consolidated index 2015

Applicable law for whether a contract has been validly executed by foreign company: *Integral Petroleum SA v SCU-Finanz AG* (Apr)

Resolving potentially inconsistent jurisdiction and arbitration provisions in commercial contracts: *Amtrust Europe Ltd v Trust Risk Group SPA* (Feb/Mar)

Third state jurisdiction clause respected – *Owusu* considered: *Plaza BV v Law Debenture Trust Corp plc* (Feb/Mar)

CJEU rules on jurisdiction in prospectus liability claim: Request for preliminary ruling: *Kolassa v Barclays Bank plc* (Feb/Mar)

Contract

PFI contracts: is the service points regime subject to good faith?: *Portsmouth City Council v Ensign Highways* (Aug/Sep)

Innocent misrepresentation: damages only available if rescissions are possible too: *Geoffrey Alan Salt v Stratstone Specialist Ltd* (Aug/Sep)

Time and method for calculating damages: *Bunge SA v Nidera BV* (Aug/Sept)

Buyer's loss caused by pre-sale misselling of insurance not covered by indemnity: *Andrew Wood v Sureterm Direct Ltd & Capita Insurance Services Ltd* (Aug/Sep)

Right to affirm a contract after repudiatory breach fettered by good faith: *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* (Jul)

Exclusions clauses ineffective in commercial contract: *Saint Gobain Building Distribution v Hillmead Joinery (Swindon) Ltd* (Jul)

Inadequate notice of warranty claim: *IPSOS SA v Dentsu Aegis Network Ltd* (Jul)

Transfer of receipts issued by commodities warehouse operator not valid delivery of goods for repo transactions: *Mercuria Energy Trading Pte Ltd & anr v Citibank NA & anr* (Jul)

Court of Appeal applies modern approach to penalty clauses: *ParkingEye Ltd v Beavis* (Jun)

Issuer liability to secondary market investor: disclaimers ineffective: *Taberna Europe CDO II plc v Selskabet* (*formerly Roskilde Bank A/S*) (*In Bankruptcy*) (May)

Contractual discretion: how to get it right: *Braganza v BP Shipping Ltd & anr sub nom The British Unity* (May)

Forced sale of security: court considers duties owed by bank: *Rosserlane Consultants Ltd & anr v Credit Suisse International* (May)

Changes to loan notes: good faith not implied: *Dennis Edward Myers & anr v Kestrel Acquisitions Ltd & ors* (May)

Meaning of "material" and "material adverse effect" in termination provision: *Decura IM Investments LLP & ors v UBS AG, London Branch* (Apr)

Netting and set-off under the 1992 ISDA Master Agreement: *MHB-Bank AG v Shanpark Ltd* (Apr)

Access to target's documents post-sale: *Alfa Finance Holding AD v Quarzwerke GmbH* (Apr)

Effect of agent's surreptitious dealing: *Tigris International NV v China Southern Airlines Co Ltd & anr* (Feb/Mar)

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*) (Jan)

Costs

Part 36 offer taken into account on costs even though beaten at trial: *Sugar Hut Group Ltd & ors v AJ Insurance* (Jan)

Criminal

Supreme Court considers the constituent elements of an offence under s328 of POCA: *R v GH* (Jun)

Money laundering offences apply to conduct occurring entirely outside the UK: *R v Rogers & ors* (Apr)

Disclosure

E-disclosure?: *In the matter of Atrium Services Ltd: In the matter of Kimberley Scott Services Ltd sub nom (1) Robert Derek Smailes (2) Stephen Blandford Ryman v (1) John McNally (2) George McClean* (Aug/Sep)

Application too late for disclosure of bank's regulatory benchmark documentation and training materials in mis-selling claim: *Peniuk & ors v Barclays Bank plc* (May)

Enforcement

Equitable execution over trust assets just and convenient: *JSC VTB Bank v Skurikhin & ors* (Aug/Sep)

Employment

Employer investigations: *James-Bowen and others v The Commissioner of Police for the Metropolis* (Jun)

Gender pay gap reporting (Apr)

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* (Jan)

Equity

Privy Council makes tracing property rights easier: *The Federal Republic of Brazil v Durant International Corp* (Aug/Sep)

Evidence

Judge not bound to accept "unchallenged" evidence: *Various claimants v Giambrone & Law* (*a firm*) (Aug/Sep)

Injunctions

Full and frank disclosure obligation breached but injunction upheld: *JSC Mezhdunarodniy Promyshlenniy Bank & anr v Sergei Viktorovich Pugachev* (Feb/Mar)

Insolvency

Lehman Brothers "Waterfall Application" in the Court of Appeal: *Lehman Brothers International Europe* (*in administration*) (Jun)

Insurance

Insurance: the objective test of materiality: *Brit UW Ltd v F&B Trenchless Solutions Ltd* (Aug/Sep)

Liability for missold payment protection insurance remained with transferor of an insurance business: *PA(GI) Ltd v GICL 2013 Ltd & anr* (Jul)

Jurisdiction issues in insurance dispute: *Mapfre Mutualidad Compania De Seguros Y Reaseguros SA, Hoteles Piñero Canarias SL v Godfrey Keefe* (Jul)

Intellectual Property

Actions for proprietary estoppel not limited to rights over land: *Motivate Publishing FZ LLC & anr v Hello Ltd* (Jul)

Limitation

Investor's knowledge bars misselling claim: Susan *Jacobs v Sesame Ltd* (May)

Contractual warranty claims: when does time begin to run? *The Hut Group Ltd v Oliver Nobahar-Cookson & anr* (Jan)

Effect of cross-border insolvency on contractual time bar: *Bank of Tokyo-Mitsubishi UFJ Ltd v Owners of the MV Sanko Mineral* (Jan)

Procedure

CPR changes: including new Financial List and Shorter and Flexible Trial Pilot Schemes (Aug/Sep)

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* (Jan)

Public law

Iranian bank entitled to recover damages for losses suffered as a result of unlawful treasury restrictions: *Mellat v HM Treasury* (Jul)

Public procurement

Public procurement: automatic suspensions to the award of contracts: *Bristol Missing Link Ltd v Bristol City Council* (May)

Review of authority's decision to cancel tender process: *Croce Amica One Italia Srl v Azienda Regionale Emergenza Urgenza* (Jan)

Regulatory

FCA rules may inform standard of the common law duty of care owed by a financial adviser to client: *Anderson v Openwork Ltd* (Jul)

Upper Tribunal criticises FCA's approach to publicising decision notices: *Bayliss & Co* (*Financial Services*) *Limited & Clive John Rosier v The Financial Conduct Authority* (Jul)

Upper Tribunal refuses to grant an extension of time to allow challenge of a settled FSA enforcement matter: *Mohammed Suba Miah v Financial Conduct Authority* (Jun)

SFO section 2 interview: When can lawyers be excluded?: *R on the application of Lord Reynolds and Mayger v Director of the Serious Fraud Office* (Jun)

What due diligence should fund managers undertake before making an investment?: *Alberto Micalizzi v The Financial Conduct Authority* (May)

FCA fines retired accountant for committing market abuse: *Final Notice issued against Kenneth George Carver* (May)

FCA Business Plan 2015/16: Key messages for litigators (Apr)

FCA decision on market abuse overturned: *Tariq Carrimjee v the Financial Conduct Authority* (April)

FCA takes enforcement action against compliance officer for being knowingly concerned in a breach of regulatory requirements committed by the firms he worked for (Apr)

New Senior Insurance Managers Regime (Jan)

Service

Commercial Court clarifies test for retrospective alternative service of claim form: *Michael Norcross v Christos Georgallides* (Feb/Mar)

Settlement

Fraud will not always unravel a settlement agreement: *Hayward v Zurich Insurance Co plc* (May)

Inter-solicitor email exchange held to amount to a binding settlement of a complex litigation: *Raymond Bieber & ors v Teathers Ltd* (*in liquidation*) (Feb/Mar)

State Aid

State aid recovery rates ordered against Irish airlines: Case T-473/12 *Aer Lingus Ltd v Commission* and Case T-500/12 *Ryanair Ltd v Commission* (Apr)

Tort

Disclaimer precludes third-party reliance on auditor reports: *Barclays Bank PLC v Grant Thornton UK LLP* (Apr)

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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