ALLEN & OVERY

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Litigation and Dispute Resolution

Review

EDITORIAL

In our final edition of 2015, we cover a number of decisions where senior courts have revisited core contractual principles. We consider the Supreme Court's decision in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd & anr* involving consideration of the test for implied terms. The Supreme Court re-emphasised the stringent nature of this test and that fairness or reasonableness alone will not be sufficient, even if the result is harsh. Allen & Overy acted for the successful parties in this appeal.

We cover the Supreme Court's landmark judgment on penalty clauses (*Makdessi v Cavendish* and *ParkingEye v Beavis*). Penalty clauses remain unenforceable, with the majority noting that "The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation".

We also consider the Court of Appeal's decision in *Dixon & EFI (Loughton) Ltd v Blindley Health Investments Ltd & ors* which looked again at estoppel by convention (see **Equity**).

We continue to see many jurisdiction challenges before the English courts. Parties remain prepared to spend time and money fighting about where they will have their cases tried. Recently we have seen a run of cases involving inconsistent dispute resolution clauses in related contracts, two of which we report on in this edition. We also report on a decision of Mr Justice Teare where the court had to consider whether a jurisdiction clause in a derivatives contract was to be construed as an exclusive or non exclusive clause (see **Conflict of laws**).

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Contents

Antitrust

FOLLOW-ON CLAIMS: CONFIDENTIALITY AND INTENTION TO CAUSE ECONOMIC LOSS

Air Canada & ors v Emerald Supplies Ltd & ors [2015] EWCA Civ 1024, 14 October 2015

In a follow-on private damages action arising from an air freight cartel, the Court of Appeal held that: (i) national courts do not have discretion to order disclosure of the confidential form of a European Commission cartel decision without redacting material protected under EU law; and (ii) the claimants' "economic tort" claims should be struck out as, among other things, there was no reasonable prospect that it could be shown that the defendant had a deliberate intention to injure the claimants. Allen & Overy acted for one of the successful appellants on point (i).

Who can see the Commission's decision?

In November 2010 the European Commission (**EC**) made a decision (the **Decision**) that certain airlines (including British Airways (**BA**)) had colluded to overcharge for carrying air freight, in breach of article 101 of the Treaty on the Functioning of the European Union (**TFEU**) and article 53 of the European Economic Area Agreement.

The claimants, 565 customers of air freight services, brought a claim against BA for damages following-on from the Decision. BA in turn joined other airlines, both addressees and non-addressees of the Decision, as additional parties. The claimants asked the court to order disclosure of a copy of the Decision, as the EC had not yet published a redacted, non-confidential version. The EC had given copies of the confidential version to the addressees of the Decision.

The High Court initially ordered the defendant to disclose a copy of the confidential Decision, after making appropriate redactions. However that redaction exercise resulted in a "meaningless document" (per Peter Smith J). So, the judge ordered that a largely unredacted copy of the Decision be disclosed into a confidentiality ring. Importantly, there was to be no redaction of material protected from inspection in EU law by the principle in *Pergan Hilfsstoffe Fur Industrielle Prozesse GmbH v Commission* [2007] ECR II-4225 (**Pergan**).

The Pergan principle

Pergan material is a finding in an EC decision that either describes or alludes to conduct which might amount to an infringement of article 101 TFEU but where the party did not have an opportunity to defend itself before the EC and which could not be challenged before the European Courts. In other words, Pergan material is a reference to a non-addressee in a decision which suggests that the non-addressee might have been involved in the infringing conduct. The redaction of this material protects the subject party's right to the presumption of innocence, and protects trade secrets and confidentiality.

Peter Smith J held that the High Court had a discretion in deciding how to protect Pergan rights, and that BA and the other parties BA had joined would be sufficiently protected if the Decision was disclosed into a confidentiality ring and the claimants undertook not to bring new claims relying on the Pergan material.

On 8 May 2015 (after the appeals were issued but shortly before they were heard), the EC published a provisional non-confidential version of the Decision. The Court of Appeal noted that that version reflected what the EC considered to be justifiable Pergan redactions.

Court of Appeal rules that Pergan protection is absolute

The Court of Appeal held that Pergan protection is absolute and that national courts must extend the same Pergan protection that is available at community level, as now published in the non-confidential version of the Decision. A national court does not have a discretion to strike a balance between a defendant's rights to Pergan protection and requiring disclosure of relevant information in the interests of justice.

Undertakings and confidentiality ring not effective anyway

Even if a national court did have such a discretion, the High Court's proposed regime had failed to strike the correct balance. It would render the Pergan protection nugatory as, while the confidentiality ring would protect the parties from wider reputational repercussions, it would not prevent the claimants using Pergan material, that should have been redacted, to improve their existing claims against BA, which could in turn seek contribution from other parties or prevent the claimants from bringing new proceedings in other jurisdictions. It would be handing the potentially damaging material to the very people the appellants most wanted not to see it. If applied more broadly, it would mean that any follow-on damages claimant would only have to start a claim against an addressee of a decision to then obtain an unredacted copy of that decision.

The fact that the addressees and non-addressees could defend themselves in the English action was not sufficient to obviate the need for full protection of their Pergan rights. Pergan itself states that the opportunity to raise a defence in the national court is not sufficient to prevent the right to the presumption of innocence from being breached. In particular, the non-addressees were not parties to the High Court action and should not be required to appear and take part in the proceedings in order to protect their Pergan rights.

The Court of Appeal disagreed that the earlier disclosed Decision had been a "hopeless exercise" as the majority of the redactions sought by the defendant and other parties had been accepted by the EC in its published non-confidential version of the Decision.

Pergan protects addressees too

The Court of Appeal held that, in addition to non-addressees' right to Pergan protection in relation to the whole of the Decision (which, as non-addressees, they did not have the opportunity to contest), addressees of the Decision were also entitled to Pergan protection in relation to the parts of the Decision which were: (i) not the operative parts of the Decision; or (ii) did not constitute the essential basis of the operative findings. This was because the addressees could not appeal non-operative parts or contest any allusions in those parts, such as suggestions that the cartel might have had a wider geographical or temporal scope than ultimately found by the EC in the operative parts. Pergan itself had been concerned only with the rights of non-addressees of a decision.

Strike-out of economic tort claims

Separately, the High Court had refused BA's application to strike out claims alleging that it had committed the torts of unlawful interference with the claimants' business and conspiracy to injure the claimants by unlawful means (the so-called "economic tort" claims). BA argued that the economic tort claims could not be sustained as the claimants could not show the necessary intention to injure, which was an essential ingredient of both torts. The High Court held that the issue of intention raised a difficult question of law and was fact sensitive. It was premature to rule on it before disclosure and it was adjourned with liberty to restore after disclosure.

Motive for economic tort claims

The Court of Appeal noted that it was likely that the reason why the claimants were bringing the economic tort claims, in addition to the breach of EU competition law claims, was because the tort claims would allow them to expand the scope of their cartel claim and include claims relating to air cargo charges paid on non EU/EEA flights. Such claims were said to account for 60% of the claimants' claims.

Intention to cause loss to claimants must be shown

The Court of Appeal noted that both torts require, among other things, proof of the defendant's intention to cause loss to the claimant. It is not enough that the loss is a foreseeable consequence of the action, the defendant's intention must be to cause the specific claimant(s) loss.

An intention to harm the claimant (or even some of a class of claimants) cannot be described as an object of the defendant's conduct if the defendant is not even sure the claimant will suffer loss at all. For example, claimants could have passed on the price increase to their customers. The vast majority of claimants were indirect purchasers of BA's air freight services and the transactions generally involved chains of manufacturers, wholesalers and distributors – the Court of Appeal noted that the airlines would not know, and would no doubt be indifferent to, where in the chain the loss ultimately fell. If it were sufficient for a defendant to have intended to injure anyone in the chain down to the ultimate consumers, this would create an unknown and unknowable class of potential claimants.

This issue was not a question of fact that would be clarified by disclosure. The Court of Appeal therefore overturned the decision to adjourn until disclosure and struck-out the economic tort claims, noting that if economic tort claims could be advanced, this would: (i) extend the effect of competition law beyond what the draftsmen had intended; and (ii) dilute the concept of intention "unacceptably and perilously close to a concept of foreseeability".

COMMENT

The Court of Appeal's decision about redactions will be welcomed by follow-on non-addressee defendants, who no longer face the risks of: (i) claimants having sight of EC findings which those defendants were not able to contest; or (ii) becoming involved in proceedings to which they are not a party simply to defend their Pergan rights. The decision also helps defendants who are addressees of an EC decision, as it confirmed that they too can avail themselves of Pergan protection to the extent the allusions to their behaviour fall outside the operative parts of the decision or the essential basis for those operative parts (though what exactly constitutes the "operative parts" and "essential basis" of a decision may be difficult to say in practice).

The decision to strike-out the economic tort claims closes off a potential avenue for claims for losses outside the EEA to be brought within the scope of a claim following-on from an EC decision, which would otherwise have cut across the geographical limits inherent in a claim based on breaches of EU competition law. While it may seem unsatisfactory that a wrongdoer's indifference to who suffers loss as a result of his actions can be a defence, economic tort claims are not a natural fit with competition law breaches and cartel victims have an appropriate remedy in a follow-on claim for breach of statutory duty.

The claimants have sought leave from the Court of Appeal to appeal both aspects of the judgment to the Supreme Court.

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Conflict of laws

USING DISPUTE RESOLUTION PROVISIONS TO MANAGE RISK: A GUIDE TO THE IMPACT OF THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

The Hague Convention on Choice of Court Agreements entered into force on 1 October 2015. Allen & Overy has produced a guide which sets out ten key facts about the Convention and its potential impact on commercial parties' approach to choice of forum, both at the drafting stage and when disputes arise.

If you would like to receive a copy of the guide or discuss the Convention in more detail please contact Karen Birch (karen.birch@allenovery.com).

PITFALLS OF MULTI-PARTY AGREEMENTS WITH INCONSISTENT DISPUTE RESOLUTION CLAUSES

Sadruddin Hashwani (1), Zaver Petroleum Corp Ltd (2), Ocean Pakistan Ltd (3) v OMV Maurice Energy Ltd (*Hashwani v OMV*) [2015] EWCA Civ 1171, 17 November 2015

The Court of Appeal has upheld the decision of Burton J, concluding that disputes between the parties to a joint operating agreement fall within the scope of an arbitration clause in one of three potentially applicable (but separate) agreements. The decision confirms that whether such disputes fall under one or another agreement in such a situation is a question of interpretation of the disputes clauses themselves. It is also a useful reminder of the importance of careful drafting in a multi-contract, multi-party setting as well as some of the pitfalls this drafting is intended to avoid.

The dispute arose out of a claim by OMV Maurice Energy Ltd (**OMV**) for payment by Zaver Petroleum Corporation Ltd (**Zaver**) and Ocean Pakistan Ltd (**OPL**) of sums due as operating costs under a joint operating agreement dated 29 December 1999 (the **JOA**) which was incorporated into and subsidiary to a separate Petroleum Concession Agreement entered into on the same day (the **PCA**). The key issue was whether the dispute fell within the arbitration clause in the JOA, or within Article 7.2 of a separate Farm Out Agreement dated 30 March 2000 (the **FOA**).

At first instance, Burton J held that OMV's disputes with OPL and Zaver fell within the scope of the arbitration agreement contained in the JOA. OPL and Zaver appealed, arguing that the dispute(s) arose under the FOA.

Inter-linking agreements for petroleum concession

Under Article 28 PCA and Article 17 JOA, disputes were to be resolved either in ICSID/ICC arbitration (for any dispute involving a foreign commercial entity, such as OPL) or in domestic Pakistani arbitration (for disputes between the Pakistani State entities and any Pakistani commercial entity, of which there were none at the time of the agreements).

Under the later FOA, OPL farmed out its interest in the JOA to Zaver and OMV, who also became parties to the PCA and JOA. Zaver was a Pakistani entity. The PCA and JOA made no express provision for disputes between a foreign commercial entity (eg OMV) and a Pakistani entity (eg Zaver), although both were now parties to the JOA.

OMV referred its dispute about payment of operating costs to ICC arbitration under the JOA. OPL and Zaver applied to the English court under s72 English Arbitration Act 1996 (the **Act**), seeking a declaration that the ICC did not have jurisdiction to hear the dispute which, they argued, should have been brought under the FOA (which provided for disputes to be heard in arbitration in Pakistan). Zaver also argued that since it was a Pakistani entity, Article 28 PCA could not apply.

First instance – disputes fell within PCA and JOA

The judge disagreed that the dispute arose under the FOA. He held that: (a) the dispute between OMV and OPL fell within Article 28 PCA because both were foreign commercial entities; and (b) the dispute between OMV and Zaver also fell within Article 28 of the PCA, by virtue of the words "*mutatis mutandis*" in Article 17 of the JOA, but that this was a question of jurisdiction for the arbitrators. OPL and Zaver appealed.

Court of Appeal – resolving inconsistent arbitration clauses

The Court of Appeal upheld the decision at first instance as regards jurisdiction. However, it concluded that Burton J was wrong to refer the question of jurisdiction over the claims against Zaver to the arbitrators. That was not "a desirable course to take in the interests of good case management".

COMMENT

This decision is a useful reminder of the pitfalls that can arise in multi-contract and multi-party settings, and a prompt for remembering some practical tips to bear in mind when drafting dispute resolution clauses in such a setting.

First, this case shows the pitfalls that can arise when parties to a set of related agreements provide for different dispute resolution mechanisms to apply to disputes under different agreements and between different parties. As the Court of Appeal noted in this case, the interlocking nature of the agreements (and the claims thereunder) and "the fact that they contain mutually inconsistent arbitration clauses makes it more difficult to decide where jurisdiction lies in any given case". Resolving these jurisdictional difficulties only adds to the costs involved in an arbitration and delays resolution of the substantive dispute. The existence of multiple dispute resolution clauses may also lead to inconsistent decisions.

Wherever possible, therefore, parties in a multi-contract scenario should provide for jurisdiction in the same terms in each of the agreements. Thought should also be given to the circumstances in which consolidation and joinder may be required. Such clauses require very careful drafting.

Second, where parties really do intend for different disputes under related agreements to be resolved in different fora, they should express that intention in clear terms. In this case, the Court of Appeal did not accept that the parties to the FOA were "so concerned about uncertainties over the way in which Art. [28] would apply once they had acquired working interests … that they decided to put in place different arbitration arrangements" in the FOA to govern disputes under the JOA, on the basis that dispute resolution clauses are rarely at the forefront of negotiations for a new agreement. Had the parties intended for the resolution of certain types of disputes under the JOA to be governed by the dispute resolution mechanism in the FOA, "they would have expressed it in different and much clearer terms".

Finally, while the Court of Appeal referred to the presumption in favour of one-stop adjudication in the seminal *Fiona Trust* case, it is important to remember that in a multi-contract setting, the presumption is a "useful starting point" and then only in cases where the related agreements are entered into for different aspects of an overall relationship or arrangement between the same parties (see *Trust Risk Group SpA v AmTrust Europe Ltd* [2015] EWCA Civ 437 (***Trust Risk Group***), at [46]). It does not apply where a single contract creating a relationship is followed by a later contract embodying a subsequent agreement about the relationship containing a differently expressed choice of jurisdiction (and/or law). In that case, the starting point will be that disputes arising under one agreement with its own choice of dispute resolution mechanism are not caught by a different disputes clause in another agreement.

Where a single contract relationship is followed by a further, separate contract (as in this case), the "one-stop" presumption carries even less weight since "it may be easier to conclude that the parties chose to have different jurisdictions to deal with different aspects of the relationship… even if the effect is a risk of fragmentation of the overall process for the resolution of disputes" (see *Trust Risk Group*, at [49], [59]).

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INCONSISTENT DISPUTE RESOLUTION PROVISIONS ON TERMINATING RELATIONSHIP

C v D1 & ors [2015] EWHC 2126 (Comm), 20 August 2015

Following a spate of decisions on reconciling inconsistent dispute resolution provisions, Carr J held that the *Fiona Trust* one-stop adjudication presumption applies with "particular potency" where there is a subsequent agreement between the parties that terminates a commercial relationship created by an earlier agreement. Carr J distinguished the Court of Appeal's decision in *AmTrust Europe Ltd v Trust Risk Group* by differentiating between a situation where there is more than one "stream of business" between the parties (as in ***Amtrust***) and where there is only one stream of business, in which the parties have moved from one phase (operating an oilfield) to another (termination).

The claimant (**C**) was a Nigerian subsidiary of a major oil company. The first and third defendants (**D1** and **D3**) were Nigerian companies involved in crude oil production, with rights in an offshore oilfield. The second defendant (**D2**) was the ultimate parent company of D1 and D3. In 2005, C, D1 and D3 entered into a production sharing contract (**PSC**), under which C was appointed as the operating contractor and in return, received a 40% participating interest in the oilfield. 60% was retained by D1 and D3. The PSC was subject to Nigerian law and *ad hoc* arbitration in Paris.

In 2011, the parties decided to end the operations. They entered into a Sale and Purchase Agreement (**SPA**), whereby C sold its 40% interest to D1. It was agreed that liabilities in relation to the 40% interest which arose before 1 September 2011 would fall to C's account and that all liabilities after 1 September 2011 would fall to D1's account. Under clause 11 of the SPA, C and D1 provided indemnities in relation to their liabilities. D2 provided three separate guarantees. The SPA and the guarantees were subject to English law and to LCIA arbitration.

A dispute arose, and C claimed under the SPA from D1 and under the guarantees from D2. A tribunal was appointed under the 1998 LCIA Rules. D1 and D3 counterclaimed:

- under the PSC; and
- under clause 11 of the SPA for indemnity in respect of C's breaches of the PSC.

C challenged the tribunal's jurisdiction over the counterclaims under the PSC. D1 and D2 also applied for the joinder of D3 to the proceedings. The tribunal issued a partial award in October 2014 deciding, by majority decision, that: (a) it had jurisdiction over disputes concerning breaches of the PSC; and (b) it had the power to join D3 to the proceedings.

Before the Commercial Court, C challenged these two findings under ss67 and 68 Arbitration Act 1996. Carr J rejected the jurisdictional challenge and upheld the joinder of D3.

Carr J applies the Fiona Trust presumption

Carr J noted that the question of whether a dispute falls within an arbitration clause is primarily one of

construction. In general, parties to an arbitration agreement do not intend that disputes under that agreement should be determined by different tribunals (the ***Fiona Trust* presumption**) following *Fiona Trust v Privalov* [2007] 4 All ER 951.

Carr J examined a long line of decisions starting from *Fiona Trust* and summarised the key legal principles. She considered that although *Fiona Trust* involved a single arbitration clause, the presumption may apply even where there are multiple related agreements between the parties. If there are inconsistent arbitration agreements, it may be necessary to identify where the "centre of gravity" of the dispute lies and which agreement lies at the commercial centre of the transaction. In this context, Carr J distinguished this case from the recent decision of the Court of Appeal in *AmTrust Europe Ltd v Trust Risk Group* [2015] EWCA Civ 437 (reported in the July 2015 issue). In *AmTrust*, the Court of Appeal had held that the *Fiona Trust* presumption does not apply where the contractual arrangement contained two different express choice of law and jurisdiction clauses in different agreements. One of the agreements in *AmTrust* was a standard London market brokerage agreement dealing with the placement of business under which AmTrust paid commission. The other related to the granting of exclusivity in the Italian market under which AmTrust received payment. Carr J considered these two agreements to be two parallel streams of business between the parties. In the present case, Carr J believed that there was a single business stream in the course of which the parties' relationship changed from one of joint operation under the PSC to an exit process under the SPA.

Relying on the recent decision in *Monde Petroleum SA v WesternZagros Ltd* [2015] EWHC 67 (Comm) (reported in the June 2015 issue) which dealt with a settlement agreement, Carr J stated that where an agreement is subsequently entered into by the parties to terminate the commercial relationship created by an earlier agreement, the *Fiona Trust* presumption will apply with particular potency.

Carr J considered that the centre of gravity of the disputes was to be found in the SPA, not the PSC. The current phase of the parties' single relationship was the exit regime. There was a "fundamental shift" in the parties' relationship which had migrated from the PSC to the SPA. The arbitration agreement in the SPA was notably broader than that contained in the PSC and in the chain of events, superseded it. It was broad enough to cover both the indemnity claims and the PSC claims.

Court refuses to revisit unchallenged finding in the course of jurisdictional challenge

During the course of the proceedings, the claimant did not formally challenge the tribunal's determination that clause 11 SPA indemnities covered claims by D1 against C with respect to the PSC. Indeed, C could not have appealed this finding as it was considered to be a finding of legal merits and an appeal on a point of law under s69 of the Arbitration Act 1996 is not allowed under the LCIA Rules (Rule 26.9 of the 1998 LCIA Rules and Rule 26.8 of the 2014 LCIA Rules). However, at the hearing, C contended that because the jurisdictional challenge involved a re-hearing, the court was unfettered by the decision of the tribunal and could consider any issue. Consequently, C argued that clause 11 SPA did not extend to claims by D1 against C under the PSC. Carr J disagreed, stating that it was not open to C to raise this point at this late stage and holding that there was issue estoppel on this point.

Tribunal's power to join third party

In relation to the tribunal's power to join D3 to the proceedings, Carr J held that, under Rule 22.1(h) of the LCIA Rules 1998, the tribunal had the power to do so unless "otherwise agreed in writing". The mere existence of an earlier arbitration clause providing for arbitration elsewhere and under a different regime was not sufficient to establish that the parties had agreed otherwise.

COMMENT

The distinction between co-existing streams of business (as in *AmTrust*) and a single stream of business (which leads to termination as in this case) is novel. It calls for an analysis of parties' commercial dealings to see

whether there is more than one stream of business, as a way of reconciling inconsistent dispute resolution provisions. One suspects that this way of analysing the issue will receive more judicial consideration in due course. In the meantime, the decision serves as a reminder of the importance of making sure, where possible, that dispute resolution provisions in related agreements are consistent. In relation to settlement or termination agreements, if the parties intend to override the dispute resolution clauses in underlying agreements, it would be prudent to do so expressly.

Practitioners should also note that the joinder issue would have been different had the LCIA Rules 2014 applied because, under Article 22.1(viii) of the 2014 Rules, there is no provision allowing the parties to disapply the power of joinder.

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EXCLUSIVE OR NON-EXCLUSIVE? JURISDICTION CLAUSE IN A DERIVATIVES CONTRACT

Global Maritime Investments Cyprus Ltd v O.W. Supply & Trading A/S (under konkurs) [2015] EWHC 2690 (Comm), 17 August 2015

A jurisdiction clause in a derivatives contract was exclusive notwithstanding the absence of express wording that it was intended to be so. The High Court considered that a reasonable commercial person who agreed to this clause, and who had also agreed to English governing law, would not regard it as permitting them to issue proceedings outside England.

The parties (a Cypriot company and a Danish company) entered into multiple derivatives transactions relating to energy commodities. The particulars of those transactions were set out in confirmations, which were subject to General Terms agreed between the parties (there does not appear to have been an ISDA Master Agreement between the parties). The confirmations incorporated the 1993 ISDA Commodity Derivatives Definitions.

The General Terms were governed by English law and contained the following jurisdiction clause:

Clause 13.2 – "*With respect to any suit, action or proceedings relating to these general terms and conditions each party irrevocably submits to the jurisdiction of the English courts.*"

In November 2014, the defendant, O.W., filed for bankruptcy in Denmark. This triggered an event of default under the General Terms entitling the claimant, GMI, to withhold making payments to the defendant.

In March 2015, the defendant's trustee in bankruptcy issued proceedings against the claimant in Denmark, under Danish insolvency law to force the claimant to close out the transactions, which would result in the claimant being liable to pay approximately USD 1.6 million to the defendant.

The claimant subsequently applied for summary judgment in the English High Court, seeking (amongst other things) a declaration that the jurisdiction clause prohibited the defendant from commencing proceedings relating to the General Terms against the claimant in any other jurisdiction (ie that it was an exclusive jurisdiction clause), such that any claim by the defendant for the USD 1.6 million had to be brought in the English courts.

At summary judgment, Teare J concluded that Clause 13.2 provided for exclusive jurisdiction.

Scope of declaratory relief

In reaching this decision, Teare J first considered whether he was able to grant declaratory relief in the

present circumstances. The application was unusual as no proceedings alleged to be in breach of Clause 13.2 had been commenced or even expressly threatened (the Danish proceedings were under Danish insolvency law rather than the General Terms). Notwithstanding, Teare J held that there was a "real fear" of proceedings being brought in Denmark by the defendant as regards the sum payable pursuant to the close-out netting provisions of the General Terms and that the claimant had a real interest in seeking a declaration that any such proceedings should be brought in England. On that basis, Teare J held that there was "a real and present dispute" between the parties as to the effect of the jurisdiction clause.

Teare J also noted the benefit of deciding the jurisdiction question in these proceedings. If the defendant were to commence proceedings outside England in future, the dispute between the parties as regards jurisdiction would be confined to the question of whether the proceedings "relate to the General Terms".

Exclusive jurisdiction

Teare J then went on to consider whether the jurisdiction clause was exclusive. Teare J noted:

(i) the wording of Clause 13.2, from which he inferred that the parties intended it to apply to all proceedings relating to the General Terms; and

(ii) the fact that the General Terms were governed by English law, from which he inferred that the parties saw that there was good sense in linking the law of the transactions to the law of the country whose courts were referred to in the jurisdiction clause.

Teare J considered that, in these circumstances, the "reasonable commercial man" would not regard Clause 13.2 as permitting him to commence a suit, action or proceeding relating to the General Terms in the courts of countries other than England.

Teare J noted that, in construing Clause 13.2, he had adopted the approach of Males J in *BNP Paribas SA v Anchorage Capital Europe LLP & ors* [2013] EWHC 3073. He accepted that the language of Clause 13.2 was not "transitive" (ie it did not say that "each party agrees to submit all claims" to the jurisdiction of the English courts), but considered that "the notion that each party is free to submit a claim to the jurisdiction of a court other than the English court in circumstances where each party has "irrevocably" submitted to the jurisdiction of the English court is difficult."

Alternatively, Teare J held that even if the clause was not an exclusive jurisdiction clause, the defendant was obliged to submit to the jurisdiction of the English court and would not be able to commence parallel proceedings elsewhere in circumstances where the claimant had already commenced proceedings relating to the General Terms in England. Teare J highlighted the risk of parallel proceedings and the prospect of inconsistent decisions by separate courts on the same matters.

COMMENT

The decision confirms that the courts are willing to interpret jurisdiction clauses as conferring exclusive jurisdiction even in circumstances where they do not expressly specify that they are intended to be exclusive.

It is worth noting that the following drafting points were relevant to Teare J's finding that the clause was exclusive: (i) the clause applied to all proceedings; (ii) it applied mutually to both parties; and (iii) it stated that the parties "irrevocably" submit to the jurisdiction of the English courts. Teare J appeared to give little weight to the question whether the clause contained "transitive" (ie "the parties submit disputes") or "intransitive" (ie "the parties submit themselves") wording, when deciding whether this clause provided for exclusive jurisdiction (a distinction that Males J also considered to be unconvincing in the *BNP Paribas* case mentioned above).

Teare J did not consider the recast EU Brussels Regulation, but the decision is consistent with Article 25, which states that, regardless of where the parties are domiciled, if they have agreed that the courts of one or more member states have jurisdiction to settle their disputes, then the agreed court will have jurisdiction. That jurisdiction will be exclusive "unless the parties have agreed otherwise".

The decision also shows that jurisdiction challenges continue to be common in English proceedings. Leaving any ambiguity as to whether a clause is exclusive or non-exclusive increases the risk of such a challenge.

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Contract

SUPREME COURT RULES ON TEST FOR IMPLIED TERMS

Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd & anr [2015] UKSC 72, 2 December 2015

The Supreme Court held unanimously for the landlords that, save in very exceptional circumstances, express words would be needed to imply a term that rent paid in respect of a period that runs post a conditional break date should be repaid after the break takes effect. In giving its judgment the Supreme Court took the opportunity to clarify the law on implied terms generally making this an important case for all contract lawyers. Allen & Overy's Head of Real Estate, Imogen Moss, and Real Estate Litigation specialist Jane Fox-Edwards, led the team that acted for the landlords, the BNP Paribas companies as trustees for Britel Fund Trustees Ltd and WELPUT.

For more detail on the property law aspects of this judgment please contact Imogen Moss or Jane Fox-Edwards. This article focuses on the general contractual principles.

Lord Neuberger gave the lead judgment. Very much in keeping with his judgments in *Arnold v Britton* [2015] UKSC 36 and *Cavendish v Makdessi; ParkingEye v Beavis* [2015] UKSC 67, he emphasised the importance of respecting the bargain struck by parties in detailed commercial contracts.

Lord Neuberger thought that the principles in the classic authorities as to the test for implying a term into a contract represent a clear and consistent approach which it would be dangerous to reformulate. One way of putting the test was as expressed by Lord Simon in the Privy Council case of *BP Refinery* (1977) 52 ALJR 20: "[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

To these classic statements Lord Neuberger added the following observations:

- There is no need to show actual intention. Rather, one is concerned with the notional intention of notional reasonable people in the position of the parties at the time at which they were contracting.
- A term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for implying a term.
- It is questionable whether reasonableness and equitableness (Lord Simon's first requirement), will usually, if ever, add anything. If a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable.

- Business necessity and obviousness can be alternatives in the sense that only one of them needs to be satisfied, although in practice it would be a rare case where only one of those two requirements would be satisfied.
- If one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care."
- Necessity for business efficacy involves a value judgment. It was rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting this is that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

Lord Neuberger, Lord Carnwath and Lord Clarke all set out how to approach the dicta of Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988: "[t]here is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?" All of the Supreme Court Justices agreed that nothing in what Lord Hoffmann had said should be taken as diluting the test of necessity: "[t]he legal test for the implication of … a term is … strict necessity", which [was] described as a "stringent test". Lord Neuberger added that, in his view, the exercise of implying a term in to a contract is not one and the same as the exercise of interpreting a contract, not least because the express terms of a contract must be interpreted before one can consider any question of implication.

Lord Carnwarth was not as critical as Lord Neuberger, if that is the word, of Lord Hoffmann's dicta, describing it as a valuable and illuminating synthesis of the factors which should guide the court. Lord Clarke found a way to reconcile what Lord Hoffmann had said on the one hand with the agreement by all the Supreme Court Justices in this case that the test had not been watered down on the other hand.

COMMENT

This judgment re-emphasises the stringent nature of the legal test which must be met before a term will be implied into a contract. Fairness or reasonableness alone will not be sufficient, even if, as claimed unsuccessfully here, the result can be harsh. Lawyers who have previously been confused by Lord Hoffmann's exposition of the test in the *Belize* case will now be able to refer to Lord Neuberger's clarification. This case will undoubtedly be the starting point, in place of *Belize*, when thinking about whether a term may be implied. This gives greater power to those who pay close attention to drafting their contracts since the message from the Supreme Court in a number of cases this year points to upholding party autonomy and away from interfering with what the parties have said.

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NEW PENALTY TEST

Cavendish v Makdessi; ParkingEye v Beavis [2015] UKSC 67, 4 November 2015

The Supreme Court has provided a new test on penalties, which replaces the old test of whether a clause was a "genuine pre-estimate of loss". The new test is whether the clause is a secondary obligation which imposes a detriment which is out of all proportion to the legitimate interest of the innocent party. If so it will be penal and therefore unenforceable. The ruling helpfully acknowledges that a party can, in some circumstances, have a legitimate interest in enforcing performance which goes beyond simply being compensated for losses.

New test

The new test for whether a provision is an unenforceable penalty is:

"… whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation."

This is taken from the majority judgments of Lord Neuberger and Lord Sumption (with whom Lord Clarke and Lord Carnwath agreed on this point). Lord Mance and Lord Hodge (with whom Lord Toulson agreed on this point) each chose, rather than agreeing with the majority, to put the test in their own words using phrases such as "extravagant disproportion" and "extravagant, exorbitant or unconscionable". It is unclear the extent to which their differences are of substance or form.

Facts – restrictive covenants and parking charges

Makdessi v Cavendish: Mr Makdessi agreed to sell to Cavendish a stake in a company. The contract provided that if Makdessi was in breach of certain restrictive covenants against competing activities, he would not be entitled to receive the final two instalments of the price paid by Cavendish (clause 5.1). Further, Makdessi could be required to sell his remaining shares to Cavendish, at a price that excluded the value of the goodwill of the business (clause 5.6). Makdessi breached the covenants but argued that clauses 5.1 and 5.6 were unenforceable penalty clauses.

ParkingEye v Beavis: ParkingEye managed a car park for the owners of a retail park. Numerous notices stated that a failure to comply with a two hour time limit would result in a parking charge of GBP 85. Mr Beavis parked in the car park, but overstayed the two hour limit. ParkingEye demanded payment of the GBP 85 charge. Mr Beavis argued that the GBP 85 charge was unenforceable as a penalty.

New test applied to the facts

Makdessi v Cavendish

All Supreme Court Justices came to the same answer - that clauses 5.1 and 5.56 were not penalties, but they arrived there via different routes.

Clause 5.1 – a price adjustment clause

Lord Neuberger and Lord Sumption (with whom Lord Carnwarth agreed) (**their Lordships**) held that clause 5.1 was in reality a price adjustment clause. Although the occasion for its operation was a breach of contract it was in no sense a secondary provision.

It was not a liquidated damages clause, it was not concerned with regulating the measure of compensation for breach of the restrictive covenants, nor was it a contractual alternative to damages at law.

Although their Lordships acknowledged that clause 5.1 had no relationship with the measure of loss attributable to the breach, Cavendish had a legitimate interest in the observance of the restrictive covenants which extended beyond the recovery of that loss. It had an interest in relating the price of the business to its value. The goodwill of the business was critical to its value to Cavendish.

There were no juridical standards by which the court could assess how much less the business was worth if the restrictive covenants were breached, instead this was a matter for the parties, who were sophisticated, successful and experienced commercial people bargaining on equal terms over a long period with expert legal advice. They were the best judges of the degree to which each of them should recognise the proper commercial interests of the other.

However, their Lordships did not sanction absolutely any price adjustment clause: "We do not doubt that price adjustment clauses are open to abuse, and if clause 5.1 were a disguised punishment for the Sellers' breach, it would make no difference that it was expressed as part of the formula for determining the consideration".

Clause 5.6: reduced price for remaining shares

Their Lordships held that the logic of the price formula for the sale of the retained shares under clause 5.6 was similar to that of the price adjustment achieved by clause 5.1 for the sale of the transferred shares. The same legitimate interest which justified clause 5.1 justified clause 5.6 also. More fundamentally, a contractual provision conferring an option to acquire shares, not by way of compensation for a breach of contract, but for distinct commercial reasons, belonged, in the eyes of their Lordships, among the parties' primary obligations, even if the occasion for its operation was a breach of contract.

Their Lordships were, perhaps, rather opaque on why they felt the need to look at the legitimate interests if the clauses were creating primary and not secondary obligations according to their test.

On this question Lord Hodge (with whom Lord Clarke agreed on this point) was clearer. He held that there was clearly a strong argument that in substance clause 5.1 was a primary obligation which made payment of the interim and final payments conditional upon the seller's performance of certain other of his obligations. But even if it were correct to analyse clause 5.1 as a secondary provision operating on breach of the seller's primary obligation, Lord Hodge was satisfied that it was not an unenforceable penalty clause. In relation to clause 5.6, Lord Hodge construed the clause as a secondary obligation but one which was not an unenforceable penalty.

ParkingEye v Beavis

Their Lordships held that while the penalty rule was plainly engaged, the GBP 85 charge was not a penalty. Although ParkingEye was not liable to suffer loss as a result of overstaying motorists, it had a legitimate interest in charging them which extended beyond the recovery of any loss. The scheme in operation here (and in many similar car parks) was that the landowner authorised ParkingEye to control access to the car park and to impose the agreed charges, with a view to managing the car park in the interests of the retail outlets, their customers and the public at large. That was an interest of the landowners because; (i) they received a fee from ParkingEye for the right to operate the scheme; and (ii) they leased sites on the retail park to various retailers, for whom the availability of customer parking was a valuable facility. It was an interest of ParkingEye, because it sold its services as the managers of such schemes and met the costs of doing so from charges for breach of the terms (and if the scheme was run directly by the landowners, the analysis would be no different).

COMMENT

This is a lengthy judgment and one in which it is not always easy to reconcile the approaches taken by the Supreme Court Justices. However it is clear we have a new test which is more flexible as it may take into account, in certain cases, not just what loss is likely to result from the breach, but instead broader considerations (perhaps, for example, reputational risk, public interest in providing a service) in deciding whether an interest is legitimate and what is proportionate to protect that interest.

Deciding on what losses may flow from a breach (such as a delay or failure to pay), can be very difficult, so it is also helpful that a number of members of the court acknowledged that sophisticated and well–advised commercial parties are in the best position to decide on what certain aspects of their relationship/promises are worth. It is likely therefore that parties of equal

bargaining power, with specialist advisors, may find it more difficult to challenge a clause as a penalty following this decision.

There remain a number of areas for debate:

- The difficult distinction as to whether a provision is a primary or secondary obligation. The members of the court did not agree on this point on the facts.
- In what circumstances, even where one is concerned with a primary obligation, it can nevertheless be viewed as a disguised punishment? It is hoped that this will only operate as a safety valve in exceptional circumstances.
- What legitimate interests can be protected? This itself may by intertwined with whether the clause is a primary obligation and parties are advised to consider this aspect of the test in any event.
- How the courts are going to apply the test of whether or not a clause is "out of all proportion" to that legitimate interest. It is hoped that they will be loath to second-guess the parties' own judgment on that issue, especially in a heavily negotiated commercial contract.

In terms of drafting solutions, some or all of the following are worth considering:

- Try to identify precisely what the legitimate interests in a clause that operates on breach may be and even consider setting those interests out the recitals.
- Try to ensure that, where possible, key clauses operating on breach are drafted so as to highlight their importance to the overall package. The idea is to maximise the chances of such a clause being identified as primary obligations. An alternative would be to draft in a way which makes the obligation conditional.
- Where appropriate include within an agreement that that each side was of comparable bargaining power and each side had been fully advised by solicitors.

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DON'T READ THE LABELS – READ THE CONTRACT

PST Energy 7 Shipping LLC & Product Shipping & Trading S.A. v OW Bunker Malta Ltd & ING Bank N.V. [2015] EWCA Civ 1058, 22 October 2015

Allen & Overy has been successful for the third time in a row now that the Court of Appeal has dismissed an appeal against an arbitration award in the latest phase of litigation arising out of the insolvency of the OW Bunker group, one of the world's largest suppliers of marine fuels. The court upheld the judgment of Males J which had itself upheld the award of an experienced panel of LMAA arbitrators.

On 22 October 2015, the Court of Appeal found that a standard form contract for the supply of fuel (bunkers) was not a contract of sale within the meaning of s2 of the Sale of Goods Act 1979 (**SOGA**). As a result PST, the owners of the ship in question, the "Res Cogitans", lost their argument that a failure to pass title to PST in the fuel meant that OW could not maintain a claim for the price. Allen & Overy acted for ING who, as agent for a syndicate of banks, asserted a right to recover, as assignee, the debt owed to OW.

The standard terms, governed by English law, provided for the fuel to be purchased on credit with payment to take place 60 days after delivery. During this period PST were given express permission to use the fuel to power

the Res Cogitans; but retention of title provisions meant that title to the fuel remained with OW's supplier Rosneft.

Moore-Bick LJ held that whatever label one attaches to the contract (and he saw nothing incongruous in describing it in commercial terms as a contract for the sale of goods), its essential nature was in his view "reasonably clear". It was a contract under which goods were to be delivered to the owners as bailees with a licence to consume them for the propulsion of the vessel, coupled with an agreement to sell any quantity remaining at the date of payment, in return for a money consideration which in commercial terms could properly be described as the price. The effect of the permission given to use the fuel coupled with the credit period was that the contract was not in essence a contract for the transfer of property in the fuel, because some if not all of the fuel would have ceased to exist by the date of payment (the date at which title would otherwise have passed).

Any remaining fuel sold under the contract would be sold subject the "incidents" of SOGA including the implied condition in s12 that the seller has (or will have) the right to sell the goods at the time when property is to pass. Although in principle a breach of s12 gives a buyer a right to repudiate and claim damages, it appears clear from the short concurring judgment of Longmore LJ and the judgment of Moore-Bick LJ read as a whole that failure to transfer title in the remaining fuel would only (save in unusual circumstances) provide the customer with a remedy in damages against the OW entity that contracted to arrange the supply. The anti set off provisions in the contract would operate to prevent this claim being set off against the price owed to ING.

This decision is important to those who finance receivables because unless the finance parties can claim the price, as they were able to here, then any financing would not be effectively secured.

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Damages

DAMAGES FOR ECONOMIC LOSS: WHAT IS TOO REMOTE?

Wellesley Partners LLP v Withers LLP [2015] EWCA Civ 1146, 11 November 2015

Financial institutions and other parties frequently on the receiving end of concurrent claims in tort and contract will welcome this decision of the Court of Appeal to apply the contractual test for remoteness of damage in cases of concurrent liability. Although on the facts the decision did not reduce the damages payable by the defendant firm of solicitors, the narrower test for remoteness of damage in contract (ie damage of a kind not unlikely to result from the breach) will provide a degree of protection against defendants having to compensate claimants for unusual (and potentially open-ended) types of loss in such cases. The judgment also illustrates how 'loss of a chance' arguments may assist a claimant to prove that a breach of contract caused it to suffer loss in cases where the claimant expected to obtain a benefit from a third party.

Negligent drafting by law firm

Wellesley Partners LLP (**WP**), a recruitment firm specialising in the investment banking sector, retained Withers LLP (**Withers**) to amend WP's partnership agreement following an investment from Addax Bank BSC (**Addax**). The amended partnership agreement was executed in May 2008. It contained an option for Addax to withdraw half of its capital contribution at any time within the first 41 months of the agreement. Just one year later, in May 2009, Addax exercised that option. WP claimed damages for negligence and breach of contract from Withers, alleging that the firm failed to carry out WP's instructions that Addax should have a right to withdraw capital only after 42 months from the execution of the agreement (not within 41 months). At first instance, the judge upheld WP's claim. The appeal focused primarily on issues relevant to the assessment of damages.

WP claimed that, but for the withdrawal of Addax's capital, it would have gained a profitable mandate from Nomura to "build out" Nomura's U.S. presence following its acquisition of the Lehman business during the financial crisis. WP presented evidence that the principal of WP had a close relationship with Lehman and that Nomura was about to award WP the mandate. However, the exercise of Addax's option left WP with insufficient capital to expand into the U.S. Such expansion (which had been part of WP's business plan since before Addax invested) was crucial to securing the Nomura mandate. In the event, WP did not get the Nomura mandate.

Nugee J awarded WP just over GBP 1 million in respect of lost profits from the Nomura opportunity, concluding on the evidence before him that there was a 15% chance of WP being awarded the full mandate and a 45% chance of it being awarded half the mandate.

What is test of remoteness in cases of concurrent liability?

At first instance, Withers argued that the Nomura losses would be irrecoverable if the contractual test for remoteness was to apply. The judge was inclined to agree (although he did not decide the issue), but held that he was constrained by authority to apply the tortious test for remoteness because a claimant is normally allowed to take advantage of more generous rules of a tortious cause of action (for example longer limitation periods) in cases of concurrent liability. Withers appealed this finding.

Contractual test for remoteness – damage of that kind "not unlikely"

Citing *Hadley v Baxendale*[1], *Victoria Laundry*[2] and *The Achilleas*[3], Floyd LJ summarised the basic rule that a contract breaker is liable for damage resulting from his breach if, at the time of making the contract, a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach. The principle is based on the idea that the parties, in the absence of special provision in the contract, would normally expect a contract breaker to be assuming responsibility for the damage which would reasonably be contemplated to result from the breach (but not for unusual circumstances particular to the injured party about which the contract breaker had no knowledge at the time of contracting).

Without expressing a view on the potential inconsistencies between the different speeches in *The Achilleas*, he added that that case shows that some foreseeable losses may not be recoverable because they are not losses for which the contract breaker could be taken to have assumed responsibility (in that case, the general understanding of the market was that the claimed loss was not recoverable).

Wider tortious test for remoteness – reasonable foreseeability

Floyd LJ reflected that in tort, the primary rule determining recoverability of loss is that of reasonable foreseeability, a wider test than the contractual one as damage may be of a kind which is reasonably foreseeable (and therefore recoverable in tort) yet highly unusual or unlikely (and therefore irrecoverable in contract).

Court of Appeal: apply contractual test where there is concurrent liability

The Court of Appeal found that the contractual test for remoteness of damage should be adopted in cases of concurrent liability as in those cases the duty of care in tort arises out of the same assumption of responsibility as exists under the contract. The rationale for the broader principle of remoteness in tort (ie that there is no opportunity in tort for the injured party to protect himself by pointing out in advance a risk which may appear unusual to the other party) does not exist in cases of concurrent liability. The parties have had the opportunity to draw to each other's attention any unusual areas of risk at the time of contracting and to take any necessary protective measures. This conclusion was not affected by the fact that a claimant is entitled to take the benefit of more favourable limitation periods in tort in cases of concurrent liability.

Even using contractual test – damages not allowed

The Court of Appeal, although agreeing with WP on the proper remoteness test to apply, found that the loss of the Nomura mandates was a type of damage for which Withers had assumed responsibility under its contract with WP. The loss was therefore recoverable regardless of which test of remoteness was applied. Unlike the position in *Victoria Laundry* (where loss of a particular high value dyeing contract unknown to the defendant was loss of a different kind from losses of the ordinary business of a laundry), the Nomura contract was exactly the sort of business Withers would have expected WP to engage in, albeit a particularly lucrative example of that business. Nor could there be any analogy with *The Achilleas* in which the general understanding of restrictions on liability in the shipping market meant that any departure from that rule would give rise to a risk of commercial uncertainty in the industry.

The loss of a chance issue

WP appealed against the judge's assessment of WP's loss of U.S. profits claim as a "loss of a chance" claim, arguing that he ought not to have applied a discount to the value of the Nomura mandate. Following consideration of *Allied Maples*[4] and subsequent loss of a chance cases, Floyd LJ upheld Nugee J's decision. The case was a classic *Allied Maples* type case in which the claimant had lost the chance to obtain a benefit which was dependent on the actions of a third party. The court stressed the importance in loss of a chance cases of separating issues of causation from issues of quantification of damages. The loss of a chance principle assisted WP in establishing causation as, once it established on the balance of probabilities that it would have set up a profitable U.S. business, it only had to satisfy the Court that there was a real and substantial chance that Nomura would have awarded it some

business. WP had satisfied the trial judge that this was the case. The chance of Nomura awarding WP the mandate had to be reflected in the quantification of damages. Again, the court upheld Nugee J's findings on the chance of WP obtaining the mandate.

It is interesting to note that one of the reasons Floyd LJ gave for rejecting WP's claim to the full value of the Nomura mandate was that WP had not adduced evidence from Mr Meissner, a key decision maker at Nomura and one with whom WP apparently had a close relationship. This obvious omission weakened WP's evidence as to how likely it was to secure the mandate. A reminder to choose witnesses wisely.

COMMENT

This decision will be relevant in any context where duties to exercise reasonable care and skill can potentially co-exist with contractual duties, including in the case of duties owed by financial institutions in relation to the sale of financial products. The decision to apply the contractual test for remoteness of damage in cases of concurrent liability gives precedence to the intentions of the contracting parties. Defendants should welcome the greater protection the decision will provide against having to compensate claimants for unusual (and potentially open-ended) types of loss. However, it also demonstrates that it will not always be straightforward to work out whether particular losses are recoverable or too remote even applying the contractual test, and that the end result may be the same regardless of which test for remoteness applies. Indeed, the mere fact that it has taken so long for the court to be called on to resolve the issue itself illustrates this point.

The Court of Appeal's summary on loss of a chance arguments is also helpful. The case clarifies that the loss of a chance principle may help a claimant to establish causation in a case like this as it will only be necessary for the claimant to show a real and substantial chance that a third party (in this case Nomura) would have conferred a benefit on it but for the breach. However, once causation is established, the level of damages awarded will reflect the Court's assessment of the chance of that benefit being conferred.

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[1] *Hadley v Baxendale* (1854) 9 E. 341.

[2] *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528.

[3] *Transfield Shipping Inc v Mercator Shipping Inc* (*The Achilleas)* [2009] 1 AC 61.

[4] *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 CA.

Equity

GOOD FAITH PREVENTS RELIANCE ON PRE-EMPTION RIGHTS

Dixon & EFI (Loughton) Ltd v Blindley Heath Investments Ltd & ors [2015] EWCA Civ 1023, 9 October 2015

A shareholder was unable to rely on contractual pre-emption rights contained in a shareholders' loan agreement because of an "estoppel by convention". The parties had years earlier transferred shares without regard to these rights. This was sufficient for an estoppel to arise. The Court of Appeal confirmed that an estoppel by convention may arise out of a shared common assumption, regardless of how that assumption was established (whether through mistake, ignorance or forgetfulness). Estoppel by convention is one of the many English law principles whose ultimate aim is the preservation of good faith dealing between contracting parties.

The dispute in this case arose out of the struggle for control of a company (**EFI**) and involved the question of whether a right of pre-emption was valid and enforceable on a particular transfer of shares.

At first instance, Ms Lesley Anderson QC (sitting as Deputy Judge of the High Court) held that the appellant (**Mr Dixon**) could not rely on a right of pre-emption to prevent the transfer of certain shares in EFI to the claimant (**BHIL**). This was because of an estoppel by convention. Mr Dixon had himself previously received shares in EFI without regard to that same right of pre-emption. Mr Dixon appealed, arguing that there could be no common assumption (giving rise to an estoppel) about the validity of certain rights where the party alleged to be estopped (ie Mr Dixon) was ignorant of those rights (or had forgotten they existed) and/or where the assumption was not sufficiently clear and unambiguous. The Court of Appeal dismissed both grounds of appeal.

Pre-emption rights under shareholders' loan

The terms of a shareholders' loan agreement (used to fund a business acquisition in 2001) included a restriction on the transfer of shares and a right of pre-emption for existing shareholders (the **2001 rights of pre-emption**), also referred to in what were called the **February 2001 Letter** and **November 2001 Letter**.

In 2009 and 2010, Mr Dixon and a fellow shareholder, Mr Wells, acquired 400 of the 600 shares in EFI through a series of transactions (the **2009/2010 transactions**). The 2009/2010 transactions were all concluded without regard to the 2001 rights of pre-emption.

Take-over attempt

Thereafter, Mr Dixon tried to acquire the remaining shares in EFI (held by a Mr Bass and a Mr Mingay) through a campaign of intimidation. However, Messrs Bass and Mingay agreed to sell their shares to a Mr Boam, to be held by BHIL. Mr Bass and Mr Mingay confirmed to the solicitor acting for Mr Boam in relation to this sale (the **BHIL sale**) that the shares were unencumbered.

The judge at first instance was satisfied that the BHIL sale was unanimously approved at a meeting of the Board in October 2011, subject only to presentation of the stock transfer form and share certificates (the **October Board meeting**).

Shortly after the October Board meeting, Mr Dixon discovered the February and November 2001 Letters referring to the 2001 rights of pre-emption, which he then tried to use to block the BHIL sale. While the detail is not important, the judge at first instance found that the manner in which he proposed to do this amounted to a lie.

In November 2011, the Board declined to register the transfer of shares to BHIL and returned the stock transfer forms (the **November Board meeting**). Their refusal to do so gave rise to the dispute in which BHIL claimed that the 2001 rights of pre-emption were not valid or enforceable and sought an order amending the register of members of EFI to include BHIL as shareholder.

First instance: estoppel prevents use of pre-emption rights

Ms Anderson QC held (*inter alia*) that the 2001 rights of pre-emption were valid and binding, but that Mr Dixon (among others) was estopped from enforcing those rights because (a) the relevant parties shared an assumption that they were not valid (and had conducted themselves on that basis), and (b) it would be unconscionable and inequitable for Mr Dixon (among others) to rely on those rights in refusing to register the transfer of shares from Messrs Bass and Mingay to BHIL in circumstances where he had acquired shares and other benefits pursuant to the 2009/2010 transactions regardless of the 2001 rights of pre-emption and at the expense of Messrs Bass and Mingay.

The issue on appeal – no common assumption arising out of "forgetfulness"

On appeal, Mr Dixon argued (*inter alia*) that there could be no common assumption as to the existence of rights where (a) the parties to the assumption did not know of those rights in the first place (or had forgotten they existed), and (b) where the assumption was not sufficiently clear and unequivocal.

Court of Appeal – reason for common assumption irrelevant

The Court of Appeal rejected these arguments, concluding on the two issues raised on appeal:

(1) Regardless of whether a common assumption arises as a result of ignorance, a mistake, forgetfulness or on any other basis "should make no difference" because the "essence of the principle is that the parties have conducted themselves on a conventional basis that is, wittingly or unwittingly, different from the true basis". The only requirement (which is an evidential one) is that the party said to be estopped must have assumed some responsibility for the shared (albeit mistaken) understanding.

(2) Whether the common assumption existed was largely a question of fact. In this case, the judge at first instance's conclusion – namely, that the 2009/2010 transactions (*inter alia*) made clear that the parties conducted themselves on the basis of a positive assumption that no valid rights of pre-emption existed – was "amply justified".

COMMENT

This decision is noteworthy for a number of reasons.

First, in the author's experience, estoppel by convention is a claim which arises not infrequently either where there is a dispute about contractual interpretation or in relationships where the parties have conducted themselves on a basis other than that provided for in the contract. This decision is therefore a useful reminder of the general principles that apply to an estoppel by convention (as first articulated in *Amalgamated Investment & Property Co Ltd (in Liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84 and *The Vistafjord* [1988] 2 Lloyd's Rep 343):

(a) A common assumption is a belief as to fact or law contrary to the true state of affairs and it must be shared by the two parties (it must have "crossed the line" between them). The assumption may be shared as a result of conduct on the party relying on the estoppel and acquiesced in by the party sought to be estopped. It may also arise out of silence (as in the *The Indian Grace* [1996] 2 Lloyd's Rep 12, at 20), if special circumstances exist giving rise to a duty to speak (as discussed by Rix LJ in *ING v Ros Roca* [2011] EWCA Civ 353).

(b) Where such a common assumption exists, the party sought to be estopped will be prevented from denying the assumption if it would be unjust and inequitable to do so. In this regard, the Court of Appeal confirmed that it will "seldom if ever be fair to allow a party who has benefitted from the assumption to repudiate it in order to prevent the other party obtaining a like benefit".

Second, an estoppel by convention is not confined to cases where an assumption arises out of a mistake. As this case clarifies, the manner in which the assumption arises is not relevant – whether through mistake, ignorance or forgetfulness. What matters is that the parties have conducted themselves on the basis of the shared assumption and that the party sought to be estopped assumed some responsibility for the assumption. This is an evidential question, not a legal one.

Third, the decision must be read alongside that of the Court of Appeal in *ING v Ros Roca* in terms of whether the assumption must be "unambiguous", "sufficiently certain" or "clear and unequivocal". In addressing this second ground of appeal in *Dixon v BHIL*, the Court of Appeal simply confirmed that the assumption in this case was evident from the mutually manifest conduct of the parties. It did not appear to consider whether this is in fact a requirement of an estoppel by convention. However, in *ING v Ros Roca*, the Court of Appeal rejected an argument that the assumption had to be "sufficiently certain", which is a requirement for an estoppel by representation only. By contrast, the existence of an assumption giving rise to an estoppel by convention "must be interpreted by the court and the only true meaning is that decided upon by the court".

Finally, it is often said that there is no general principle of good faith in English law. This is true insofar as there is no general term of good faith automatically implied into all contractual dealings. However, English law has developed a number of different principles whose ultimate aim is, broadly speaking, to preserve good faith dealings between contracting parties.

Estoppel by convention is one such principle – as the Court of Appeal in this case said, "the origins of the modern (and developing) principles [of estoppel by convention] … are self-evidently a matter of good faith and fair dealing". Clearly relevant in this case was the fact that Mr Dixon (as a solicitor) was prepared to lie about the manner in which the 2001 rights of pre-emption were allegedly re-discovered – a fact which went to the weight of his evidence as well as to whether it would be inequitable for him to repudiate the assumption.

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Injunctions

PROCEEDS OF LOAN CAUGHT BY COMMERCIAL COURT FREEZING ORDER

JSC BTA Bank v Mukhtar Ablyazov & 16 ors [2015] UKSC 64, 21 October 2015 (on appeal from: [2013] EWCA Civ 928)

The proceeds of four loan agreements entered into by the respondent (as borrower) were caught by the expanded definition of "asset" contained in the current standard form of Commercial Court freezing order which includes "*any asset which [the respondent] has the power, directly or indirectly, to dispose of or deal with as if it were his own*". In a unanimous decision, the Supreme Court overturned the decisions of the High Court and the Court of Appeal.

The appellant was one of Kazakhstan's four systemic banks (the **Bank**). The respondent, Mr Ablyazov was the chairman and majority shareholder of the respondent between 2005 and 2009. The Bank accused

Mr Ablyazov of presiding over the misappropriation of USD 10 billion of its monies for his own personal benefit whilst chairman and commenced 11 sets of proceedings against him in England (where he had fled following the nationalisation of the Bank). The Bank went on to obtain judgment against Mr Ablyazov in four of these cases in an aggregate sum of over USD 4.4 billion.

The Freezing Order

The Bank had obtained a worldwide freezing order over Mr Ablyazov's assets (the **Freezing Order**).

Paragraph 5 of the Freezing Order followed the standard form of the order that has been set out in the Admiralty and Commercial Court Guide since 2002. The final two sentences (in bold below) were added in 2002:

"*5. Paragraph 4 applies to all the respondents' assets whether or not they are in their own name and whether they are solely or jointly owned and whether or not the respondent asserts a beneficial interest in them.* ***For the purpose of this Order the respondents' assets include any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own. The respondents are to be regarded as having such power if a third party holds or controls the assets in accordance with their direct or indirect instructions***." [Emphasis added]

The Loan Agreements

Mr Ablyazov had entered into four loan agreements (the Loans) as the borrower. The Loans each contained the following clause:

"*1.12* ***Use of Proceeds****. The proceeds of the Loan Facility shall be used at the Borrower's sole discretion. The Borrower may direct the Lender to transfer the proceeds of the Loan Facility to any third party…*"

Mr Ablyazov had fully drawn down under each of the Loans and had directed that monies be paid directly to third parties, including to his former solicitors, corporate service providers and to lawyers acting for his co-defendants. According to the Bank's counsel, Mr Ablyazov used the proceeds of the loan agreements to make payments without reference to the restrictions contained in the Freezing Order (which permitted payment of his legal fees only to the extent that they were reasonable, limited his weekly expenditure and would have required the consent of the Bank or the court to payments to, for example, his co-defendants).

The Bank applied for a declaration that if the Loans were valid agreements: (a) Mr Ablyazov's rights under them were assets for the purposes of the Freezing Order; and (b) any drawings under the Loans could only lawfully be made pursuant to the exceptions set out in the Freezing Order.

Issues before the Supreme Court

The issues to be decided by the Supreme Court were:

(1) whether Mr Ablyazov's right to draw down under the Loans was an "asset" within the meaning of the Freezing Order;

(2) if so, whether the exercise of that right by directing the lender to pay the sum to a third party constituted "disposing of" or "dealing with" or "diminishing the value" of an "asset"; and

(3) whether the proceeds of the Loans were "assets" within the meaning of the extended definition in paragraph 5 of the Freezing Order on the basis that Mr Ablyazov had the power "directly or indirectly to dispose of, or deal with [the proceeds] as if they were his own".

The Supreme Court dismissed the Bank's appeal on issues (1) and (2) but allowed the appeal on issue (3).

Extended description of assets

Lord Clarke emphasised that the Freezing Order differed from the pre-2002 form of freezing order as it contained an extended description of "assets" in the last two sentences of paragraph 5, and the words "whether the respondent is interested in them [the assets] legally, beneficially or otherwise".

It is noted in the Commercial Court Guide that whether this wider wording should be included in relation to the order and/or the provision of information under it will be considered by the court when granting the order on a case by case basis.

Lord Clarke stated that the standard pre-2002 form of freezing order does not prevent a party borrowing money

and spending it and held that it would be inappropriate to reverse previous decisions which did not support the proposition that Mr Ablyazov's right to draw down under the loan was an "asset" within the meaning of the standard form of freezing orders as originally drafted (which excludes the extended definition).

On issue (1), Lord Clarke held that the right to draw down loans did not constitute an "asset" for the purposes of the standard pre-2002 form of freezing order; the expanded wording (shown in bold above) is required to achieve this. In light of this, and in respect of issue (2), Lord Clarke did not think that anything Mr Ablyazov had done amounted to "disposing of" or "dealing with" or "diminishing the value" of an "asset".

In respect of issue (3), the Supreme Court held that the proceeds of the Loans were "assets" within the meaning of the extended definition in paragraph 5. He noted that the Loans contained: (i) a provision that the loan proceeds would be used at Mr Ablyazov's sole discretion, and (ii) a power to direct the lender to transfer the proceeds to any third party (at clause 1.12, set out above). Accordingly, an instruction by Mr Ablyazov to the lender to pay the lender's money to a third party did constitute Mr Ablyazov dealing with the lender's assets as if they were his own and thereby these proceeds fall within the extended definition.

In his judgment, Lord Clarke explained that the extended definition is designed to catch assets which are not owned legally or beneficially by the respondent but over which the respondent has control; it therefore did not matter that the respondent did not own the proceeds of the Loan, nor that he had incurred a liability at some stage to reimburse the lender. Lord Clarke also made clear that the entire purpose of the extended definition is to extend the meaning previously given to "assets" and to widen the scope of the Freezing Order to catch assets which would not otherwise have been caught.

COMMENT

This judgment is of interest not only to those who may need to draft a freezing order (as it demonstrates the importance of taking care when drafting to ensure that the definition of "assets" catches all the assets the respondent is suspected of having) but also to third parties who have lent funds to a respondent to a freezing order. The Supreme Court's judgment makes clear that, depending on the definition of "assets", a freezing order is capable of attaching to the proceeds of a loan. However, it does not comment on how a lender might enforce its right to be repaid or exercise its security in circumstances where loan proceeds have been frozen. This judgment does not appear to affect the current state of the law in this area, whereby pre-existing liabilities to third parties will be respected, albeit the particular terms of the order should be considered in each case to determine what steps can and cannot be taken with a respondent's assets. In many circumstances, it is likely that the terms of a freezing order may need to be varied to allow the repayment of a third party.

By allowing the Bank's appeal on issue (3) in this case, the Supreme Court can be seen to have closed one loophole which a "wily operator" (in the words of the Court of Appeal) may have used to manoeuvre around the restrictions imposed by a freezing order. However, in his judgment, Lord Clarke also made clear that the court will take a restrictive, not expansive, approach when construing freezing orders: he emphasised that the only real question for the court when construing an order is what the freezing order as drafted actually means. Therefore, in circumstances where it is desirable to give a broader meaning to the order, the correct approach is for the court to vary the order appropriately for the future, rather than exercise its jurisdiction in a "flexible and adaptable manner" and give the order a meaning that it does not have.

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Privilege

LIBOR CLAIMS BACKDROP ENOUGH FOR PRIVILEGE CLAIM

Property Alliance Group Ltd v The Royal Bank of Scotland plc [2015] EWHC 3187 (Ch), 5 November 2015

In this LIBOR follow-on case, the defendant was able to claim legal advice privilege over high level documents that had been produced by the bank's external lawyers for meetings with an internal executive committee with oversight of the LIBOR regulatory investigations. The backdrop of the active regulatory investigations was sufficient legal context for privilege to apply. While not only containing legal advice, the documents were part of the "continuum" of communications between lawyer and client, the object of which was the giving of legal advice as and when appropriate. The documents were therefore privileged in their entirety.

The decision is about whether certain "high level" documents (**ESG Documents**) produced by the bank's external lawyers for a body within the bank (known as the Executive Steering Group (**ESG**)) were properly the subject of a claim for legal advice privilege.

Executive Steering Group

The bank established the ESG as a standalone committee, made up of individuals from Legal, HR, Compliance and senior business representatives to oversee the bank's responses to the worldwide regulatory investigations into LIBOR and related litigation, liaise with legal advisors and provide instructions accordingly.

The ESG held regular meetings (via conference call) led by the bank's external counsel to discuss the status of the investigations. The bank's legal advisors provided advice and analysis on issues and next steps to enable the ESG to make decisions and provide further instructions as necessary.

Categories of document

There were two categories of the ESG Documents subject to the claim for legal advice privilege:

- Confidential memoranda, which informed and updated the ESG on progress, status, issues arising in the regulatory investigations and next steps. These formed, in essence, a briefing and agenda for the ESG meetings. Many entries were no more than a brief factual recital of recent or upcoming events; for example, references to matters in the public domain such as the commencement of a new investigation or litigation, or non-public matters such as non-privileged meetings with regulators.
- Confidential summary minutes of the discussions at the ESG meetings.

All the ESG Documents were produced by the bank's external lawyers for the ESG, were marked "privileged and confidential", and were communicated by the bank's external lawyers to the ESG.

Legal advice privilege

The issue was whether legal advice privilege attached to the ESG Documents: whether they were communications made in confidence between solicitors and clients for the purpose of giving or obtaining legal advice.

In *Balabel v Air India* [1988] 1 Ch 317, Taylor LJ described the privilege as not confined to telling the client the law, but extending to "advice as to what should prudently and sensibly be done in the relevant legal context". The test in such instances is whether the communication (or other document) was made confidentially for the purposes of legal advice. That privilege will extend to all information that is passed

between the solicitor and client "as part of the continuum aimed at keeping both informed so that advice may be sought and given as required".

In the seminal case *Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610, Lord Scott reiterated that there must be a "relevant legal context" for privilege to attach to the advice. Lord Scott recommended that, in cases of doubt, the relevant inquiry was whether the advice "relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law" and, if it does, whether the communication falls within the underlying policy justification for legal advice privilege.

Update on investigation was part of the continuum of communications

Snowdon J was satisfied that the bank had engaged their external counsel in a "relevant legal context": to provide advice and assistance as specialist lawyers and deal with communications with regulators. This was in circumstances where the bank was facing multiple regulatory investigations that could have (and in fact did) lead to pecuniary penalties, and consequent civil litigation. That advice and assistance "undoubtedly related to the rights, liabilities and obligations of RBS, and the remedies that might be granted against it either under private law or under public law".

Within that context, Snowdon J was confident that both categories of the ESG Documents formed part of "a continuum of communication and meetings" between the bank and its lawyers, the object of which was the giving of legal advice as and when appropriate. In particular:

- The purpose of the memoranda was to provide comprehensive and up-to-date summaries of developments in the regulatory investigation. Although they did not explicitly communicate or request advice, their overall purpose was to form the basis of discussion that would allow advice to be given at the ESG meetings. Therefore, these were properly viewed as part of the "continuum" of information passed with the aim of keeping the client informed so that advice may be sought and given as required.
- The summary minutes demonstrated that at the ESG meetings the lawyers gave factual updates on meetings and communications with regulators on behalf of the bank. However, they also gave their impressions and responses to questions on those matters, and suggested next steps in the investigations. Snowdon J found that the role of the lawyers at these meetings was to convey information to the ESG and to provide them with legal advice. Therefore, these documents included both factual update and legal advice and so were privileged.

Privileged entirely or to be redacted?

PAG submitted that even if legal advice privilege attached to some parts of the documents, it would not cover the documents in their entirety. In particular, reference to public events or dealings with regulators would not be privileged. By way of analogy with minutes of decisions taken by a board of directors, it was submitted that direct references to legal advice should be redacted, with the remainder of the documents disclosed.

Snowdon J rejected these submissions. Although some elements of the documents would not ordinarily have attracted privilege on their own merits, here they formed part of the "necessary exchange of information" **between** lawyer and client, the object of which was giving legal advice as and when appropriate. The test was the "relevance and purpose" of the communication: the source of the underlying information was irrelevant.

Construing the exact role of the lawyer will be critical

PAG submitted that had the briefing papers or minutes been prepared internally (rather than by the external lawyers in a "secretariat" capacity), the documents would not have been privileged and would have had to be disclosed (with redactions for any legal advice). It was illogical to draw a distinction based on who had prepared the documents.

Snowdon J drew a distinction between documents that were in fact passed between client and lawyer (as in this case) and secondary internal documents that merely recorded or summarised discussions, which included

legal advice. Previous authorities for allowing redacted copies of documents to be disclosed applied only to the latter type of secondary documents. A person should not have to redact the primary documents that were actually sent to him by his lawyers. As such, these documents were privileged in their entirety.

However, he reiterated that a court would not uphold a claim to legal advice privilege simply because the documents were prepared by a lawyer: if the lawyers were involved merely for convenience, rather than as lawyers, documents would not attract privilege. For example, if minutes of a business meeting with no legal content were simply taken by a lawyer and then sent to the client, or if a law firm was asked to send press cuttings from its own library to a client who could not find them.

However, he found that in this case the meetings had very substantial legal content and the lawyers led the discussions, as they were handling the regulatory investigations. The ESG meetings themselves were held for the purpose of the lawyers giving information and legal advice to the members of the ESG as to what to do about those investigations and claims. It was understandable that lawyers took the lead in deciding how to present the information, setting the agenda and co-ordinating meetings, leading discussions and preparing minutes: this was an "integral part of their provision of legal advice and assistance to the ESG".

Public policy justification fulfilled

Snowdon J gave a robust exposition of the clear policy justification for legal advice privilege being applicable to the flow of information from lawyer to client (and not just from client to lawyer) including in the regulatory context. He specifically noted that where there is a regulatory investigation lawyers may need to brief the client on the factual situation to enable the client to decide what further advice to obtain and steps to take, or record the steps taken:

"There is a clear public interest in regulatory investigations being conducted efficiently and in accordance with law. That public interest will be advanced if the regulators can deal with experienced lawyers who can accurately advise their clients how to respond and co-operate. Such lawyers must be able to give their client candid factual briefings as well as legal advice, secure in the knowledge that any such communications and any record of their discussions and the decisions taken will not subsequently be disclosed without the client's consent."

COMMENT

The decision provides useful and timely clarification on the extent of legal advice privilege in the context of regulatory investigations: an area sure to be the subject of on-going interest in coming years.

The key message is that a claim to legal advice privilege depends on the relevance and purpose of the information contained in the broader context of the lawyers' advisory role. It therefore did not matter in this case what the source of the underlying information was or whether there was explicitly a request or exposition of legal advice. This decision is highly practical. It recognises that the targets of any regulatory investigation, in particular as wide ranging and extensive as the LIBOR probes, will need to take legal advice on their public and private law positions. There is a public interest in their doing so on a privileged basis.

To provide such advice, lawyers must often undertake extensive factual investigations to discern the relevant facts. They may conduct non-privileged meetings with regulators, and have regard to material in the public domain. External lawyers must then report on these matters regularly to a decision-maker at the client. This will include providing legal advice, discussing the client's broader strategy, and taking instructions on dealings with regulators. To bifurcate the provision of legal advice from the underlying communications between the lawyers and the clients in such matters would seem artificial.

This decision assists these situations where lawyers perform an investigatory and co-ordinating role as an integral part of their legal services. This is particularly helpful in the light of the difficulties that can arise in determining when a regulatory investigation becomes sufficiently adversarial to attract litigation privilege. A broad application of legal advice privilege based on the ultimate purpose for which the communications

occur will give comfort in situations where in civil proceedings litigation privilege may have been more clearly available.

Interestingly, the decision implies different treatment of documents depending on who has prepared them. On the one hand, the summary minutes of the ESG were privileged in their entirety; notwithstanding the fact that some of their content was not legal advice. Conversely, had the minutes been prepared internally by the client's non-legal staff, recording the same mixture of advice and non-privileged facts, the documents may have been disclosable with the redaction of the legal advice. Mr Justice Snowden acknowledged this point, but emphasised that this was because the "secretariat" function that the lawyers provided was an integral part of the legal assistance being given. This case therefore highlights the importance of the involvement of internal or external legal advisors in regulatory investigations.

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Service

QUITE AN ART: PERSONAL SERVICE ON RUSSIAN DEFENDANT

Alexandre Yakovlevick Tseitline v Leonid Victorovich Mikhelson & ors [2015] EWHC 3065, 3 November 2015

Serving a claim form on an evasive foreign individual can be difficult and time consuming. Two persistent process servers managed to do so on a Russian defendant who was visiting an art gallery in London, despite the defendant only briefly touching the documents. This Commercial Court ruling shows that the English courts will take a flexible and pragmatic interpretation approach to the meaning of "leaving with" in the rules on personal service.

The defendant, Mr Mikhelson, is a Russian national domiciled in Russia. He does not speak or understand English, apart from a few words. The claimant wanted to serve an English court claim form on Mr Mikhelson while he was visiting London.

The claimant employed two process servers, who filmed their attempts to serve Mr Mikhelson. The process servers each had an envelope containing a sealed copy of the claim form (with a certified Russian translation) and supporting documents.

Defendant briefly touches envelope on arrival

The first process server approached Mr Mikhelson as he arrived at an art gallery with his daughter, who was fluent in English. Mr Mikhelson was told in English that he was being served with papers as part of a High Court claim. He took hold of one side of the envelope containing the documents while the process server kept hold of the other side of the envelope. Mr Mikhelson asked his daughter what the envelope was. He then released the envelope without taking it leaving the first process server holding the envelope. The process server tried again to hand the envelope to Mr Mikhelson, again repeating in English, and in earshot of Mr Mikhelson's daughter, that the documents were related to High Court proceedings. In response, Mr Mikhelson said "Speak only Russian" and continued walking into the gallery. The process server then asked Mr Mikhelson's daughter to give the papers to her father, explaining that they were

in connection with High Court proceedings and that she needed to give them to her father. Mr Mikhelson then told his daughter in Russian not to listen to the process server.

Envelope wedged under defendant's arm – and then drops

Inside the art gallery, the second process server lodged a second envelope containing the claim form between Mr Mikhelson's arm and his body and let go of the envelope. The envelope fell to the floor and Mr Mikhelson walked off. The first process server threw his copy of the envelope at Mr Mikhelson, but it hit a door as it closed behind Mr Mikhelson. The second process server then attempted to give his envelope to Mr Mikhelson's daughter by lodging his envelope between her back and her bag. The envelope fell to the floor and it was picked up by another person. She placed the envelope back on the floor after something was said or indicated to her. The process servers retrieved their envelopes and left the gallery. The claimants subsequently posted the claim form and supporting documents to Mr Mikhelson's residential and business address in Russia claiming that he had been served personally.

CPR: meaning of "leaving with" an individual

CPR 6.5 only provides that a claim form is "served personally on … an individual by leaving it with that individual". It was common ground that the two-limb test established by the House of Lords in *Kenneth Allison Ltd v A.E. Limehouse & Co* [1992] 2 AC 105, which considered the pre-CPR equivalent provision, was equally applicable to CPR 6.5. That test requires that: (1) the document be handed to the person to be served; or (2) if they will not accept the document, they must be told what the document contains and leave it with or near them.

Where the document is accepted

Where the document is accepted by the recipient, the first limb of the *Kenneth Allison* test requires that the nature of the document be "immediately and readily apparent on its face". Otherwise the recipient may discard the document as junk mail without its contents ever reaching their attention.

Where the document is not accepted

If the document has not been accepted, the second limb of the *Kenneth Allison* test is engaged and an explanation of the document is required.

Documents will have been "left with" the intended recipient if the recipient has been given "a sufficient degree of possession of the document to enable him to exercise dominion over it for any period of time however brief". Personal service can still be effected even where the process server subsequently picked up documents after they have been "left with" the recipient.

The process of leaving a document with the intended recipient must result in them "acquiring knowledge that it is a legal document which requires their attention in connection with proceedings". This requirement is concerned with the knowledge of the recipient rather than the process by which the knowledge is acquired. While in most cases, this requirement is satisfied by the imparting of a simple explanation, such knowledge can be readily inferred from pre-existing knowledge, prior dealings, or from conduct at the time of or after service has been attempted including conduct in evading service.

Service was validly effected

Phillips J found that the proceedings had been properly served on the defendant inside the art gallery, whereas attempts outside the gallery did not amount to valid service.

The purported service by the first process server on Mr Mikhelson outside the art gallery did not meet either limb of the *Kenneth Allison* test. The process server had not completed the process of "handing the document" to Mr Mikhelson as the process server had not released the envelope, and Mr Mikhelson was not given a sufficient degree of possession of the document to enable him to retain it. However, Phillips J held that Mr Mikhelson, despite not speaking English, had acquired knowledge of the nature of the documents in the envelope outside the gallery.

Personal service was effected inside the art gallery. The envelopes had been left sufficiently with or near Mr Mikhelson such that he control over them, however briefly. It did not matter that the process servers later

tried to lodge an envelope under his daughter's bag or that they took the envelopes with them after Mr Mikhelson abandoned them.

Mr Mikhelson's conduct demonstrated that he had the requisite knowledge of the nature of the documents. His Honour inferred from Mr Mikhelson's conduct – refusing to interact with the two process servers and telling the second process server to "go away" – that he had been informed of the nature of the documents by his English speaking companions.

COMMENT

This decision provides practical tips when attempting to effect personal service on a foreign individual.

- An audio or video record of the service attempt should be made in circumstances where a defendant is expected to take steps to avoid service. Many of the factual findings in this application were derived from the video of the purported service rather than from witness statements.
- The nature of the documents served should be made apparent on their face. The documents served in this case should instead have been placed inside an envelope bearing a description of the documents which could be understood by the intended recipient.
- Documents must be handed to or left near the recipient such that they have control over the documents for a brief period.
- Where it is known that the intended recipient does not understand English, it may be advisable to arrange for a process server who can explain the documents to the recipient in a language they can understand, or arrange for an interpreter to accompany the process server when service is to be effected.

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Tort

SECURITISED LOANS: WHO IS THE PROPER CLAIMANT FOR LOSSES CAUSED BY NEGLIGENT VALUATION OF UNDERLYING SECURITY?

Titan Europe 2006-3 plc v Colliers International UK plc (in liquidation) [2015] EWHC Civ 1083, 3 November 2015

The transferee SPV of a non-recourse securitised loan is the proper claimant in respect of losses said to have been caused by the allegedly negligent valuation of underlying security, the Court of Appeal has found in *obiter* comments. Although the court reversed the High Court decision concerning the valuation, the issue concerning who has title to sue in these circumstances will be of interest to the securitisation industry.

In 2005 Credit Suisse First Boston International (**CSFB**) lent Valbonne Real Estate BV (**Valbonne**) EUR 110 million. Valbonne owned a large property in Nuremburg (the **Property**), on which the loan was secured.

In deciding to make the loan, CSFB relied on a valuation of the Property by Colliers International UK plc (**Colliers**). CSFB then securitised the loan, together with other loans secured on other properties. As part of this, Titan Europe 2006-3 plc (**Titan**) was created as a special

purpose vehicle. Titan's roles included issuing floating rate notes (the **Notes**). In June 2006, Titan bought the package of loans using funds provided by subscribers for the Notes.

In 2009 Valbonne defaulted under its Facility Agreement. In 2010 different valuers valued the Property at EUR 12.4 million. Titan began proceedings against Colliers in negligence for undervaluing the Property. Titan alleged that it had suffered a loss by buying the package of loans, where the security was far less than it had been led to believe by the valuation.

As well as denying that it had been negligent, a main plank of Colliers' defence in the High Court was that Titan was the wrong claimant. Collier argued that Titan had issued the Notes on a non-recourse basis, and so had suffered no loss. Blair J ruled that Colliers had been negligent, and that Titan had been a proper claimant. Colliers appealed.

Colliers not negligent – 15% margin of error

Blair J held that the Property had been worth EUR 103 million at the date of valuation, as against Colliers' negligent valuation of EUR 135 million, so Colliers were liable for EUR 32 million in damages. Blair J had commented that an acceptable, or non-negligent, margin of error for a valuation could, in certain conditions, be as much as 15% above or below the "true market price". However, he also held that a valuation of the Property at below EUR 100 million would have had no credibility in the market.

On appeal, Longmore LJ agreed with Colliers that it did not make sense for the High Court to have found a true value of EUR 103 million, subject to a margin of 15%, while saying that a valuation below EUR 100 million would have carried no credibility in the market. In reviewing actual transactions involving the Property, he also noted that it had been sold six months before the valuation for EUR 127 million. It was therefore "inconceivable", in a rising market, that the correct value could have been only EUR 103 million. The court held that "the correct value was in the region of EUR 118.3 million" and Colliers' valuation of EUR 135 million was, therefore, within the 15% margin and so was not negligent.Who was the proper claimant?

As Colliers had not been negligent, the question of whether Titan had title to sue was not relevant, and the rest of the court's comments were obiter. However, as Longmore LJ said, the question of title to sue "is probably of more importance to the securitisation industry than the outcome of any one valuation", and the court would therefore express its view.

Longmore LJ noted that Titan was "the legal and beneficial owner of both the securitised loans and the securities", which meant that it was "not at first sight easy to see why Titan… cannot sue Colliers", and that was so even though Titan was obliged to pass on any recoveries it might make. What happened to any recoveries was "a matter with which Colliers should have no legitimate concern".

He also drew attention to the certificate which Colliers issued with its valuation. This contained a wide category of parties which were allowed to rely on the valuation, including "any actual or prospective purchaser, transferee, assignee, or service provider of the loan, and prospective investor… in any securities evidencing a beneficial interest in or backed by the loan [and] any trustee for bond holders holding bonds backed by the loan". Counsel for Colliers argued that, since this meant the Noteholders had their own right of action, "it could not have been intended that Titan should have a cause of action as well".

However, Longmore LJ rejected this. The choses in action that Titan held were "just as much property as any other sort of property and… entitle[d] it to sue for substantial damages if it [had]… a cause of action at all."

Longmore LJ also questioned whether the Noteholders could actually bring claims in such circumstances. It was possible that any Noteholder who attempted to bring a claim would be met by the argument that his loss was in fact reflective of losses suffered by Titan. If so, Noteholders might be unable to recover. The Noteholders themselves also had no contractual relationship with Colliers in this case.Finally, he rejected Colliers' argument as being factually wrong: "it is not correct to say that Titan suffered no loss. It suffered a loss when it acquired the loan and the securities… The price it paid for the loan was too high. Titan's relationship with the Noteholders is analogous to that of

a company with its shareholders: no one suggests that because the shareholders may be the ultimate losers in a case of this kind, the company has not suffered a loss."

COMMENT

Negligence

The case does not raise any new legal principles concerning valuations, though Longmore LJ's judgment gives a useful overview of how negligence is assessed in the context of valuing buildings.

One striking practical feature of the case was the range of values which two experts, and two different courts, ascribed to the Property. Titan's expert initially valued the Property at EUR 61 million, later revised to EUR 76.6 million. Colliers' valuation had valued it at EUR 135 million, Blair J at EUR 103 million and the Court of Appeal at EUR 118 million – while accepting that a valuation of EUR 135 million was not negligent. The Property was finally sold for only EUR 22.5 million.

It is difficult to see what clients can do to protect themselves against the risks posed by professional valuers whose expert opinions can vary so widely, though it might perhaps be possible to contract on the basis that the parties agree on the acceptable range of the margin around "true" value. From valuers' perspective, this case suggests that particular care should be given to qualifying valuations when appropriate – the Property was an unusual one, and its value was particularly dependent on a key tenant. A valuer is less likely to be found to have been negligent if the degree of uncertainty about a specific valuation is made suitably clear. Longmore LJ's judgment does not say why Colliers agreed to allow so many – generic – parties to rely on its valuation. This was perhaps a pre-condition which CSFB imposed for the valuation contract, but, as a point to be agreed between the parties, it is clearly a key means of limiting valuers' risk.

Proper claimant?

As regards who had title to sue, the decision will be a welcome confirmation for parties involved in securitisation and similar structures, as it makes clear that issuers are proper parties for bringing comparable claims. In any event, the question of who has title to sue is a point that people involved in securitisations should be careful to make clear in the relevant documents.

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Litigation Review consolidated index 2015

Follow-on damages competition claim: jurisdiction issues: *Cartel Damage Claims Hydrogen Peroxide v Akzo Nobel NV* (Jul)

Jurisdiction clause is exclusive despite it contemplating proceedings in other jurisdictions: *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* (Jun)

Resolving inconsistent jurisdiction clauses: *Trust Risk Group Spa v Amtrust Europe Ltd* (Jun)

Schemes of arrangement and why loan note investors should be wary of governing law amendment mechanisms: *In the matter of DTEK Finance B.V.* (Jun)

Ability to litigate in England torpedoed by foreign insolvency proceedings: *Erste Group Bank AG London Branch v J "VMZ Red October" & ors* (Jun)

Competing dispute resolution clauses between settlement agreement and underlying contract: *Monde Petroleum SA v WesternZagros Ltd* (May)

Jurisdiction battle lost and *Fiona Trust* considered: *Deutsche Bank AG London Branch v Petromena ASA* (Apr)

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

Supreme Court rules on test for implied terms *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd & anr* (Dec)

New penalty test: *Cavendish v Makdessi; ParkingEye v Beavis* (Dec)

Don't read the labels – read the contract: *PST Energy 7 Shipping LLC & Product Shipping & Trading S.A. v O.W. Bunker Malta Ltd & ING Bank N.V.* (Dec)

An individual lender's rights under a syndicated loan: *Charmway Hong Kong Investment Ltd & ors v Fortunesea (Cayman) Ltd & ors* (Oct)

Borrowers not liable for lender's costs of unwinding an internal hedge upon pre-payment of loan: *Barnett Waddington Trustees (1980) Ltd & anr v The Royal Bank of Scotland Plc* (Oct)

Natural language interpretation triumphs despite junior noteholder's frustration with rating agency: *Deutsche Trustee Co Ltd v Cheyne Capital (Management) UK (LLP)* (Oct)

What's in a name? – The case of "on-demand" performance bonds: *Caterpillar Motoren GmbH & Co KG v Mutual Benefits Assurance Co* (Oct)

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)

Damages

Damages for economic loss: what is too remote?: *Wellesley Partners LLP v Withers LLP* (Dec)

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

State immunity, letters of credit and third party debt orders: *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Republic of Iraq* (Oct)

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

Good faith prevents reliance on pre-emption rights: *Dixon & EFI (Loughton) Ltd v Blindley Heath Investments Ltd & ors* (Dec)

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

Evidence

Business intelligence consultants: protection of sources: *Rio Tinto Plc v Vale SA & ors* (Oct)

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

Injunctions

Proceeds of loan caught by Commercial Court freezing order: *JSC BTA Bank v Mukhtar Ablyazov & 16 ors* (Dec)

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

Damages for late payment of insurance claims: Enterprise Bill (Oct)

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)

Privilege

LIBOR claims backdrop enough for privilege claim: *Property Alliance Group Ltd v The Royal Bank of Scotland plc* (Dec)

Procedure

Complex finance disputes and simple commercial disputes: procedural changes afoot (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* (Apr)

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

Quite an art: personal service on Russian defendant: *Alexandre Yakovlevick Tseitline v Leonid Victorovich Mikhelson & ors* (Dec)

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

Settlement

Part 36 offer must contain genuine concession: *R (on the application of MVN) v Greenwich London Borough Council* (Oct)

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

Securitised loans: who is the proper claimant for losses caused by negligent valuation of underlying security?: *Titan Europe 2006-3 plc v Colliers International UK plc (in liquidation)* (Dec)

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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