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Litigation and Dispute Resolution

Review

EDITORIAL

In this edition of the Litigation Review we report on a decision of Mrs Justice Andrews relating to Letters of Request issued by the New York courts for "business intelligence" (or "business risk") consultants to produce documents and give evidence in New York proceedings (*Rio Tinto plc v Vale SA & ors*). As part of its assessment as to whether or not to accede to the request for assistance from a foreign court, Andrews J considered certain topical issues that arise as a result of engagement of such consultants, including the duties of confidence consultants may owe to their sources and whether their knowledge about aspects of a potential claim can have an impact on a limitation period.

Also on limitation, we consider *Arcadia Group Brands Ltd & 11 ors v Visa Inc & ors* where the Chancellor of the High Court made it clear that once a claimant is aware of facts that complete its claim, then the limitation period starts running. The limitation period does not wait for further facts to emerge which may clarify or strengthen a claim or raise a defence.

We consider the Court of Appeal's decision in *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Republic of Iraq* which involved issues of immunity and third party debt orders. The Court of Appeal's judgment not only provides a helpful analysis of the *situs* of a debt under a letter of credit (the place of payment), it also serves as a reminder that state owned entities with a separate corporate personality and powers typical of a commercial organisation may not satisfy the statutory test for immunity under UK law.

Finally, as we go to print, the Supreme Court has given its landmark judgment on the penalty clause cases (*Makdessi v Cavendish* and *ParkingEye v Beavis).* We will be providing a full review of this significant judgment in our next edition. In short, penalty clauses remain unenforceable, with the majority noting "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".

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Appeals

APPEAL CONDITIONAL ON PAYMENT INTO COURT OF GBP 3.64 MILLION JUDGMENT

Goldtrail Travel Ltd v Aydin & ors [2015] EWCA Civ 926, 11 June 2015

In this rare example of a court granting conditional permission to appeal, Turkish airline Onur Air Tasimacilik AS (**Onur Air**) had to pay the judgment sum of GBP 3.64 million into court as a condition of being allowed to continue with its case. There was a "*compelling reason*" for imposing this condition: Onur Air had stopped flying to the UK and Floyd LJ considered it would be unlikely to pay the judgment sum if its appeal failed. Companies should be aware of this decision when seeking permission to appeal, especially if they are considering changes to their UK business activities after trial.

The High Court found Onur Air liable for dishonestly assisting with the misapplication of money from Goldtrail Travel Limited (**Goldtrail**), but stayed payment of the judgment sum of GBP 3.64 million until after any appeal. However, Goldtrail argued that the airline, as a condition of appeal, should pay the judgment sum into court because it had stopped flying to the UK after the first court hearing and no longer had any assets there. Floyd LJ, agreeing with Goldtrail, made Onur Air's appeal conditional on payment of the entire GBP 3.64 million. Onur Air applied to have this set aside.

Test − "compelling reason"

The Civil Procedure Rules provide the test for whether to impose conditions on an appeal. Under CPR 52.9, the court will only exercise its power to impose conditions on an appeal where there is a compelling reason for doing so. Floyd LJ considered the factors in *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065, where a compelling reason had been found to exist because:

- there was a real risk that the claimant would be unable to recover the judgment sum if successful;
- the defendant had been in breach of a court order to pay the judgment sum;
- the defendant had not been forthcoming about its financial affairs;
- the appeal would not be stifled if the condition was imposed; and
- the defendant had the resources to fund the costs of the appeal and pay the judgment sum.

Noting that these factors should not be taken as a checklist for future cases, Floyd LJ suggested that they were "*indications which may be material*" in constituting a compelling reason.

Onur Air's behaviour

Floyd LJ found three factors amounting to a compelling reason to impose the condition.

First, Onur Air had stopped flying to the UK and had no aircraft there. Enforcing any judgment against the airline was therefore significantly harder than it had been at the time of the first hearing. Onur Air's motives for stopping flights to the UK were not relevant.

Second, Onur Air was late paying certain sums due after the first hearing and did not provide an adequate explanation for this. Floyd LJ concluded that he could not be confident that the appellant would pay the judgment sum if its appeal failed.

Finally, Floyd LJ noted that the condition would not prevent the airline from appealing. He recognised that the first two factors might not amount to a compelling reason in another case, but appeared more willing to impose the condition because he could not see a disadvantage to either side in doing so (beyond the loss of enjoyment of the funds caused by placing them into court).

COMMENT

The judge has a difficult balance to strike when considering imposing conditions on a company as part of its permission to appeal. One side has already won the case and is entitled to the judgment sum but the judge has granted an appeal because there is at least some doubt as to whether the court decided the case correctly. In such circumstances, imposing onerous conditions can be a barrier to justice. The judge has to be careful not to obstruct an appeal by imposing conditions that make it unaffordable.

Perhaps this is why it is relatively rare to see conditions imposed, especially those requiring payment of the entire judgment sum into court. Indeed, Floyd LJ was clear that the court would only impose conditions where there is a sufficiently compelling reason for doing so. Onur Air had removed its assets from the jurisdiction and was not likely to cooperate with payment of the judgment sum if it lost the appeal, and, crucially, Floyd LJ did not think that he was obstructing its appeal by imposing the condition (despite Onur Air's protests that it had cash flow difficulties).

Onur Air's motives for removing its assets from the jurisdiction were not relevant. It is therefore important for companies to tread carefully when considering changes to their UK business activities after trial, if they have not complied with any judgment against them. Even if the court accepts that there are legitimate reasons for such changes, it may still impose costly conditions on a permission to appeal.

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Competition

WHAT KNOWLEDGE OF A POTENTIAL CAUSE OF ACTION STARTS THE LIMITATION CLOCK RUNNING?

Arcadia Group Brands Ltd & 11 ors v Visa Inc & ors [2015] EWCA Civ 883, 5 August 2015

Even where a claim is evidentially weak, and the relevant law complex, the limitation period starts as soon as a claimant has enough facts to make its cause of action complete. Under s32 Limitation Act 1980 (the **Act**), if a defendant has deliberately concealed facts relevant to the right to bring a claim, the period does not run until the concealment has, or could reasonably have, been discovered. In this case, the court stressed that s32 must be read narrowly in terms of what facts are needed to trigger the limitation period. A "*fact relevant to a plaintiff's right of action*" is a fact without which a cause of action would be incomplete.

The claimants are or were all well-known high street retailers. They sought damages for breaches of European and domestic competition law from 1977 to 2014. They alleged that the price they had paid for accepting credit and debit cards had been inflated as a result of the "multilateral interchange fee" (**MIF**) set by Visa.

Payments made with Visa cards in Europe generally involve four parties: (1) a merchant; (2) the merchant's bank (the **Acquirer**); (3) a cardholder; and (4) the cardholder's bank (the **Issuer**). When a cardholder makes a payment with a Visa debit or credit card, the Issuer collects payment from the cardholder and pays the Acquirer the payment amount minus a transaction or "interchange" fee. The Acquirer in turn pays the merchant the amount it received from the Issuer less a Merchant Service Charge made up of: (1) a fee for the Acquirer's services; (2) a card network scheme fee payable to Visa; and (3) the interchange fee.

The retailers alleged that the MIF was an unlawful restriction of competition.

The Act

Visa argued that the effect of the Act was that the claimants could not bring an action relating to any alleged breaches which had taken place more than six years before the proceedings started. The claimants, however, relied on s32 of the Act which says:

> *"(1) …where in the case of any action for which a period of limitation is prescribed by this Act-*
>
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant;…*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the… concealment… or could with reasonable diligence have discovered it."*

Thus, where there has been a deliberate concealment of a "*fact relevant to the plaintiff's right of action*", there is a longer period for bringing actions. The claimants argued that Visa had deliberately concealed facts relevant to their right of action, thereby making it possible for them to bring claims relating to events as far back as 1977. Visa applied for summary judgment on the point, arguing that the period for bringing claims could not be extended because, if any facts had actually been concealed, they were not relevant to the claimants' cause of action.

"Fact relevant to the plaintiff's right of action"

In his judgment, the Chancellor of the High Court, Sir Terence Etherton, considered, in particular, *Johnson v Chief Constable of Surrey* (CA, unreported, 23 November 1992) and subsequent cases in which the principles outlined in *Johnson* had been followed.

The Chancellor held that a "*fact relevant to a plaintiff's right of action*" was a fact without which a cause of action would be incomplete. Facts which merely improved the prospects of success were not necessarily relevant to a claimant's right of action. Equally, facts which might provide a defence to a claim were not relevant to a claimant's right of action, or to the question of when a claim could be brought.

Section 32(1)(b) of the Act is to be given a very narrow interpretation. A right of action is to be contrasted with a fact relevant to the "*plaintiff's action*" or "*his case*" or "*his right to damages*". New facts might make a claimant's case stronger, or a right to damages easier to establish, but they did not bite upon the right of action itself and so were not relevant to when the limitation period begins. The claimants' allegations that: (i) the MIFs were anti-competitive; and (ii) they had suffered a loss, were (if true) sufficient to create a cause of action. The facts allegedly concealed, such as the precise way in which Visa had fixed the MIFs, would only have strengthened the claim and/or been commercial considerations bearing on whether to bring proceedings. Any cause of action which might have existed was complete without this information. On this basis, the Chancellor held that s32(1)(b) did not apply to extend the limitation period and claims could be brought relating to the period from 2007 only.

Competition law and the European Union

One element which the claimants relied on was the complexity of competition law and the corresponding complexity in terms of what had to be alleged and pleaded. It was common ground that a claimant alleging a violation of Article 101(1) of the Treaty on Functioning of the European Union (**TFEU**), or its domestic equivalent (including the Competition Act 1998), must demonstrate a "*restriction of competition*" that is "*appreciable*" and has an effect on trade, which lacks "*objective necessity*". In effect, in order to bring a claim under Article 101, the claimants argued that they required more than just "*facts relevant to a right of action*".

The claimants also argued that applying the principles from *Johnson* would effectively contradict the principle of EU law that compensation for wrongs must be full and effective. They argued that applying domestic principles of limitation would make it practically impossible or excessively difficult to recover for breach of legal rights conferred by EU law.

The Chancellor found that, so far as s32(1)(b) was concerned, competition claims were not to be treated differently to other claims. The policy considerations of finality and certainty which underlay limitation periods were as important to competition claims as to any other case.

As to whether the EU principles of effectiveness and full compensation had been infringed, the Chancellor found it to be well established that domestic law imposing a limitation period is consistent with EU jurisprudence, so long as it does not make recovery of compensation practically impossible or excessively difficult, which in this case it did not Further, EU jurisprudence recognised that reasonable periods of limitation are necessary and desirable ways of achieving legal certainty.

COMMENT

Statutory provision for limitation periods has existed for well over a century. Successive Limitation Acts have been enacted, but as with its predecessors, the current Act remains complex, difficult to interpret and arguably lacking in consistency. It represents an attempt to balance the maxim that there should be no wrong without a remedy against the need to achieve finality in legal disputes. In this sense, there is perhaps no philosophically or logically "right" approach. Competing interests are at stake and they may be irreconcilable except on a pragmatic basis.

In this instance, the court has re-affirmed, in striking fashion, the firm line taken in *Johnson*. Thus, even where a claimant is faced with what may at the time appear a legally and evidentially difficult claim, if he possesses everything necessary to constitute a cause of

action, limitation will begin to run. In essence, as soon as you have a possible cause of action, no matter how factually or evidentially weak your claim, the clock starts to tick.

Here, even though it was alleged there had been a breach of competition law since 1977, and, notwithstanding the sums that might be involved in breaches over such a lengthy period, the claimants lost their remedy in respect of breaches over a 30-year period. The fact that they may have failed to act sooner because they might initially have felt that their claim was legally or evidentially weak is irrelevant. In effect, the Act forces or may force claimants to bring proceedings before they are in a position to assess whether proceedings are legally or commercially worthwhile.

However, it is not clear what alternative approach might be adopted. It is difficult to see how a court could properly assess whether, at a particular date, it would have been evidentially or legally difficult for a claimant to have started proceedings, or whether a claimant made a sensible commercial decision to delay starting an action.

The Chancellor was clearly alert to the difficult issue such cases pose. He referred to obiter dicta Elias LJ had made about s32 in *Williams v Lishman, Sidwell, Campbell & Price Ltd* [2010] EWCA Civ 418. Elias LJ had said that a fact might be relevant to a claimant's right of action if it was causally relevant to the decision to pursue that right. The Chancellor was not, however, persuaded by this suggestion and it does not reflect current law.

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Contract

AN INDIVIDUAL LENDER'S RIGHTS UNDER A SYNDICATED LOAN

Charmway Hong Kong Investment Ltd & ors v Fortunesea (Cayman) Ltd & ors [2015] HKCFI 1308, 28 July 2015

The traditional view of a syndicated loan has always been that an individual lender can take action to recover its share of the loan when due unless it is expressly prohibited from doing so. Unfortunately, a Hong Kong court recently reached the opposite view. While the decision is probably wrong, standard wording in syndicated loan agreements is likely to change to remove any doubt.

The traditional view of a syndicated loan

The essence of a syndicated loan is that a group of lenders agree to make a loan to one or more borrowers on common terms. In some respects, a syndicated loan is effectively a collection of bilateral loans grouped together for administrative convenience. In particular, it is fundamental to a syndicated loan that a lender is only responsible for its own obligations. If a lender fails to perform, the other lenders are not responsible. In other words, the obligations of the lenders to the borrower(s) are several. Consistent with this, the traditional view has always been that the obligations of the borrower(s) to the lenders are also several. As a result, the debts owed by the borrower(s) to the lenders are individual and separately enforceable (meaning, for example, that a lender can sue in its own name to recover its share of a loan that is due but unpaid).

The "Finance Parties' rights and obligations" clause

In syndicated loan agreements based on Loan Market Association (**LMA**) and Asia Pacific Loan Market Association (**APLMA**) terms, this traditional view of a syndicated loan is reflected in the "Finance Parties' rights and obligations" clause. This clause expressly states that each finance party's obligations are several, and that its rights and any debt owed to it are separate and independent. It goes on to state that each finance party may separately enforce its rights.

The *Charmway* decision

In *Charmway*, a Hong Kong court faced the question of whether an individual lender could take action to recover its share of overdue loans under a syndicated loan agreement that appears to have been based on LMA or APLMA terms. Surprisingly, the court held that an individual lender could not do so. The decision largely rests on the absence of any provisions in the loan agreement *specifically* stating or acknowledging that each lender's share in a loan is a separately enforceable debt owed to that lender.

The court referred to a number of provisions that it said were inconsistent with each lender being owed a separate debt and having the right to enforce it. In relation to provisions that might point to the opposite conclusion, the court said that, taken individually and together, they did not overcome the absence of specific provisions.

Referring to the "Finance Parties' rights and obligations" clause, the court said that it does not "say when, if at all, a debt to an individual lender arises". The fact that it "suggests that such a debt may arise does not mean that it does". As a result, in the absence of some other provision saying that a lender's participation in a loan creates a debt owing to that lender, the court found that the clause simply did not apply.

In relation to enforcement, the court said that there were no provisions giving an individual lender the right to take independent enforcement action. Rather, taken as a

whole, the relevant provisions in the loan agreement "envisage collective action" only. It was for the majority lenders "to decide what enforcement proceedings to take".

In its concluding remarks, the court commented that the absence of specific provisions dealing with an individual lender's rights might be explained by the use of the LMA loan agreement "which does not address adequately the individual rights of lenders to recover in the event of default".

COMMENT

The *Charmway* decision appears to reflect a major misunderstanding of the nature of a syndicated loan. The leading English texts all support the traditional view that a lender's obligations and rights in connection with a syndicated loan are several and that it can separately enforce its rights. There are some U.S. cases supporting the *Charmway* decision, but those cases have been widely criticised and, as was pointed out in *Charmway*, were based on different contractual terms. In particular, the loan agreements in those cases did not include anything similar to a "Finance Parties' rights and obligations" clause. By contrast, one U.S. decision supporting the traditional view involved a loan agreement that included such a clause.

It is true that syndicated loan agreements generally do not include provisions specifically stating or acknowledging that each lender's share in a loan is a separately enforceable debt owed to that lender. However, it is also true that they generally do not include provisions specifically stating that each loan is, to quote the court in *Charmway*, a "unitary" or "aggregated" debt owed to the lenders jointly and that an individual lender has no right to enforce its share of the debt when due.

In the absence of specific provisions, a syndicated loan agreement has to be considered in the round to determine the intention of the parties. The question is what a reasonable person having all the background knowledge available to the parties would understand the loan agreement to mean.

The right to repayment is a lender's most fundamental right in relation to a loan. If it is correct that a lender has no right to take action to recover its share of a syndicated loan when due (ie after acceleration or final maturity), it is entirely in the hands of the majority lenders as to whether that lender is repaid if a borrower defaults. Indeed, a blocking minority could stop any lender being repaid by refusing to sanction enforcement action. That means a lender could potentially find itself unpaid and remediless for an indefinite period without any specific provision to that effect. This makes little commercial sense (especially considering that a lender has no control over who is in a syndicate and therefore no control over who might form a majority or blocking minority).

With that commercial context in mind, it would appear that the court in *Charmway* started from the wrong basic premise. Consistent with the traditional view, the starting point for any analysis of a syndicated loan agreement should be to say that each lender's share in a loan is a separately enforceable debt owed to that lender, unless there is a specific provision to the contrary. None of the provisions identified in *Charmway* as being inconsistent with each lender being owed a separately enforceable debt specifically and unambiguously addresses the point. Set against those provisions are others that either implicitly support the traditional view or, at the very least, are inconsistent with the *Charmway* analysis.

While the *Charmway* decision is probably wrong and an English court could be expected to reach a different conclusion, it cannot be ignored. In the absence of provisions specifically stating that each lender's share in a loan is a separately enforceable debt owed to that lender, there is room for argument. As a result, the drafting of "Finance Parties' rights and obligations" clauses is likely to change to remove any doubt. Both the LMA and the APLMA are considering changes to their loan agreements.

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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 [2015] EWHC 2435 (Ch), 14 August 2015

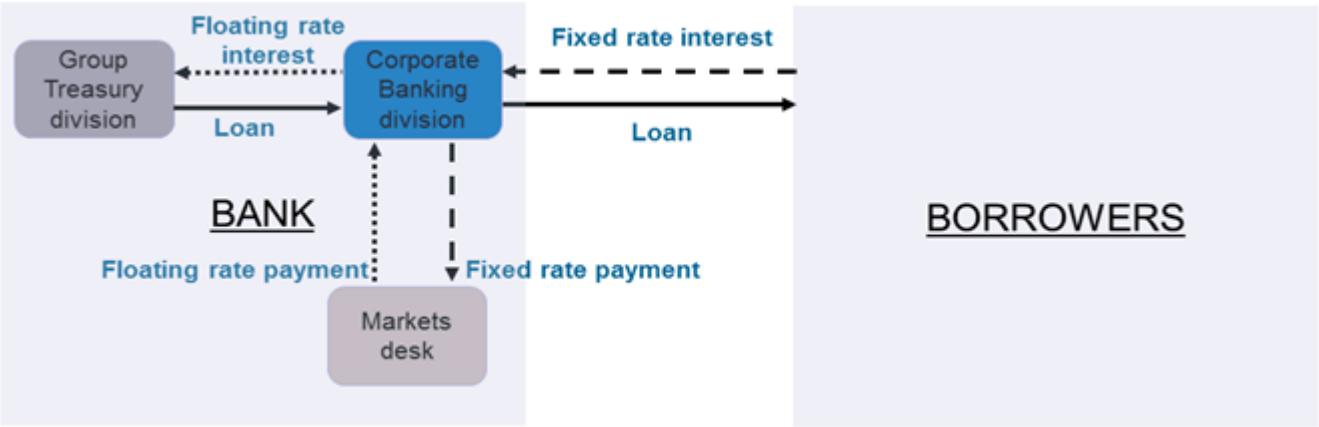
A lender's internal interest rate swap was not a "*funding transaction*" under the terms of a loan agreement. This meant that the borrowers were not liable to pay the costs of unwinding the internal swap in the event they pre-paid the loan. Warren J held that an internal swap between divisions of a lending bank did not amount to a "*transaction*" as a transaction involved two different legal entities. Further, the bank would not suffer any loss or cost if the internal swap was unwound. In the circumstances, the borrowers were not liable to pay the bank any sums in respect of unwinding its internal swap.

This ruling focuses on a point of construction arising out of a loan agreement dated 1 April 2004 (the **Loan Agreement**) between the defendant (the **Bank**) and a group of borrowers (the **Borrowers**). The Bank agreed to lend money to the Borrowers at a fixed rate of interest (the **Loan**). The Bank funded the Loan and hedged its interest rate exposure as follows:

(i) the Bank's Corporate Banking division obtained the money for the Loan by borrowing it from the Bank's Group Treasury division (**Group Treasury**) at a floating rate of interest;

(ii) in order to fund any shortfall between the fixed rate of interest received under the Loan Agreement and the floating rate of interest being paid to Group Treasury, and as part of funding the Loan, Corporate Banking entered into an internal swap with the Bank's Markets desk, essentially mirroring the characteristics of the Loan (the **Internal Swap**); and

(iii) the Markets desk entered into an interest rate swap with an external market counterparty on a "*portfolio basis*". This meant that the Bank's Markets desk did not enter into a reverse transaction exactly matching the internal swap but on terms which hedged the Bank's risk across a portfolio of fixed rate loans.



The Loan Agreement provided for a repayment fee if the Loan was pre-paid within five years of drawdown. After five years there was no such fee. More than five years after the drawdown (ie in circumstances where no repayment fee was provided for in the Loan Agreement), the Borrowers were considering repaying the whole loan.

The dispute

The Bank contended that any pre-payment would activate the indemnity provisions in Clause 12 of the Loan Agreement under which the Borrowers gave an indemnity for any loss incurred in unwinding a "*funding transaction*" undertaken in connection with the Loan. "*Loss*" was defined as "*any cost to the Bank incurred in the unwinding of funding transactions undertaken in connection with the Facility and including…costs incurred when there has been a reduction in the market level of interest rate underlying the Facility…such costs to be determined by the Bank in its sole discretion*".

If the Loan was repaid early, the Bank would have to unwind the Internal Swap. In reliance upon Clause 12, the Bank required the Borrowers to pay an "Interest Rate Swap termination cost". The Bank claimed that the Internal Swap was a funding transaction without which the Bank would not be able to offer the fixed rate Loan. They argued it followed that the cost of unwinding the Internal Swap would be an "unwinding of funding transactions undertaken in connection with the Facility". If the Internal Swap did not amount to a relevant "funding transaction", then the Bank's alternative argument was that the relevant "funding transaction" was the Internal Swap taken together with the arrangements with third parties by which the Bank managed its risk on a portfolio basis.

The Borrowers argued that the arrangement was not a "*funding transaction*" (emphasis added) because it was not entered into by the Bank in order to provide the actual Loan. Further, the Bank could not have entered into a "*funding transaction*" (emphasis added) because the Internal Swap was an arrangement between different departments of the Bank. In effect, the Borrowers argued that the Bank cannot transact with itself.

The Borrowers also contended that when the Internal Swap was unwound, one department of the Bank would simply be accounting to another department for a sum of money. This did not amount to a "Loss" for the Bank. More generally, the Borrowers noted that the Bank's construction would be unfair and uncommercial, as the Borrowers would suffer the downside of unwinding the Internal Swap when interest rates had moved against the Bank's Corporate Banking department, but would not obtain the upside when interest rates moved in its favour.

Construction of Clause 12.1(f)

In considering the construction of Clause 12, Warren J referred to the decision of the UK Supreme Court in *Rainy Sky SA v Koomin Bank* [2011] UKSC 50, which confirms that, in circumstances where there is an ambiguous contractual provision, the courts can consider the commercial purpose behind the provision.

Warren J found that the internal arrangements of the Bank did not form part of the factual matrix against which the Loan Agreement was to be construed. There was nothing to suggest that the Borrowers were aware of the way in which the Bank funded or hedged the loans which it made to its customers and it was not suggested that the Borrowers ought to have been aware of the Bank's internal hedging arrangements. In considering the construction of the Clause, Warren J noted the following four points:

(i) the Loan Agreement itself said nothing expressly about hedging, whether by an internal agreement or by an agreement with a third party. The agreement did not state that the Bank would be entitled to enter into an internal or external interest rate swap and that the Borrowers would be liable for any break costs arising as the result of the early termination of the swap;

(ii) the Internal Swap was not a contractual arrangement, but simply an arrangement between two departments within the Bank;

(iii) similarly, the Corporate Banking division's agreement to source the money to lend to the Borrowers was not a contractual agreement either

(since Group Treasury was also a department of the Bank) but rather a "virtual construct" for internal accounting purposes; and

(iv) he would not deal (other than tangentially) with the question of whether a purely external hedging transaction was capable of being a "*funding transaction*", as it had not been argued and he did not have the evidence before him to make a determination.

Warren J noted that the words "*funding transaction*" should be construed together. He noted that the Bank's internal hedging arrangement did not amount to a "*transaction*" because the Clause envisaged a transaction that took place between two legal entities. Different departments of the Bank did not qualify as separate entities.

Even if the Internal Swap was a "*funding transaction*", Warren J noted that unwinding the Internal Swap would not have given rise to any loss or cost to the Bank even though the external hedge may only have been entered into because of the Internal Swap. The finding that there would be no loss was based on the Bank's explanation that it operates a "flat book", ie it hedges in a way so that it takes no risk. When an early repayment is made, the Bank adjusts its portfolio of external contracts so that its overall book remains "flat". This rebalancing of the external position could give rise to costs to the Bank. But Warren J found that the Internal Swap, viewed on its own, gave rise to no loss or cost. In particular, because the Internal Swap was internal to the Bank, the Bank itself was in precisely the same position both before and after the unwinding of the Internal Swap.

Although the external hedge would no doubt have been undertaken to protect the Bank against the risk it has incurred in relation to the Loan with the Borrowers, Warren J said it was not undertaken to protect the Bank against the risk of the Internal Swap because that risk is not really a risk – the Bank's overall position regarding the Internal Swap is entirely neutral.

COMMENT

Warren J focused on the fact that the Borrowers had not entered into any hedging arrangement and were unaware that any hedging taking place in relation to the Loan was anything other than an internal formality. Even if the Borrowers had notice of the hedging, the Internal Swap would not have been considered a "transaction" on the basis of Warren J's construction of the relevant provisions. The Bank's acceptance that it would not incur any loss upon the unwinding of the Internal Swap also played a crucial role in Warren J's analysis.

Interestingly Warren J noted that purely external hedging may amount to a "*funding transaction*". This would include a specific hedging transaction by the Bank with a third party, "back-to-back" with the facility. In such a case, the external hedge would be undertaken with a third party to protect the Bank against the risk it had incurred in relation to the Loan to the Borrowers, not to protect the Bank against any risks it incurred in relation to internal swaps.

Importantly, however, Warren J noted that he did not have enough evidence before him to decide whether an internal swap and external hedging on a portfolio basis could amount to a "*funding transaction*" in the present case. Portfolio hedging is no doubt more practical for banks. However, to the extent banks have structured their transactions in such a manner, there remains uncertainty as to how the court will approach this issue.

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NATURAL LANGUAGE INTERPRETATION TRIUMPHS DESPITE JUNIOR NOTEHOLDERS' FRUSTRATION WITH RATING AGENCY

Deutsche Trustee Co Ltd v Cheyne Capital (Management) UK (LLP) [2015] EWHC 2282 (Ch), 31 July 2015

The claimant Note Trustee and Issuer Security Trustee (the **Trustee**) sought the Court's assistance interpreting a servicing agreement (in the context of a mid-2007 commercial mortgage-backed securitisation (**CMBS**) transaction) because of a rating agency's policy change (since October 2012, Fitch has refused to confirm that the appointment of a special servicer would not cause the downgrade of notes). The Trustee's interpretation that Fitch's confirmation was required prior to the replacement of a special servicer, despite not necessarily being the most "sensible" result, was upheld.

The transaction followed a broadly standard CMBS transaction structure. The issuer was a special purpose vehicle only, with ongoing loan management outsourced to a third party service provider pursuant to a loan servicing agreement (the **Issuer Servicing Agreement**). Post-default, responsibility for active management of the defaulting loan(s) passed to a specialist recovery service (the **Issuer Special Servicer**).

Materially, for the purpose of this case, the notes were issued in ten classes. One or more of three rating agencies rated each class of notes: Moody's, S&P and Fitch (the **Rating Agencies**).

The holders of the most junior ranking class of notes with at least 25% of its original principal amount outstanding, the Class G noteholders (as the **Controlling Class**), were entitled to appoint a noteholder representative (as the **Operating Adviser**).

The Operating Adviser had certain rights, including in particular to replace the Issuer Special Servicer. However, such replacement could only take effect if each of the Rating Agencies was informed of the identity of the successor Issuer Special Servicer and, materially, "the Rating Agencies … confirmed to the [Trustee] that the appointment of the successor … Issuer Special Servicer will not result in an Adverse Rating Event, unless each class of Noteholders have approved the successor … Issuer Special Servicer… by Extraordinary Resolution". An "Adverse Rating Event" includes any downgrade, qualification, or withdrawal of the current rating by any of the three Rating Agencies.

On 10 December 2012, Fitch announced that, as a matter of policy, it would no longer provide such rating confirmations for EMEA CMBS transactions. As such, when Cheyne (in its capacity as Operating Adviser) sought to replace the Issuer Special Servicer, it was unable to obtain the confirmation sought from Fitch. Cheyne contended that the confirmation clause should be interpreted as only requiring confirmations from such Rating Agencies willing in principle to give such confirmations. The Trustee contended that the clause required confirmation from all Rating Agencies, and that absent all three confirmations, the Issuer Special Servicer could not be replaced.

Decision

Arnold J noted that the right to replace the Issuer Special Servicer was a valuable one as it enabled the noteholders to take steps to enhance their recovery. However there was an inherent potential for conflict of interest and preferences (in terms of the identity of the replacement Issuer Special Servicer) between the different noteholder classes, in light of the waterfall priority in recovery.

Arnold J agreed with the Trustee's construction, holding that the clause clearly provided that the right could not be exercised without the requisite confirmation from all Rating Agencies: as a matter of language, this was the "natural" interpretation.

Cheyne contended that the Trustee's interpretation of the clause produced the commercially absurd result that a confirmation was required from a Rating Agency that

would not issue one. While agreeing that this did not appear "sensible" at first glance, the judge was ultimately not persuaded by the argument as there was an alternative mechanism to replace the Issuer Special Servicer in the second limb of the clause: that is, it could be approved by each class of noteholders. While there may be difficulties in reaching agreement between classes of noteholder, it was not improbable that there were any circumstances in which this could occur.

Separately, the Issuer Servicing Agreement included certain provisions predicated on the basis that confirmation may not be obtained from Moody's; however, it did not address the possibility that Fitch or S&P might not provide confirmation. The judge refused to interpret that clause in such a way that it would extend to the other Rating Agencies (which would have amounted to a "re-writing"), noting instead that this demonstrated that the scenario had been considered in the drafting process.

COMMENT

While the Trustee had no commercial interest in the outcome of the proceedings, the case demonstrates the important and active role that a Trustee may take in advocating a construction of the transaction documents in the alternative to that put forth by a certain class of noteholders: in this case it was the Trustee contending the position ultimately upheld by the court (to the benefit of more senior noteholders).

In terms of principles of general contractual interpretation, while citing and applying the most well known authorities, the case ultimately turned on the specific wording of the transaction documents and the ordinary and natural meaning of those words (following in spirit the most recent Supreme Court authority of *Arnold v Britton* [2015] UKSC 36).

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WHAT'S IN A NAME? THE CASE OF "ON-DEMAND" PERFORMANCE BONDS

Caterpillar Motoren GmbH & Co KG v Mutual Benefits Assurance Co [2015] EWHC 2304, 31 July 2015

A bank's attempt to characterise performance bonds as guarantees failed in a further example of the English Court's strict approach to construction of "on-demand" payment obligations. In a decision which provides some guidance for those drafting these agreements, Teare J held that the application of "Paget's presumption" and the general principles of construction produced the same result: if the issuer of the performance bond is obliged to pay on demand by the beneficiary, then the bond is indeed "on-demand". Despite the use of terminology to the contrary, if to a reasonable person an agreement looks like an "on-demand" performance bond and acts like an "on-demand" performance bond, then it will be interpreted as such by the English court.

In 2013, *Caterpillar Motoren GmbH & Co KG* (**Caterpillar**), a German company which manufactures and provides industrial equipment and services, entered into contracts to deliver two power plants in Liberia. Caterpillar also entered into two sub-contracts with International Construction & Engineering Inc. (**ICE**) under which ICE would provide construction services at the two Liberian sites. Each sub-contract required ICE to procure an Advance Payment Bond (**APB**) and a Performance Bond (**PB**) in favour of Caterpillar. The APB was to provide security to Caterpillar if ICE did not carry out the activities financed by Caterpillar via

advance payment. The PBs were intended to provide security to Caterpillar if ICE failed to perform its other obligations under the sub-contracts.

The bonds were issued by Mutual Benefits Assurance Co (**MBAC**), a Liberian company with a licence from the Central Bank of Liberia to function as a "non-bank financial institution".

Caterpillar made advance payments to ICE. When disputes arose between Caterpillar and ICE, Caterpillar purported to terminate the sub-contracts and demanded that ICE return the advance payments and pay a further sum by way of liquidated damages. Upon ICE disputing the claim, Caterpillar demanded payment from MBAC under the bonds. MBAC refused to make payment. Caterpillar issued proceedings to obtain payment and sought summary judgment against MBAC.

A question of construction

Caterpillar argued that the bonds were "on-demand" bonds and that MBAC's liability arose on Caterpillar's demand for payment. MBAC, on the contrary, maintained that the bonds were guarantees and that its liability arose only where it was established (by admission by ICE, concession by MBAC or by an arbitration award under the sub-contracts) that ICE was to liable to Caterpillar for the sums claimed.

Teare J construed the bonds by applying both: (i) the general principles of construction (ie identifying the meaning which the bond would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time the bonds were entered into) (the approach advocated by Caterpillar); and (ii) "Paget's presumption" (the approach favoured by MBAC).

By way of reminder, "Paget's presumption", the analysis in Paget's Law of Banking (11th edition) applied by Longmore LJ in *Wuhan Guoyu Logistics Group Co Ltd & anr v Emporiki Bank of Greece SA* [2012] EWCA Civ 1629, provides that:

> "W*here an instrument (i) relates to an underlying transaction between the parties in different jurisdictions, (ii) is issued by a bank, (iii) contains an undertaking to pay "on demand" (with or without the words "first" and/or "written") and (iv) does not contain clauses excluding or limiting the defences available to a guarantor, it will almost always be construed as a demand guarantee*."

Decision

Teare J held that the following terms of the APB established beyond doubt that MBAC was bound to pay on demand of Caterpillar, despite the use of the word "guarantee" in the title and opening section of the APB and the operative clause, and the reference made to a failure by ICE to perform its obligations:

(1) MBAC's undertaking is to "pay forthwith on demand" and "without reference to the Contractor [ICE]";

(2) what is to be paid is that which is "claimed by the Beneficiary [Caterpillar] to be due from the Contractor"; and

(3) MBAC's agreement that the decision of Caterpillar "as to whether any money is payable by the Contractor to the Beneficiary or whether the Contractor has made any such default […] will be binding" and the fact that MBAC is not entitled to ask "the Beneficiary to establish its claims".

Although elements of the wording of the PB were suggestive of a true guarantee (ie that MBAC would be liable to pay when ICE fails to pay any lawful claims against it), this suggestion was undermined by the following wording:

(1) MBAC is to pay once Caterpillar has "declared" that ICE is in default;

(2) MBAC is to pay "unconditionally" and without demur "the amount of damages claimed by" Caterpillar;

(3) any such "demand" shall be "conclusive" regarding the amount due and payment by MBAC; and

(4) MBAC will be deemed to be in default 15 days after any additional notice from Caterpillar demanding payment.

For Teare J, this wording makes it clear that MBAC's liability is derived from Caterpillar's demand (an "on-demand" obligation) rather than from proof that ICE is liable to Caterpillar.

Although the bonds failed to satisfy the fourth condition of Paget's presumption (ie the absence of clauses excluding or limiting the defences available to the guarantor), this was not fatal. Teare J found nothing in the background or in the wording of the bonds which was capable of rebutting Paget's presumption and held on the contrary that the elements listed above confirmed the bonds were indeed "on-demand" obligations.

COMMENT

This decision provides a useful example of the application of Paget's presumption and the rules of construction, which Teare J held not to be in conflict. It also makes clear that the court is willing to apply Paget's presumption to non-bank financial institution issuers.

The court has provided a further reminder that dressing up an on-demand obligation as a guarantee offers little protection for issuers. If the intention is to draft a payment guarantee where the issuer's liability to pay arises only on proof of liability, care should be taken to avoid including terms which suggest any obligation to pay arises on demand by the beneficiary. The issuer's right to make enquiries should be expressly reserved.

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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 [2015] EWCA Civ 835, 28 July 2015

This Court of Appeal ruling gives a clear signal that State-owned trading entities will face difficulties invoking sovereign immunity to evade payment of their debts. The decision also clarifies the rules of construction applicable to letters of credits, and confirms in particular that absent provision to the contrary, the *situs* of a debt due under a letter of credit will be the place of payment. The decision will be of particular interest to the crude oil and gas trading community, but its implications are relevant to anyone engaged in commodities trading and wider international commerce, particularly in sectors where State-owned entities participate in the market.

The dispute arose from efforts by Taurus Petroleum Ltd (**Taurus**) to enforce a USD 8.7 million arbitration award against the State Oil Marketing Co. of the Ministry of Oil, Republic of Iraq (**SOMO**). Taurus sought to do so with third party debt orders and the appointment of a receiver in respect of sums payable to SOMO under letters of credit issued in London by Crédit Agricole SA. Those orders were granted by the English court in March 2013, but were subsequently challenged by SOMO and set aside at first instance on the basis that the promise to pay under the letters of credit was made jointly to SOMO and the Central Bank of Iraq (**CBI**).[1] Taurus appealed against that decision.

The letters of credit contained an unusual payment structure, which reflected the requirements imposed on Iraq by a 2003 UN Security Council Resolution.

The Resolution required that proceeds from the sale of Iraqi oil be paid into an account held by CBI at the Federal Reserve Bank in New York. Although the sanctions were relaxed in 2011, Iraq chose to retain this payment structure. As a result, the letters of credit in this case provided for payment of their proceeds to CBI in New York, while designating SOMO as the "beneficiary".

High Court

Payment under the letters of credit required Crédit Agricole to take certain steps in London. On this basis, Field J found that the debts under the letters of credit were governed by English law[2] and that they were situated in London. The attachment of the debts under a third party debt order would not interfere with the authority of a foreign State and the court therefore had jurisdiction to make the orders that it did. However, Field J also found that under the terms of each letter of credit the promise to pay was made jointly to SOMO and CBI. Neither a third party debt order nor an execution order could be made with regard to jointly held rights and the orders were set aside.

Field J also considered matters of sovereign immunity under the State Immunity Act 1978 (the **Act**). The relevant provisions of the Act are: s13(2)(b), which provides that the property of the State is immune from execution; s14(2), which extends sovereign immunity to any acts by a separate entity in the exercise of sovereign authority; and s14(4), which renders the property of a central bank immune from execution. As SOMO was a separate corporate entity, debts owed to it were not State property. Accordingly, the sovereign immunity defence under s13(2)(b) did not apply. Sales of oil by SOMO were of a commercial (and not sovereign) character and therefore SOMO could not invoke State immunity under s14(2) either. However, the central bank's interest triggered the protection of s14(4) of the Act, leading to a discharge of the orders.

Court of Appeal – no jurisdiction to make third party debt orders or receivership order

Moore-Bick, Sullivan and Briggs LJJ were unanimous in holding that the appeal should be dismissed. However, they disagreed (among themselves and with Field J) on the proper construction of the letters of credit.

Moore-Bick LJ found, following the authority in *Power Curber*,[3] that the debts under the letters of credit were situated at the place where payment was to be made (ie in New York). The court had no jurisdiction to issue the third party debt orders (which are orders *in rem*) with respect to property outside the jurisdiction. This conclusion did not necessarily follow with regard to the receivership order, which is an order *in personam*. However, in the circumstances, a receivership order would have the adverse effect of depriving CBI of its contractual right to receive payment. This led Moore-Bick LJ to conclude that appointing a receiver would exceed the proper limits of the court's jurisdiction. Sullivan and Briggs LJJ agreed.

The above grounds were sufficient to dismiss the appeal, but the court went on to consider matters of State immunity.

State immunity and State-owned entities

Following the *Gécamines* case,[4] Moore-Bick LJ relied on the principle that a State-owned entity with separate corporate personality and powers typical of a commercial organisation is presumed not to be an organ of the State. The presumption was strengthened by evidence that SOMO's board, and not the Ministry of Oil, was responsible for and conducted the affairs of the company. The facts that SOMO did not retain revenue from oil sales and that it had to submit its programmes for the sale of crude to the Ministry of Oil were insufficient to rebut the presumption. Whether SOMO at any point held the title to the oil it marketed was similarly of "little consequence".[5] Moore-Bick LJ also held that selling oil owned by the State is an ordinary commercial activity. SOMO was therefore not entitled to immunity under s13(2)(b) or s14(2) of the Act.

Following an analysis of the terms of the letters of credit, and in particular the special conditions which required payment of the monies to the CBI account in New York, Moore-Bick LJ concluded that while CBI had a contractual right to require payment, it did not have a proprietary interest in the debt. A contractual interest of this type was insufficient to trigger immunity under s14(4) of the Act.

Sullivan and Briggs LJJ disagreed on this point. In their view, the unusual terms of the letters of credit made CBI and not SOMO the sole creditor and, as a result, the debts were immune from execution under s14(4) of the Act. Briggs LJ recognised that, apart from the unusual circumstances of this case, there may be good commercial reasons why a seller accepting payment by way of a letter of credit may require the issuing bank to recognise someone else as the creditor under that letter of credit. Such circumstances would include assignment of the underlying contract debt or arrangements with working capital lenders, in which case it may be preferable for the assignee/lender to be entitled to direct payment. Such arrangements can be achieved by appropriately crafted special conditions.

COMMENT

The judgment arguably limits the availability of the sovereign immunity defence to those State-owned trading companies whose day to day operations are in effect dictated by the State. The structure of the sales, including title to goods or right to proceeds, would seem to be of lesser importance to the applicability of the State immunity doctrine. Evidence of the State's structural and *de facto* control over the entity seems to be the key factor.

The judgment also provides clarity as to the *situs* of debt under a letter of credit, which in the absence of express agreement will be the place of payment. Accordingly, when negotiating a letter of credit, the parties should consider whether the contemplated place of payment will allow for effective enforcement of the proprietary rights in the debt. More fundamentally, ambivalence as to the identity of the true beneficiary of the proceeds of a letter of credit can lead to commercial uncertainty and protracted disputes.

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[1] [2013] EWHC 3494 (Comm), [2014] 1 All ER (Comm) 942.

[2] Applying Article 4(2) of the Rome I Regulation (Regulation (EC) No 593/2008), which provides that a contract will be governed by the law of the country where the party required to effect the characteristic performance of the contract has its habitual residence.

[3] *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233.

[4] *La Générale des Carrières et des Mines S.a.r.L. v Hemisphere Associates LLC (Jersey)* [2012] UKPC 27, [2012] 2 Lloyd's Rep. 443.

[5] Paragraph. 45.

Evidence

BUSINESS INTELLIGENCE CONSULTANTS: PROTECTION OF SOURCES

Rio Tinto plc v Vale SA & ors [2015] EWHC 1865 (QB), 29 June 2015

The court set aside orders for "business intelligence" (or "business risk") consultants to disclose their sources for the purpose of U.S. proceedings concerning Guinean iron ore concessions. The court considered the balance between the public interest in preserving confidentiality and avoiding a breach of confidence on the one hand, and enabling a fair resolution of foreign proceedings on the other. Business intelligence consultants are commonly used by businesses. There are interesting lessons to be drawn from this case both for those who engage business intelligence consultants, and for parties framing or responding to foreign letters of request.

In December 2008, the Guinean government withdrew a number of iron ore concessions held by Rio Tinto and granted them instead to mining company BSGR, with whom Vale then entered a joint venture in April 2010. Rio Tinto alleges that its loss of the concessions was due to a fraudulent conspiracy between BSGR and Vale and has brought proceedings against these two companies in the U.S.

As well as denying the substantive allegations (Vale's position is that it had no involvement with the withdrawal of the concession from Rio Tinto and only came on the scene after BSGR has obtained these concessions), Vale has contended that Rio Tinto's lawsuit is time-barred. Its arguments in this respect are partly based on the fact that Rio commissioned three business intelligence firms in 2009 and 2010 (after having lost the concessions) to investigate the political and commercial situation in Guinea, including the activities of BSGR. Vale, which obtained copies of these reports in pre-trial discovery, contends Rio therefore had sufficient knowledge to bring a claim within the limitation period, which it failed to do.

In response, Rio Tinto seeks to rely on an "equitable tolling" defence, ie that the limitation period should be postponed until Rio Tinto could have discovered – by investigating with "reasonable diligence" – that it had a claim. Rio Tinto says that Vale took steps to conceal matters that prevented it from discovering it had a claim sooner. The merits of Vale's limitation defence will turn in part on the U.S. court deciding whether Rio Tinto's investigations were reasonably diligent, and also whether Vale did cover up relevant facts. Vale obtained copies of the reports in pre-trial discovery but, when Rio refused to provide any information other than the reports themselves, made an application under the Hague Convention which resulted in the U.S. court issuing Letters of Request to the English High Court for the consultants to produce documents and give witness evidence in New York which, Vale argued, would have a bearing on its limitation defence.

In line with the principle of comity that the English courts will endeavour to give effect to a request from a foreign court unless there is a good reason not to, the High Court gave effect to these Letters by making CPR Part 34 (evidence for foreign courts) Orders. These Orders were made without notice, permitting applications to be made within 14 days of service for the Orders to be set aside, and accordingly the consultants applied to the court to vary the Orders such that they would not have to reveal – in documentary or witness evidence – the identities of their sources.

A balancing exercise to decide whether the consultants should be compelled to disclose their sources

The consultants' application for the Orders to be varied was successful and the court agreed that the identities of their sources should be protected.

As a general principle, the English court will give effect to a request from a foreign court for assistance in obtaining evidence for the purpose of proceedings in that court, so far as is proper and practicable and to the extent that is permissible under English law, but Andrews J also noted in her judgment that the English court is entitled to edit a letter of request by applying the metaphorical "blue pencil" rather than simply accepting or rejecting it wholesale.

Andrews J recognised that in deciding whether to vary the order, the court would consider whether doing so would cause a breach of confidence, but this alone would not determine the matter. Instead, the court must carry out a balancing exercise, in which it weighs the public interest in preserving confidentiality and the damage caused by breaching it, against the importance of enabling fair resolution of the foreign proceedings. There were two key issues that the court considered in this exercise.

First, the risks and dangers to which the sources (who had given the information on the expectation they would never be named) would be exposed. In this case the sources were at particularly high risk due to the local political context, but the court was mindful more generally of the importance of protecting corruption whistleblowers in any jurisdiction.

Secondly, whether the information sought was of critical importance for the fair resolution of the issues in the foreign proceedings, which the court decided it was not in this case. The justification for the letter of request was that the information sought would be relevant to the New York court's resolution of the limitation and equitable tolling arguments. Andrew J did not agree that the identities of the consultants' sources would have a material effect on either party's arguments in this respect, and held that the fair and just resolution of the New York proceedings could be achieved "without requiring the very serious breaches of undertakings of confidentiality that revealing those identities would entail". On this basis, the consultants' application to vary the Orders was successful.

The consultants had also argued that compelling the identification of their sources would damage their reputations and businesses. Andrews J did give some thought to this and conceded that the risk was not fanciful, but nonetheless confirmed the court would not be minded to refuse disclosure on that basis alone – the risks that the breaches of confidence posed to the consultants carried far more weight.

Terms of engagement and confidentiality clauses

Andrews J devoted significant time in her judgment to considering the express and implied duties of confidence. As mentioned above, whether the Order would entail a breach of confidence would not in itself be decisive, but was clearly a feature that needed to be present as part of the "balancing exercise". Had there been no breach of confidence, there would be no public policy concern to consider the role the information might play in the foreign proceedings.

One of the three consultants contracted with Rio Tinto on the consultant's own terms, which imposed an express obligation of confidentiality on the information supplied to Rio Tinto – as such, Rio Tinto has no right to obtain the identities of the consultant's sources and would, Andrews J considered, have been unlikely to have succeeded if it had tried to do so.

The other two consultants contracted on Rio Tinto's standard terms. These only contained express obligations of confidentiality in favour of information the client supplied to the consultant, and not vice versa. The terms did contain representations from the consultant that the performance of the services did not result in the breach of any agreement or undertaking by which the consultant was bound, which the consultants submitted was a restriction on their sharing information with Rio that had been imparted to them in confidence (and of which they would be in breach by complying with the Orders). Andrews J was not convinced that this provision would in fact enable the consultants to refuse to supply confidential information to the client, in light of a further

provision in the terms that the consultant must provide Rio Tinto with any information requested in relation to the provision of the consultancy services. However, should this be tested by Rio Tinto demanding that a consultant name its sources, Andrews J suggested that an English court may well not make an order in Rio Tinto's favour for public policy reasons regardless of the terms of engagement.

This examination of the terms of engagement was not ultimately of particular relevance to the court's decision. In the end "whatever the contractual position" Andrews J found that, on the evidence provided, the sources had cooperated on the basis of assurances their identities would be kept confidential and therefore an implied duty of confidentiality (which would also apply to the client if the client was given their names) had arisen and this was more than sufficient to raise strong public policy concerns, regardless of the contractual position.

COMMENT

There are interesting lessons to be drawn here both for the engagement of business intelligence consultants, and for parties framing or responding to foreign letters of request.

Risks of engagement

It is worth noting that nothing in this judgment casts any doubt on the legitimacy of engaging business intelligence consultants. In practice, such consultants may be engaged in a variety of contexts, from gathering intelligence prior to making an investment decision, to (as in this case) better understand facts that might give rise to a claim, or even to investigate allegations made within an existing dispute. An interesting feature of this case, which is of particular relevance to engaging consultants, is the argument that by virtue of the information Rio Tinto had obtained from the consultants it was on notice of possible claims and the clock had started to run for the relevant limitation periods. Before engaging consultants in a contentious or potentially contentious scenario, thought should therefore be given to what sort of facts the resulting report may put you on notice of, what effect this may have on setting limitation periods running, and perhaps even what disclosure obligations in the regulatory or criminal sphere such information might trigger for the client that receives it. Finally, an important point to note is that, as this case shows, the information obtained from a consultant has the potential to be disclosable (though this risk ought to be lessened if reports are being commissioned in the context of a dispute and may thus benefit from litigation privilege).

Engagement terms

Companies who choose to do so will naturally want to have engagement terms in place that give them scope to obtain information about the reports (such as information about their sources, perhaps to appraise the report's reliability) and use this as they see fit. However, from this judgment it is clear that this ability will be limited by public policy concerns, such that even where express contractual terms purport to allow the client to obtain information that is confidential to the consultant, the court may refuse to grant such permission. In any event, any such confidential information that a client does manage to obtain from its consultant (whether voluntarily or by compulsion) will still be subject to any implied duty of confidentiality at play.

Framing a letter of request

The fact that courts will take seriously matters of public policy in considering whether to refuse or amend a request, particularly where the evidence is not of critical importance to the dispute, will be of comfort to respondents looking to challenge a request to which they are subject. Likewise, this scope for challenge should be noted by parties seeking to make such a request, who should consider limiting the scope of their requests to information that is central to resolving the issues in dispute – and minimises potential public policy conflicts – to reduce the likelihood of requests being refused or successfully challenged.

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Insurance

DAMAGES FOR LATE PAYMENT OF INSURANCE CLAIMS: ENTERPRISE BILL

Catching many by surprise, the UK government has announced proposals to introduce a legal requirement for insurers to pay out on insurance claims within a reasonable time, and to permit claims for damages based on the consequences of a failure by them to do so. The new provisions are included in the Enterprise Bill (the **Bill**) which was published in September.

Previous proposals to include such provisions within the Insurance Act 2015 were dropped due to resistance from the insurance industry. Given the government's stated commitment to address the issue of late payment, it was anticipated that the provisions may resurface in the future, but few predicted that it would be so soon.

The stated purpose of the proposed measures is to protect businesses, in particular to enable them to recover more quickly from insured losses such as fires and floods. Small and medium sized businesses are considered particularly vulnerable, and the late payment of insurance claims, which it has been estimated occurs in up to 10% of cases, can have serious consequences including insolvency.

The current position: no timing requirement

At present there is no requirement for insurers to pay out on policy claims in a reasonable time, and no ability in law to hold an insurer to account for the consequences of any delay in paying out on a valid claim in a reasonable time. This arises out of the "hold harmless" principle, which is the notion that insurers are contracting to protect the policyholder from loss. The occurrence of the insured event constitutes a breach of that obligation, and the damages to which the insured is entitled is the payment of the insurance claim, plus interest. There is no cause of action for claims for late payment of damages, and therefore no legal mechanism by which insurers can be obliged to make payment of additional damages arising out of the consequential losses resulting from their late payment.

The proposed measures

The Bill introduces a new s13A to the Insurance Act 2015 (the **Act**) which creates an implied term that insurance claims must be paid within a reasonable time. A breach of this term will leave insurers liable for damages on top of the original indemnity claim and any interest payable. "Reasonable time", although not defined, will allow for the investigation and assessment of the claim and take into account all relevant circumstances including the type of insurance and the size and complexity of the claim. Insurers will have a defence to any failure to pay out in respect of all or part of the claim where there are "reasonable grounds" to dispute the claim, but the insurers' conduct in handling the claim may be a factor in that assessment.

A further new s16A would allow parties to contract out of the implied term. However, this carve-out does not apply to consumer contracts, and is further subject to the transparency rules contained in the Insurance Act 2015 requiring the insurer to bring such clauses to a policyholder's attention. As such, the marketability of a policy which expressly absolves the insurer from any obligation to pay out under the policy in a reasonable time remains to be seen. Further, even should a policyholder agree to such a term, it will not operate to protect the insurer if the delay can be shown to be reckless or deliberate.

Implications

These reforms, which will be welcomed by businesses and policyholders, would serve to bring the London insurance market into line with many other jurisdictions. For example, Scotland, Australia and the U.S. have no equivalent of the hold "harmless" principle, and therefore already allow recovery of damages to compensate policyholders for losses resulting from the late payment of a valid claim.

These proposals also align the law with the current position for consumers and micro-businesses, who already benefit from the ability of the Financial Ombudsman Service to award damages for late payment in respect of complaints made to it.

Concerns have been raised by insurer bodies during the consultation on the original reforms to the Insurance Act 2015, which mirror these proposals, related to the uncapped nature of the potential damages; this makes it difficult for firms to value potential costs and the potential implications for insurers' capital adequacy and reinsurance requirements. A further concern raised was the potential for insurers to pay claims in haste and with insufficient scrutiny for fear of being sued, resulting in unnecessary costs and potential increase in fraudulent claims. In light of the available defence to insurers that there were reasonable grounds for disputing the validity or value of a claim, should the proposed measures become law, we can expect to see insurers taking steps to strengthen their systems relating to the assessment and payment of claims to enable them to demonstrate reasonableness if required.

What next?

The Bill will now pass through the usual Parliamentary process. As a government bill, formal consultation is not part of that process, but insurers will no doubt take steps to ensure their concerns are heard.

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Settlement

PART 36 OFFER MUST CONTAIN GENUINE CONCESSION

R (on the application of MVN) v Greenwich London Borough Council [2015] EWHC 2663 (Admin), 10 July 2015

To attract the usual cost consequences of a successful Part 36 Offer, the offer must not require the total capitulation of the offeree, but rather contain some genuine concession to them.

The underlying dispute concerned whether the Claimant was legally a child (as the Claimant submitted). The court ruled in the Claimant's favour and ordered the Defendant local authority to pay the Claimant's costs. This judgment concerned whether those costs should be increased because of a settlement offer (the **Offer**) the Claimant had made which he submitted was a successful Part 36 offer.

In May 2015 (under the new April 2015 Part 36 regime) the Claimant made the Offer to settle the whole claim. The Offer stated that it was made pursuant to Part 36 and included all the usual Part 36 technical requirements (as set out in CPR 36.5). However, the substance of the Offer was that the Defendant should accept the Claimant's age (ie the Claimant's entire claim) and agree to pay the Claimant's costs. Given that judgment was

then given in the Claimant's favour, the Claimant submitted that the Offer was a successful Part 36 Offer and he should be granted the usual Part 36 cost benefits.

By way of reminder, Part 36 provides that a Claimant's Part 36 Offer is "successful" where "*judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer*" (CPR 36.17(1)(b)). If a Claimant Part 36 Offer is successful the court will then, unless "*it considers it unjust to do so*", order that the claimant is entitled to enhanced interest and costs (ie interest on the sum awarded, costs on an indemnity basis, interest on those costs and an additional amount calculated by reference to the costs or sum awarded) (CPR 36.17(4)). The rules specify that in determining whether it would be unjust to make such an order the court must consider "*all the circumstances of the case*" and specifically "*whether the offer was a genuine attempt to settle proceedings*" (CPR 36.17(5)).

Picken J held in this case that the usual Part 36 order as to costs would be unjust in the circumstances and the Defendant should pay the Claimant's costs on the normal basis. The offer was not a genuine offer to settle as the Claimant was only offering settlement in return for total capitulation by the Defendant (ie he was offering nothing short of what he was claiming). A settlement offer requires both "*give*" and "*take*" to the particular Defendant not just "take" (as was the case here). Picken J did not accept the argument that the Offer contained the requisite "give" because the Defendant was saving the costs of going to trial if it accepted the proposal. He also drew out that a Part 36 offer made at a very late stage can often be indicative of the offer being used as a tactical ploy to obtain cost benefits rather than achieve settlement (the stage at which a Part 36 offer is made is also a specific factor which the court must take into account when determining whether it would be unjust to grant the usual Part 36 cost benefits).

COMMENT

This judgment is one of the first reported cases under the April 2015 redraft of the Part 36 rules.

Under the old rules the court was always required to consider "*all the circumstances of the case*" in determining whether it would be unjust to make the usual order as to costs for a successful Part 36 offer. Cases such as *AB v CD* [2011] EWHC 602 (Ch) under the old regime said that an "*offer to settle*" under Part 36 must contain a genuine element of concession by the claimant. A claimant couldn't just make a very high offer in a cynical attempt to gain the Part 36 cost benefits rather than obtain settlement. However against such cases, there was also the case of *Huck v Robson* [2002] EWCA Civ 398 where it was held that a claimant's offer for 95% of the value of the claim was still a valid Part 36 offer. It was felt that this case has encouraged the practice of claimants making very high Part 36 offers simply to achieve the significant Part 36 cost benefits (especially after they were enhanced by the Jackson reforms) rather than settlement.

In the April 2015 rewrite of the Part 36 regime, the Civil Procedure Rules Committee (**CPRC**) sought to deal with this perceived abuse by adding to the list of factors the court had to specifically consider when looking at "*all the circumstances of the case*" and "*whether the offer was a genuine attempt to settle the proceedings*." Apparently it is not intended that this additional factor should prevent claimants with very strong cases from making high Part 36 offers. However, clearly where very high Part 36 offers are made and are successful, there may well be satellite litigation disputing whether the usual cost consequences should apply. What this case does make clear however is that in order for those Part 36 offers to be upheld they must contain some concession although the level of that concession will depend very much on the facts of the case.

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

PITFALLS IN CONTRACTING WITH GOVERNMENT BODIES

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

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

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

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

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

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

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

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

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

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

BOND TRUSTEES: WHEN THE GOING GETS TOUGH, THE TRUSTEE GETS GOING

Thursday 3 December 2015, 12.30pm – 1.30pm

Presented by Andrew Denny, Partner – Litigation; Luke Lewis, Partner – ICM (Corporate Trust & Agency); Morgan Krone, Partner – ICM (Corporate Trust & Agency); Simon Hill, Partner – ICM (Corporate Trust & Agency); Tim Beech, Senior Associate – ICM (Corporate Trust & Agency)

Join Allen & Overy's market-leading lawyers from our Corporate Trust & Agency and Litigation groups as they discuss how trustees have an important role to play in

defaults, disputes and litigation in the post-global financial crisis era. They will be considering the circumstances in which trustees may become involved in disputes and litigation, including where a trustee is seeking guidance from the court or pursuing litigation with the agreement of the investors, and they will also touch on instances where a trustee's own actions may be challenged by a third party. They will demonstrate with real-life case studies how, with the benefit of high quality legal advice from experienced corporate trust and litigation specialists, the process does not necessarily expose the trustee to liability and therefore should not be feared.

This discussion will be of relevance to bond trustees, noteholders, arrangers and issuers.

Questions from the audience are welcome, and we would be happy to receive any in advance so that we can address them on the day.

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

RECENT DEVELOPMENTS IN RECOVERING THE PROCEEDS OF FRAUD

Wednesday 9 December 2015, 12.30pm – 1.30pm

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

Banks may find themselves mixed up in the fraud of others. Despite acting honestly, a bank may find itself exposed to a range of personal and proprietary claims. This seminar seeks to explain the risks of liability arising in the light of a number of new cases, including Federal Republic of Brazil v Durant International Corp [2015] UKPC 35 and Credit Agricole Corporation and Investment Bank v Papadimitriou [2015] UKPC 13.

Registration and lunch will take place from 12pm; the seminar commences at 12.30pm.

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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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