ALLEN & OVERY

July 2016

Litigation and Dispute Resolution

Review

EDITORIAL

In this edition of the Litigation Review we report on two decisions involving employees that stole confidential information. In *Arthur J Gallagher Services (UK) Ltd & ors v Alexandre Skriptchenkov & ors* Slade J issued an interim injunction to search for and destroy confidential information on two ex-employees' computers. This appears to be the first reported authority where destruction of documents on a defendant's computer has been ordered as interim relief. We also report on a recent criminal prosecution of an employee who stole client lists (see **Confidentiality** and **Employment**).

We consider new SFO guidance which appears to make it harder for an individual to have his lawyer present at a compelled interview. We also report on the second-ever Deferred Prosecution Agreement between a corporate and the SFO (see **Anti-bribery & Corruption)**.

Finance parties will be interested to read about the decision in *Qadir & anr v Barclays Bank plc* where the court considered limitation periods in swaps mis-selling claims and the decision in *Finch & anr v Lloyds TSB Bank plc* where the court determined whether or not a bank owed a duty to draw a borrower's attention to onerous conditions in a loan agreement (see **Limitation** and **Contract**).

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Anti-bribery and corruption

SECOND UK DEFERRED PROSECUTION AGREEMENT

Serious Fraud Office v XYZ Ltd, 11 July 2016 (full judgment not yet published)

The Serious Fraud Office has entered into its second-ever Deferred Prosecution Agreement (**DPA**) with a corporate. Against the backdrop of the first DPA, entered into with Standard Bank late last year, this second DPA provides further guidance on what level of cooperation is necessary from a business being investigated for financial crime to secure a DPA, the application of DPAs in particularly serious instances of bribery, and the calculation of fines in complex bribery cases.

On 8 July 2016, the UK's second-ever Deferred Prosecution Agreement was concluded between the Serious Fraud Office (**SFO**) and an unnamed party for a number of bribery offences.

Related criminal proceedings are still on-going. Accordingly, to preserve anonymity, certain facts have not yet been released and the judgment authorising the DPA refers to the counterparty as "XYZ" throughout. Even so, the case offers significant additional guidance on the level of cooperation necessary to secure a DPA (particularly regarding interview notes and privilege) and the calculation of financial penalties in complex scenarios.

Background

The conduct subject to the DPA took place between June 2004 and June 2012. XYZ was a UK SME that conducted most of its business in Asia. XYZ paid bribes through agents to secure many of its contracts (the SFO found that 38% of the contracts it examined had been secured as a result of bribery). In doing so, XYZ had committed offences under the Prevention of Corruption Act 1906 (conspiracy to corrupt) and s1 and s7 of the Bribery Act 2010 (conspiracy to bribe and corporate failure to prevent bribery).

In February 2000, XYZ was taken over by ABC, a U.S.-based entity. In 2011, ABC rolled out its global compliance programme to XYZ. It was during the implementation of this programme that the bribery came to light. Following initial anonymous discussions with the SFO in October 2012, a formal self-report was submitted on 31 January 2013. The SFO then conducted its own investigation into XYZ, which concluded earlier this year. On 8 July 2016, Sir Brian Leveson, at Southwark Crown Court, approved the DPA.

What was required to secure a DPA?

Following the SFO's first DPA with Standard Bank and Sweett Group's conviction for a corporate failure to prevent bribery, a clearer picture of the behaviour required to secure a DPA is emerging (though unspoken practical considerations such as how likely a party is to contest a prosecution may inevitably apply). The overriding factor influencing whether a DPA will be granted is whether it is in "the interests of justice" to do so. In assessing this, the court considered six factors:

(1) **Seriousness of the offence**. In contrast to Standard Bank, XYZ's conduct had occurred over multiple years, on numerous occasions, and included substantive bribery offences beyond the s7 corporate failure to prevent bribery. However, while the conduct was considered "grave", the court noted that the bribery had been instigated by XYZ's agents and there had been no attempt by XYZ at a "corporate cover-up".

(2) **Self-reporting and cooperation**. XYZ's lawyers first made anonymous enquiries of the SFO on 2 October 2013. XYZ's lawyers then confirmed to the SFO on 13 November 2013 that XYZ would be making a self-report. As per agreement with the

SFO, the full self-report was submitted on 31 January 2013. Importantly, in light of this dialogue, the self-report was still viewed as sufficiently prompt even though almost five months had passed since the conduct was initially identified.

XYZ provided oral summaries of witness interviews it had conducted. XYZ appears to have claimed privilege in responding to the SFO's requests for information. Significantly, the court viewed the production of oral summaries of witness interviews and a claim of privilege as consistent with "full and genuine" cooperation. This is likely to be of comfort to corporates given recent comments by SFO and FCA officials that have indicated that corporates should produce full written accounts of interviews and judiciously consider claims to privilege in order to be viewed as fully cooperative.

(3) **No history of similar conduct**. XYZ had not previously engaged in such conduct.

(4) **Attention paid to compliance**. XYZ's compliance programme was, it admitted, inadequate prior to 2011. Nonetheless, the implementation of a global compliance programme by its parent company was noted.

(5) **The extent to which the entity has changed**. Another factor in XYZ's favour was that, as a result of remedial action, it was now "effectively a different entity". Contracts with implicated agents had been terminated and senior employees had been dismissed. According to Leveson P, XYZ's parent company, ABC, had behaved in an "exemplary" fashion in dealing with the bribery it had uncovered.

(6) **Impact of prosecution on individuals not involved in the misconduct**. The fact that a conviction would bar XYZ from public procurement tenders and almost inevitably lead to its collapse (and the loss of innocent employees' jobs) was also a relevant consideration.

How was the financial penalty assessed?

XYZ was in financial difficulty. This created a dilemma: whether to impose a harsh fine that would almost certainly bankrupt XYZ, or a lesser fine, with the risk that such a low fine would represent an insufficient deterrent.

Ultimately, the latter approach was chosen. Normally, a party to a DPA can expect to disgorge the gross profits of its bribery and pay a financial penalty calculated as a multiple of those profits. Sentencing Council Guidelines indicate the multiplier will be between 250% and 400% in serious cases, such as this.

Counsel for XYZ submitted that a multiplier of 250% should be applied. Weighing up the various mitigating and aggravating factors, the court was clearly not inclined to agree to a multiplier this low (for comparison, Standard Bank's fine was based on a 300% multiplier). However, given XYZ's inability to pay a fine based on even the lowest multiplier, the point was moot.

As a result, it was agreed that XYZ's total penalty would be limited: equivalent to a disgorgement of the gross profits (GBP 6.5 million) from the contracts procured by bribery. XYZ itself was only able to pay GBP 352,000 (this amount therefore comprised the financial penalty element). However, ABC had, crucially, agreed to provide GBP 1.9 million towards the total penalty. The remainder of the penalty will be repaid over the lifetime of the DPA.

COMMENT

While we do not yet know all the facts of the case, the SFO's second DPA may turn out to be almost as significant as its first.

First, and notwithstanding the limited current information, investigators will be grateful for the further guidance on cooperation – particularly relating to interview notes and privilege – which XYZ's DPA provides. Likewise, the fact that the SFO appeared receptive to being approached on an initial no-name basis, and provided time to prepare a full self-report is encouraging.

Secondly, XYZ's DPA illustrates that even in the "most serious" cases of bribery, significant cooperation and subsequent reforms to the offending entity may make a DPA a realistic option. Thirdly, it provides a model for an innocent parent company upon discovering such

conduct in a subsidiary. Finally, it illustrates the wide discretion available when determining fines in corporate criminal matters.

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EXCLUDING LAWYERS FROM SECTION 2 INTERVIEWS: HAS THE SFO GONE TOO FAR?

It has usually been taken for granted that an individual who is required to attend an interview with a UK regulator or authority can be accompanied by a lawyer of their choice. Until now. Under new UK Serious Fraud Office (**SFO**) guidance[1] a lawyer's attendance at SFO compelled interviews will not be guaranteed. Rather, lawyers will have to justify why they should attend such interviews, and sign-up to quite strict undertakings about their role during the interview (if they are even permitted to attend).

The SFO can compel a subject of or a witness to its investigations to attend an interview (known as **s2 interviews**).[2] These interviews are not carried out under caution and the protections in the Police and Criminal Evidence Act 1984 (**PACE**) do not apply to them.

Last year, the High Court upheld a decision[3] taken by the SFO to prevent lawyers acting for a company under investigation from also representing employees of that company (who were not suspects) at their s2 interviews. The SFO's rationale for this decision was that, in the particular circumstances of that investigation, allowing the company's lawyers to attend these witness interviews would prejudice the SFO investigation.

Following this challenge, the SFO undertook to produce new guidance regarding the attendance of lawyers at s2 interviews.

The new guidance

The SFO's new guidance states that a lawyer may only accompany an interviewee to their s2 interview if "the SFO believes it likely they will assist the purpose of the interview and/or the investigation, or that they will provide essential assistance to the interviewee by way of legal advice or pastoral support".

If an interviewee wants their lawyer to attend a s2 interview, the SFO must be provided with the following information, either within seven days prior to the interview or three days after the interviewee receives a letter inviting them to attend a s2 interview (whichever is the later):

- The name of the lawyer and "reasons why their presence in the interview will assist the purpose of the interview and/or investigation, or that they will provide essential assistance to the interviewee by way of legal advice or pastoral support".
- A written undertaking from the lawyer in question in the name of their law firm that the firm "does not represent any individual or legal person who is a suspect in the investigation" and that they will abide by a series of confidentiality restrictions, including not sharing or making copies of any documents provided by the SFO to the interviewee in advance of their interview.
- Written acknowledgement from the lawyer of the parameters of the role of a lawyer in the interview and that any breach of the parameters is likely to lead to the exclusion of the lawyer from the interview without notice. The "parameters" in question include that the lawyer "may provide legal advice or essential assistance. Otherwise, they must not do anything to undermine the free flow of full and truthful information which the interviewee, by law, is required to give".

If a lawyer's request to attend a s2 interview is refused, the SFO has not said whether reasons for this decision will be provided, or whether there is a process for formally appealing such a decision.

Practical impact

The SFO's guidance applies to any lawyer who wants to attend a s2 interview, including an interviewee's independent legal adviser. This is quite a shake-up in terms of how things have worked in the past. However, it looks like the SFO's new measures regarding s2 interviews are particularly focused on the situation (like the one that was challenged in the High Court last year) where a lawyer who represents a company under investigation by the SFO, also wants to represent current or former employees of that company at their s2 interviews. In particular, the accompanying SFO operational guidance warns that:

"Where a lawyer is unable to demonstrate (by giving appropriate undertakings) that they are not retained by, or otherwise owe a duty of disclosure to any other person (natural or legal) who may come under suspicion during the course of the investigation, including the interviewee's employer, they are unlikely to be allowed to attend the interview. This is because, depending always on the particular facts of the case, their attendance may reasonably be assessed as potentially prejudicing the investigation, whether as a result of a professional duty owed to a third party or the risk that their attendance will reduce the candour with which a section 2 interviewee may answer questions put to them".

The broad drafting of this guidance raises a number of potential issues.

Conflicts of interest

The SFO's guidance quoted above states that a lawyer must confirm that they are not retained by/owe a duty of disclosure to any other person who may come under suspicion during the course of the investigation. Contrast this to the wording of the SFO's draft undertaking that they want lawyers attending s2 interviews to sign, which requires them to undertake that their firm does not represent someone who is a subject in the investigation. It is a subtle difference in wording, but nonetheless an important one for which no explanation is given. In any event, how is a law firm supposed to know if they are retained by or owe a duty of disclosure to another person who "may" come under suspicion during the course of the investigation? What, if any, information will the SFO be willing to provide to lawyers about its investigation to help them undertake this assessment?

Independent Legal Advisors

If the SFO refuses to allow a company's lawyer to attend a s2 interview, can an individual be provided with an independent legal adviser from another law firm? Presumably so, provided they fulfil the SFO's criteria of providing "essential assistance to the interviewee by way of legal advice or pastoral support".

Access to evidence

If lawyers for a company under investigation are not permitted to attend a s2 interview with or of their current or former employees, what access will the company and its lawyers get to the note or transcript of that interview? One of the reasons given by the judge in the High Court case referred to above for upholding the SFO's decision to bar a company's lawyers from s2 witness interviews was that "there is no obvious bar to the [interviewees] themselves telling [their employer] about the contents of the interviews". However, the SFO's new guidance issued for those who are required to attend s2 interviews states that they are "asked not to disclose anything said or seen in the interview to anyone except [their] lawyer" and cautions that, to do otherwise in certain cases, may amount to a criminal offence.

Inadvertent disclosure of privileged information

What if, in the absence of the company's lawyer at a s2 interview, an interviewee inadvertently discloses privileged information? Can that information be struck from the record at a later date? Would a company even be notified of the inadvertent disclosure?

How flexible the SFO is willing to be in relation to its new guidance about s2 interviews remains to be seen, but the overall tone of the new guidance is quite stern. However, what is clear is that the SFO's new guidance has been designed to allow the SFO much greater flexibility when it comes to shutting lawyers out of their

s2 interviews. As a result, it may prove more challenging for lawyers to secure a spot at s2 interviews in the future.

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[1] https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/codes-and-protocols/

[2] Under section 2 of the Criminal Justice Act 1987.

[3] *R (on the application of Lords Reynolds and Taylor) v Director of the Serious Fraud Office* [2015] EWHC 865 (Admin); see http://www.allenovery.com/publications/en-gb/Pages/SFO-section-2-interviews-when-can-lawyers-be-excluded-.aspx

Arbitration

RESTRUCTURING BUSINESS TO TAKE ADVANTAGE OF INVESTMENT TREATY – A CAUTIONARY TALE

Philip Morris Asia Ltd v The Commonwealth of Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, published 16 May 2016

An investment arbitration tribunal has found that the Philip Morris International group (**PMI Group**) restructured its Australian business for the sole purpose of gaining investment treaty protection, in order to bring an investment treaty claim against Australia to challenge new tobacco plain packaging (**TPP**) legislation. The restructuring was carried out at a time when that claim was foreseeable. As a result, the entire claim was dismissed as an abuse of process. While structuring investments so as to secure investment treaty protection can provide important rights of recourse against certain state acts, there are risks in restructuring existing investments for this purpose, especially where (as in this case) a dispute is foreseeable.

The Tobacco Plain Packaging Act 2011 (the **TPP Act**) was enacted in Australia on 21 November 2011, requiring tobacco companies in Australia to package their cigarettes in logo-free, dark brown packs, with large and graphic health warnings. On the same date, a Hong Kong incorporated subsidiary of the PMI Group, Philip Morris Asia Limited (**PM Asia**), filed its Notice of Arbitration challenging the TPP Act as contrary to the Hong Kong/Australia bilateral investment treaty (the **Treaty**).[1] PM Asia's complaint was that its entire business rests on its intellectual property and, in particular, the recognition of its brands. Australia contested the claim both as to its admissibility and the jurisdiction of the tribunal under the Treaty, as well as on the merits.

The Tribunal hearing the claim ordered that the admissibility and jurisdiction issues be considered prior to the merits of the dispute.

A key issue concerning the application of the Treaty (and therefore the jurisdiction of the tribunal) was whether the PMI Group had restructured its Australian business in order to take advantage of the arbitration provisions in the Treaty at a time when the dispute relating to the TPP legislation was foreseeable. This required the Tribunal to examine both the history of the PMI Group's restructuring and the way in which the TPP Act came about.

The Australian government first began considering TPP legislation in 2008, at which time the PMI Group's business in Australia was owned by Philip Morris Brands Sàrl, a Swiss company (**PM Brands**). In October

2009, an Australian subsidiary of the PMI Group wrote to the Australian Health Minister, expressing concerns about interference with its rights and the potential effect of TPP legislation on its business. Internal memoranda show that, even at this point, the PMI Group viewed this in legal terms.

In April 2010, the Australian Government announced its intention to introduce TPP legislation. Earlier the same month, the PMI Group produced a plan to further streamline its corporate structure. Although 2010 saw a change of Prime Minister followed by a general election in Australia, coupled with some uncertainty as to the detail of any TPP legislation, nothing happened to make clear that the introduction of TPP legislation was being abandoned.

In September 2010, the PMI Group approved certain restructuring arrangements, including the transfer of its Australian businesses from PM Brands to PM Asia, the future claimant in the arbitration. As required by Australian law, PMI Group filed a Foreign Investment Application for the transfer, which was later approved and the transfer formally took effect on 23 February 2011, nine months before the TPP Act was enacted.

The restructuring brought investments under the protection of the Treaty

The Tribunal found that PM Asia only acquired a protected investment under the Treaty as at 23 February 2011, when the restructuring was completed. The restructuring had been effected in accordance with Australian law and regulations. The investment was also held to be within the temporal scope of the Treaty's protection, the crucial time for assessing this being the point at which the measure alleged to constitute a Treaty breach occurred. This was the date on which the TPP Act was enacted, at which time PM Asia owned the PMI Group's Australian business.

Restructuring solely to bring a treaty claim in respect of a foreseeable dispute is an abuse of process

The Tribunal considered whether PM Asia's claim amounted to an abuse of process, as alleged by Australia.

The Tribunal began by emphasising that the threshold for finding an abuse of process is a high one and the notion does not necessarily imply bad faith. Nor is the mere fact of restructuring to gain investment treaty protection illegitimate *per se*. Such restructuring may, however, amount to an abuse in respect of a foreseen dispute. The Tribunal cited jurisprudence that "it is clearly an abuse for an investor to manipulate the nationality of a company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration."[2]

The Tribunal ruled that the test of whether a dispute was "foreseeable" is whether "there is a reasonable prospect that a measure which may give rise to a treaty claim will materialise". This is a somewhat less stringent test for abuse of process than that adopted in an earlier decision, which required a specific dispute to be foreseen as a "very high probability".[3]

Applying this test to the facts of the case, the Tribunal held that the key question was whether the dispute over TPP legislation was reasonably foreseeable prior to the PMI Group restructuring. In the Tribunal's view, from April 2010 when it was announced that TPP legislation would be introduced, there was no uncertainty as to the Australian Government's intentions. Despite the various political events over the course of 2010, nothing happened which could reasonably lead PM Asia to conclude that TPP legislation was no longer foreseeable. Accordingly, when the restructuring took place, the dispute was foreseeable.

The Tribunal found that the restructuring could not be justified by any legal or commercial considerations other than the possibility of bringing a treaty claim. The Tribunal held that PM Asia could not prove that there were any tax or other business reasons, which were determinative for the restructuring and it was only possible to conclude that the "main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under the Treaty".

The Tribunal, therefore, dismissed PM Asia's claim as an abuse of process.

COMMENT

Ensuring that cross-border investments come under the protective umbrella of an investment treaty typically provides a number of valuable substantive protections. Most of these treaties allow an investor to pursue arbitration proceedings directly against a state that has (allegedly) breached the treaty, providing an important right of recourse, which would otherwise not exist. It is recommended that consideration be given to structuring transactions for investment treaty protection at the time they are entered into (in the same way considerations as to tax and other matters are factored in). This ensures protection for investments from the outset. While restructuring existing investments is not in itself illegitimate, the *PM Asia* case demonstrates risks associated with such restructuring if it is not done correctly. This is particularly the case if the restructuring is done with the aim of securing treaty protection against a backdrop of events that may form the basis of, or be relevant to, a future claim under the treaty. Specialist advice should be taken before any restructuring of this kind takes place. Failure to do so could result, as it did in *PM Asia*, in a claim being deemed inadmissible as an abuse of process.

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[1] Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, dated 15 September 1993.

[2] *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, para. 70.

[3] *Pac Rim Cayman LLC v El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.99.

Confidentiality

PRODUCT DERIVED INDIRECTLY FROM EARLIER MISUSE OF CONFIDENTIAL INFORMATION – WHAT DAMAGES ARE AVAILABLE?

MVF 3 APS (formerly Vestergaard Frandsen A/S) v Bestnet Europe Ltd & ors [2016] EWCA Civ 541, 13 June 2016

When considering damages for breach of confidence, there is a distinction between products which embody confidential information and those which merely derive from earlier misuse of information. The Court of Appeal agreed with Rose J's distinction between the measures of damages applicable in this case where the defendants had made different types of insecticidal mosquito nets using the claimant's confidential information.

The dispute had a complex history involving hearings in the French and Danish courts, two hearings in the High Court and two in the Court of Appeal. This note is concerned with an appeal from Rose J on the question of damages.

The defendants (**Bestnet**) had produced particular types of mosquito nets using the claimant's (**Vestergaard**) confidential information. The High Court distinguished between the ways in which Bestnet's different products used Vestergaard's confidential information and applied different measures of damages accordingly.

Products from direct misuse of confidential information

The High Court found that production of the first version of Bestnet's products – the "First Formula" nets – involved direct misuse of Vestergaard's confidential information. Rose J held that the correct measure for damages in such cases was that established in a patent-infringement case, *General Tire & Rubber Company v Firestone* [1975] 1 WLR 819, 16 April 1975. On this measure, damages were based on lost profits from the sales of nets which Vestergaard would have made, but for the sales of nets which Bestnet was able to make by its misuse of confidential data.

Derived products from earlier misuse

However, Rose J held that the second version of the nets that Bestnets produced (the "Later Formula" products) was merely "derived" from the original misuse of information. Rose J awarded damages in respect of Later Formula products based on losses Vestergaard incurred because of the accelerated entry into the market that Bestnet was able to make by selling these products sooner than it would have been able to without the earlier misuse (the "accelerated entry" basis). In this instance, Bestnet had been able to shorten the time needed to develop its Later Formula products by virtue of the earlier misuse.

Both parties appealed to the Court of Appeal, raising six issues. The Court of Appeal upheld Rose J's original findings on all of them.

Derived products – which basis for damages?

The first issue was whether damages in respect of the Later Formula products should be calculated on the *General Tire* basis or on the accelerated basis. The Court of Appeal emphasised the difference between products which embody confidential information and products which merely derive from the earlier misuse of information. "The *General Tire* measure was to award lost profits on sales of Bestnet's First Formula nets to the extent that those sales replaced sales that Vestergaard would otherwise have made." However, the sale of the latter type of products would not in itself be wrongful. Instead, the issue was "what recoverable harm can be traced back to the initial wrongful use of the confidential information in order to develop the product". Where a product is merely derived from the misuse, the consequences should be "more limited" and are likely to be "the acceleration or limitation of lawful competition." The Court accordingly upheld Rose J's decision not to apply the *General Tire* measure to the calculation of damages in respect of the Later Formula products. Instead, (the second issue), Rose J decided that damages in respect of the Later Formula products should be measured on an accelerated entry basis.

Accelerated entry – two heads of damages

Rose J held that there were two heads of damages:

- a lump sum quasi-consultancy fee to reflect the extent to which use of the confidential information had contributed to sales of Bestnet's Later Formula nets; and
- payment for Bestnet sales made during any period when Bestnet would not yet have been able to sell their goods if they had not misused Vestergaard's confidential information.

Development time saved

Rose J first concluded that Bestnet had saved six months in development of the Later Formula product by using the confidential information. Rose J then considered how much of that period had actually resulted in accelerated sales for Bestnet and concluded that there had in fact been no acceleration of Bestnet's entry into the market.

Notional royalty rate

The Court of Appeal also upheld Rose J's decision that damages should reflect a notional 4% royalty rate payable to Vestergaard in respective of a notional licensing agreement. In order to assess appropriate royalty rates, one had to consider what sum would have been arrived at in licence negotiations between the parties. This was on the assumption that each had made reasonable use of their respective bargaining positions, bearing in mind the information available and the commercial context in which this negotiation would have taken place.

These hypothetical negotiations assumed that "the nets which were to be licensed were those which did not cause sales to be diverted from Vestergaard." The Court

of Appeal rejected submissions that the judge had used hindsight and that it was wrong to assume that the parties would have known at the time of the hypothetical negotiation that sales of the product would not have deprived Vestergaard of any sales. Rather, damages had properly been assessed based on the "user principle", reflecting the fact that royalties were not based on assumed sales which Vestergaard would have made but for licensing.

Rose J had awarded a quasi-consultancy fee on the basis that Vestergaard's confidential information had given Bestnet substantial help in developing its own products. The Court held that "the proper approach was to award, as a first head of damage, a lump sum by way of a quasi-consultancy fee to reflect the extent to which the sales of the Later Formula nets were brought about by use of the confidential information". The second head of damage was compensation for sales made in any period when Bestnet would not have been in the market were it not for misuse of Vestergaard's confidential information. Rose J had been right to take a retrospective approach - taking account of what had actually happened – when assessing how much compensation Bestnet should pay Vestergaard in respect of the Later Formula products.

Court determines production levels

The High Court had asked Bestnet to provide production records for their First Formula and Later Formula nets in order to measure the quantities of each type of net that had been produced. The judge found that Bestnet's response had been so unsatisfactory that the court made its own decision about how many nets were made to the First, and Later, Formula. Rose J found that a large order for nets had been for First Formula products. This was unfavourable to Bestnet, but the Court of Appeal upheld her finding: given Bestnet's unsatisfactory disclosure, this was a finding open to the judge.

On the final issue, Bestnet appealed against the judge's decision to award interest at 2% over Barclays Bank's base lending rate. Vestergaard was a successful company, which, Bestnet argued, meant that the interest rate should be based on the interest paid by similarly profitable companies. However, the Court of Appeal upheld the judge's award. The judge had not been given any evidence about the rates of interest available to companies similar to Vestergaard and the Court held that, by reference to the White Book, 2% above base rate was not sufficiently unusual to justify interference.

COMMENT

The Court of Appeal had to consider many different issues and many different possible bases for awarding damages. As Sales J put it in *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424:

> "The law relating to breach of confidence covers a very wide range of different factual situations and it is unsurprising that the strength of the arguments in favour of any particular remedy or set of remedies … varies across that range."

Sometimes the breach may be akin to a breach of fiduciary obligations, other times it may be akin to a breach of intellectual property rights, or of contractual rights, or the wrong may be similar to a tort. This particular judgment is a potentially useful guide to remedies and defences that might be available.

It is also a helpful reminder that it can be difficult to calculate, or even demonstrate, potential losses from breaches of confidentiality clauses. This is reflected in the fact that well-drafted confidentiality agreements will contain explicit recognition by the parties of the fact that other remedies, such as injunctions, may be appropriate.

Indeed, in an earlier hearing in this case before Arnold J, the court had agreed that Vestergaard was entitled to an injunction preventing Bestnet from using or disclosing certain data, but had refused an application for an injunction which would have prevented a Dr Skovmand from working for Bestnet on insecticides using a particular chemical that Vestergaard also used. Arnold J also declined to grant an injunction which would have prevented Bestnet from benefitting from past misuse of confidential information. Given the uncertainties around damages awards and the availability of injunctions, it may be worth considering whether to include a liquidated damages clause within confidentiality provisions if this is possible.

Finally, Bestnet's failure to give proper disclosure meant it lost the benefit of the doubt when the court had to

decide whether a large order for nets had been for First or Later Formula nets. This is a reminder that parties can expect no sympathy if they fail to obey disclosure orders.

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TOUGH STANCE ON CONFIDENTIAL INFORMATION: SEARCH AND DESTROY ORDERED

Arthur J Gallagher Services (UK) Ltd & ors v Alexandre Skriptchenkov & ors [2016] EWHC 603 (QB), 11 February 2016

The court ordered, on an interim application, that the claimants' confidential information be searched for and destroyed on the defendants' computers. In an area of law where there was previously no direct authority, the decision provides clear guidance on the principles to be applied in such cases and the terms of the order which can be made.

The defendants had admitted to taking and using various confidential information upon leaving the claimants' businesses and establishing their own competing businesses. The defendants stored the confidential information in electronic form.

By consent, the claimants initially obtained an order requiring the defendants to produce copies of documents which contained the claimants' confidential information. The claimants then sought a further mandatory interlocutory injunction requiring search terms to be run across the defendants' devices and computers to identify the claimants' confidential information and for that information to then be destroyed.

Although *Warm Zones v Thurley & anr* [2014] IRLR 791 (**Warm Zones**) is authority for the availability of an interlocutory order for inspection and imaging of a defendant's devices, counsel could not produce any authority for the destruction of documents being granted as interim relief.

Slade J observed that, whilst it was not the court's role to decide the merits of the case on an interim application she felt a high degree of assurance that the claimants would establish at trial that the defendants had taken and used their confidential information and therefore that the relief being sought (destruction of that confidential information on the defendants' devices) would be granted.

Despite the defendants' co-operation in the proceedings, the evidence revealed "a high degree of subterfuge in the use of the claimants' confidential material". Slade J did not trust the defendants to identify and delete the claimants' confidential information from their devices themselves.

Applying the *American Cyanamid* principles, Slade J was satisfied that:

- the claimants had shown a strong case that their claim would succeed at trial and they would obtain the relief sought;
- that damages would be an inadequate remedy were interim relief not granted; and
- that the claimants would be able to meet their cross-undertaking in damages (ie if it turned out at trial that it had been wrong to grant the interim relief).

Slade J was also satisfied that an order requiring the defendants to deliver up their devices to a computer expert of their choosing, who could seek out and delete the claimants' confidential information from those devices, but who would retain an image of the device pre-deletion in case it became apparent that any documents should be restored, would involve the least risk of injustice if it turned out to be the wrong decision.

COMMENT

Prior to this decision there was no direct authority on the question of whether, and if so, when, a mandatory interim injunction should be granted to require the destruction of a claimant's confidential information. Slade J was obviously aware that her judgment would become that authority (or at least the first in the line of authority which may develop) and took care to clearly set out her reasoning and the principles to be applied in future cases.

This judgment recognises that the harm which can be done to a claimant from the misuse of its confidential information often cannot be adequately compensated by damages at the conclusion of a trial. Instead, claimants in that situation require immediate relief and this decision sets out the circumstances in which that relief may be granted.

The decision gives employers and other claimants who have had their confidential information misappropriated a very powerful tool to quickly stem the potential for that misappropriation to harm their business.

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Conflict of laws

BRUSSELS RECAST ANTI-TORPEDO PROTECTION FOR HYBRID JURISDICTION CLAUSES

Perella Weinberg Partners UK LLP & anr v Codere SA [2016] EWHC 1182 (Comm), 17 May 2016

The High Court has held, albeit *obiter*, that an asymmetric (or hybrid) exclusive jurisdiction clause falls within the definition of "exclusive" for the purposes of the "anti-torpedo" provision in the recast Brussels Regulation (**Brussels Recast Regulation**). An asymmetric exclusive jurisdiction clause confers a right to invoke the exclusive jurisdiction of the courts of a given jurisdiction on one party only. The status of such clauses remains in doubt in certain jurisdictions and under certain treaties. The Explanatory Report on the 2005 Hague Convention on Choice of Court Agreements suggests that such a clause will not be considered exclusive under that agreement, and the French courts have refused to uphold them altogether.[1]

In 2013, Codere SA, a Spanish company in financial difficulties, retained the services of Perella, a London-based restructuring specialist. In September 2015 Codere started Spanish proceedings against Perella claiming breach of contract by Perella. Perella challenged the jurisdiction of the Spanish court. Soon afterwards Perella commenced a separate set of proceedings in England and Codere challenged the jurisdiction of the English court. It was Codere's jurisdiction challenge which was the subject of this judgment.

The jurisdiction agreement between the parties stated:

"Codere agrees for the benefit of Perella that the courts of England will have non-exclusive jurisdiction to settle any dispute which may arise in connection with this engagement."

Exclusive and non-exclusive jurisdiction clauses

An exclusive jurisdiction clause is an agreement to litigate in the courts of a single, specified jurisdiction. In the event of a dispute, the claimant party must resort to the chosen court. Both parties are prohibited from referring the matter to any other.

In contrast, a non-exclusive clause simply confers jurisdiction on a given court without affecting the right of any party to bring proceedings elsewhere. Why go to the trouble of building such non-exclusive language into a contract? Generally, its purpose is to reserve or guarantee a right to resort to the chosen court in situations where other parts of the Brussels Recast Regulation could prevent it.

Article 31 and defeating the "Italian torpedo"

Article 31 Brussels Recast Regulation says that where the court upon which jurisdiction is conferred by an exclusive jurisdiction clause is seised, a court in any other Member State must refuse to hear the matter until the "chosen" court declines jurisdiction. If Perella could convince the English court that the clause above gave exclusive jurisdiction to the English court then, under Article 31, the Spanish court would be required to stay the proceedings before it. If not, the two sets of proceedings could continue in parallel.

Under the original Brussels Regulation, there would have been no point in making such an application because exclusive jurisdiction clauses did not have similar protection to that under Article 31 Brussels Recast Regulation. The seisin provisions of the original Brussels Regulation (giving priority to the Member State court first seised of a dispute) prevented the courts of the chosen Member State from hearing the matter until the other court had refused jurisdiction. Exploiting this anomaly became known as the "Italian torpedo" because some prospective defendants realised that by commencing pre-emptive proceedings in Italy, lengthy delays in the Italian courts severely delayed the chosen court from proceeding to hear the claim.

Does a hybrid clause enjoy Article 31 protection?

Article 31 applies to exclusive jurisdiction clauses. Under Article 25 of the Brussels Recast Regulation jurisdiction agreements are considered exclusive unless they specifically state a contrary intention. Whether or not a hybrid clause could be considered exclusive is a matter of EU law. Walker J's *obiter* view was that nothing in Article 31 says that a jurisdiction clause must be symmetrical to be considered exclusive. It need simply confer jurisdiction on the court of a given Member State and restrict at least one party from invoking the jurisdiction of any other. This means, in effect, that the English court has indicated that it will construe Article 31 as giving "anti-torpedo" protection to both symmetric and asymmetric jurisdiction clauses.

This is in contrast with the Hague Convention on Choice of Court Agreements, the Explanatory Note for which suggests that asymmetric clauses will not be considered "exclusive" under it. If this is indeed the case, such clauses will be outside the scope of the Hague regime.

Was the "benefit" a right to invoke exclusive jurisdiction?

Perella argued that the "benefit" conferred on it by the jurisdiction clause was the right to invoke the exclusive jurisdiction of the English courts. It argued that non-exclusive English jurisdiction was a base line, or starting point. The "benefit" was the right to unilaterally convert it to an agreement exclusive in nature.

Codere maintained that the "benefit" was the right to invoke the jurisdiction of the English courts. This was essentially an asymmetrical non-exclusive jurisdiction clause in favour of Perella.

This point, the issue of what exactly the parties had agreed to, was a matter of English contractual interpretation. Walker J applied the *Rainy Sky*[2] construction principles, giving the language the meaning that it would have conveyed to the reasonable person possessed of all background facts reasonably available to the parties at the time the agreement was made. Where two possible constructions emerge the court will prefer the one which is more consistent with "business common sense".

Walker J considered the most important feature of the factual matrix – that both parties were sophisticated business entities that would have been well aware of the existence and effect of the Brussels Recast Regulation. Particularly, the parties would have factored the Article 25 rebuttable presumption of exclusivity into their contractual language. The express reference in the language to "non-exclusive jurisdiction" represented an insurmountable obstacle to Perella's position. Walker J could not accept that the wording "for the benefit of Perella" cancelled out the term "non-exclusive". Codere's position was more compatible with business common sense. Perella was not by any means guaranteed the right to bring proceedings in England in the absence of the express reference to English jurisdiction. As an English-based entity it would have had an interest in reserving that right, on a non-exclusive basis, and Codere was happy to allow it. The clause was not an exclusive jurisdiction clause.

COMMENT

An asymmetric jurisdiction clause remains a useful way for a party to reserve a right to litigate in a given court but it should be borne in mind that the validity of such clauses remains disputed in certain jurisdictions, notably France. The French courts have made it clear that they will not uphold such agreements. If indeed the status of asymmetric jurisdiction clauses is different under the Hague Convention in comparison to Brussels Recast, this will no doubt lead to confusion and misunderstanding.

While Walker J's *obiter* confirmation that asymmetric jurisdiction clauses fall within the Article 31 definition of "exclusive" is to be welcomed, residual uncertainty remains. The matter was not fully argued before Walker J so his comments are to be treated cautiously. That said, his approach seems uncontroversial.

The rebuttable presumption of exclusivity under Article 25 of the Brussels Recast Regulation must be expressly rejected by the parties. It comes as no surprise that using the term "non-exclusive" satisfies that requirement.

The use of the term "for the benefit" is a hangover from the original Lugano Convention and 1968 Brussels Convention which expressly provided for the use of that language to reserve the right of the party which enjoys the benefit to bring proceedings elsewhere, whereas the counterparty would be required to bring proceedings in one jurisdiction only. Under the Brussels Recast Regulation, and indeed under the current, revised Lugano regime, the term is redundant and should not be used. Expressing a clause to be for the benefit of one party now just adds uncertainty which can lead to unpredictable, results.

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Please contact Ken Kaar, or your usual Allen & Overy contact if you would like our guide to the Hague Convention on Choice of Court Agreements, covering 10 key points about this instrument and its potential impact on commercial parties' approach to choice of forum, both at the drafting stage and when disputes arise.

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1 http://www.allenovery.com/publications/en-gb/european-finance-litigation-review/eu-developments/Pages/Hybrid-jurisdiction-clauses.aspx

2 http://www.allenovery.com/publications/en-gb/Pages/Interpretation-of-contracts-and-business-common-sense.aspx

EXCLUSIVE JURISDICTION AGREEMENT IN BOND PROSPECTUS: DOES IT BIND A SECONDARY MARKET PURCHASER?

Profit Investment Sim SpA (in liquidation) v Ossi (C-366/13, 20 April 2016

The Court of Justice of the European Union (**CJEU**) has ruled upon the circumstances in which an exclusive jurisdiction clause contained in a prospectus concerning the issue of bonds will be enforceable against a secondary market purchaser of those bonds.

The Brussels jurisdictional regime in civil and commercial matters (ie the Brussels Regulation and its successor the Brussels Recast Regulation[1]) is founded on the principle that the rules of jurisdiction should be "highly predictable" and generally based on the defendant's domicile. This regime, however, acknowledges that exceptions to this general principle must be available "in a few well defined situations in which the subject matter of the dispute or the autonomy of the parties warrants a different connecting factor".[2]

In *Profit Investment*, the CJEU considered one such exception: Article 23 of the Brussels Regulation. Article 23 provides that if parties (one or more of whom is domiciled in a Member State) have agreed that the courts of a Member State are to have jurisdiction to settle any disputes which arise in connection with a particular legal relationship "those courts shall have jurisdiction".[3] Although the CJEU determined the issue under the old Brussels Regulation, the central provisions under consideration are materially unchanged in the Recast Regulation (the requirement that at least one of the parties to the jurisdiction clause be domiciled in a Member State has fallen away under the Recast Regulation).

Credit-linked notes sold on secondary market

This dispute concerned credit-linked notes (the **Notes**) issued by Commerzbank and subscribed for on the primary market by a financial intermediary, Redi. The Terms and Conditions of the Notes, which were in the prospectus, included the provision that "[t]he Courts of England have exclusive jurisdiction to settle any dispute arising from or connected with the Notes". The prospectus was approved by the Irish Stock Exchange and was available to the public on the website of the Irish Stock Exchange. Redi subsequently sold the Notes to Profit Investment, a company governed by Italian law, on the secondary market. When the entity to which the Notes were linked failed to meet a payment obligation, Commerzbank gave notice of a credit event, which brought about the compulsory administrative liquidation of Profit Investment.

Italian court refers jurisdiction questions to CJEU

Profit Investment issued proceedings in the Milan District Court against Commerzbank (and others) seeking (among other things) a declaration that the agreements under which Profit Investment acquired the Notes were a nullity on the grounds of an "imbalance of the contract, insufficient or lack of consideration" and consequently sought restitution of the sum paid. In response, Commerzbank challenged the jurisdiction of the Italian court relying on the exclusive English jurisdiction clause in the prospectus.

The Italian court stayed its proceedings and referred three questions to the CJEU. Of primary relevance is the first part of the second question, which asked, in effect, whether the English jurisdiction clause in the terms and conditions set out in the prospectus bound a secondary market investor. The question posed was:

"Can the requirement that the agreement conferring jurisdiction be in written form, as laid down in Article 23(1)(a) of Regulation No 44/2001, be said to be satisfied where such an agreement is inserted into the [prospectus] that has been created unilaterally by a bond issuer, with the effect that the prorogation of jurisdiction is made applicable to disputes involving any future purchaser concerning the validity of those bonds?"

Was a jurisdiction clause in a prospectus "in writing"?

Where parties have agreed that the courts of a particular Member State have jurisdiction to settle disputes, under Article 23 such a jurisdiction clause must satisfy one of three requirements. One such requirement is that the agreement is "in writing or evidenced in writing".[4]

As the CJEU noted, Article 23 does not indicate whether a jurisdiction clause may be transmitted beyond the parties to a contract, to a third party, who is party to a subsequent contract.[5] It is that question that the CJEU sought to answer first. Recognising that Article 23 gives primacy to an agreement between the parties, the CJEU asked whether it could be said that the parties to the primary market transaction (ie the issuer and the financial intermediary) had agreed to the English jurisdiction clause contained in a prospectus produced by one party. Referring to settled case law, the CJEU held that consensus between the parties must be "clearly and precisely demonstrated"[6] and noted that the "in writing" requirement was not met where a jurisdiction clause was included among one party's general conditions of sale printed on the back of a contract, unless the contract contained an express reference to the general conditions.[7] On that basis, the CJEU concluded that where a jurisdiction clause is included in a prospectus, the "in writing" requirement of Article 23(1)(a) is satisfied only if the contract signed by the parties upon the issue of the bonds on the primary market expressly mentions the acceptance of that clause or contains an express reference to the prospectus.

Did the jurisdiction clause bind a secondary market purchaser?

The CJEU then went onto consider[8] whether a jurisdiction clause, validly agreed in the contract concluded between the issuer of a bond and the subscriber for that bond (ie the primary market transaction), could be enforceable against a party who subsequently acquired the bonds from the subscriber without expressly consenting to the clause. To answer this question, the CJEU again turned to European case law.

In the context of bills of lading, it has been held that a jurisdiction clause can be relied upon against a third party if: (1) the clause is valid as between the carrier and the shipper; and (2) under the relevant national law, the third party on acquiring the bill of lading succeeded to the shipper's rights and obligations.[9] In the share subscription context, the CJEU has also held that, on becoming a shareholder, the shareholder is bound by a jurisdiction clause in the statutes of the company provided that the statutes are lodged in a place to which the shareholder has access.[10]

Having regard to this case law, the CJEU set out three requirements that it felt should be met for a secondary market purchaser of bonds from a financial intermediary to be bound by a jurisdiction clause in the issuing prospectus:

- the clause is valid as between the issuer and the financial intermediary;
- the third party, by acquiring those bonds on the secondary market, succeeded to the financial intermediary's rights and obligations attached to those bonds under the applicable national law; and
- the third party had the opportunity to acquaint himself with the prospectus containing that clause.

Where these three requirements are met, a secondary market purchaser will be deemed to have agreed to a jurisdiction clause in the prospectus and therefore will be bound by it should that purchaser later seek to bring any proceedings in relation to the bonds. The CJEU remitted the issues back to the Italian courts to consider these questions further.

The CJEU also considered an alternative requirement, namely, that in international trade or commerce, a jurisdiction agreement can be "In a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned" (Article 23(1)(c)). The Court concluded that actual or presumed awareness of a usage on the part of the parties may be demonstrated by showing that parties had previously had commercial or trade relations between themselves, or with other parties

operating in the sector in question, or that in that sector a particular course of conduct is sufficiently well known in that sector that bonds "generally and regularly accompanied by a prospectus containing a jurisdiction clause and whether that practice is established".

COMMENT

In March 2015 we covered the CJEU's decision on jurisdiction in another prospectus liability case, *Kolassa v Barclays Bank plc*.[11] Kolassa also concerned a claim brought against an issuer (**Barclays Bank**) by a secondary market investor (**Mr Kolassa**) who had purchased index certificates from a financial intermediary (direktanlage.at). However, the CJEU's consideration of jurisdiction in Kolassa focused upon different provisions of the Brussels Regulation; Article 23 was not in issue. This is because there was in that case no contractual nexus between the claimant and the issuer – the financial intermediary held the certificates, as covering assets, in its own name. Mr Kolassa was not the bearer of the bonds. In the absence of that contractual nexus, the court did not consider the jurisdiction clause in the prospectus, which explains the disparate approach taken by the CJEU to the question of jurisdiction in claims against issuers brought by secondary market purchasers.

The Profit case is an interesting decision of the senior European court considering documentation familiar to many clients. The CJEU guidance on the potential enforceability of a jurisdiction clause contained in a prospectus in a secondary market purchase certainly gives scope for argument that third parties are bound (although the ultimate decision was referred back to the Italian courts for further consideration) and hints at (perhaps unexpected) flexibility in the test. Whilst dependent on the facts, the CJEU's observations concerning trade usage may be helpful to those seeking to demonstrate a purchaser in the secondary market is bound by a jurisdiction clause included in the terms and conditions of notes. The decision also raises the prospect of a more detailed factual investigation by the courts at a preliminary stage of proceedings.

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1 Regulation (EU) 1215/2012.

2 See Recital 15 of Brussels I Recast and Recital 11 of Regulation No. 44/2001.

3 The requirements of Article 23 of Regulation No. 44/2001 (Prorogation of Jurisdiction) are repeated in Article 25 of Brussels I Recast. However, the previous regulation continues to apply to proceedings (such as this one) commenced before 10 January 2015. For consistency with the judgment, we will refer to Article 23 but unless stated otherwise, our comments are equally applicable to Article 25 of Brussels I Recast.

4 Article 23(1)(a). Alternatively, the agreement as to jurisdiction may be in a form which accords with practices which the parties have established between themselves (Article 23(1)(b)); or in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned: Article 23(1)(c).

5 See paragraph 23.

6 See paragraph 27.

7 *Estasis Saloti di Colzani*, 24/76, EU:C:1976:177, paragraph 10.

8 It is important to note that this second step will not be necessary if the secondary market contract expressly accepts or refers to the exclusive jurisdiction clause, in which case it will be enforceable against the third party.

9 See the judgments listed at paragraph 33, the most recent of which is *Refcomp* C-543/10, EU:C:2013:62.

10 See paragraph 34 and *Powell Duffryn*, C-214/89, EU:C:1992:115.

11 http://www.allenovery.com/publications/en-gb/european-finance-litigation-review/eu-developments/Pages/CJEU-rules-on-jurisdiction-in-prospectus-liability-claim.aspx.

Contract

CONTRACT VARIATION JUST GOT EASIER – MITIGATING THE RISK OF INADVERTENT CHANGE

MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553, 21 June 2016

In finding that an oral agreement to defer payments was legally binding, the Court of Appeal has confirmed the limitations of "no variation" clauses whilst at the same time making it easier for a party to establish the critical elements of consideration or estoppel when seeking to show a contractual variation. The consideration for the agreement was simply the benefit to the landlord of not having empty premises.

The more things change, the more they stay the same, or so the saying goes. In light of recent events one might be forgiven for doubting that adage. Certainly, it has not found much favour recently with the Court of Appeal when it comes to the law of contract. Following its recent decision in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 , the Court of Appeal has now loosened further the rules of when and how a contract can be altered by the parties.

The story was a familiar one. Rock licensed office space in central London. The licence agreement contained a clause precluding oral variations, but when Rock encountered financial difficulties it negotiated an oral agreement with its landlord, MWB, essentially to defer payment of part of the rent. Two days later MWB wrote to Rock insisting that it honour the terms of the original licence. Was the oral variation binding?

That question gave rise to three issues:

(1) What was the effect of the no variation clause?

(2) Assuming the contract could be varied, Rock was simply paying its original debt over a longer period of time: was that sufficient consideration to make the variation binding?

(3) Assuming it was not, was MWB estopped from going back on the oral variation?

Was a variation possible?

This was the most straightforward issue, in that the Court of Appeal adopted the reasoning in *Globe Motors*. "No variation" clauses may make it harder to show that the parties intended their negotiations to result in a change to the contract, but they cannot preclude that outcome. In terms of how much harder they make it to establish a binding change it is notable that the Court of Appeal here found that the hurdle had been surmounted despite considerable uncertainty, stemming from the first instance proceedings, as to what the terms of the oral agreement actually were. As the Court of Appeal noted in *Globe Motors* and again here, that uncertainty is precisely the issue that "no variation" clauses are designed to avoid. It made no difference to the outcome, however; the clause did not preclude the variation.

Was it supported by consideration?

If a party wants to vary a contract it must show the same elements that go to form a contract in the first place, namely offer, acceptance, consideration and intention to create legal relations. Those with memories of their undergraduate contract classes may recall that the requirement of consideration can be satisfied with objects of apparently trivial value: peppercorns and chocolate wrappers will, in the right circumstances, suffice. What has generally not been sufficient, at least when it comes to the payment of debts, is performance of an existing obligation. Put another way, part payment

of a debt does not discharge the whole debt (what is sometimes called the rule in *Foakes v Beer*).

On the face of it, that is exactly what was happening here: Rock was not paying interest on the deferred payments and so was doing nothing more than performing its original obligation late. In the circumstances, could the oral agreement be enforced?

The Court of Appeal found that it could because MWB enjoyed two advantages from the revised arrangement:

(1) MWB would immediately recover some of the arrears that had built up and would have "*some hope*" (to use the words of Kitchin LJ) of recovering them all in due course. As the Court of Appeal noted, that in itself would not be enough.

(2) Rock would remain a licensee and continue to occupy the property, meaning it would not be left standing empty. This was found to be significant because in the context of commercial real estate, a "void" or empty unit can affect the value of the property as a whole. As such, keeping in place a tenant that was a poor payer (or presumably even a non-payer) offered some practical benefit to MWB. In circumstances where there was no evidence of economic duress from Rock, that was sufficient consideration.

This approach raises two issues. The first is a factual question. Parties will only normally enter into an agreement where they see some practical benefit to it. If that is the case, what does consideration add to the requirement to show offer and acceptance? Presumably something, since otherwise why require it at all, but there is little guidance as to what that something is.

Second, the Court of Appeal recognised that there were questions as to where this left the rule in *Foakes v Beer*. That is important because *Foakes v Beer* is a decision of the House of Lords and so the rule can only be changed by the Supreme Court. Arden LJ suggested that there was no issue because there has always been an exception to the rule, which was explained by Lord Coke in *Pinnel's Case*: "the gift of a horse, hawk, or robe etc in satisfaction is good for it shall be intended that a horse, hawk or robe etc might be more beneficial to the plaintiff than the money." The doctrine of practical benefit was, Arden LJ suggested, simply a more modern equivalent of that long standing exception.

Again, that is not straightforward. In *Pinnel's Case* Lord Coke was talking about substitute performance – something different to what was originally agreed. Here, the parties are talking about the same or lesser performance; it is simply that the situation has developed in a way that renders that performance more beneficial, at least to one of them, than was originally thought. Factually, determining whether performance has changed is straightforward; determining whether it was more useful is, obviously, a question more likely to lead to disputes. Legally, if the Court of Appeal's approach does not fit within an exception to the rule in *Foakes v Beer*, there is the obvious risk of a legal argument as to which approach should apply.

Was MWB estopped from denying the variation?

Given the Court of Appeal's conclusions on the first two questions this fell away, such that the decision on this issue was *obiter*. It still raises some valuable points, however. Having reiterated the elements of promissory estoppel – a representation had to be made and it had to be inequitable, in all the circumstances, for the representor to go back on it – the Court of Appeal found there was no estoppel on the facts. Again, two elements of the decision are significant:

(1) In establishing that there was no detriment it was important that MWB had acted quickly, after making its representation, to reassert its rights. There was nothing to suggest that Rock's position had been prejudiced in the interim.

(2) Estoppel can result in a permanent change in the parties' relationship, not simply a suspension of obligations. Put another way, it can operate as an alternative route to achieve (effectively) a variation of the contract. Kitchin LJ emphasised simply that "All will depend upon the circumstances."

Let's talk about Brexit

Contracts come under strain, and attempts to vary them are more common when they stop working for one or more parties. Volatility, especially economic volatility, is a key driver. And we live in volatile times. Coupled

with *Globe*, *MWB* has made such variations harder to control and, therefore, less predictable. Whether that strikes you as a good thing or a bad thing probably depends on whether, economically, you are in the money or out of it under the contract as it stands. Either way, there are three key points to keep in mind:

(1) "No variation" clauses clearly now offer only limited protection. Even where the precise terms of the subsequent oral agreement are contested or unclear, they may still represent a valid variation.

(2) Part payment of a debt may now discharge the whole debt, especially where there will be an on-going relationship between the parties. The rule in *Foakes v Beer* is arguably not such an absolute bar as it once was.

(3) Estoppel can take the place of variation. Everything will turn on the specific circumstances, but the longer the representor waits before seeking to reassert its rights, the more likely it is that a permanent change will have been effected to the parties' relationship.

In a quickly changing environment having the systems in place to keep on top of renegotiations is easier said than done, of course. But as the recent cases have made clear, the party that gives things a little more consideration often prevails.

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LENDER UNDER NO DUTY TO ADVISE BORROWER ABOUT ONEROUS TERM IN LOAN AGREEMENT

Finch & anr v Lloyds TSB Bank Plc [2016] EWHC 1236 (QB), 8 June 2016

A lender did not owe a contractual or tortious duty to advise a borrower about a potentially onerous clause in a loan agreement. The clause in question made the borrower liable for the lender's hedging break costs if the borrower chose to repay the fixed rate loan early.

The dispute arose out of a ten-year fixed rate loan for GBP 11.6 million that a bank (the **Bank**) made to the borrower. The claimants (being the assignees of a cause of action formerly vested in the borrower until it entered into administration) brought claims for breach of contract, negligence and negligent misrepresentation against the Bank.

The loan agreement included a term that obliged the borrower to make good any break costs incurred by the Bank as a result of early repayment of the loan. The claimants alleged that it was only after the agreement had been signed that the Bank informed the borrower that this would include costs incurred by the Bank as a result of having to break a swap agreement that the Bank entered into to hedge against the risk of lending at a fixed rate funds that the Bank borrowed at variable rates. These break costs were likely to exceed GBP 1.5 million.

As the borrower would be required to pay these costs on early repayment, the claimants argued that this had prevented the borrower refinancing at a lower interest rate, which was the main cause of the borrower being unable to meet a demand for the repayment of its overdraft. The borrower was consequently placed in administration.

The claimants also asserted that the Bank negligently misrepresented to the borrower that the loan agreement had been tailored to its needs.

Contractual duty of care

The claimants argued that the bank had a contractual duty to advise the borrower of the potentially significant costs that they might incur by repaying early, by reason of s13 Supply of Goods and Services Act 1982 (the **SGSA**). This provision provides for an implied term in contracts for the supply of services that the supplier will carry out that service with reasonable care and skill. Judge Pelling rejected this argument, stating that even if the claimants had been able to prove the existence of a relevant contract whereby the Bank was to provide a service that included the provision of advice (which they had not done), the only implied term was that this service was provided with reasonable care and skill. In this instance the claimants were not alleging that negligent advice had been given, rather that advice should have been given that was not. S13 of the SGSA therefore did not apply.

Tortious duty of care

The claimants also asserted that the Bank had a duty under common law principles to provide this advice voluntarily to the borrower.

Judge Pelling began by providing a useful summary of the applicable legal principles. The general rule is that banks are not under a legal obligation to provide advice, but if they do then they must do so with reasonable care and skill (*Woods v Martins Bank Limited* [1958] 1 QB 55; *Bankers Trust International Plc v PT Dharmala Saki Sejahtera* [1996] CLC 518; and *National Commercial Bank (Jamaica) Ltd v Hew* [2003] UKPC 52).

Judge Pelling set out the tests to apply when considering whether a duty in tort is owed in a particular case:

- whether there had been an assumption of responsibility which had been relied on;
- the three-fold test of whether:
  - the loss was reasonably foreseeable;
  - there was sufficient proximity between the parties; and
  - it is fair, just and reasonable to impose a duty of care; and
- that the duty should be incremental to an established category of duty. The courts are more likely to hold that a duty exists where the facts of the current case are similar to those of a previous case in which a court held that a duty did exist.

To conclude, Judge Pelling noted that when applying the above tests a distinction should be drawn between the provision of advice in the context of a commercial relationship and the assumption of responsibility for that advice and/or any obligation to give advice about certain matters. (*JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm)).

It was held that any duty to provide such advice voluntarily would go further than the current authorities. It would also undermine the general principle that there is no legal obligation for banks to provide advice, especially in circumstances where the giving of such advice might be contrary to a bank's commercial best interests. Although Judge Pelling could not confirm that there are no circumstances in which such a duty could arise when applying the tests, he considered that any circumstances would be exceptional and markedly different from the conventional relationship of banker and customer.

The claimants argued that the use of the phrase "trusted advisor", which the Bank used in internal marketing and training material, demonstrated a closer relationship than that usually held between a borrower and a bank. Judge Pelling rejected this, finding that this phrase was merely part of a marketing strategy to differentiate the Bank from its competitors. The expression did not have any other significance.

It was particularly difficult for the claimants to argue that a duty arose as the borrower had been represented by solicitors who negotiated the terms of the loan agreement on an arm's length basis. Judge Pelling concluded that if there had been a breach of contract or duty in relation to the failure to advise it was not by the Bank.

Negligent misrepresentation

The claimants also asserted that the individual acting for the Bank had represented that the Bank would tailor a product to the needs of the borrower but the loan was

unsuitable due to the costs of an early exit. Judge Pelling also rejected this argument, holding that: (a) the claimants had failed to establish that the borrower notified the Bank that they intended to repay the loan early; and (b) even if the Bank had been informed, the expression "tailored" meant that the loan offered would be the best that the Bank was prepared to give, taking into account the requirements of the borrower. The Bank was under no obligation to subordinate its own interests to those of the borrower when making any offer.

COMMENT

This is a welcome judgment for lenders, emphasising the difficulty for a borrower to establish that a lender had a duty to provide advice on potentially onerous terms in loan documentation, even if lenders emphasise in their marketing strategy a willingness to co-operate with a borrower to find the best solution for their borrowing requirements. It is even more challenging for borrowers to prove that a lender has such a duty when they are represented by solicitors and financial advisors.

For lawyers it is worthwhile taking note of Judge Pelling's remark that if there was a breach of contract or duty in relation to the failure to advise the borrower it was not by the Bank. It was the borrower's solicitors and chartered accountants who should have advised them on the possible implications of this clause. This is a reminder that when acting for a borrower it is important to flag any potentially onerous clauses with regard to the borrower's individual circumstances.

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Employment

ICO WARNING ABOUT THE RISKS OF TAKING CLIENT RECORDS TO A NEW COMPANY

Mark Lloyd – ICO Enforcement Notice

The ICO has recently issued a warning to employees that taking client records which contain personal information is a criminal offence, following the prosecution of an employee who took client records with him when joining a competitor company. This case demonstrates that there may be criminal consequences for an employee taking any confidential and/or customer information, in addition to any consequences arising from a breach of their contractual employment obligations or from a breach of confidence. Whilst this may act as a deterrent to employees, it is still important for employers to put in place their own robust protections against such breaches and take action to stop the use of any confidential information stolen.

Mark Lloyd was a waste disposal employee, at Acorn Waste Management Ltd (the **Company**), who emailed information regarding 957 of the Company's clients to his personal email account before leaving to take up a role at a rival company. The information included contact details, customer purchase history and commercially sensitive information which was deemed to constitute personal information under the Data Protection Act 1998 (the **DPA**). Mr Lloyd pleaded guilty to the criminal offence of unlawfully obtaining data under s55 DPA and was fined GBP 300, ordered to pay a victim surcharge of GBP 30 and GBP 405.98 costs.

Following the prosecution, the Information Commissioner's Office has publicly reinforced the

message that "taking client records that contain personal information to a new job, without permission, is a criminal offence" and has warned that employees should "be aware that documents containing personal data they have produced or worked on belong to their employer and are not theirs to take with them when they leave."

Contractual terms

Employees who have access to commercially sensitive information should be employed on strict contractual terms, which may include the following protections:

- garden leave provisions and post-termination restrictions, where employees are prohibited from joining competitors or dealing with certain customers for a period of time after termination of employment;
- express confidentiality provisions applying during and after termination of employment;
- obligations to return all company property and information on termination of employment, or earlier by request; and
- intellectual property provisions.

Employee monitoring

In light of advances in technology and the resulting and increasing threats to cyber security, it is also essential for employers to consider reducing data security risks more generally by monitoring employees' emails, instant messages and internet use within the parameters permitted under the relevant law. For instance, in the UK monitoring is allowed for a range of specific business reasons including compliance with regulation or company policy, preventing a crime and to investigate unauthorised use of company IT systems and must be carried out in accordance with the ICO's Employment Practices Code.

Taking action

Once an employer is aware that confidential information has been taken by an employee, they may seek to enforce any post-termination restrictions in the employee's contract and take steps to obtain an injunction. For instance, the employer may apply for a springboard injunction to prevent the employee from taking unfair advantage or benefitting from the use of the stolen information and/or from joining the competitor company. Alternatively, or if the employer is not successful in obtaining an injunction, it may seek damages from the employee for breach of the post-termination restrictions.

Employers may also consider putting in place an internal contingency plan to recover compromised company data in the event of a breach. This should involve teams from across the company including IT, legal, HR, communications, security and compliance and potential action could (depending on the nature of the breach) even include private investigators or international arrest warrants

COMMENT

This case demonstrates that the consequences of an employee taking any confidential and/or customer information can be criminal, in addition to any other consequences arising from a breach of their employment obligations. Whilst the threat of this criminal offence may be a deterrent, employers should bolster the position with robust contractual protections that apply throughout the employment relationship. These protections should not only seek to prevent confidential information being stolen in the first place, but also from being used subsequently.

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Limitation

SUCCESSFUL LIMITATION DEFENCE IN SWAPS MIS-SELLING CLAIM

Qadir & anr v Barclays Bank plc [2016] EWHC 1092 (Comm), 13 May 2016

The High Court struck out a claim for negligent advice on suitability in connection with the sale of interest rate hedging products (**IRHP**), due to the expiry of the limitation period. The claimants had the knowledge required to bring their claim more than three years prior to commencement, in that they were aware: (i) that the IRHP were loss-making; and, (ii) that there were alternatives to the particular IRHPs purchased. At this point they were in a position to make enquiries as to the adequacy of the product suitability advice given to them. The complaint related to advice given in spring 2008 by the defendant (the **Bank**) to Mr Qadir and Mr Hussain (the **claimants**) in connection with their entry into two interest rate swaps (the **Swaps**).

The claimants had refinanced two existing facilities with the Bank and taken out a fresh loan to cover a new hotel acquisition. All three loans included express conditions requiring hedging, and three types of IRHP were discussed between the Bank and the claimants. The claimants ultimately entered into the Swaps (with terms of ten and 15 years respectively) thereby fixing their interest rate at 5.42% regardless of fluctuations in variable interest rates. Following the October 2008 global financial crisis, variable interest rates fell to unprecedented lows, leading to the claimants being substantially out of the money.

On a number of occasions between 2009 and 2011, the claimants sought to restructure the Swaps, discussing breakage fees with the Bank, and in March 2010 one additional swap (not the subject of this claim) was partially terminated.

In 2012, the Financial Services Authority (as it was then known) announced it had found failings in the sale of IRHPs to SMEs and that four banks (including the Bank) had agreed to carry out a review (the **Review**). While redress was offered and accepted for a swap not the subject of the claim, the Swaps were found to have met the agreed sales standard. The Swaps were ultimately terminated (with breakage fees) in October 2014. The claim was commenced on 5 January 2015.

The Bank applied to strike out the claim on the basis that the limitation period had expired. While it was agreed that the primary six-year limitation period had expired, the claimants sought to rely on the 'safety net' of the s14A Limitation Act 1980 which provides a supplemental time limit of three years from the date where a claimant has the "knowledge required for bringing an action for damages". Such knowledge must include

- material facts about the damage (which pertains primarily to quantum); and
- knowledge that the damage was attributable in whole or in part to the act or omission alleged to constitute negligence. This requires the claimants to know the factual essence of the claim, to realise that the damage was capable of being attributable to the Bank and to begin to investigate further.

Factual essence of the claim

It was agreed between the parties that the factual essence of the claim was the suitability of the Swaps: that is, whether they were inherently unsuitable products to be recommended and sold to the claimants.

Therefore, to determine when the s14A period began to run, the Court needed to identify the relevant "building blocks" of knowledge necessary for the claimants to be

in a position to investigate whether a complaint was viable.

Sara Cockerill QC (sitting as a Deputy Judge of the High Court) held that there were two building blocks required to enable the claimants to question whether a better route had been open to them: (i) that the Swaps were loss-making; and, (ii) that there were alternatives to the Swaps which might have been advised to them.

The first criterion was easily satisfied in the factual matrix, given that the claimants had made enquiries as to the cost of breakage, the amount paid out under the Swaps, and the fact that it was apparent to them that a movement in interest rates such as to make the Swaps profitable was highly unlikely.

On the second, the Court found that the claimants had been aware from the time they entered the Swaps that they had received advice from the Bank, and that they had been advised of alternatives to the Swaps. Even if they did not recall the details of the specific products or their relative merits, that knowledge of the existence of a choice of products was sufficient to commence the running of the limitation period. The Court rejected the claimants' argument that they needed specific awareness of the cap alternative which they pleaded should have been advised, or the merits of alternative products – this was a matter of particulars which would emerge during the course of their enquiries, rather than the "thrust" of their claim.

Estoppel

The claimants contended that the Bank was estopped from raising a limitation defence on the basis that statements made in three letters sent by the Bank in the course of the Review caused them to believe that they would later have time to bring a legal action. The Court rejected these arguments: the statements (which related to the use of claims management companies and the claimant' ability to take action through the courts) were not unequivocal representations that the Bank would not enforce its strict legal rights.

As such, the Bank' application was successful and the claim was struck out in its entirety.

COMMENT

In the context of numerous IRHP mis-selling claims now making their way through the courts, the case is a helpful elucidation of the knowledge required on the part of a claimant to trigger the commencement of the limitation period under s14A. While the broader application of such decisions can be circumscribed where the facts are unique (and in this case, the Court was able to distinguish two recent similar mis-selling limitation decisions on just such a basis), the "building blocks" set out in this case are sufficiently general and non-factually specific so as to enable the case to be a useful precedent going forward.

In addition, the Court's rejection of the claimants'arguments on estoppel at a strike-out stage is particularly helpful to banks in their on-going defence of numerous post-Review mis-selling claims.

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Procedure

JUDGE'S "DEPLORABLE" BEHAVIOUR – BUT STILL NO BIAS

Harb v Prince Abdul Aziz Fahd, Court of Appeal, 13 May 2015

Despite being condemned as "deplorable" behaviour, by the Court of Appeal, the actions of a High Court Judge were still not sufficient to constitute bias.

The appellant Prince Adbul Aziz appealed against the judgment of Mr Justice Peter Smith in favour of the respondent, Mrs Janan Harb. At first instance Smith J held that the Prince and Mrs Harb had entered into a binding contract that Mrs Harb, a wife of King Fahd, could enforce in order to receive GBP 12 million and two Chelsea properties.

The Prince appealed on five grounds, one of which was an allegation of bias on the part of Smith J, in particular bias against the Prince's Counsel, a barrister from Blackstone Chambers. In December 2015, Smith J had written a letter to Mr Antony Peto QC, joint Head of Blackstone Chambers, remarking "I will no longer support your Chambers".

Background to the letter

A long-running action (unrelated to the Prince's case) against British Airways (**BA**) involved allegations that the airline had colluded to fix cargo prices (*Emerald Supplies v British Airways*). Smith J had been involved in the BA case for over a year when he took a BA flight and arrived at Gatwick to discover that the plane's entire cargo of passenger luggage had been left behind in Florence. Smith J disclosed his personal dispute with the airline to the lawyers of the parties' to the competition case then before him, and wrote a series of emails – in his judicial capacity – to BA's Chairman, alerting him of his role in the on-going litigation. One such email claimed that the airline might have deliberately mislaid passengers' luggage so that it could instead carry commercial freight "at the expense of passengers who could go to hell at the expense of profits".

Having previously and unsuccessfully tried to remove Smith J from the case on the basis of his alleged lack of competition law experience, BA then made what Smith J branded an "opportunistic" recusal application to exploit his personal dispute with the airline. At his recusal hearing, Smith J doggedly pressed counsel for BA to explain why and how his flight had taken off without his, and other passenger's, luggage, perhaps deliberately. Smith J strongly refuted the airline's allegation of bias on his part, but nevertheless recused himself from the case.

On 3 September 2015 an article written by Lord Pannick QC of Blackstone Chambers was published in The Times, arguing that Smith J's recusal hearing raised serious issues about judicial conduct. Lord Pannick QC quoted extensively from the "extraordinary" transcript of the recusal hearing ([2015] EWHC 2201 (Ch)), highlighting Smith J's "inexcusably bullying manner and threats", his refusal to acknowledge that his "personal irritation… was affecting his judicial responsibilities" and his "arrogant" remarks on a 2007 Court of Appeal decision to remove him from a case in which he had a personal interest (in relation to which Smith J. had claimed he was "no longer surprised by what happens in the Court of Appeal").

Lord Pannick concluded that no one would have been the least bit surprised to hear of Smith J's "latest episode", and that it was time for the Lord Chief Justice to consider "whether action to address [his] injudicious conduct has, like his luggage, been delayed for too long". In response, Smith J wrote a letter to Mr Antony Peto QC, joint Head of Blackstone Chambers, remarking "I do not wish to be associated with Chambers that have

people like Pannick in it" and "I will no longer support your Chambers".

Perhaps not surprisingly in circumstances where Blackstone Chambers represented Prince Adbul Aziz, an allegation of bias on the part of Smith J formed one of the Prince's five grounds of appeal in the case that fell to be decided by Lord Justices Moore-Bick and McFarlane. Having succeeded on the first four grounds, their Lordships noted it was not strictly necessary for them to determine the Prince's final ground of appeal, but they chose to set out their conclusions "in view of the importance of the allegation [against Smith J]".

Test for apparent bias

The court considered the test for apparent bias set out in *Porter v Magill* [2002] 2 AC 357 by Lord Hope: would the fair-minded and informed observer, having considered the facts, conclude that there was a real possibility the tribunal was biased?

Counsel for the Prince argued that there was apparent bias on six grounds, including that Smith J's letter would lead an impartial observer to conclude that the judge harboured a grudge against members of Blackstone Chambers and that this apparent bias may have affected Smith J's decision against the Prince. It was also claimed that Smith J. had inexplicably changed his stance between the conclusion of the hearing in July 2015 (at which Smith J had expressed incredulity over some aspects of Mrs Harb's evidence) and publication of his draft judgment in October 2015 (which post-dated publication of Lord Pannick's article), which found in favour of Mrs Harb.

In response, counsel for Mrs Harb argued that possible bias for or against an advocate was very unlikely to translate into a case of apparent bias against the client of that advocate, and that Smith J's letter to Mr Peto QC was a reaction to an article written by one individual in a set of 100 self-employed barristers. Counsel for Mrs Harb argued that it was fanciful to suppose that in every case in which a member of Blackstone Chambers appeared before Smith J, the "fair minded and informed observer" would conclude that the client of that barrister could not hope to receive a fair trial. Mrs Harb's legal team also denied that Smith J had changed his mind, having indicated informally at the conclusion of the hearing that he was of the provisional view that there was an agreement, as Mrs Harb had alleged.

The Court of Appeal observed that Smith J had subsequently accepted, in a letter to the Prince's solicitors, that he should not have written his letter to Mr Peto QC. The Court of Appeal agreed, noting that it was "difficult to believe that any judge, still less a High Court judge, could have done so. It was a shocking and, we regret to say, disgraceful letter to write". They further observed that it showed a "deeply worrying" fundamental lack of understanding of the role of a judge, particularly in the wake of the BA "baggage affair". However in the opinion of the Court of Appeal, it did not follow from Smith J's "deplorable" behaviour that there was apparent bias on his part. The *Porter v Magill* test of apparent bias is objective and requires a degree of detachment in assessing whether there was a "real possibility" of bias: the opinion of the "informed and fair-minded observer" should not be confused with the opinion of a client of Blackstone Chambers who, faced with having his case heard by Smith J, may well feel apprehensive. The judges noted that most litigants will oppose anything they perceive to endanger their prospects of success, even where their fears are not well-founded.

The Court of Appeal also stressed that the hypothetical fair-minded observer is assumed to be in possession of all of the relevant facts of the case, including those which are not publicly available. The Court of Appeal's assessment of whether or not that fair-minded observer would have concluded there was a real possibility of apparent bias is therefore very much "fact sensitive". Had a fair-minded observer to Mrs Harb's action against the Prince known all of the relevant circumstances, the Court held that he/she would not have concluded that there was a real possibility of bias that would affect Smith J's determination of the issues simply on the basis that the Prince was represented by members of Blackstone Chambers. The Court also rejected counsel for the appellant's claim that Smith J had changed his stance after publication of the article in The Times. Whether or not the Prince and Mrs Harb had entered into a binding contract largely turned on witness evidence and the Court was not persuaded that the fair-minded

and, moreover, informed observer would conclude there was a real possibility that Smith J would have made substantive amends to his draft judgment simply as a reaction to the article. Although the Court allowed the appeal on the Prince's first four grounds of appeal, it therefore rejected the allegation of apparent bias.

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