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Litigation and Dispute Resolution

Review

EDITORIAL

The final 2016 edition of the Litigation and Dispute Resolution Review covers a number of interesting cases from the past few weeks. We are increasingly seeing third party funding issues arise in commercial litigation. This edition covers a Commercial Court decision ordering the identity of a third party funder to be disclosed for the purposes of a security for costs application and Court of Appeal guidance on a third party litigation funder's liability for a successful defendant's costs. Also on costs, potential overseas litigators launching unmeritorious claims in the English courts were dealt a blow by a recent Court of Appeal ruling which lowers the bar for obtaining a security for costs order (see **Costs**).

Premature contract formation was an issue that faced the claimant consulting company in *Arcadis Consulting (UK) Ltd v AMEC* who tried, unsuccessfully, to argue that a very simple letter of intent had been superseded by more detailed terms and conditions (including a limitation of liability). Absent the limitation of liability wording the claimant was left exposed to a GBP 40 million claim for defective services, instead of limited liability of GBP 610, 515 (see **Contract**).

We cover an attempt, with mixed success, by an energy company to get the English court to order the Serious Fraud Office to stop an on-going bribery investigation. Long-running investigations can seriously affect a company's reputation and ability to raise finance. Whilst the court application was not successful, it appeared to prompt the SFO to issue a letter stating that there was currently insufficient evidence in relation to the primary aspect of the investigation, and the investigation was then closed by the SFO on 14 December for 'insufficient evidence'.

Finally, the High Court has ruled that in-house and external lawyers' attendance notes of conversations with employees of a client company were not protected by legal advice privilege, highlighting how careful lawyers must be about their notes when litigation is not in reasonable contemplation (see **Privilege**).

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Arbitration

EMERGENCY ARBITRATOR PROVISIONS LIMIT ACCESS TO URGENT RELIEF FROM COURTS

Gerald Metals S.A. v Timis & ors [2016] EWHC 2327 (Ch), 21 September 2016

This Commercial Court ruling suggests that the availability of emergency relief (for example to appoint an emergency arbitrator, or an expedited tribunal) under the LCIA (and other) arbitration rules may limit a party's ability to obtain urgent interim relief from the English court in support of arbitral proceedings. In this instance, the court rejected the claimant's application for urgent interim relief in circumstances where its applications for urgent and emergency relief under the LCIA Rules had been rejected.

The claimant, Gerald Metals, a Swiss company engaged in commodities trading, entered into an agreement with Timis Mining Corp, under which Gerald Metals advanced USD 50 million. This was secured by a guarantee given by the trustees of the Timis Trust (the **Trust**), which owned Timis Mining Corp, among various other business interests of Mr Timis. The guarantee was governed by English law and provided for arbitration under the rules of the London Court of Arbitration (the **LCIA Rules**). Timis Mining Corp defaulted under its agreement with Gerald Metals and, ultimately, the latter commenced arbitration against the trustees to enforce the guarantee.

Application for emergency arbitrator rejected

Gerald Metals had applied under Article 9B of the LCIA Rules for the appointment of an emergency sole arbitrator, seeking an order preventing the trustees from disposing of the Trust's assets. In response, the trustees provided undertakings to the effect that they would not dispose of any assets other than for full market value and at arm's length, and that they would give seven days' notice to Gerald Metals before disposing any asset worth more than GBP 250,000. The LCIA rejected Gerald Metals' application for the appointment of an emergency arbitrator. It appears from parties' submissions (although it is not expressly stated) that an application for expedited tribunal formation was also made and rejected by the LCIA.

Court applications for emergency relief

Subsequently, Gerald Metals sought, in the English court, a worldwide freezing order against Mr Timis and a freezing injunction against the Trust. This note deals with the latter, although it is worth noting that the worldwide freezing order against Mr Timis was refused.

Framework of the Act and the Rules

Section 44 of the Act provides that:

- the court has the power to make orders in relation to arbitral proceedings, including interim injunctions; and
- if the case is urgent, the court can make orders as it thinks necessary to preserve evidence or assets. The test of urgency is whether the tribunal had the power and the practical ability to grant effective relief within the relevant timescale.[1]

Section 44(5) of the Act provides that, "[i]n any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively" (emphasis added).

The current version of the LCIA Rules, which came into force in 2014, provide for the expedited formation of an arbitral tribunal in cases of "exceptional urgency" under Article 9A, while Article 9B allows a party, in the case

of an emergency prior to the (expedited) formation of the tribunal to seek the appointment of a sole arbitrator (usually referred to as an "emergency arbitrator") to decide emergency proceedings. Article 9B was first introduced into the LCIA Rules 2014, some years after s44 of the Act appeared on the statute book.

Scope of Court's powers under s44 in light of the LCIA Rules

The key issue before the court was whether it had the power to act under s44 of the Act, or whether this jurisdiction was limited by the existence of Articles 9A and 9B of the LCIA Rules.

It was common ground that there are situations where the relief required was so urgent that the court could properly act under s44 because the power to appoint an emergency arbitrator would not be sufficient to grant effective relief. The example given was of an application for a freezing injunction that needs to be made without notice. Gerald Metals contended, however, that the LCIA Rules create a gap in the relief framework for cases that are not "exceptionally urgent" or emergencies for the purposes of Articles 9A or 9B but are, nevertheless, cases of urgency within the meaning of s44(3) of the Act.

Leggatt J rejected this submission, holding that "it would be uncommercial and unreasonable" to give such an interpretation to the LCIA Rules. The clear purpose of Articles 9A and 9B is "to reduce the need to invoke the assistance of the court in cases of urgency by enabling an arbitral tribunal to act quickly in an appropriate case". The test to determine under the LCIA Rules whether a situation either constitutes an "emergency" or is "exceptionally urgent" is a functional one, just as it is under s44(3) of the Act: is the situation one in which effective relief could not otherwise be granted within the "relevant timescale", ie the time to constitute the tribunal in the ordinary manner?

The judge ruled that, on the facts, he could not infer that the LCIA Court had taken a narrower view of its powers. It appeared to him that the LCIA Court had simply not been persuaded – in light of the trustees' undertakings – that the application was urgent enough to require the appointment of an emergency arbitrator.

Gerald Metals' application under s44 of the Act was, therefore, dismissed on the basis that there was, at that stage, no power under s44 of the Act. Permission to appeal has been denied so the decision cannot be overturned by the Court of Appeal unless the same issue comes back to the court in a different case.

COMMENT

In recent years, many of the leading arbitral institutions (including the International Chamber of Commerce, the Stockholm Chamber of Commerce, the Hong Kong International Arbitration Centre and the Singapore International Arbitration Centre, as well as the LCIA, of course) have introduced provisions for the expedited constitution of the tribunal and/or the appointment of emergency arbitrators. Many also seek to preserve parties' rights to approach the national courts for interim measures or relief. The introduction of such provisions was usually with a view to broadening the options for a party seeking urgent relief.

This judgment, however, determines that the availability of such recourse under an institution's rules –whether a party actually seeks to exercise it or not – may have the opposite effect and limit the powers of the court to act in support of arbitration under s44 of the Act. It does, however, make clear that there are still situations, such as where applications need to be made without notice or where relief against third parties is required, in which the court can still grant relief.

The decision suggests that there is a hierarchy of routes to obtain interim relief for a party to an arbitration under the LCIA Rules:

- ordinarily, interim relief should be sought once the tribunal has been constituted;.
- if it is a matter of "exceptional urgency", a party should ask for expedited tribunal formation under Article 9A;
- if the matter is an emergency, meaning that expedited formation will take too long, a party should apply for an emergency arbitrator under Article 9B; and

- only if that will not be effective or is unavailable, should a party approach the courts to obtain interim relief.

It should be noted that the impact of this judgment is not limited to arbitrations under the LCIA Rules, although the above "hierarchy" may look slightly different depending on the provisions of the applicable rules – for example, whether expedited formation is available.

Parties may wish to consider, particularly in circumstances where they are considering arbitration with an English seat or it is anticipated that interim relief from the English courts may nevertheless be required, whether they want to carve out the emergency arbitrator provisions (and expedited formation of tribunal provisions, to the extent they exist) of arbitral rules so as to prevent those provisions from curtailing access to the national courts to obtain emergency or interim relief. Particularly in light of the ambiguity regarding the enforcement of emergency arbitrator decisions, parties may consider access to English courts for interim relief to be a preferable option. Leggatt J stated that even if his interpretation of s44 was wrong, he did not think it appropriate to grant the orders sought by Gerald Metals where Safeguard had given certain undertakings and voluntarily responded to requests for information by Gerald Metals. Therefore, the court agreed with the LCIA's assessment of the urgency of Gerald Metals' application. It remains to be seen if, where their assessments do not match, the court would be willing to go behind an arbitral institution's decision to determine whether the application was sufficiently urgent and what relief would be provided in such situation.

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[1] *Starlight Shipping v Tai Ping Insurance* [2008] 1 Lloyd's Rep 230.

Conflicts of law

TESTING LEGAL CERTAINTY UNDER ROME I

Hellenic Republic v Nikiforidis Case C-135/15, ECLI:EU:C:2016:774, 19 October 2016

The CJEU has ruled for the first time on when the "overriding mandatory provisions" of the law of a particular state can be taken into account by a Member State court when determining a contractual dispute even where a different law has been chosen to govern the contract. Applying the Rome I Regulation on the law applicable to contractual obligations[1], the CJEU found that a national court may only give effect to overriding mandatory provisions of the law of the forum or the place of performance; not those of a third state. However, overriding mandatory laws of a third state (in this case, Greek emergency measures to reduce the public wage bill) may nevertheless be taken into account as a matter of fact if the applicable law so allows. The CJEU also ruled that a contract initially concluded prior to the effective date under Rome I may nevertheless be within the scope of Rome I if the substance of that contract has subsequently been modified to such an extent that it constitutes the creation of a new legal relationship between the parties.

The application of overriding provisions of the law of a particular state under Article 9 of Rome I is a threat to the governing law chosen by the parties to a contract. Article 9 came under the spotlight at the height of the Greek economic crisis, when concerns arose as to whether there were circumstances in which Greek

emergency legislation might be taken into account by Member State courts, thereby undermining the insulatory effect of a choice of English law in many loan and other commercial agreements. Whilst the facts of this case (involving a teacher's employment contract) are quite narrow, the CJEU's ruling on the scope of Article 9 is of more general interest.

Facts

The claimant was a Greek national employed as a teacher at a Greek primary school in Germany. His contract of employment commenced in 1996. It was agreed that the contract had since been amended and that it was governed by German law. In response to the economic crisis in Greece, the European Council issued a decision requiring Greece to reduce its public wage bill. The resulting measures introduced by the Greek legislature (new Greek laws) had the effect of reducing the claimant's annual salary, for the period October 2010 to December 2012, since under Greek law the claimant was considered a public-sector employee of the Hellenic Republic. The claimant started proceedings in the German courts seeking to recover his loss in salary on the grounds that his employment relationship was conducted in Germany and subject only to German law.

The dispute thus raised the question of whether the new Greek laws applied – and the wider question of whether and to what extent the laws of a third state can apply to a contract which is expressed to be governed by another law.

Did Rome I apply to the contract?

Article 28 of Rome I provides that the Regulation applies to contracts concluded after 17 December 2009. The first question the CJEU had to consider was whether the claimant's employment contract, which was concluded in 1996, but was now continuing on amended terms, fell within the scope of Rome I.

The CJEU ruled that a contract which was concluded before 17 December 2009 may be subject to Rome I but only if, after that date, the contract was varied to such an extent that the amendment amounted to a new legal relationship between the parties, one which effectively replaced the older agreement. Whether the amendment is of sufficient magnitude is a matter to be evaluated by the domestic court.

Could overriding mandatory provisions of a third state apply?

Under Article 9, overriding mandatory provisions are provisions of the law of a particular state that are regarded as crucial by the state to safeguarding its public interests. A Member State court may give effect to the overriding mandatory provisions of its own law (ie the law of the forum) (Article 9(2)) or of the law of the state where the obligations arising out of the contract have to be or have been performed (Article 9(3)). These provisions are interpreted restrictively since they derogate from the principle that the parties have freedom to choose the applicable law of the contract: *Unama* (C-184/12).

The CJEU considered whether Article 9 could allow a domestic court to give effect to the mandatory laws of a third state (here, Greece – which was neither the forum nor the place of performance). The CJEU concluded that Article 9 precluded the court from applying, as legal rules, overriding mandatory provisions other than those of the state of the forum or of the state where the obligations arising out of the contract had to be or have been performed. Consequently, since Mr Nikiforidis's employment contract has been performed in Germany, and the referring court is German, the German court could not in this instance apply, directly or indirectly, the Greek overriding mandatory provisions in question under Article 9.

However, the CJEU went on to state that Article 9 does not preclude overriding mandatory provisions of the law of a state other than the state of the forum or the state where the obligations arising out of the contract have to be or have been performed from being taken into account as a matter of fact, in so far as this is provided for by a substantive rule of the law that is applicable to the contract pursuant to Rome I. This is because, the CJEU said, Rome I harmonises conflict-of-law rules concerning contractual obligations and not the substantive rules of the law of contract. In so far as the latter (in this case the substantive rules of German law) provide that the court of the forum is to take into

account, as a matter of fact, overriding mandatory provisions of the legal order of a state other than the state of the forum or the state of performance of the contractual obligations, Article 9 cannot prevent the court seised from taking that matter of fact into account.

The German Labour Court had stated in its reference that it could apply the relevant German employment law while taking the Greek provisions into account as a matter of fact.

Did the principle of sincere cooperation in Article 4(3) TEU influence the interpretation of the scope of Article 9?

The CJEU held that its interpretation of Rome I was unaffected by the principle of sincere cooperation enshrined in Article 4(3) of the Treaty on European Union which could not be used to circumvent a proper interpretation of the Regulation.

COMMENT

Parties need to be able to predict with certainty how to determine the law that applies to their contract, and whether their choice of law will be in any way limited by the application of laws of another state (eg overriding mandatory provisions of another state). This judgment is a helpful one in that it confirms that there are clear limits on the extent to which European conflicts of law rules will allow laws other than the laws chosen by the parties to be taken into account by Member State courts. It is also a useful reminder of the limits of the protection provided by those rules given the recognition that the substantive law rules of some jurisdictions may allow the courts to consider other laws as a matter of fact.

The CJEU's ruling also goes some way to clarify when Rome I applies to contracts that predate Rome I but are amended after its entry into force. However, there remains uncertainty as to the extent of the amendment required to a contract for it to amount, in effect, to a new legal relationship.

Given this uncertainty, does it really matter whether a contract is within the scope of Rome I or covered by its predecessor – the Rome Convention? The answer is yes. For example, the mandatory rules provisions of the Rome Convention on the face of it are wider than those in Rome I. Article 7(1) Rome Convention provides that the mandatory rules of another country (that is, a country other than the forum) with which the situation has a "close connection" may apply in addition to those of the forum. As the CJEU confirms, Rome I only allows mandatory rules of the forum or the place of performance to apply. However, while Article 7(1) is applied in some Member States, it was not incorporated into English law because it was felt that it would create too much uncertainty.

The German Labour Court had stated in its reference that it could apply the relevant German law while taking the Greek mandatory laws into account as a matter of fact. By agreeing with this approach, the CJEU has recognised that under some laws, there may be wider scope to have regard to third State laws than others.

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[1] Regulation (EC) No 593/2008 on the law applicable to contractual obligations (**Rome I**).

Contract

CONTRACTUAL COMPENSATION SCHEME EXCLUDES COMMON-LAW REMEDIES

Scottish Power UK Plc v BP Exploration Operating Co Ltd & ors [2016] EWCA Civ 1043, 1 November 2016

The Court of Appeal considered the validity and scope of an industry-standard contractual provision specifying the consequences of gas delivery shortfalls under a long-term gas supply agreement (to the exclusion of the buyer's right to claim damages at common law). The court confirmed that English law will give effect to this and similar provisions in contracts negotiated at arm's length between sophisticated commercial parties.

Underdeliveries of gas under a long-term gas supply contract can have significant adverse consequences for the buyer, whether that is a wholesaler, a large industrial end-user, or a power producer. Those buyers who re-sell gas risk not only forgoing their profits but may also be subject to penalties (or damages claims) from their customers. Faced with a shortfall in delivery by its gas supplier, the buyer will typically source the gas on the traded markets (hubs) on relatively short notice, quite possibly at a higher price, and often without the daily flexibility built into many long-term supply contracts.

It is therefore not surprising that it is common practice for long-term gas sales agreements to contain contractual mechanisms for dealing with the consequences of underdeliveries of gas by the seller. One of the usual mechanisms used in pipeline contracts characterises the shortfall amount of gas as "Default Gas" (or "Shortfall Gas", "Shortfall Quantity", "Deficient Quantity", etc). The buyer is then entitled to take the Default Gas at a discount to the contractual price. The range of discounts varies widely, and more modern contracts modulate the discount depending on the amount or duration of the shortfall and the period of the year in which the entitlement to Default Gas arises. In clauses with seasonal variations, the discounts will be higher in winter months to reflect the higher cost of obtaining gas at traded markets in those months.

There are many causes of underdeliveries. They can include a deliberate decision by the seller not to supply the gas, a failure by the seller to maintain, or make available, the necessary production and/or transport infrastructure, a non-negligent accident or a natural cause. Some contractual shortfall mechanisms specify the specific cause(s) of underdelivery that will trigger the provision, but many are silent on this point. In other words, the remedy (discount on Default Gas) is the same regardless of the cause of underdelivery (save for *force majeure*, which is rarely invoked).

The contractual alternative to a discount mechanism is to require the seller to compensate the buyer for either: (i) the costs of procuring gas from an alternative source; or (ii) the lost profits and any liability incurred by the buyer for not re-selling the gas to its customers. As one can appreciate, these alternative mechanisms are more difficult to operate in practice and can lead to disputes (over what may be relatively small amounts of money in the context of the contract). This is all the more so if the agreement is silent on the consequences of underdelivery, in which case common-law remedies apply.

Following a period of underdeliveries, Scottish Power claims Default Gas and damages

The agreements in question were a series of long-term gas sale and purchase contracts entered into by Scottish Power UK Plc (**Scottish Power**) and the respondent natural gas-selling companies. The underdelivery mechanism was a typical Default Gas provision. The price for Default Gas was 70% of the contract price. The

agreements also specified (at Article 16.6) that the buyer's entitlement to Default Gas "in respect of underdeliveries" replaced the buyer's common-law remedies "howsoever arising … in respect of underdeliveries by the Seller".

In addition to gas delivery obligations, the agreements included an obligation on the sellers to provide, maintain and operate the production and transport infrastructure necessary to deliver the contracted gas to Scottish Power (Article 7.1). This kind of clause is common in North Sea agreements, but a parallel obligation often does not feature in contracts for gas from other production fields, eg in Russia or Norway.

There was a period of three and a half years during which the sellers' facilities were "shut in" and no deliveries occurred. In addition to its entitlement to Default Gas, Scottish Power sought damages from the Sellers. Scottish Power claimed that its losses from buying gas elsewhere were more than the discount it received for Default Gas for the shut-in period. It claimed that those losses were recoverable, not as losses for underdeliveries, but as losses flowing from the sellers' failure to maintain their facilities in an operational state in breach of Article 7.1.

Default Gas regime is comprehensive

The sellers admitted breach of Article 7.1, but asserted that the Default Gas mechanism provided a complete code of compensation for all losses related to underdeliveries.

Christopher Clarke LJ, giving the leading judgment in the Court of Appeal, held that the compensation mechanism in the Agreements was intended to be comprehensive. While the wording "in respect of underdeliveries" was in principle capable of a narrower interpretation, that interpretation would require "a degree of legal finesse which commercial men are unlikely to have contemplated" (para. 22). This broad interpretation was also supported by the wide wording of Article 16.6, which covered all remedies "howsoever arising".

Common law rights can be replaced

Scottish Power's case also relied on the rule that when interpreting a contract it should be presumed that parties to the agreement did not intend to deprive themselves of common-law rights absent clear language excluding or limiting such rights (the "*Gilbert-Ash*[1] presumption"). Christopher Clarke LJ clarified that the strength of the presumption will depend on the degree of derogation from common-law rights. Here, the compensation mechanism was not a pure exclusion clause. Common-law rights were replaced by a different contractual remedy, which in some circumstances could have been more valuable than damages. In the circumstances, given the language of the agreements and also the parties' experience and sophistication, the presumption was overturned.

COMMENT

From a contract law perspective, this decision follows existing authority and should be uncontroversial. The judgment is nevertheless important for the energy sector, as it provides a welcome clarification and endorsement of what has long been the contractual practice of market participants.

It is notable that the decision gives comfort to the wider energy sector. Most energy-related contracts are agreed at arm's length by parties that are sophisticated, commercially minded, and have an understanding of the market and industry. They are intended to set out a comprehensive framework for the parties' relationship, reflecting the allocation of risks between them. It is therefore not unusual for these contracts to replace common-law remedies with comprehensive contractual compensation codes. Even in the narrower gas sales context, underdeliveries provisions are just one example of such mechanisms. Other commonly seen mechanisms address the consequences of overdeliveries, the provision of gas of deficient quality, or the buyer's failure to take the minimum daily, quarterly or yearly amounts of gas.

The Court of Appeal's decision delivers a clear signal that such contractual mechanisms, provided they are agreed by parties with similar bargaining strength and are not unreasonable exclusion clauses, will be upheld by the English courts. English law continues to be a safe choice for parties in the energy sector.

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[1] http://www.bailii.org/ew/cases/EWHC/TCC/2014/1028.html

COURT OF APPEAL RULES THAT OMISSION IN ORAL CONTRACT CANNOT BE CURED BY IMPLICATION OF A TERM WHERE CONTRACT IS INCOMPLETE

Edward Martin Robert Wells v Mehul Devani [2016] EWCA Civ 1106, 15 November 2016

An oral contract under which an estate agent was to find a purchaser for a property developer's property was incomplete where the parties had failed to specify the event which would trigger the agent's entitlement to commission. That omission could not be cured by the implication of a term providing the trigger event. The judgment clarifies that the courts cannot imply terms to make a bargain work in circumstances where there is no binding contract and emphasises the need for contracting parties to ensure that provisions relating to performance of their and their counterparties' obligations are expressly agreed. It also highlights the potential for judges to reach different conclusions when applying the law on the interpretation and implication of contractual terms.

The dispute concerned an oral agreement between Mr Wells, a property developer, and Mr Devani, an estate agent. Several exchanges, including a telephone conversation, took place between Mr Wells and Mr Devani in relation to property developed by Mr Wells which had not been sold. Following the exchanges, Mr Devani found a purchaser for Mr Wells' property and a sale was completed. Mr Devani claimed a commission of 2% plus VAT from Mr Wells.

At first instance, the judge considered the main issue of fact to be whether, during the telephone conversation, Mr Devani had informed Mr Wells that he was an estate agent and that his commission would be 2% plus VAT. The judge found that it was more likely than not that Mr Devani had done so but there had been a failure by the parties to define the commission-entitling event. The judge concluded that the parties had nevertheless made a binding contract during their telephone conversation and he implied a term that payment of commission was due on the introduction of a purchaser who actually completed the purchase. He found Mr Wells liable to pay commission to Mr Devani on this basis.

Mr Wells appealed the judge's finding that he was liable to Mr Devani for commission. The principal question for the Court of Appeal was whether a term providing the trigger for payment of commission could be implied in circumstances where it had been omitted by the parties.

In addition to this issue – which is the focus of this article – the first instance and appeal proceedings also concerned Mr Devani's obligations under the Estate Agents Act 1979 and the applicability of a reduction in the amount of commission due in the circumstances, which are not dealt with here.

No term can be implied where no binding contract

The Court of Appeal allowed Mr Wells' appeal, overturning the judge's decision implying a term triggering payment of a commission by a majority of two to one. It was held that such a term could not be implied in circumstances where there was no binding contract between the parties. Lord Justice Lewison, with whom Lord Justice McCombe agreed, gave the leading judgment. Lady Justice Arden dissented on this issue.

Lord Justice Lewison, citing *Scancarriers A/S v Aotearog International Ltd* [1985] 2 Lloyd's Rep 419, held that terms cannot be implied by the courts unless there is a binding contract into which to imply them.

Lord Justice Lewison emphasised that in order to be binding a contract must be complete. In this case, the identification of the trigger event upon which commission was to become payable was essential for the formation of a binding contract. Lord Justice Lewison referred to the House of Lords' decision in *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, and confirmed that the event giving rise to an estate agent's entitlement to commission is of critical importance and a variety of events could be specified. Unless the parties themselves specify the event, the bargain is incomplete. On the facts as found at first instance, the parties did not reach agreement on the circumstances in which Mr Devani would be entitled to commission. In these circumstances, the contract was incomplete and the trigger event could not be determined by the courts by reference to the standard of reasonableness.

Lord Justice Lewison commented that had he been of the view that Mr Wells and Mr Devani had entered into a binding contract during their telephone conversation, he would have dismissed Mr Wells' appeal. His decision to allow the appeal rested on his conclusion that there was no binding contract.

Dissenting opinion

Lady Justice Arden, dissenting, found that there was a binding contract between the parties under which Mr Devani would act as agent and would be entitled to commission. The contract became binding at the latest when the contract for the sale of the property to the purchaser was completed.

According to Lady Justice Arden, resolving the question of the trigger for the agreed commission was a matter of interpretation. In the case of an oral contract, the courts are not restricted to interpreting the express words exchanged by the parties; rather, what matters is what the parties actually agreed. Adopting this approach, Lady Justice Arden found that when the parties agreed (as the judge found) that Mr Devani should be the estate agent for the sale of the property, it followed that he became entitled to commission if he succeeded in finding a purchaser who bought the property. The trigger for commission was, at the latest, the completion of the sale of the property to the purchaser found by Mr Devani. Lady Justice Arden concluded that although the judge at first instance should have interpreted the agreement in this way rather than implying a term, the outcome would have been the same.

Implication or interpretation?

Mr Devani argued that the question of whether the judge's finding was reached by implication or interpretation was a matter of indifference. Lady Justice Arden's decision was made on interpretation, but she expressed the view that both interpretation and implication reached the same outcome.

On the question of convergence of interpretation and implication, Lord Justice Lewison confirmed that although at one point the two were viewed as an indivisible process, the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] UKSC 72, [2016] AC 742 found that "construing the words used and implying additional words are different processes governed by different rules." In the case before him, Lord Justice Lewison concluded that the judge had not interpreted what the parties had said, as he had made a clear finding of fact that the parties had said *nothing* about the trigger event.

Instead, the judge had implied the term providing the trigger event for payment of commission, contrary to the law on implication.

COMMENT

The Court of Appeal's decision confirms that the courts can only imply terms which are necessary and reasonable to make a bargain work in circumstances where the bargain amounts to a complete, legally binding contract. This case serves as a reminder that parties should not leave essential elements of their agreements, such as triggering events for the performance of payment obligations, to chance. As was the case here, the court may well find that the contract is incomplete and non-binding, resulting in one or both of the parties losing out in respect of the obligations they expected the other to perform. In addition, given the reversal and dissenting opinion in this case, we should anticipate further litigation and developments in the case law on interpretation and implication of terms in relation to contracts lacking certainty.

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CONTRACT FORMED BEFORE MORE DETAILED TERMS AGREED

Arcadis Consulting (UK) Ltd v AMEC (BSC) Ltd [2016] EWHC 2509 (TCC), 25 October 2016

This case highlights the risks where a simple contract is found to have been formed before more detailed terms are agreed. The court found that a contract had come into force on the basis of a letter of intent and commencement of work while the parties negotiated more detailed terms to govern the work retrospectively. No more detailed contract was ever executed. Although every set of terms proposed by the defendant included a limit on the claimant's liability, the judge found that it was impossible to construe a binding agreement in respect of any one of the proposed versions. The court refused to grant the claimant a declaration that its liability was limited to GBP 610,515, leaving it exposed to a GBP 40 million claim by the defendant.

The defendant, a specialist concrete sub-contractor, engaged the claimant for design services in relation to two large projects in anticipation of a wider agreement between the parties. The defendant proposed a suite of documents (the **Contract Documents**), comprising an umbrella agreement (which the parties called the **Protocol Agreement**) and various schedules, including a schedule containing terms and conditions and project-specific schedules. Although the defendant sent several different drafts to the claimant, the Contract Documents were never finalised or executed.

Key events and correspondence

After a "kick-off" meeting for the Castlepoint Car Park project in February 2002, the claimant started design work and requested a "formal letter of instruction […] subject to preparation and signature of the services agreement in due course". On 6 March 2002, the defendant sent two letters to the claimant. The first letter (the **Instruction Letter**) confirmed (i) the defendant's instruction to commence work in accordance with the Contract Documents and the claimant's quotation of GBP 285,000; (ii) that pending finalisation of the Contract Documents the defendant would pay the claimant up to a maximum amount; and (iii) that once the Contract Documents were executed their terms would supersede the Instruction Letter and retrospectively govern work done. In the second letter the defendant wrote that it considered that the Contract Documents should apply to all work executed by the

claimant and attached revised drafts (including an amended limitation of liability clause).

Over the following months, the defendant chased the claimant for agreement to the Contract Documents. In August 2002, the claimant responded, proposing what the judge described as a "complete rewrite" of the limitation-of-liability clause. In the end, in the absence of executed Contract Documents, the design work was completed under extensions to the expenditure limit in the Instruction Letter.

Castlepoint Car Park is alleged to be defective and may need to be rebuilt, at a cost of many tens of millions of pounds. Although the claimant denied liability, it also sought a declaration that its liability was in any event limited to GBP 610,515, a figure included in an incomplete schedule sent by the defendant to the claimant on 6 March 2002.

Was there a contract between the parties?

Coulson J held that there was a binding, simple contract between the parties. He rejected the argument that the lack of the formal detailed contract envisaged in the parties' correspondence precluded the existence of any contractual relationship, finding that this was contrary to the legal principles determining whether or not a binding contract exists. As summarised by Lord Clarke in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH* [2010] 1 WLR 753, this did not depend on the parties' subjective state of mind, but whether the parties' words or conduct led objectively to a conclusion that they intended to create legal relations and had agreed on all the terms which they regarded or the law required as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties had not been finalised, an objective appraisal of their words and conduct might nonetheless lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement. Moreover, in circumstances where works had been carried out, it would usually be implausible to argue that there was no contract.

Coulson J found that the Instruction Letter had all the hallmarks of a letter of intent, namely an instruction to carry out work up to a certain value on an interim basis, pending the agreement of a formal contract. He observed that the courts had repeatedly found that, in normal circumstances, arrangements evidenced by letters of intent were a form of simple contract, and quoted Akenhead J in *Diamond Build Ltd v Clapham Park Homes Ltd* [2008] EWHC 1439 that it was not a particular difficulty for the court to find a contract in the circumstances of a letter of intent which was not only signed but also acted on by the parties; this was so, even if the parties intended ultimately to conclude a detailed contract (*Bryen and Langley Ltd v Boston* [2005] EWCA Civ 973).

The judge suggested that the principal way in which parties could indicate that they did not intend to enter into legal relations until the final contract was signed was by marking their pre-contract correspondence "subject to contract", which the parties had not done in this case (*Regalian Properties Plc v London Dockland Development Corporation* [1995] 1 WLR 212).

Were any terms and conditions incorporated into the simple contract?

Coulson J concluded that no version of the draft terms and conditions had been incorporated into the simple contract, on the basis that the first version had been superseded (and was the subject of expressly objection by the claimant), the second had not been identified (no copies of these terms and conditions could be found) and the third was never agreed. He considered that the defendant's direction in the Instruction Letter for the claimant to start work in accordance with the "Protocol Agreement and Terms and Conditions associated that we are currently working under with yourselves" was merely a general reference to the terms that were still being negotiated.

With respect to the limit on liability, the figure put forward by the claimant had appeared in a schedule, which the judge analysed as dependent ("parasitic") on agreement of the terms and conditions. He also found it relevant that, as restated by Briggs LJ in *Nobahar-Cookson v The Hut Group* [2016] EWCA Civ 128, "the parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect".

The judge emphasised that the law required that, on an objective assessment, there had been a final and unqualified expression of assent (*Day Morris Associates v Voyce* [2003] EWCA Civ 189). The claimant had failed to say clearly and unequivocally that it accepted any part of a set of terms. He considered it therefore impossible as a matter of law to "stop the music" at any stage and construe an unequivocal and binding agreement in respect of any one of the three competing versions of the terms and conditions.

Ultimately, the judge concluded that there was simply "too much uncertainty and too much that was not agreed" for the court to conclude on an objective analysis of the correspondence that the parties intended to be bound by the liability cap. Although he commented that the court should always strive to find a concluded contract in circumstances where work has been performed (and did indeed find that a simple contract had been formed), the court was "not entitled to rewrite history so as to incorporate into that contract express terms which were not the subject of a clear and binding agreement".

COMMENT

This was indeed, as the judge described it, a "case with something of a sting in its tail", at least for the claimant, whose failure to accept any of the terms offered (or negotiate terms it preferred) in a timely fashion left it with unlimited liability. It is also a reminder of the risks of commencing work under a letter of intent, a device which the judge commented was commonly used – sometimes without adequate care and attention – in the construction industry. Parties should keep in mind that in normal circumstances a simple contract is likely to be formed and ensure that the letter of intent is drafted such that any critical terms, such as a limitation of liability, are in place. More generally, the case is a striking illustration of the principle that the court will only give contractual effect to the parties' objective agreement rather than subjective intentions. Although every draft of the terms and conditions (including those proposed by the defendant) included a limitation of the claimant's liability, and despite the court's willingness to find a concluded contract of some kind where work has been performed, in the absence of one clearly agreed limit, it was impossible for the court to "stop the music" at any one of the competing versions. Finally, the case also includes some pragmatic advice from Coulson J, who warned that it "starkly demonstrates the commercial truism that it is usually better for a party to reach a full agreement (which in this case would almost certainly have included some sort of cap on their liability) through a process of negotiation and give-and-take, rather than to delay and then fail to reach any detailed agreement at all."

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PROCURING A BREACH OF CONTRACT – LOSS-OF-CHANCE DAMAGES

Anthony McGill v The Sports and Entertainment Media Group & ors [2016] EWCA Civ 1063, 4 November 2016

The Court of Appeal has held that a football agent could recover damages on a loss-of-chance basis from a rival agent and a football club for inducing a player to breach an oral agency contract. It also held that the agent's settlement of a prior breach-of-contract claim against the player did not preclude him also recovering in tort against the agent and football club.

In April 2007 Anthony McGill entered into an oral agency contract with a football player, Gavin McCann, to act as his exclusive agent and to arrange his transfer from Aston Villa to Bolton Wanderers (**Bolton**). Mr McGill negotiated an in-principle transfer deal with Bolton. However, before the transfer to Bolton was formalised, Mr McCann signed a written agency contract with the Sports and Entertainment Media Group (**SEM**), a rival agency, to arrange the transfer to Bolton, which went through on 11 June 2007 on materially the same terms Mr McGill had negotiated. Bolton paid SEM a commission of GBP 300,000.

Mr McGill first sued Mr McCann for repudiatory breach of their oral agency contract. That claim was settled in September 2009 for GBP 50,000. Mr McGill then commenced these proceedings against SEM, Bolton, and certain individuals alleging that they induced Mr McCann to breach the oral agency contract, depriving Mr McGill of the commission he would otherwise have earned.

At first instance, HHJ Waksman QC accepted that there was a binding oral agency contract, and that SEM and Bolton had induced Mr McCann to breach that contract. However the Football Association Regulations 2006 (**FA Regulations**) prescribe that, to be enforceable, agency contracts must be made in a standard written form. Therefore to demonstrate that SEM and Bolton's actions caused him loss, Mr McGill had to show that Mr McCann would have signed an FA Regulations compliant written agency contract prior to the completion of the transfer. HHJ Waksman QC applied the ordinary "but for" causation test, and held that Mr McGill was unable to prove on the balance of probabilities that Mr McCann would have done so.

The Court of Appeal held that HHJ Waksman QC had applied the wrong causation test. Whether or not SEM and Bolton's actions had caused Mr McGill loss depended on the hypothetical actions of a third party, namely whether Mr McCann would have signed a written agreement. Following its previous judgments in *Allied Maples Limited v Simmons & Simmons* [1995] 1 WLR 1602 and *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, the Court of Appeal held that where a claimant's loss depends on the hypothetical actions of a third party, he need only prove that there was a real or substantial chance, as opposed to a speculative one, that the third party would have so acted. A real or substantial chance can be less than or equal to a 50% probability, and so the threshold to establish causation is less in such cases than the balance of probabilities requirement of the "but for" test. However once causation is established on this approach, the claimant can only recover the same percentage of his loss as the percentage chance he established. By contrast, under the "but for" test, if causation is established on the balance of probabilities then the claimant can recover the full amount of his loss.

The Court of Appeal did not disturb the High Court's finding that Mr McGill had not proved on the balance of probabilities that Mr McCann would have signed an FA Regulations compliant contract, but accepted that Mr McGill could show a real or substantial chance that he would have done so. Therefore, Mr McGill was entitled to recover damages as a percentage of the lost

commission, but that percentage could not exceed 50%. The case was remitted back to the High Court for an assessment of that percentage.

The *Jameson* principle

The Court of Appeal also considered the application of the principle in *Jameson v CEGB* [2000] 1 AC 455, that where concurrent tortfeasors are liable for the same harm and the claimant enters into a settlement with one of them, the other tortfeasors are discharged from liability for the same damage if the settlement is, on a proper construction of the relevant agreement, in full and final satisfaction of the claimant's claims.

Bolton and SEM argued that Mr McGill's settlement with Mr McCann barred him from pursuing his claims against them under this principle, as Mr McGill was seeking to recover the same losses from Mr McCann that he now claimed from them. The settlement with Mr McCann should therefore be treated as in full and final satisfaction of Mr McGill's losses.

Both HHJ Waksman QC and the Court of Appeal rejected this argument. The Court of Appeal did so on the basis that Jameson concerned concurrent tortfeasors and, whilst the House of Lords in *Heaton v AXA Equity and Law Assurance Society Plc* [2002] UKHL 15 confirmed that the principle could apply to successive contract breakers, this case concerned claims in both contract and tort. Whilst *Heaton* established that the *Jameson* principle could apply in such circumstances, the Court of Appeal considered that it should not bar a claimant from pursuing such claims sequentially, unless there was clear evidence that settlement of the first pursued claim satisfied other claims of a different character. The Court stated that that would require clear language in the relevant settlement, and in this case no such language was present.

COMMENT

This case is a cogent reminder that courts may award damages on the loss-of-chance basis. Whilst the loss-of-chance approach involves a lower evidential standard to establish causation than the "but for" approach, the quantum of damages recoverable will only be a percentage of that which could be recovered on the latter approach.

It also raises important practice points for those drafting settlement agreements. The Court of Appeal has confirmed that the *Jameson* principle can apply not only to concurrent tortfeasors and contract breakers, but in circumstances where a claimant has both contractual and tortious claims against different parties. Therefore care needs to be taken when acting for a claimant settling claims against only one defendant in these circumstances not to compromise any remaining claims, of whatever nature, against other defendants. The Court of Appeal helpfully clarified that clear language would likely be required to do so, but close attention always needs to be paid to precisely what is being settled.

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Costs

CLAIMANT ORDERED TO DISCLOSE IDENTITY OF THIRD-PARTY FUNDER

Stuart Barrie Wall v The Royal Bank of Scotland plc [2016] EWHC 2460 (Comm), 7 October 2016

The Commercial Court ordered a claimant to disclose the identity of a third party funding the litigation he had commenced against RBS where, armed with that information, RBS had a serious prospect of succeeding in an application for security for costs from the funder. Litigation funding has been on the rise in recent years, as have the issues it presents – see for example the *Essar v Norscot*[1] decision covered in the October 2016 Litigation Review in which the costs of third party funding was awarded by an arbitration tribunal. The *Wall v RBS* judgment serves as a reminder to defendants to English court proceedings to consider whether the claimant may be in receipt of funding and if so, to consider seeking security for costs from the funder.

RBS's intended application for security for costs

The application arose in the course of litigation commenced by Mr Stuart Wall (as alleged assignee of claims by an insolvent company he had owned and controlled) against RBS alleging mis-selling of interest rate swaps and LIBOR manipulation. The litigation was large and complex. RBS estimated that its costs to the conclusion of trial would exceed GBP 9 million. RBS had reason to believe that the litigation was being funded by a third party and wished to make an application for security for costs against the funder under CPR 25.14, which gives the court discretion to order someone other than a claimant to provide security for costs if:

- the court is satisfied that it is just to make such an order;
- (in the case of a third party funder), the party against whom the application is made has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings; and
- a costs order may be made against that person.

The claimant refused to confirm that he was in receipt of funding. RBS applied to the court for an order that Mr Wall: (a) provide the name and address of any third party funding the litigation; and (b) confirm whether any such funder met the second criterion above (ie has contributed or agreed to contribute to the costs of the litigation in return for a share of any proceeds).

Mr Wall submitted that the application should be dismissed on the basis of Mr Wall's right to private life under Article 8 of the ECHR or alternatively because any application for security for costs would, in any event, be defeated by Mr Wall's ATE insurance.

Claimant ordered to disclose identity of third party funder

Mr Andrew Baker QC, sitting as High Court judge, ordered Mr Wall to provide the information RBS sought on the basis that:

- The court has power ancillary to CPR 25.14 to order a claimant to disclose the identity of a third-party funder and whether that funder would benefit from a share of any proceeds of the litigation. Such a power must be implied in order to make CPR 25.14 effective in circumstances such as these.
- There was good reason to believe that Mr Wall had funding as there was no evidence to suggest he had the means to fund such complex and expensive litigation.
- It was probable that whoever was funding the litigation was doing so in return for a share of the proceeds (as discussed above, this is a necessary

criterion for an order for security for costs under CPR 25.14).

- RBS would have a serious prospect of success in an application under CPR 25.14 for security for costs. RBS would be materially prejudiced if deprived of the opportunity to make that application because of Mr Wall withholding the identity of the funder. There was no argument of prejudice to Mr Wall to balance against that.
- Mr Wall's Article 8 right to private life was not engaged. He could not reasonably have thought that the identity of his funder could be kept private as this information would be apt to come out if RBS later obtained a costs award in its favour, if not before. The judge concluded that it would be "no skin off Mr Wall's nose at all" if the order was made. In any event, Article 8.2 allows the court to interfere with that right where necessary for the protection of the rights and freedoms of others. RBS's procedural right under CPR 25.14 was sufficient to engage that exception.
- Finally, the Judge rejected Mr Wall's argument that his ATE insurance would necessarily defeat any application for security for costs. This was a matter on which the parties should have an opportunity to present full argument on an application for security.

COMMENT

The Judge stated that the power he found to exist could not be used as a "fishing expedition". An order for disclosure will only be granted where there is good reason to believe the claimant is in receipt of funding and an application for security for costs would have a reasonable prospect of success. However, it is interesting to note the comparative ease with which the court was satisfied that RBS had met this hurdle in this case – apparently accepting the inferences drawn by RBS's counsel from the amounts at stake (including RBS's estimate of costs exceeding GBP 9 million to the end of trial) and relying on Mr Wall's failure to provide evidence to establish that he was not in receipt of funding. It is unclear what evidence of Mr Wall's means (if any) was put before the court. It remains to be seen whether a defendant may need to do more to secure a comparable order in a less expensive piece of litigation.

RBS would almost certainly not have succeeded in obtaining security for its (vast) costs of the litigation from Mr Wall (an individual claimant) as the grounds in CPR 25.13 would not have been met. The decision gives RBS another avenue for seeking security for those costs, although it remains to be seen whether the claimant's ATE insurance will defeat that application. There have been a number of decisions going both ways on this point in recent years so the precise terms of Mr Wall's ATE policy will no doubt be crucial.

RBS sensibly confined its application to the information strictly necessary to enable it to make an application for security for costs under CPR 25.14. In the earlier case of *Reeves v Sprecher et al* [2007] EWHC 3226 (Ch), the court refused to order disclosure of a funding agreement itself on the basis that it was not necessary to allow the defendant to make an application for security.

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[1] http://www.allenovery.com/publications/en-gb/Pages/Costs-of-third-party-funding-awarded-in-arbitration.aspx

THIRD-PARTY FUNDERS HELD LIABLE FOR COSTS ON AN INDEMNITY BASIS

Excalibur Ventures LLC v Texas Keystone Inc & ors [2016] EWCA Civ 1144, 18 November 2016

The Court of Appeal has provided important guidance on the extent to which third-party litigation funders may be liable to pay the costs of a defendant who has successfully defended a funded claim. In particular, the Court held that a commercial funder should ordinarily be required to contribute to a successful defendant's costs on the same basis as a funded claimant; that it was appropriate to include funds provided in order to furnish security for costs in calculating a funder's liability under the *Arkin* cap; and that an order could be made against a party who in reality had funded the litigation, irrespective of whether they were a party to any funding agreement.

This decision marks the latest chapter in the now infamous *Excalibur* litigation, one of the largest and longest-running Commercial Court cases of recent years. The underlying litigation involved a claim made by Excalibur Ventures LLC (**Excalibur**) against Texas Keystone Inc and others (the **defendants**), in which Excalibur alleged that it was entitled to an interest in a number of profitable oil fields in Kurdistan and sought an order for specific performance of an agreement under which it could exercise this interest or damages in the sum of USD 1.6 billion. Four groups of funders (the **Funders**) had provided Excalibur with funding on commercial terms in return for a share of any proceeds of the litigation. Between them, the Funders provided GBP 14.25 million to cover Excalibur's own costs and GBP 17.5 million towards the payment of security for the defendants' costs.

At first instance, Christopher Clarke J (as he then was) dismissed the claim in its entirety, describing it as a "resounding, indeed catastrophic, defeat" for Excalibur. Excalibur was ordered to pay the defendants' costs on an indemnity basis. The defendants' costs were, for the most part, met by the security ordered, but there was a shortfall of some GBP 4.8 million, which largely represented the difference between standard and indemnity costs. The defendants applied for, and were granted, a third-party costs order under s51(3) of the Senior Courts Act, stipulating that the Funders were jointly and severally liable to pay the defendants' costs on an indemnity basis. Each Funder's liability was capped at the amount of funding it had provided and each was only liable in respect of costs that had been incurred after it had provided funding. The Funders appealed. In dismissing the Funders' appeal, the Court of Appeal provided important guidance on the extent to which third- party funders may be liable to pay the costs of a defendant who has successfully defended a funded claim.

Appropriateness of indemnity costs

The Funders accepted that they were liable to pay the defendants' costs, but argued that those costs should be assessed on a standard basis, rather than an indemnity basis, because the Funders themselves had not been guilty of any discreditable conduct. The Court rejected this argument. Tomlinson LJ, giving the leading judgment, pointed out that this is only one factor to be considered. The Funders' argument ignored the character of the action which they were funding and the effect that it had upon the defendants, who had expended significant time, energy and expense in defending an unmeritorious claim. There was no principled basis upon which a funder could disassociate themselves from the conduct of those whom they had chosen to fund and from whom they stood to make a return on their investment.

The Court was at pains to agree with Christopher Clarke J's conclusion that the derivative nature of a commercial funder's interest in litigation should ordinarily mean that they were required to contribute to the costs on the basis upon which they had been assessed against the party whom the funder choose to fund. The Court explained that such a presumption was not irrebuttable, but

represented the outcome that would usually be just and equitable.

Commercial funders were making an investment and were not motivated by promoting access to justice. That investment carried risks, the nature of which a funder was able to inform themselves of both prior to providing funding and throughout the course of the litigation. In this regard, the Court endorsed the first instance judge's determination that it is expected that a responsible funder would carry out a "rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate levels" and that such action would not be champertous. The Court also explained that on going review of the progress of litigation by lawyers who were independent of those actually carrying out the litigation was essential in reducing the risk that an unsuccessful funded party would have indemnity costs awarded against it.

Treatment of funds provided for security for costs

In *Arkin v Borchard Lines Ltd (Costs Order)* [2005] EWCA Civ 655, the Court of Appeal held that a commercial third-party funder's liability for adverse costs is limited to an amount equivalent to the funding provided. This principle is known as the "Arkin cap". In the instant case, some of the Funders argued that funds provided in order to meet a court order for security for costs should not be taken into account when calculating the Arkin cap.

The Court rejected the Funders' argument. There was no basis upon which a funder who advances funds to meet an order for security for costs should be treated differently from one who advances funds to meet a litigant's costs of its lawyers or expert witnesses. The Court explained that both types of costs were general costs of the litigation, which, if not met, would result in the litigation being unable to proceed and that "[a]ll the sums advanced are used in pursuit of the common enterprise and for the benefit of all of the funders".

Relevance of separate corporate personality

Three of the four groups of Funders had provided funds on a back-to-back basis via companies with no sources of funds and no assets and had not entered into direct funding agreements with Excalibur. These Funders argued that a contractual nexus was a prerequisite to their being subject to a third-party costs order under s51(3).

The Court of Appeal dismissed that argument. As Gloster LJ noted, any other conclusion would allow funders to insulate themselves through the use of special purpose vehicles. Citing *Threlfall v ECD Insight Ltd* [2014] 2 Costs LO 129, Tomlinson LJ explained that, when making a s51(3) order, "the court is not fettered by the legal realities but can look to the economic realities". The exercise of the court's discretion in making a third-party costs order did not amount to an enforcement of legal rights and therefore the doctrine of separate corporate personality was not relevant. The Court reiterated the well-established principle that it is just and appropriate to make a third-party costs order against a funder not just where that funder substantially controls proceedings, but also in circumstances where the funder stands to derive a substantial benefit from the litigation.

COMMENT

The Court of Appeal's decision provides a further incentive, if one was needed, for commercial funders not only to conduct a thorough due diligence prior to funding a litigant, but also to maintain a robust process for reviewing the litigation as it progresses. Furthermore, it provides clarity that funders can, and sometimes should, engage independent external counsel to review litigation strategy in order to minimise the risk of indemnity costs being awarded against a funded litigant. In this respect, the Court's confirmation that such courses of action will not constitute champertous conduct is particularly welcome.

Although users of commercial litigation funding may now find their cases subject to more thorough and on-going scrutiny, given that professional commercial funders do not typically fund cases as unmeritorious as Excalibur's, the case is unlikely to have a seismic impact on the funding industry. In this regard it is worth remembering that the Funders were not members of the Association of Litigation Funders (**ALF**) (who had intervened in the appeal) and that only one of the Funders had any litigation funding experience at all. Indeed, the decision has in fact been welcomed by the

professional funding community, including the ALF, as a welcome reaffirmation that funding is not only part of the modern legal landscape but also, in Tomlinson LJ's words, "an accepted and judicially sanctioned activity perceived to be in the public interest".

The Court of Appeal was not asked to decide on the appropriateness of the *Arkin* cap principle; however, Tomlinson LJ twice commented upon the fact that some view the principle as over-generous to commercial litigation funders. It therefore remains to be seen whether the principle will survive intact if and when it comes properly before the Court of Appeal for consideration.

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COSTS NOT TO BE CONSIDERED WHEN ASSESSING WHETHER PART 36 OFFER HAS BEEN BEATEN

Transocean Drilling UK Ltd v Providence Resources Plc [2016] EWHC 2611 (Comm), 20 October 2016

An assessment of whether a Part 36 offer has been beaten at trial does not involve any consideration of the extent of the parties' costs. The assessment was to be made only on the basis of the judgment obtained on the substantive issues.

Part 36 of the Civil Procedure Rules (CPR)

Part 36 encourages parties to settle their claims, with negative costs consequences for a party that declines an offer and then obtains a less favourable result at trial. This case concerned the question of whether, when deciding whether a party has beaten a Part 36 Offer at trial, any account should be taken of the extra costs that have been incurred in bringing the case to trial.

Part 36 provides that if either:

- a defendant does not accept a claimant's offer and the claimant then obtains a judgment which is at least as advantageous as its offer; or
- a claimant does not accept a defendant's offer and the claimant fails to obtain a more advantageous judgment; and
- the party which made the offer can access the Part 36 costs rules, which tend to be more favourable than the costs orders which will ordinarily be made under Part 44. The Court is not told of any Part 36 offers until after it has reached its decision on the substantive issues.

Facts

Transocean Drilling UK Ltd (the **claimant**) had made a Part 36 offer to Providence Resources Plc (the **defendant**) which was rejected. At trial the claimant failed to obtain as much in damages as it had offered to accept in its Part 36 offer. The claimant won on some but not all of its claims and was awarded approximately USD 7.6 million inclusive of interest. Its previous Part 36 offer had offered to accept USD 13 million inclusive of interest. The offer had stated that the sum did not include costs, and drew attention to the fact that if it were accepted, Providence would be liable to pay the claimant's costs up until the date the offer was accepted, on the standard basis (Part 36).

The parties did not inform the court of the Part 36 offer because the sum awarded to the claimant fell well short of its offer. In making its decision regarding costs under Part 44 of the CPR, the trial judge determined that although the claimant had won the litigation, there should be no order as to costs.

The claimant successfully appealed, which increased the judgment sum to approximately USD 14 million. The

case was returned to the trial judge for a decision on costs. The claimant contended that the more favourable Part 36 costs consequences should apply because it had beaten its offer to accept USD 13 million.

The defendant claimed that the offer had not been beaten because, if the effect of the trial judge's original order under Part 44 that each party would bear its own costs was taken into consideration, the total sum that the claimant would recover (estimated to be USD 14.6 million) was less than if the defendant had accepted the claimant's offer and had had to pay the claimant's costs on the standard basis to the date on which the offer was accepted (estimated to be USD 16.3 million).

Costs not relevant to whether Part 36 Offer has been beaten

The court analysed the relevant provisions in Part 36, together with case law. The court also considered the practical implications of the defendant's contention, which if correct would require the trial court to undertake an exercise that involved:

- summarily assessing the parties' costs (unless those costs had been agreed), which the court noted was ordinarily a task for a costs judge, not a trial judge;
- the court then making hypothetical decisions regarding the treatment of costs, both under Part 44 and Part 36;
- comparing the sums that the winning party would obtain when both the substantive judgment and each of the alternative costs calculations were taken into consideration in order to determine which was more favourable to the winning party.

Through this analysis the court formed the view that the draftsman of Part 36 could not have intended that the assessment of whether Part 36 was engaged should involve any consideration of the parties' costs. The assessment was to be made only on the basis of the judgment obtained on the substantive issues.

COMMENT

If the defendant's argument had been held to be correct it would have undermined the efficacy of the Part 36 regime in all but the most simple of cases.

Weighing up the various contingencies and uncertainties inherent to litigation in order to determine what offer to make or whether to accept an offer is often already a difficult process for parties. If a step were introduced by which a party would be required to estimate both the cost consequences of the offer being accepted at that point in time against the potential cost consequences of running the matter to trial, with the treatment of those costs being determined under Part 44, it would become too impractical for parties to perform the necessary analysis involved in order to make, accept or reject an offer with any degree of confidence. This would be likely to seriously undermine the purpose of Part 36, which is to encourage settlement.

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COURT OF APPEAL PROVIDES MUCH-NEEDED CLARITY ON SECURITY FOR COSTS

Bestfort Developments LLP & ors v Ras Al Khaimah Investment Authority & ors [2016] EWCA Civ 1099, 8 November 2016

The Court of Appeal has clarified the test to be met in an application for security for costs on the basis that a claimant is resident outside the jurisdiction. Distinguishing past decisions that required applicants to prove that it was "likely" that difficulties would be faced in enforcing costs against a claimant, the court has determined that an order should be made if evidence is adduced that there is a "real risk" that obstacles might exist.

Background

Ras Al Khaimah Investment Authority, the respondents/claimants (the **respondents**), brought proceedings against Bestfort Developments LLP, the appellants/defendants (the **appellants**) for a worldwide freezing order and associated disclosure orders. The orders were sought in support of pending proceedings by the respondents against the appellants who were alleged to have misappropriated sums of up to USD 42 million in respect of property developments in Georgia.

The appellants subsequently made an application for security for costs as the respondents were all incorporated and resident outside the jurisdiction and the EU, and their only assets were in Ras Al Khaimah (in the UAE) and in Georgia. Permission to appeal to the Court of Appeal was granted after the application for security of costs was dismissed twice previously, first by Master Bowles, and then on appeal by David Richards J.

A confused test

Under CPR r25.12, a defendant to a claim can apply for security for its costs of the proceedings. Under CPR r25.13, the court must consider whether it is just, in all the circumstances, to grant the application and whether one of the conditions set out in CPR 25.13(2) is applicable. A security-for-costs order can be made under CPR r25.13(2)(a) where the Claimant is not resident in the jurisdiction or a Convention state. The issue of principle permitted for appeal was the correct evidential threshold for use of judicial discretion in the grant of an order for security for costs under this rule.

The question arose because the Court of Appeal in *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868 had previously held that such an order was capable of amounting to discrimination under article 14 in the entitlement to effective access to the courts under Article 6 of the European Convention of Human Rights (the **ECHR**). The root of the potential discrimination was that such an order for security of costs on the grounds of national origin could not be made against a person resident either in the UK or in a Convention state. However, the case also stood as authority for the position that if the making of an order for costs could be objectively justified, there would be no breach of article 14. In doing so, the court could take into account potential difficulties or burdens that might be encountered by a party when seeking to enforce a costs order outside of the EU.

Since the judgment in *Nasser*, the Court of Appeal had been inconsistent in its approach to setting the evidential threshold to determine whether a party would face such difficulties in enforcing an order for costs. Two different tests had been used by the Court:

- The test of 'likelihood', as established in *Nasser*, could be met if an applicant for security could demonstrate, on a balance of probabilities, that there were significant obstacles to enforcement.
- The test of "real risk", utilised in *De Beer v Kanaar* [2003] 1 WLR 38, set a lower threshold, requiring the claimant to prove that it would face a real risk of being unable to enforce an order for costs.

There was further confusion when the Court of Appeal, in *Dumrul v Standard Chartered Bank* [2010] EWHC 2625, without taking into account the decision in *De Beer*, reverted to *Nasser* and held that the Court needed to be satisfied that there was likely to be an obstacle or burden to enforcing costs.

Considerations

It was common ground that the respondents were not resident in the UK or a Convention state, with some of them incorporated in Ras Al Khaimah and others in Georgia. It was not alleged that any of the Respondents would have been unable to meet an order for security for costs. Additionally, there was little objection brought by the respondents that there would be significant obstacles to enforcement in Ras Al Khaimah. However, considering the appellants' evidence of a lack of bilateral enforcement treaties between Georgia and the UK, and the respondents' evidence that the Georgian courts had recognised foreign divorces in multiple instances, neither Master Bowles nor David Richards J, applying *Dumrul* and *Nasser*, found that it was more likely than not that difficulties to enforcement existed.

The respondents argued in favour of the "likelihood test", on the basis that *Nasser* was authority for the proposition that CPR r25.13(2) discriminated on grounds of nationality, and not only residence, for the purposes of Article 14 of the ECHR. Such discrimination existed because the court was unable to make an order for security of costs against an EU resident, and that residence was a personal characteristic that could be equated with nationality. The threshold needed to be set high because compelling reasons were required to justify indirect discrimination on the grounds of nationality.

The appellant took the position that claimants resident in a non-Convention state were in a substantially different position from claimants resident in a Convention state, and because of this distinction, it would not be discriminatory for the purposes of Article 14 to require security for costs from the former type of claimant.

It was further argued that even if the court were to view the two categories of claimants as being in analogous situations, the existence of a real risk of unenforceability provided a sufficient reason to find an objective justification to treat claimants resident in a non-Convention state differently under Article 14 ECHR.

Decision

In making her decision, Gloster LJ emphasised her view that the approach to an application for security for costs should be simple. The starting point was that CPR r. 25.13(2)(a) was *prima facie* discriminatory against claimants not resident in the UK or in another Convention state. However, distinguishing *Nasser*, Gloster LJ held that any discrimination inherent in the provision was based on the grounds of residence, not nationality. Additionally, in an application for security of costs, the court was not dealing with a situation in which an individual's human rights were concerned, but rather with a question of general economic strategy. As such, there was no need for weighty evidence to justify the difference in treatment towards a claimant resident in jurisdiction, and a claimant not resident in a Convention state.

Gloster LJ noted that aside from a risk that a losing party will not have the means to pay the costs order, or where a UK judgment for costs might not be recognised, parties to litigation were entitled to protection from the extra burden of costs and delay that enforce judgments outside of the EU could lead to, even in jurisdictions such as the United States, Accordingly, it must be sufficient for an applicant for security for costs to present evidence that there existed a real risk that it would not be able to enforce an order for costs.

COMMENT

This decision has brought much-needed clarity to an important aspect of civil litigation strategy. The Court of Appeal's choice of the lower test of "real risk" rather than "likelihood" has the effect that potential overseas litigators will be forced to think twice before making spurious claims in English courts.

Gloster LJ has taken a practical and principled view in setting the bar for applications at a lower threshold, avoiding the need for the court to be burdened by evidence-heavy applications for security for costs, particularly at a case management stage. Having said this, it is worth bearing in mind that applications for security for costs should be made as early as possible in the proceedings, usually during the course of the Case Management Conference.

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Crime

ATTEMPT TO STOP SFO INVESTIGATION FAILS

The Queen on the application of Soma Oil & Gas Ltd v Director of the Serious Fraud Office [2016] EWHC 2471 (Admin), 12 October 2016

An on-going bribery investigation can severely affect a company's reputation, business and ability to raise finance. This case is the first time a company has tried to get the English Court to order the Serious Fraud Office (**SFO**) to stop a bribery and corruption investigation. Soma Oil & Gas Ltd (**Soma**) sought, by way of judicial review, to require the SFO to stop its long-running investigation into potential bribery and corruption offences committed in Somalia by Soma. Although unsuccessful, the proceedings prompted the SFO to issue a letter informing Soma that there was currently insufficient evidence in relation to the primary aspect of the investigation. On 14 December the SFO announced that it had closed its investigation having concluded that it had insufficient evidence for a realistic prospect of conviction.

On-going investigation into Soma affects ability to raise funds

Soma was involved in oil exploration and drilling operations in Somalia. It had agreed with the Federal Government of Somalia (**FGS**) to conduct an oil exploration programme in Somalia, at the end of which it could apply for Production Sharing Agreements (**PSAs**) over blocks of interest to it (a valuable right enabling Soma to move beyond exploration into oil production).

In 2014, Soma entered into an agreement with the FGS to provide direct financial support to the Somali Ministry of Petroleum and Natural Resources through "capacity building payments". The FGS, in its discretion, used the funds to pay "allowances" to certain Ministry employees.

In June 2015, the SFO commenced an investigation into whether Soma had, through its involvement in these capacity building payments, committed bribery and corruption offences. Soma vigorously denied the commission of any criminal offence, and co-operated extensively with the SFO's investigation.

Over time, Soma perceived that the investigation was dragging, and expressed its concerns to the SFO. The delay had serious consequences for Soma: it needed to raise sufficient financing to be in a position to execute the PSAs by 25 August 2016, a task which was being hampered by the investigation. Absent funding, it could lose the valuable targeted blocks to competitors, risking insolvency.

Soma seeks court assistance to force SFO's hand

In August 2016, Soma commenced proceedings for judicial review. Soma sought mandatory orders or declarations that the SFO must: (i) terminate its investigation into Soma for offences connected with the capacity building payments; (ii) provide a clear indication that the investigation would be the subject of no further action and a clear timetable to a formal decision; or (iii) take a decision by 23 August 2016 as to whether to prosecute Soma in respect of the capacity building payments.

In response to the claim, on 16 August (merely one day prior to the hearing), the SFO informed Soma in a letter that, based on the information available, there was "currently insufficient evidence of criminality" in relation to the capacity building payments to found any realistic prospect of conviction, but that "other strands" to the investigation were continuing.

A high hurdle

Soma argued that the SFO was acting unlawfully in that the failure to conclude the investigation was irrational; and that, in addition to being irrational, the SFO's refusal to indicate that no further action would be taken against Soma failed to take into account relevant considerations and/or was disproportionate under Article 8 of the European Convention on Human Rights (**ECHR**).

No case authority to date precluded a challenge to the SFO's discretion to prosecute or investigate fraud. However, the court held that the law was clear: Soma faced a "very high hurdle indeed" in asking the court to judicially review the SFO's discretionary decision in conducting an investigation in good faith into serious criminality, and in seeking a mandatory order to terminate that investigation.

Lord Justice Gross surveyed the authorities, finding assistance in precedents dealing with decisions of prosecutors. These may only be challenged in "exceptionally rare circumstances": where there has been some unlawful policy, where the prosecutor has failed to act in accordance with their own set policy, or where the decision is perverse (in the sense that it is one no reasonable prosecutor could have reached).

However, as the court noted, it is "still more difficult" to challenge a decision of an investigator. Under the Criminal Justice Act 1987, the Director of the SFO is vested with a wide discretion to investigate any suspected offence which appears on reasonable grounds to involve serious or complex fraud. Courts have long declined to intervene in on-going investigations, as to do so would be an "unwelcome blurring" of the separate roles of a Court and investigator.

No basis for judicial intervention

Importantly, the claim was found to fail in light of the 16 August letter, as Soma could do "no better". While it was not the "public decision" sought, Soma had permission to communicate the letter to potential investors.

The court did go on regardless to consider the academic merits of the case aside from the 16 August letter, and still found against Soma.

- There was nothing irrational about either the commencement or continuation of the SFO's investigation, nor was there anything about the conduct of the investigation that meant it was wholly or most exceptional so as to warrant the court's intervention. It had been commenced, and continued, in good faith. While Soma may be

frustrated, it could not be said that there was undue or even any delay given the nature of the investigation and the geographical context. It would have been "remarkable" for the court to mandatorily terminate the investigation in such circumstances.

- Assuming Soma's ECHR right to privacy was engaged, the interference with that right was justified, and the investigation conducted proportionately. The SFO did not approach the matter "in generic terms": it was alive to the particular risks faced by Soma.

Seeking disclosure from the SFO

Soma had further sought to force the SFO to disclose the nature of any on-going "other matters" being pursued. It argued that the refusal to provide this information was unlawful on the grounds that it was contrary to minimum standards of disclosure required at common law and under EU Directive 2012/13/EU (the **Directive**) on the rights of an accused or suspected person.

The SFO had informed Soma that, for reasons of operational sensitivity and security, it could not impart any more information on that element of the investigation, save that it was being conducted as expeditiously as possible and was a sensitive on-going inquiry in respect of serious criminality.

The court held that there was no basis for it to go behind the SFO's response. Some material about the investigation had been disclosed to Soma – but the court was "unable to accept that there [was] any common law right to compel further disclosure at this stage". Rights under the Directive were limited to circumstances where information could be provided "without prejudicing the course of on-going investigation", and therefore this did not assist.

COMMENT

In the 2015-2016 financial year, 12 new criminal investigations were opened (one concluding without charge) such that the SFO ended the year with around 60 active investigations – many of which will have persisted for a number of years. A challenge to the duration of an SFO investigation was therefore somewhat inevitable. On-going investigations impose significant long-term economic burdens on target businesses: increased compliance costs, difficulty raising funds and general reputational damage. It is very much in the financial interests of the investigation subject for the SFO to conduct its investigation, diligently, prudently and to conclude it as soon as practicable. In the case of Soma, the financial risk associated with the on-going investigation crystallised at a particular date, prompting their judicial review application.

While not a particularly encouraging precedent in the context of future challenges, given the "very high hurdle" set, there are a few positives to be drawn. Most importantly, the commencement of the judicial review proceedings did act as a catalyst prompting the production of the SFO's concessionary 16 August letter. While the SFO emphasised that letter was a "unique exception" to its policy, and should not be taken as precedent for any other case or investigation, it is clear that there was a link between the judicial proceedings and the issuance of the 16 August letter (merely one day prior to the oral hearing), as recognised in the discount applied to the costs order made against Soma.

Secondly, while the bar is set "very high", it may not be impossible – in this case, the issuance of the 16 August letter was determinative of the claim, and should a more aggressive attitude be maintained by the SFO in a more remarkable factual situation, the balance may be different – particularly should an investigation have persisted far longer than the one year investigation into Soma. However, overall, it remains the case that seeking judicial review of a decision of the SFO would need very careful consideration and is likely to be advanced only in exceptional circumstances.

On 14 December, just as this Review went to press, the SFO announced that it had closed its investigation based on having insufficient evidence for a realistic prospect of conviction.

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Privilege

NO LEGAL ADVICE PRIVILEGE OVER LAWYERS' NOTES OF INTERVIEWS WITH EMPLOYEES

Astex Therapeutics Limited v Astrazeneca AB [2016] EWHC 2759 (Ch), 8 November 2016

In-house and external lawyers' attendance notes of conversations with employees of a client company who are not directly involved in instructing or receiving advice from the lawyers do not attract legal advice privilege. Where litigation is in reasonable contemplation, litigation privilege may attach to such notes – but where it is not, they are unlikely to be privileged. The High Court also ruled that claims for privilege in disclosure statements must be set out in a reasonable level of detail. It is not sufficient to state that documents have been withheld because they are "by their nature privileged" without providing any information about the documents.

This application by Astex is set against the background of a dispute with Astrazeneca arising from a joint research and development programme into chemical leads for the treatment of Alzheimer's Disease.

Claiming privilege over interview notes

A key issue was whether in-house and external counsel's notes of interviews with current and former employees of Astrazeneca attracted legal advice privilege. The answer was that they did not, unless those employees could be shown to be part of the class of persons which could be treated as "the client".

Chief Master Marsh reminded the parties that "[t]he essence of legal advice privilege is the protection of confidential communications between lawyers and their clients for the purpose of giving and receiving legal advice." He applied the decision in *Three Rivers No. 5* [2003] QB 1556, where it was held that documents prepared by employees of the Bank of England who were not in the select group involved in instructing external counsel did not attract legal advice privilege. The principle which has been taken from that decision is that, where "the client" is a corporate entity, only communications between lawyers and those expressly or impliedly authorised to instruct them or to receive advice on behalf of that entity can attract legal advice privilege. Employees who are not involved with counsel in this way must be treated as "third parties", and legal advice privilege does not attach to communications between them and the lawyers.

Astrazeneca had not revealed which employees were involved in the interviews of which notes had been taken. The judge held that unless it could be shown that the interviewees were authorised to instruct and receive advice from counsel, they were not "the client" for the purposes of claiming legal advice privilege.

Chief Master Marsh was not convinced by Astrazeneca's arguments that litigation was in reasonable contemplation at the time the employee interviews were conducted (which would have meant that the interview notes attracted litigation privilege, even if they did not attract legal advice privilege): "a party cannot simply self-certify that this part of the test is satisfied". Unless the position is obvious, some evidence must be provided. In this case, none had been. Astrazeneca was therefore ordered to produce a list of documents over which privilege was claimed, including the date on which the document was created, a statement as to whether legal advice privilege, litigation privilege or both was claimed in relation to each document, and further evidence about how any claim to litigation privilege arose and when it was said to have arisen.

Describing privileged documents in disclosure statements

The application stemmed from the manner in which Astrazeneca had presented its disclosure statement. Rather than itemising in any detail each document over which privilege was claimed, Astrazeneca simply set out broad categories of document and stated that it objected to Astex inspecting them because they were "by their nature privileged from production".

Chief Master Marsh ruled that "although it may have been conventional at one time to state that other documents are "by their nature privileged", such a statement has no place in modern litigation, let alone litigation of very real complexity." Instead, the party claiming privilege over a document must set out the factual basis of the grounds giving rise to the claim in sufficient detail to allow their opponent to make an assessment of whether the claim is justified.

COMMENT

This decision emphasises how important it is for lawyers conducting employee interviews to consider whether or not litigation is in reasonable contemplation. If it is not, the lawyers should be wary of the fact that the interview notes may not be privileged.

If the prospect of litigation has appeared over the horizon, this case serves as a reminder of the importance of creating a clear paper-trail which shows when this became true. The more easily a party is able to demonstrate that litigation was reasonably in prospect from a certain point in time, the easier it will be to claim privilege over communications after that date.

The judge indicated that the court must be cautious about applications challenging privilege, and emphasised that there must be a firm evidential basis to justify an order for further evidence in response to such a challenge. However, Astrazeneca's incorrect assertion of legal advice privilege combined with its failure to provide adequate details in support of its other assertions of privilege was sufficient to merit such an order.

The main trial in *Astex v Astrazeneca* is listed for May 2017.

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