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Litigation and Dispute Resolution

Review

EDITORIAL

The court's Michaelmas Term only started on 3 October 2016 but there are still a number of interesting decisions covered in this Review, including a ruling allowing the recovery of significant third party funding costs (including a 300% success fee) in arbitration, a Court of Appeal decision on whether an obligation to pay was a condition in a contract, a new test for how the court will assess whether a financial advisor has used reasonable care and skill when giving investment advice and a ruling on whether EU competition law covers an Asian supply chain that ended in Europe.

On 13 October 2016 the English High Court began hearing a legal challenge to the UK Government's position that it is free to serve notice of its intention to leave the EU (an Article 50 notice) without involvement of the UK Parliament. Not only is this one of the most important constitutional cases in decades, it may also have significant practical consequences for commercial parties given its potential to impact the timing of Brexit. We are reporting on how this case develops on Brexit Law.[1]

On the same day, the Criminal Finances Bill was presented to Parliament. It contains new powers and criminal offences aimed at money launderers, tax evaders, and those individuals and businesses that assist them (see **Crime**). Of particular note for businesses is a proposed new criminal offence that applies to companies or partnerships that fail to prevent an "associated person" (eg an employee, agent) from facilitating UK or foreign tax evasion. The Bill is the largest expansion of UK corporate criminal liability since the Bribery Act 2010. It requires firms and companies to have 'reasonable' prevention procedures in place in order to have a valid defence. Compliance policies will need to be reviewed and amended as the government expects 'rapid implementation'. The government guidance[2] makes clear that it will not be sufficient simply to make minor modifications to existing anti–bribery and anti–money laundering policies.

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[1] http://www.allenovery.com/Brexit-Law/Pages/Article-50.aspx

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560120/Tackling_tax_evasion_-Draft_government_guidance_for_the_corporate_offence_of_failure_to_prevent_the_criminal_facilitation_of_tax_evasion.pdf

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Antitrust

ASIAN SUPPLY CHAINS AND THE TERRITORIAL LIMITS OF EU COMPETITION LAW

iiyama (UK) Ltd & ors v Samsung Electronics Co Ltd & ors [2016] EWHC 1980 (Ch), 29 July 2016

A supply chain where goods, which were the subject of a cartel, were sold by the defendants in Asia and then indirectly resold to the claimants in the EEA did not amount to "implementation" of the cartel in the EEA and so fell outside the territorial scope of EU competition law. An alternative claim, that "but for" the EU cartel the claimants would have bought in the EU at non–cartelised prices instead of purchasing from Asia, was allowed to proceed but faced evidential hurdles. This latter argument potentially gives claimants a new avenue to try to bring worldwide cartel claims before the English courts

The claimants (**iiyama**) claimed damages for breaches of competition law by the defendants (various companies in the electronics industry) in the Liquid Crystal Display market (the **LCD Case**). The defendants' competition infringement in the EU has been the subject of a European Commission decision, on which iiyama relied in bringing their claim.

The defendants had sold LCD products in Asia, to Asian manufacturers, for use in their products. These products were sold to iiyama's parent company in Japan which onsold them to its European subsidiaries (ie the claimants). The claimants sought to argue that this Asian supply chain, ending in Europe, amounted to implementation of the cartel in Europe, thus making the claim subject to EU competition law and allowing iiyama to rely on the findings of infringement made by the European Commission. The defendants sought to challenge the jurisdiction of the English court or strike out the claim on the basis that the relevant sales fell outside the territorial scope of EU competition law.

Previous similar claim (relating to Cathode Ray Tubes) had not worked

In May 2016 iiyama's claim against a different group of cartelists was rejected by the English court on jurisdiction grounds.[1] The defendants had been found by the European Commission to be in cartels in the CRT and CRT Glass market (CRTs were common in television and monitor displays before the advent of flat screens) (the **CRT Case**). The CRT Case involved similar supply chains which started with the defendants in Asia and passed through several steps before reaching iiyama in the EU. The defendants to the CRT Case made jurisdiction challenges and strike–out applications on similar grounds to those raised by the defendants in the LCD Case.

Mann J held that iiyama's CRT claim fell outside the scope of the European Commission decisions and (even if the claim had not be pleaded as following–on from the Commission's decisions) fell outside the territorial scope of EU competition law.

This failure perhaps explains why iiyama ran an alternative "but for" argument in the LCD case (see below).

LCD Asian supply chain outside territorial scope of EU competition law

Morgan J held, consistently with the CRT Case judgment, that the LCD supply chains did not involve implementation of a cartel within the territorial scope of Article 101 TFEU[2] because the only implementation of the cartel by the defendants was the first sale of the LCDs by the defendants in Asia. iiyama needed to "…show that they suffered harm by reason of the implementation of the cartel in the EU…it is not enough for the Claimants to say that they are indirect purchasers downstream from the implementation of the cartel in

Asia...". While the defendants had implemented a cartel in Europe (as established by the European Commission), iiyama's indirect and Asian–focused contractual chain could not show loss arising from the European cartel.

Indirect causation argument not struck out

iiyama also argued that, if the cartel had not been implemented in Europe, iiyama could have bought LCDs and LCD products in the EEA at non–cartel prices. Instead, because of the European cartel, iiyama had to buy in Asia at allegedly inflated prices. Alternatively, iiyama argued that the cartel in the rest of the world would have collapsed without the EU cartel. Morgan J held that these claims were arguable and therefore not suitable for strike–out.

Morgan J did note that iiyama's "but for" case did not have much evidence to support it and the evidential basis would likely be closely scrutinised by the defendants. The defendants had also argued that, in any event, iiyama's claims were not sufficiently direct or proximate to be recoverable. Mann J held these points of law raised important questions of policy, which might require a reference to the CJEU (once the facts and iiyama's case on causation are clarified), and were therefore not suitable for summary disposal.

Subsidiaries of cartelists

The Court also considered whether certain defendants, which were not part of the cartel according to the European Commission's findings, but were subsidiaries of a cartelist, should have the claim against them struck out. The claimants argued that as a matter of law, because the subsidiaries delegated decisions on pricing to their parent companies, the parent companies' knowledge could be attributed to the subsidiaries as a matter of English law. Morgan J held that the proposition was at least arguable so declined to strike-out the claims against the subsidiaries.

COMMENT

Together with the CRT Case, Morgan J lays down an important marker concerning the territorial limits of EU competition law. Claimants looking to bring worldwide cartel claims in a single jurisdiction should take note that the English court will not readily take on the role of global policeman. Claimants may instead need to plead their foreign losses on the basis of the relevant foreign law (which iiyama had largely not done, likely due to limitation issues in the relevant Asian jurisdictions).

As for the "but for" counterfactual on which iiyama's claim survived, iiyama is likely to face an uphill battle to provide the evidence (that they would have bought in Europe but for the European cartel prices) and causation (that overcharges paid by iiyama in Asia were causally linked to the European cartel) that will be needed to support their claim.

iiyama has applied to the Court of Appeal for permission to appeal the CRT Case (as against the defendants who were addressee of the CRT Decision, but not as against the CRT Glass defendants) after Mann J refused to grant permission to appeal. We understand that both iiyama and the defendants intend to seek permission to appeal the LCD judgment in October.

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[1] *iiyama Benelux BV & ors v Schott AG & ors* [2016] EWHC 1207 (Ch).

[2] Per the "implementation" test established in the *Woodpulp* case and the "qualified effects" test in Gencor.

LIMITATION AND FOREIGN FOLLOW–ON ACTIONS

Deutsche Bahn AG & ors v MasterCard Incorporated & ors; [2016] CAT 13, 27 July 2016; *Peugeot Citroen Automobiles UK Ltd & ors v Pilkington Group Ltd & anr & Asahi Glass Co Ltd & ors* (Rule 39 Defendants) [2016] CAT 14

Two recent attempts to hedge limitation risk in follow–on claims by commencing proceedings in the UK High Court and the UK Competition Appeal Tribunal have failed. The Tribunal ruled that a claim, based on foreign law, brought before the Tribunal is subject to the same limitation rules applicable in court (based on the Foreign Limitation Periods Act 1984). The limitation regime contained in the Tribunal rules (which may be more favourable) does not oust applicable foreign law limitation rules under the Act.

Two recent cases have given rise to similar issues regarding limitation periods in follow–on claims involving foreign law (eg a claim for breach of Belgian competition rules). In both cases the claimants sought to take advantage of a potentially more favourable limitation regime in the Tribunal, than in the English High Court.

Limitation for foreign law claims in English court

A foreign law claim brought before the English courts is subject to foreign law rules on limitation, unless it is a matter where the foreign law and English law are required to be taken into account (with a saving for public policy).[1]

Special limitation provisions before the Tribunal

A special limitation regime applied to claims in the CAT prior to 1 October 2015, due to the fact that its jurisdiction was limited to follow on competition claims (claims based on a decision of the regulator). Instead of the standard court rules on jurisdiction, claimants were entitled to bring claims within two years of the relevant decision becoming final.

It was the potential difference between the limitation regimes in the High Court (based on the Foreign Limitation Period Act 1984) (**FLPA**) and in the Tribunal (under the 2003 Tribunal Rules) that the claimants in two recent cases sought to exploit. In each case the claims arose pre–1 October 2015 so the limitation regime before the Tribunal was as described above.

In both cases the claimants commenced proceedings in the Tribunal as well as the High Court (the former being a strategic hedge in case the foreign law limitation rules, applied in court, did not apply before the Tribunal). The key issue was whether the Tribunal limitation regime precluded the application of the FLPA by the Tribunal.

Deutsche Bahn v MasterCard

The Deutsche Bahn case is a "follow–on" action (ie a claim based on a finding of a regulator), based on a decision of the European Commission adopted on 19 December 2007 with a final appeal dismissed by the Court of Justice of the European Union on 11 September 2014.

The Commission found that the MasterCard payment organisation and the legal entities representing it (the **defendants**) infringed competition law by arrangements relating to the "Intra–EEA fall–back interchange fee". In effect, these arrangements were found to set a minimum price merchants had to pay their bank for accepting MasterCard or Maestro branded cards in certain circumstances. The claimants, comprising around 1000 entities from six large corporate groups, claim for losses suffered in 17 countries between 1992 and 2007.

In the High Court, MasterCard had a valuable limitation defence, based on foreign law limitation rules.

Tribunal proceedings were therefore commenced on a protective basis by the claimants, in case the applicable limitation rules before the Tribunal were more favourable.

Peugeot Citroen v Pilkington

The Pilkington case is another "follow–on" action based on a decision of the European Commission adopted on 12 November 2008 relating to a cartel operating in the automotive glass sector from 1998 to 2002. Pilkington's appeal to the General Court was dismissed on 17 December 2014, and no further appeals on the findings are pending.

The claimants commenced proceedings in the High Court on 4 November 2014, and then in the Tribunal on 18 December 2015. The claimants contended that the applicable law was English law, but the defendants contended that the governing law was French law for eight out of the nine claims and Swedish law for the final ninth claim. If the defendants were right about the governing law, there was therefore arguably a more favourable limitation regime for the claimants before the Tribunal because the French and Swedish limitation rules were stricter.

Tribunal limitation rules do not oust foreign limitation rules

In both cases the claimants argued that the 2003 Tribunal Rules provided a complete and comprehensive code, and that the FLPA did not apply. As a consequence of the 2003 Tribunal Rules (which permitted a claim to be brought within two years of the relevant decision becoming final), said the claimants, both the present proceedings were within time, irrespective of any foreign law rule.[2] In each case the relevant decision had become final within two years of the start of proceedings in the Tribunal.

The defendants, by contrast, argued that the position on limitation before the Tribunal should be no different from the position before the High Court. Even if the claimants were entitled to start their claims before the Tribunal by virtue of the 2003 Tribunal Rules, the foreign law rules on limitation were available as a defence to the action, and nothing in the Competition Act or the Tribunal Rules suggested otherwise.

The Tribunal agreed with the defendants. It found that the wording of the FLPA was not limited, and applied generally to proceedings in England and Wales. The limitation regime in the Tribunal Rules meant that the claimants were entitled to start their claims in the Tribunal (as they were within time for the purpose of the 2003 Tribunal Rules), but those Rules did not oust the limitation defence available to the defendants, based on the general applicability of the FLPA. The words of the Competition Act and the Tribunal Rules were not enough to create a complete code that ruled out the application of the FLPA.

One interesting point that was clarified by the Tribunal, is that the effect of its decision is that a "stand–alone" claim brought after 1 October 2015, but which arose before 1 October 2015, may be in time by reason of the foreign limitation period, where it would not otherwise be in time under the Tribunal Rules. The Tribunal also noted that a claim for collective proceedings, if governed by foreign law, could be in time in circumstances where it would be otherwise barred under the Tribunal Rules. The Tribunal noted that this disparity was inherent in the fact that rules on limitation are different in different legal systems, but it means that the Tribunal's jurisdiction is "wider" for certain foreign law claims than it would be for domestic law claims.

COMMENT

The decision is important as it clarifies that foreign law limitation defences apply to foreign law competition claims brought in the Tribunal, as before the High Court. The availability of this defence may favour defendants, but it is also potentially advantageous to claimants, depending on the terms of the relevant foreign law. For example, the current statutory limitation period for a damages claim based on the Swedish Act on Competition 2008 is ten years from the time the damage was caused.

The potential applicability of foreign law limitation periods to collective actions will also be of interest to claimants and defendants, although it remains to be seen how frequently this point will arise in practice. For "opt-out" collective proceedings, class members are restricted to UK domiciled persons, so the number of potential foreign law claims in that form of collective proceedings may be limited.

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[1] Section 1 of the Foreign Limitation Period Act 1984 (**FLPA**), Equivalent provision is made in Scotland by the Prescription and Limitation (Scotland) Act 1984, and in Northern Ireland.

[2] This does not consider the period prior to 20 June 1997. This falls under a different rule, which is not considered in this judgment.

Arbitration

COSTS OF THIRD–PARTY FUNDING AWARDED IN ARBITRATION

Essar Oilfields Services Ltd v Norscot Management Pvt Ltd [2016] EWHC 2361 (Comm), 15 September 2016

The Commercial Court has stated that it is within an arbitral tribunal's discretion to award to a claimant its costs of third–party funding, including the uplift payable by the claimant in the event of success. This decision is notable because these costs would generally not be recoverable in English court litigation. Moreover, the Court's reasoning would arguably allow an arbitral tribunal to include other sums within an award of costs, including success fees under damages–based agreements and after–the–event insurance premiums.

Arbitrator includes third party funder's success fee when awarding costs to successful claimant

Norscot Rig Management Pvt Ltd (**Norscot**) brought arbitral proceedings in England against Essar Oilfields Services Ltd (**Essar**) for breach of an operations management agreement, under the ICC Rules.

Norscot secured third–party funding of GBP 647,000 in order to bring the arbitration, which entitled the third-party funder to a fee in the event of Norscot's success (the **Success Fee**). The Success Fee was 300% of the funds advanced by the funder or 35% of the damages recovered.

The sole arbitrator found Essar liable in damages to Norscot. It is relevant to the arbitrator's decision on costs that he found that Essar had sought to cripple Norscot financially; that Norscot could not have pursued its claim without third–party funding; and that the funding obtained by Norscot was on standard commercial terms for litigation finance.

The arbitrator also made an award of costs in Norscot's favour. One part of the costs order was a sum of GBP 1.94 million which Norscot owed to its funder. This included the Success Fee.

Section 59 of the Arbitration Act 1996 (the **Act**) defines the categories of costs that an arbitral tribunal seated in England may award. They are: (a) the arbitrators' fees and expenses; (b) the fees and expenses of any arbitral institution; and (c) "the legal and other costs of the parties". The ICC Rules refer similarly to "the reasonable legal and other costs incurred by the parties for the arbitration".

The arbitrator determined that s59 and the ICC Rules gave him a wide discretion as to the "other costs" he could award, and that the cost of litigation funding fell within the ambit of such "other costs". In deciding his exercise of his discretion, the arbitrator took into account his criticisms of Essar's conduct.

Costs award challenged in Commercial Court

Essar challenged the costs award under s68 of the Act. S68 allows a party to challenge an award on the basis that a serious irregularity (of one of the types specified in s68(2)) has occurred which has caused substantial injustice to that party. Essar asserted that the arbitrator had allegedly exceeded his powers by awarding costs which he had no jurisdiction to award (s68(2)(b)).

HHJ Waksman QC rejected the challenge, finding that the arbitrator did not exceed his powers. Consequently, there could be no serious irregularity to justify annulling the award under s68. The judge seems to have held that, since the arbitrator had a power under the Act and the ICC Rules to award costs, it followed that the arbitrator did not exceed his powers because an award of costs is what he made. This is consistent with previous authorities (especially the decision of the House of Lords in *Lesotho v Impregilo* [2006] 1 AC 221): even if an arbitral tribunal's award is erroneous, this does not mean that it has exceeded its powers. Essar's challenge therefore failed for this reason alone.

What type of costs can be claimed?

The real interest in the judgment is found in the judge's subsequent comments (which are obiter) on the meaning of "legal and other costs". The judge effectively endorsed the arbitrator's broad reading of this phrase: "the real limiting factor … is the functional one. Do the costs relate to the arbitration and are they for the purposes of it?". The judge seemed to have reasoned that, since Norscot had incurred borrowing costs in order to pursue the arbitration (including, contingently, the Success Fee), they fell within the category of "other costs". The judge noted that no arbitral tribunal would be required automatically to make an award of such costs. Instead, it would fall within the tribunal's broad discretion under the Act.

Two matters fortified the judge's conclusion. The first was statements in a 2015 report by the ICC Commission on *Decisions on Costs in International Arbitration* which suggested that success fees payable to a third party funder ought in principle to be recoverable in costs awards (It appears that the court was not made aware of a draft report by a committee of academics at Queen Mary University of London, practitioners and litigation funders earlier this year which reached the opposite view.) The second was the particular circumstances of this case. The judge felt that it would be unjust for Norscot to have to bear the Success Fee when Essar's conduct had compelled it to obtain third party funding.

The judge went on to consider other aspects of the challenge which are not covered here.

COMMENT

Potentially, the consequences of this decision could be quite far–reaching. If the recoverable costs in an arbitration include any costs that have been incurred by reason of participating in the arbitration, other categories of costs are arguably recoverable too. These could include a success fee under a damages–based agreement (**DBA**) payable by a claimant to its law firm, an after-the–event (**ATE**) insurance premium or an uplift in a conditional fee arrangement (**CFA**). As a result, the costs liability of an unsuccessful party could vary substantially, depending on whether the successful party self–funded its claim or assigned some of the risk to a litigation funder or to its counsel by way of a DBA. The unsuccessful party may not be aware that the successful party has any of these arrangements in place until a statement of costs is submitted.

Even in an ordinary case without any of these features, on the reasoning of this case it would be within an arbitral tribunal's discretion to award a successful party its cost of funding the proceedings, by reference to its cost of capital. That would introduce a good deal of complexity into costs claims. It seems unlikely that most arbitral tribunals are ready or willing to deal with that.

The decision does not mean that an arbitral tribunal will always make an award of costs covering any of the broad categories referred to above. For the arbitral

tribunal, the allocation of costs is a matter of discretion. It was evidently relevant to both the arbitrator and the judge that Norscot was compelled by Essar's conduct to fund its claim by borrowing from a litigation funder. Arbitral tribunals in future might well regard this case as a decision based on its particular facts, and decide to exercise their discretion differently. Nevertheless, as a matter of principle there would be nothing to stop an arbitral tribunal from awarding to a party, as "other costs", the success fee that it owes to a third–party funder, even when that funding was not necessary to pursue the claim. There is scope for debate as to whether it is right that this risk should fall on the unsuccessful party.

This decision goes against the prevailing trend in the English courts: ATE insurance premiums and CFA uplifts have not been recoverable since the Jackson reforms were implemented in 2013 (subject to certain limited exceptions). In the same way, in English civil litigation the cost of funding a claim (ie in this case, the Success Fee) is generally not recoverable. This decision suggests, therefore, that the categories of recoverable costs are potentially broader in arbitration than litigation. There is no obvious policy reason why this should be the case, but it seems to make third–party funding more attractive in arbitration than English civil litigation.

As a practical matter, it is worth considering whether to seek disclosure of the other party's funding arrangements if it is suspected to be in receipt of third-party funding, through an order from the tribunal if necessary. Conversely, there may be some tactical advantage to a party disclosing that it is in receipt of third–party funding, since the threat to the other party of an adverse costs order including the cost of that funding may provide some leverage in settlement discussions.

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Contract

WHEN IS PROMPT PAYMENT IN A CONTRACT A CONDITION?

Grand China Logistics Holding (Group) Co v Spar Shipping AS [2016] EWCA Civ 982, 7 October 2016

The Court of Appeal has recently looked at when prompt payment is a condition of a contract in the context of shipping law and charterparties. It had to consider competing High Court authority on the question of whether a charterer's failure to pay instalments under a time charterparty is a breach of a condition. Lord Justice Gross noted that the question had "long generated conflicting observations from Judges of the highest standing."

At first instance, Mr Justice Popplewell held that the answer was "no". However, Flaux J had previously held, in *The Astra*,[1] that the answer was "yes".

Grand China Shipping had built up substantial arrears under a charterparty. In response, Spar had brought an arbitral claim against it seeking the balance of the hire due, and damages for loss of bargain in respect of the remaining term of the charter. Grand China then went into insolvency, and Spar claimed against Grand China Logistics as guarantor.

If punctual payment was a condition, Spar was entitled to terminate the contract and, crucially, claim for loss of bargain for the remainder of the charterparty.

In favour of treating prompt payment as a condition, Flaux J had noted in The Astra that this promoted certainty (which was particularly important in falling markets) and that time was typically of the essence in commercial contracts. However, in *Grand China Logistics*, there was no clear language suggesting any remedy was available apart from damages. Grossman LJ agreed with Popplewell J that "where … breaches of a term may have consequences ranging from the trivial to the serious, that is a strong indication that it is to be treated as an innominate term" (and so not a condition which would give rise to a right to claim for loss of bargain).

Further, Spar's argument could result in termination where a payment had been only a few minutes late - clear contractual language would be needed to support such a result. A mere right to terminate for breach of an obligation was not enough to make that obligation a condition in terms of the available remedies following breach (here, the right to claim for loss of bargain). Commercial certainty had to make way for business common sense and late payments must be judged according to contractual terms and the significance of the breach.

If you want a term to be a condition (and everything that entails) you need to spell that out.

This article first appeared on http://www.aocompactcontract.com/, an Allen & Overy blog which covers topical issues in contract law.

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[1] [2013] EWHC 865 (Comm).

Crime

FURTHER EXPANSION OF CORPORATE CRIMINAL LIABILITY

With the publication of the draft Criminal Finances Bill 2016–2017 on 13 October 2016, businesses have been put on notice of what stands to be the largest expansion of UK corporate criminal liability since the Bribery Act 2010. In case that were not enough for practitioners to digest, the Bill also proposes one of the most significant overhauls of money laundering and proceeds of crime legislation in the last decade.

What is in the Criminal Finances Bill?

The Bill contains: (i) new criminal offences relating to corporate failure to prevent the facilitation of tax evasion; (ii) changes to the Suspicious Activity Report (**SAR**) regime; (iii) enhanced proceeds of crime powers; (iv) new disclosure powers to combat money laundering; and (v) the Unexplained Wealth Orders regime.

Corporate facilitation of tax evasion

We examined the proposed corporate criminal tax evasion offence at the time of the Government's first and second consultations. The Bill incorporates the two "failure to prevent facilitation" offences suggested in the second consultation paper – one for domestic tax evasion and one for evading foreign taxes. There is no sign, yet, of the broader "failure to prevent economic crime" offence.

A company is guilty of a criminal offence if an associated person commits a UK or foreign tax evasion facilitation offence (a **TEFO**) while acting in their capacity as an associated person of the company.

What behaviour constitutes 'acting in the capacity' of an associated person has been the source of much discussion. Helpfully, draft Government Guidance has also been published to accompany the Bill. This gives the example of an employee helping their spouse evade tax. While a TEFO would have been committed by the employee, the conduct is a "frolic of their own" and not performed in their capacity of a person associated with the employer. Accordingly, the employer would not be liable for the corporate offence.

The guidance also focuses on a corporate's defence to the new crime. A company is not guilty if it had "such prevention procedures as it was reasonable in all the circumstances to expect [it] to have in place" – or – it was not reasonable to expect the firm to have such procedures in place. The wording thus differs slightly to the Bribery Act's s7 defence that a corporate "had in place adequate procedures designed to prevent" associated persons from bribing. However – it seems unlikely that there is much practical difference between the two. The Explanatory Notes to the Bill state that prevention procedures are not required to be "fool–proof" or "excessively burdensome". The latter remark may be a matter of perspective: those who remember the implementation of the Bribery Act will be in little doubt that ensuring "reasonable" procedures to prevent tax evasion across a global business will be no small task.

Inevitably, the complexity of this new offence raises the question of how often it will be prosecuted. However, it is worth noting that HMRC has well developed civil settlement tools to encourage individuals to disclose tax evasion (ie Code of Practice 9 and Contractual Disclosure Facilities). Accordingly, prosecuting authorities and regulators may find it easier to gather evidence than in Bribery Act cases (where similar options do not exist for individuals).

Suspicious Activity Reports – Information sharing

The Bill allows for information sharing between POCA regulated firms where there is a suspicion of money laundering; either of the firms' own initiative or at the request of the National Crime Agency (**NCA**). The Bill sets out the requirements for such an information sharing

request (including that the NCA grants permission) and provides for a joint report to be submitted following information sharing that would fulfil both firms' reporting obligations. Firms who share information under these provisions are also protected from civil liability for breach of any confidentiality obligations.

While well intended, and requested by some firms, one wonders what appetite there will be for firms to share or request such information from each other. The power could be very useful where firms' interests align. On the other hand, the decision to submit a SAR is often finely balanced; MLROs may not always agree and one firm may feel it is obliged to submit a SAR if the other is intending to.

Suspicious Activity Reports – Moratorium period

A firm must request approval from the NCA to engage in activity relating to property it suspects as being the proceeds of crime. Currently the NCA may refuse its consent. If this occurs, the refusal has the effect of stopping the activity occurring for up to 31 days – the so–called 'moratorium period'. The Bill provides for the moratorium period to be extended for additional 31 day periods – up to a maximum of 186 days (ie six months).

A potential six–fold increase in the moratorium period may raise concerns in time critical transactions. However, as long as refusal of consent by the NCA remains the exception rather than the norm, firms may consider it the lesser of two evils. There had been talk of an end to the consent–based system, however, the Government's consultation response, published alongside the Bill, states "the Government does not intend to remove the consent regime at this time".

What next?

Given the current political climate, it is hard to see the Criminal Finances Bill not making it onto the statute books in one form or another. The obvious question for businesses given the Bill's potentially significant impact is when it will become law.

This is difficult to answer with certainty: the Bill is at a very early stage and Parliament may be focused on other issues in the coming months. However, in 2018 the UK's anti money laundering regime is due to be reviewed by the global Financial Action Task Force. With the Criminal Finances Bill forming a key plank of the Government's Anti–Money Laundering Action Plan, it seems probable there will be a drive to have the legislation in place (if not in effect) before the review. In the meantime, we will monitor its progress and look out for any substantial amendments to the Bill.

This article first appeared on http://www.aoinvestigationsinsight.com/. Further articles will cover other aspects of the Bill, including the new "Unexpected Wealth Order" and disclosure orders.

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Data Protection

DATA SUBJECT ACCESS REQUEST CANNOT BE USED TO CIRCUMVENT CPR DISCLOSURE REGIME

Dr DB v The General Medical Council [2016] EWHC 2331(QB), 23 September 2016

Where a data subject access request (**DSAR**) is made relating to "mixed data" (ie data within a document containing the data of individuals other than the data subject) there must be a careful balancing exercise between the respective privacy rights of the data subjects. In the absence of consent, the rebuttable presumption is against disclosure of information relating to third parties, and an express refusal of consent is a specific factor to be taken in to account. If it appears that the sole or dominant purpose of the DSAR is to obtain a document for the purposes of a claim against the other data subject, that is a weighty factor in favour of refusal, on the basis that the more appropriate forum is the Court procedure under CPR 31.

An individual (the **Data Subject**) can make a DSAR to access personal data held about them, under the Data Protection Act 1998 (the **DPA**). This case concerned a request by a person seeking data contained in a report that included mixed data, ie both his own and a third party's data. The underlying rationale was to obtain evidence for a claim against the third party. Although in the field of medical professional negligence, the principles apply more broadly.

P (the **patient**) made a DSAR in relation to an independent expert report commissioned by the General Medical Council (the **GMC**) to investigate a complaint made by P against his doctor (**DB**). In accordance with its established practice, upon deciding not to take the complaint against DB further, the GMC had provided P with a summary of the report rather than the full document. P's DSAR sought the full report. DB refused consent to that request, but the GMC accepted the DSAR and determined that the full report should be disclosed.

DB sought to challenge the GMC's decision to provide the full report, arguing that the GMC's decision to do so was unlawful. In allowing DB's claim, and overturning the GMC's decision, two key factors in Soole J's judgment were an individual's fundamental right to privacy and the purpose of P's request.

Mixed data requires a balancing exercise

The report contained the personal data of both P and DB. The DPA expressly provides for cases of mixed data, qualifying the right of a data subject to access his personal data where compliance with the request will involve disclosure of information relating to another individual. S7(4) requires that the data controller undertake a balancing exercise and states that he is not obliged to comply with the DSAR unless "(a) the other individual has consented to the disclosure…; or (b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual".

It was common ground that the court's review of GMC's decision to disclose the report was to be more intensive than the traditional *Wednesbury* test thus, while it was "not for the court to substitute its own view for that of the data controller, the latter's decision involves an interference with fundamental rights (including data protection and privacy) and is to be subject to "anxious scrutiny".

Express refusal means rebuttable presumption against disclosure

It was relevant that DB had expressly refused his consent to disclosure, a factor that the DPA expressly requires be taken in to account in the balancing exercise

(s7(6)(d)) and that case law holds gives rise to a rebuttable presumption against disclosure.[1] In the absence of consent, the GMC should have started with a presumption against disclosure.

The right to privacy must be part of the balancing act

It was common ground that: (a) the personal data of both P (his medical condition) and DB (his professional competence and reputation) constituted private information; and (b) the right to privacy under both the common law and Article 8 of the European Convention on Human Rights (the right to respect for private and family life) must be taken into account in the balancing exercise.

Soole J found that, despite acknowledging it, the GMC gave no real weight to DB's privacy right, focusing instead on P's rights and the GMC's interest in ensuring fairness and transparency in its procedures. Soole J rejected P's contention that DB must have had a "reasonable expectation" that the report would be supplied if a request were made, finding instead that DB's reasonable expectation was that if a request were made the GMC would carry out a lawful balancing exercise, which would include taking into account the fact that the report contained mixed private information. That reasonable expectation was fortified by the GMC's established practice, when a complaint is not to be taken further, of only providing a complainant with a summary of a report. Soole J also noted that had the GMC's interest in ensuring transparency in its procedures required provision of a full report in these circumstances, its practice would no doubt have reflected that.

P's purpose in making DSAR was for use in litigation

The court held that the GMC had reasonably inferred from the coincidence in timing between the DSAR and a letter before action sent to DB, that the purpose of P's request was to use the report and its information in the litigation he intended to bring against DB. This gave rise to two primary concerns:

- First, the information was not being sought for the purposes envisaged by EU Directive 95/46/EC. The DPA gives effect to that Directive, the primary objective of which is to protect individuals' fundamental rights, including the right to privacy and accuracy of personal data held by others (*Durant*).
- Secondly, providing the document to P pursuant to a DSAR would deprive DB of the protections that the Civil Procedure Rules would otherwise provide in the context of civil litigation, in particular the restriction on the use of the document (CPR 31.22).

In light of those concerns, a "weighty factor" in the balancing exercise (in favour of refusal) should have been that the sole or dominant purpose for requesting the document appeared to be its intended use in litigation.

The GMC's decision did not adequately balance these factors so its decision to disclose the full report was therefore unlawful.

Balancing exercise in mixed data cases

While Soole J was reluctant to devise any principles of general application, and stressed that each application must be considered on its merits, he did note that in conducting the balancing exercise in mixed data cases:

- it is essential to keep in mind that the exercise involves a balance between the respective privacy rights of data subjects;
- in the absence of consent, the rebuttable presumption is against disclosure, and the express refusal of consent is a specific factor to be taken in to account; and
- if it appears that the sole or dominant purpose of the DSAR is to obtain a document for the purposes of a claim against the other data subject, that is a weighty factor in favour of refusal, on the basis that the more appropriate forum is the Court procedure under CPR 31.

COMMENT

The DPA allows DSARs for the purposes of protecting privacy and ensuring the accuracy of personal data. This case highlights the importance a data controller must place upon adhering to those objectives, and the need to carefully balance the rights of a requestor against any other individual whose personal data appears in the

document. It also serves as a warning to any party seeking to use a DSAR as a back door to obtaining documents for the purposes of litigation; while the DPA is "purpose blind", the Courts will not allow it to be used where doing so could circumvent the disclosure regime mandated by the Civil Procedure Rules and render redundant the protections those rules provide. It has long been the position of the Information Commissioner's Office (**ICO**), notwithstanding a line of previous case law, including *Durant*, *Eszias*[2] and *Edem*[3], that it will not look at the motivation behind a DSAR when considering complaints by data subjects. It remains unlikely that this case will cause the ICO to adopt a different approach, but it is increasingly becoming a more difficult position for the ICO to defend.

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1 *Durant v FSA* [2003] EWCA Civ 1747.
2 *Ezsias v Welsh Ministers* [2007] All ER (D) 65.
3 *Edem v IC & Financial Services Authority [2014] EWCA Civ 92.*

Injunctions

ASSESSMENT OF DAMAGES UNDER A CROSS–UNDERTAKING

Fiona Trust & Holding Corporation v Yuri Privalov & ors [2016] EWHC 2163 (Comm), 5 September 2016

The enforcement of a cross–undertaking in damages, provided by a claimant in order to obtain a freezing injunction against a defendant, can mean a substantial liability for a claimant. This ruling illustrates that damages under a cross–undertaking are assessed on a broadly contractual basis but with added flexibility. The court will apply a liberal assessment of damages, meaning that it recognises the difficulty of establishing loss caused by injunctions and will not over–scrutinise a defendant's evidence. Potential losses made as a result of not being able to make a risky investment can be claimed if the defendant can establish there was a real chance of making a profit. However, the court will make a deduction from the estimated profit to reflect the risk. When assessing damages over periods of market turmoil, evidence as to the timing of proposed investments is critical. The decision is useful both for claimants in terms of evaluating size of exposure under a cross–undertaking, and any defendant seeking to recover under such an undertaking.

In August 2005, the claimants sued the defendants for bribery, corruption and diversion of assets, claiming in excess of USD 577 million. During the litigation, the claimants obtained two English court worldwide freezing injunctions: in 2005 over USD 225 million and in 2007 over an additional USD 377 million. The injunctions prevented, inter alia, certain trading activities unless the defendants first made an application to court.

At trial, the claimants succeeded but only to a very limited extent – the value of the frozen assets far outweighed what the claimants were awarded. As a result the defendants applied to enforce the cross–undertakings in damages which the claimants had been required to provide as a condition of the freezing injunctions being granted.

Defendants' questionable character did not preclude enforcement of undertaking

In previous hearings, Andrew Smith J had been critical about the honesty and credibility of both sides to the dispute. Males J however found that the defendants had not sought to mislead the court and approved Smith J's decision to permit enforcement of the cross–undertaking, noting that "even serious and well–founded criticisms of a defendant's character do not mean that claimants can be less scrupulous in complying with their duties when applying for a freezing order. Nor do they provide a reason not to enforce an undertaking". [1]

Did the defendants really miss out on making money or were they making it up?

The defendants gave evidence that, but for the freezing injunctions, they would have used the funds for the purchase and resale of some ships (the **newbuilding project**), and that remaining funds would have been invested. The claimants responded that these claims were a "dishonest fiction invented with hindsight to produce the maximum possible claim, which bears no relationship to what would actually have happened in the absence of the freezing orders".

While unable to provide evidence or documents relating to a specific planned purchase, the defendants relied on the following; (i) this was their primary business activity, (ii) a recently concluded similar transaction which had been very profitable and (iii) a hypothetical strategy. In relation to the assets subject to the freezing order, to the extent the funds were not also needed for the newbuilding project contemplated above (the **invested funds**), the defendants argued that they would have pursued a "moderate" as opposed to low–risk investment strategy. In total the defendants claimed USD 387 million in losses.

Absolute proof of loss not required – court adopts a liberal assessment

Males J confirmed that the contractual basis for assessing damages should be used, although applied with some flexibility.[2] While the burden of proof rests with the defendant to demonstrate the loss suffered, the fact that the defendants could not prove that they would have purchased any particular ship, or would have made a specific profit, was not fatal to their case. The concept of "liberal assessment" applies (see *Les Laboratoires Servier v Apotex Inc* [2008] EWHC 2347 (Ch)). This means that the defendant is not treated generously, in the sense of being awarded damages it has not suffered, but the court must recognise that the assessment of damages suffered as a result of a freezing order (or other type of interim injunction) will often be inherently imprecise. Overeager scrutiny and criticism of the defendant's evidence as to how they would have used the funds is not appropriate. Although Males J added that this in no way absolves the defendant from having to prove damages.

Damages can be awarded if there was a real chance for profit, even if loss also a possibility

The claimants argued that damages cannot be awarded if the defendant would have used the funds in a way which might have resulted in a loss,[3] and the purchase and resale of ships is an inherently risky business. However Males J held that the correct test was whether or not there was a real or substantial chance of making a profit. If so, the court will make the best assessment of damages that it can, applying a discount if necessary to reflect whatever uncertainty exists. Where several uncertainties are involved, the appropriate assessment is to look at the "overall chance" of the defendants making the profits in question.[4]

Applying this test, Males J found that there was a real chance the defendants would both have invested in the newbuilding project and made a profit. However, he applied a 50% discount to the estimated profit figure to reflect the uncertainty and risk.

Evidence of timing is critical when calculating damages over periods of market turmoil

The freezing orders spanned the financial crisis and a considerable crash in the shipping market. Consequently, the timing of the defendants' proposed investments was critical. Males J accepted the suggested timeline for the newbuilding project, but rejected that the invested funds would have been invested in a way that avoided the impact of the financial crisis. As a result the judge found that the defendants suffered no losses in respect of the invested funds.

COMMENT

In the absence of the freezing injunction, the claimants could have walked away with over USD 16 million in damages. Instead they are faced with paying having to pay out at least the same under the cross–undertaking. While freezing orders are undoubtedly powerful tools, this case highlights the very real risk claimants open themselves to on the cross–undertaking, particularly when a defendant's trading activities are affected. In principle, a defendant may be entitled to recover (a) general damages for loss of business, the adverse effects caused by the inappropriate policing of the injunction, upset, stress and loss of reputation; (b) special damages, eg special damages for loss of future trade (especially where the claimant is made aware of the potential for this type of loss); and (c) aggravated damages, if a claimant deliberately conceals matters from the court at the original injunction hearing.

There are clearly tactical decisions to be made on both sides. A claimant will need to consider how much to freeze, and what type of transactions may still be allowed. A balance needs to be struck between protecting its position whilst at the same time not giving disproportionate exposure under the cross–undertaking. A defendant will need to consider putting the claimant on notice of the type of loss it could suffer as a result of its assets being frozen.

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[1] Para [143]

[2] Following *Hone v Abbey Forwarding Ltd* [2014] EWCA Civ 711).

[3] Relying on *The Anselma de Larrinaga* (1913) 29 TLR 587, *E. Bailey & Co Ltd v Balholm Securities Ltd* [1973] 2 Lloyd's Rep 404 and *Alta v American Express Bank Ltd* (Court of Appeal, 17 June 1988).

[4] By reference to *Tom Hoskins Plc v EMW Law* [2010] EWHC 479 (Ch) at [133] to [135].

Procedure

FOREIGN REQUEST FOR LEGAL ASSISTANCE DISCLOSABLE

Blue Holdings (1) Pte Ltd & anr v National Crime Agency [2016] EWCA Civ 760, 19 July 2016

The appellant companies successfully sought inspection of a mutual legal assistance request from the U.S. Department of Justice to the National Crime Agency (NCA) to obtain a prohibition order from an English court on the basis that reference to that request was made in a witness statement. In ordering a redacted version of the request to be produced, the Court of Appeal decision sought to balance the right to inspect a document in proceedings and an enforcement authority's claim to confidentiality of their investigation.

A foreign authority may request UK assistance in securing proceedings of crime. Under the Proceeds of Crime Act 2002 and Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 an enforcement authority (eg the National Crime Agency (**NCA**)) may obtain a prohibition order in relation to property in England and Wales, which is the subject of an external request. The High Court may make such an order if it is satisfied that it is "relevant property identified in an external request".

DOJ asks NCA for help in securing assets

The NCA applied to the English court at the request of the US Department of Justice (**DOJ**) to obtain a prohibition order against the appellants (the **Request**). The NCA sought to preserve assets valued at over GBP 100 million which the DOJ claimed had been

misappropriated by General Sani Abacha, the former president of Nigeria, and his associates, pending conclusion of asset forfeiture proceedings in the United States. The order extended to assets owned by the appellant companies in England and Wales.

This Request was referred to in a witness statement filed in support of the application for the prohibition order. The appellants sought inspection of the Request pursuant to CPR 31.14 on the basis that it had been "mentioned" in a witness statement as they wished to ascertain whether the property identified in the NCA's application for a prohibition order was indeed "relevant property identified in an external request".

The application was dismissed at first instance as the court held that the Request was a confidential communication between foreign states and inspection was not necessary for the fair disposal of the NCA's application. The appellants appealed.

Inspection of redacted Request allowed

The Court of Appeal allowed the appeal in part, ordering disclosure and inspection of a redacted version of the Request so far as necessary to show the property identified, as:

- The Request had been "mentioned" in the witness statement. The witness statement made a number of direct illusions to the Request. One of the passages from the witness statement in question read: "The relevant property which is identified in the external request from the DOJ, and to which this application for a prohibition concerns…".
- The right of a party to inspect a document mentioned in a witness statement is not absolute. It is subject to "CPR rules based limits", such as proportionality and the court retains the discretion to refuse inspection of that document. The confidentiality of the document is a relevant factor for the court to take into account. The Court of Appeal further noted by way of example that the mere mention of a privileged document in, for example, a statement of case may not of itself lead to a loss of the privilege.
- Another relevant factor was whether disclosure of the Request was necessary for the fair disposal of the application. The Court of Appeal held that the first instance judge was incorrect to conclude that there was a free–standing "necessity" test before inspection is permitted; necessity is one of the many relevant factors.

The Court of Appeal noted that the competing balancing factors in this instance were the appellants' right to inspect the Request and the legitimate interest in the Request's confidentiality. Accordingly, the Court sought to strike a balance by ordering disclosure of a redacted version of the Request so far as it showed the property identified.

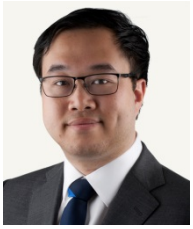
Here, the Court noted that the existence of the Request was revealed by the commencement of proceedings and there could be no confidentiality as concerns the property identified in the Request (as opposed to details of the investigation).

The Court provided the DOJ with an opportunity to choose between giving disclosure of a redacted version of the Request or abandoning the Request altogether.

COMMENT

Parties to litigation should continue to be wary of the risk of losing confidentiality when making reference to confidential documents in statements of case or witness statements. Whilst there is no automatic right to disclosure of such documents, the onus will be on the party resisting disclosure to show why the general rule in favour of disclosure should not apply.

Even in the context of private state to state communications, the court was willing to order disclosure, albeit in a redacted form. This would have assisted the respondent party to determine whether the property identified in the NCA's application matched the property identified in the Request.



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Tort

ABANDONING BOLAM: A NEW STANDARD FOR ADVISING ON INVESTMENT RISK

O'Hare & ors v Coutts & Co [2016] EWHC 2224 (QB), 9 September 2016

There has been a change in how the court will assess whether a financial advisor has used reasonable care and skill when giving investment advice. Following Supreme Court case law in the medical negligence field, Kerr J declined to rely on the traditional *Bolam* test (ie the standard of a reasonably competent practitioner in the same field) and favoured an approach based instead on the advisor's duty to explain risk to a client.

Mr and Mrs O'Hare (the **claimants**) alleged that their private bank, Coutts (the **Bank**), breached its duty to exercise reasonable skill and care in advising them on five investments they made between 2007 and 2010, causing them to suffer loss of GBP 3.3 million, plus interest.

The claimants were high net worth individuals who commenced a private banking relationship with the Bank in 2001. Acting on advice from the Bank, the claimants had invested in five structured products between 2007 and 2010. Understandably, the risk profile of the claimants had changed over that time, and the key issue in the case was whether the investments recommended to them had been suitable in their circumstances, with particular regard to their risk appetite and their overall investment goals, or whether the Bank's salesmanship had led them to become overexposed to risk.

Nature of the Bank's contractual duty to "develop an investment strategy"

The contractual duty of the Bank in this case was set out in the "Agreement to Provide Investment Advice", pursuant to which the Bank was obliged to "work with" the claimants "to understand [their] circumstances, objectives and requirements to enable us to develop an investment strategy for [them]", and to "provide [the claimants] with our advice and recommendations in writing at such time or times as we consider appropriate or as agreed between us".

The court rejected the claimants' contention that this contractual duty imported an obligation on the part of the Bank to produce a "holistic and coherent plan" for the whole of the claimants' wealth: rather, it was simply an obligation to liaise with the claimants, recommend products as and when agreed or appropriate, and implement the claimants' chosen strategy.

Standard of care when assessing the adequacy of an investment advisor's disclosure of risk

The court then turned to the question of whether the Bank had breached its duty, imposed in tort and contract, to use reasonable skill and care in recommending the five investments.

Traditionally, the test derived from *Bolam v Friern Barnet Hospital Management Committee* [1957] 1 WLR 582 has been applied in resolving that question. The adequacy of the advice is to be judged by testing "whether the defendants, in acting in the way they did, were acting in accordance with a practice of competent respected professional opinion". In effect, this means that the relevant standard is that of a reasonably competent practitioner in the relevant sector of the profession (here, private banking).

However, in a medical context, the *Bolam* test has recently been held by the Supreme Court not to govern the standard of care expected on the part of a medical professional explaining risks to a person to whom advice is given (as opposed to the standard required in carrying out any medical treatment). In *Montgomery v*

Lanarkshire Health Board [2015] AC 1430, the duty imposed on a medical professional explaining risk was instead "to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments". The materiality of a risk is to be assessed based on "whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should be aware that the particular patient would be likely to attach significance to it".

Justice Kerr extended the application of the *Montgomery* test to define the standard of care to be applied in the explanation of risk as part of the provision of investment advice. In doing so, he noted that the expert evidence demonstrated that there was "little consensus in the financial services industry about how the treatment of risk appetite should be managed by an advisor", and the "extent of required communication with the client should not depend on the attitude of the individual advisor". The regulatory regime was "strong evidence" of what the common law required on the part of an investment advisor, as a duty to explain (analogous to *Montgomery*) was already found in the relevant Conduct of Business rules. The content of these regulatory rules, in effect imposing an objective duty to explain on advisors, was "very difficult to square" with a conventional *Bolam* approach to the explanation of risk, which would set the standard solely based on a responsible body of opinion within the profession.

In the circumstances of this case, the court found that the discussions between the claimants and the Bank were "very full", and could not accept that there had been any lack of adequate communication and explanation. The issue therefore turned on whether the investments were objectively suitable, rather than any failure to inform the claimants about the risk of the products.

Can an investment advisor properly influence the client's risk appetite?

A key issue in the case was whether the relevant Bank employee, Mr Shone, had led and persuaded the claimants to take higher risk investments than was consistent with their unconditioned risk appetite, or, whether the claimants had, showing experience and sophistication as investors, sought high risk investments.

Justice Kerr held that there was "nothing intrinsically wrong with a private banker using persuasive techniques to induce a client to take risks the client would not take but for the banker's powers of persuasion". He accepted that advice from a private banker "may condition the client's risk appetite, rather than the other way round". However, the banker must be satisfied "the client can afford to take the risks and shows himself willing to take them", and subject to the proviso that the risks were not "so high as to be foolhardy".

Given that, in this case, the exchanges of information and discussions between the Bank and the claimants were very extensive and full, responsibility for the investment decision, even though taken under the influence of salesmanship, could fairly be taken by the claimants as investors.

Voluntary absence of the key Bank witness – reduced weight given to his notes

A separate point of interest raised in the case was the fact that the "pivotal" witness of fact for the Bank, Mr Shone (the claimants' relationship advisor who recommended the products in question) did not give testimony. The Bank's solicitors had explained to the court that Mr Shone had informed them that he was too preoccupied with other business responsibilities to devote time to the proceedings, and sought to rely on Mr Shone's contemporaneous notes made during the course of his employment.

In circumstances where the claimants had not applied to call Mr Shone for the purpose of cross–examining him on his notes of the meetings, the hearsay notes were admissible as evidence of the truth of their content. The issue was therefore one of the relative weight to be given to the notes, and whether they should be preferred to the Claimant's direct and otherwise uncontradicted evidence.

Justice Kerr noted that he would have expected the Bank to call evidence from Mr Shone (as the person alleged to have given negligent advice). Mr Shone continued to work in the United Kingdom, and in the financial services industry, and was the only person present at the meetings in dispute. The fact that the Bank may have

had to call Mr Shone 'blind' was not a complete answer to his absence from the witness box. Rather, Justice Kerr inferred that the Bank's legal advisors assessed the potential benefits and risk of calling him, and concluded that the risks outweighed the benefit. As such, the court could not accept that contemporaneous notes were to be preferred to the testimony of Mr O'Hare for the claimant.

COMMENT

The application of the revised *Montgomery* test in the financial services sector reflects a move over time in professional negligence cases away from essentially a self–certified standard set by the relevant professionals to an objective standard in relation to the explanation of risk. In the case of financial services, this will mean a standard set principally on regulatory rules, although the *Montgomery* standard and the regulatory rules are of course not identical. In cases where investors are exercising discretion, compliance with both will prove key in defending future negligence actions.

It is clear that the Court will not turn a blind eye to the absence of a key witness. Failure to produce such a witness, or at the very least, a credible direct explanation for their absence, will impact the weight to be given to former employee's contemporaneous notes. The Court in this case was highly critical of what it saw as a tactical decision to rely on the documents, without calling the witness at least to vouch for the accuracy of the documents. For banks, this reiterates importance insofar as possible of imposing a contractual duty of continued co–operation on employees.

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PAN–EUROPEAN FREEZING ORDERS OVER BANK ACCOUNTS – ARE YOU READY?

Tuesday 1 November 2016 – 12.30pm–1.30pm

Presented by: Sarah Garvey, Counsel – Litigation; Mona Vaswani, Partner – Litigation – Banking, Finance & Regulatory

From January 2017 a pan European Account Preservation Order (**EAPO**) will be available to claimants in proceedings before the courts of 26 Member States. EAPOs provide a new and potentially potent weapon in a claimant’s litigation armoury – these orders allow a claimant to “freeze” monies in a defendant’s bank accounts across Europe by making a single, paper application to one court, rather than multiple applications to different national courts. The UK and Danish courts will not apply this new Regulation.

However EAPOs are still relevant to UK companies not least because any bank accounts they may have in the 26 participating Member States may be frozen pursuant to such an order. Banks operating in the 26 participating Member States will have to get to grips with implementing these orders and the administrative requirements may be significant. In this seminar Mona and Sarah discuss the key elements of this new legislation, assess the risks (and opportunities) for commercial parties presented by this measure, as well as highlighting some of the practical implications for banks who will have to administer such orders.

POST–BREXIT UPDATE: THE UK'S FREE TRADE AGREEMENT STRATEGY

Friday 11 November 2016 – 8.30am–9.30am

Presented by: Jeff Sullivan, Partner – Litigation (Arbitration); Matt Townsend – Partner – Litigation; Tom Sebastian, Monckton Chambers

Jeff Sullivan and Matt Townsend, together with Tom Sebastian of Monckton Chambers, will consider the UK's options as to future trading relationships post–Brexit. In particular, as the prospect of a "hard" Brexit becomes more likely, businesses need to understand the realities of the World Trade Organisation model and whether it is possible for the UK to adopt this model. Jeff, Matt and Tom will provide an overview of the UK's current legal position, as well as studying the potential legal and practical obstacles and opportunities that the UK will face going forward. Finally, they will provide their views on what UK–based companies should be doing in order to prepare for the UK's trade status post–Brexit.

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

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