ALLEN & OVERY

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Litigation and Dispute Resolution

Review

EDITORIAL

This edition covers a number of recent cases and developments in litigation, arbitration and investigations. We had hoped to report that the High Court's ruling in the RBS Rights Issue litigation last December, which put a renewed spotlight on privilege issues during corporate investigations, was being appealed to the Supreme Court. The High Court ruled that interviews conducted by a bank's solicitors with its employees were not covered by legal advice privilege as the employees were not part of the 'client' for privilege purposes. Although the High Court judge had granted a 'leap frog' appeal to the Supreme Court, we now know that the decision is not going to be appealed. At a time of increasing investigations the decision leaves corporates in a difficult position should they want to carry out internal investigations whilst retaining privilege. If you would like to discuss the range of approaches we have been considering as a result of the High Court ruling please contact Jason Rix or your normal Allen & Overy contact.

We can expect to see a steady rise in competition claims as a result of the Damages Directive, which came into force this month. It makes it easier for claimants to bring competition claims and provides additional tools for defendants too. Other topics in this edition include whether a parent company was liable for the actions of an African subsidiary (in the energy sector), the use of subsequent communications to ascertain whether a contract has been formed earlier (and why therefore it is important to be careful about the content of such subsequent statements), the theft of confidential information by departing employees, and the tight restrictions on use of documents that have been disclosed in previous litigation.

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Antitrust

DAMAGES DIRECTIVE IN FORCE: MANAGING THE INCREASED RISK OF COMPETITION CLAIMS

The Damages Directive came into force in the UK on 9 March 2017. This change is important, as the risk of competition claims is likely to increase steadily across the EU. What may be less obvious, but is equally significant, is that the Directive provides tools for potential defendants to manage and limit their risk when infringements arise, and claims follow.

The impact on risk of competition claims

The Directive harmonizes rules for competition claims across the EU. This is part of a policy to promote private enforcement of competition infringements. It imposes a more claimant-friendly regime across the EU. The Directive tilts the playing field in claimants' favour in several ways:

- There is now a rebuttable presumption that cartels cause harm. This means that the burden of proof, to establish that the cartel has not caused loss and damage, shifts onto the defendant.
- Decisions of Member State competition authorities or courts are now prima facie evidence of an infringement. Findings of the European Commission and courts, as well as the regulator and courts of the 'home' jurisdiction, are already binding on issues of liability in follow on actions. Now, decisions of authorities or courts in other member states are prima facie evidence of infringements, shifting the burden of proof again onto the defendant to provide evidence to the contrary.
- The burden of proof is imposed on the defendant in establishing a defence that any claimant "passed on" an overcharge. This shift is important, as experience shows that "pass on" of an overcharge is hard for a defendant to prove. For example, in the interchange fee litigation in the UK, Mastercard argued that Sainsbury's had passed on any alleged overcharge in respect of credit and debit card transactions to consumers. The defence failed, as Mastercard could not meet the high legal threshold for proving the alleged overcharges were passed on.

Indirect claimants have also been given an advantage. To establish a claim, an indirect purchaser of goods or services from a cartel now only needs establish (i) an infringement of competition law; (ii) that infringement resulted in an overcharge or underpayment to the direct purchaser; and (iii) the indirect purchaser purchased goods or services that were the object of the infringement. These changes again make it easier for claimants, and shift the burden onto defendants.

As the rules apply Europe-wide, the position for claimants has inevitably improved Europe-wide. The regime applies in the UK post-Brexit, and the risk of claims will only increase in the UK and across the EU. However, the extent of the increase in risk in any particular jurisdiction remains to be seen. It will only be known once the new regime has had time to bed in, and claims governed by the new rules start coming through the courts.

Where is the risk going to fall?

Broadly, the Directive brings the procedural and substantive rules across the EU closer to the more claimant-friendly regime in jurisdictions such as the UK. This should assist claimants and increase the risk of claims across the EU. In particular, disclosure will now be a feature of competition claims EU-wide.

However, this change is not likely to reduce the number of claims in jurisdictions with deep experience of these claims, such as the UK. The Directive does not change the rules on jurisdiction, and potential claimants will not

have any wider choice about where they bring their claim than they currently enjoy. And where the claimant has a choice, there are still strong reasons to choose a forum where the courts and practitioners are used to handling competition claims. For this reason, the more developed jurisdictions, with strong claimant bars, and, in the case of the UK, established experience of disclosure, are likely to remain popular for the foreseeable future.

What does the Directive do to assist potential defendants in managing risk?

The Directive encourages whistleblowing and self-reporting by increasing the protection available to immunity and leniency applicants. Under the new regime, the immunity or leniency process should offer defendants a more reliable path to managing their exposure, as limitations are now placed on the evidence available to claimants, and the scope of potential liability in follow on claims.

First, there are protections regarding disclosure and evidence. Leniency statements and settlement submissions are specifically protected from disclosure, and from admissibility as evidence in follow on claims. In addition, a competition authority's investigation materials may not be ordered to be disclosed until the investigation is closed.

Importantly, there are also limitations imposed on the principle of joint and several liability. Previously, an immunity applicant was potentially exposed to joint and several liability for all the loss caused by a cartel. There was therefore a disincentive to self-report, especially where other significant potential defendants disputed liability. Now, an immunity recipient's exposure will generally be limited - to liability for products and services that are the object of the infringement, and directly or indirectly purchased from, or provided to, that immunity recipient (or products or services derived from those products or services). This is subject to the claimant being able to recover losses caused by other cartel participants from those entities.

The rules also provide a structure to encourage alleged infringers to settle claims. This is again by imposing tighter limits on the principle of joint and several liability. The settling complainant's claim is reduced by the settling infringer's share of the loss and damage, a settlement ends the complainant's right of action against that defendant, and there is protection against contribution claims for the settling infringer (the settling infringer's share of loss and damage is irrecoverable via a contribution claim).

These pragmatic limitations are designed to promote recovery of competition losses through the courts. There are benefits to potential claimants - in that the rules shift the burden of proof in their favour, and encourage infringers to self-report and settle claims. But there are also corresponding benefits to defendants – as the limitations on evidence and joint and several liability allow them to manage their risk with greater certainty, via immunity or leniency applications, and settlement.

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Arbitration

ABUSE OF PROCESS AND PRIOR ARBITRAL AWARDS

Michael Wilson & Partners Ltd v Sinclair & anr [2017] EWCA Civ 3, 13 January 2017

The Court of Appeal has provided important guidance on the circumstances in which a court claim can be struck out as an abuse of process on the basis that it forms a collateral attack on a prior arbitral award between different parties. The Court held that a prior arbitration award could form the basis of an abuse of process claim; that, whilst its power to strike out proceedings where the application was based on a prior arbitral award (as opposed to court proceedings) should be exercised with caution, that should not inhibit the court's duty to act appropriately. It would be a very rare case where court proceedings against a non-party to an arbitration can be said to be an abuse of process.

Michael Wilson & Partners Ltd (**MWP**) appealed against a decision striking out its claim against Mr Sinclair and Sokol Holdings Incorporated (the **respondents**) as an abuse of process.

At its core, this case came down to the issue of whether it is an abuse of the court's process for A to claim in legal proceedings against C, on a basis which has been decided against A in arbitration proceedings between A and B. The Court answered this question in the positive.

In 2006, MWP had brought arbitration proceedings against one Mr Emmott, a former partner in MWP and the recipient of certain assets (comprising shares and cash) which had allegedly been acquired by him in breach of the contractual obligations and fiduciary duties he owed to MWP as a partner and with the knowing assistance of the respondents. The respondents maintained that a third party held the shares on behalf of Mr Sinclair, not Mr Emmott, and that there had been no breach of any obligation to MWP for which they were liable. Mr Sinclair had been invited to join the arbitration as a party, but had declined. However, Mr Sinclair did appear as a witness for Mr Emmott and provided funding for Mr Emmott's defence. In 2010, the arbitral tribunal rejected MWP's claim, concluding that Mr Emmott had received the shares on behalf of Mr Sinclair and had no beneficial interest them. MWP subsequently brought court proceedings against the respondents and the respondents applied to have those proceedings struck out on the basis of abuse of process.

At first instance, Teare J found that the abuse of process doctrine could apply where the decision under collateral attack (ie the prior decision) was an arbitration award. However, he also held that it would be rare for a court claim to be an abuse of process where only one of the parties to the court claim had been party to the prior arbitration. Nevertheless, in Teare J's view, the instant case contained "special circumstances", namely the fact that: (i) Mr Sinclair had been a witness in the arbitration and had funded the defence; and (ii) the arbitral tribunal had made determinations as to the ownership of the relevant shares, which rendered the MWP's claim an abuse of process. MWP appealed. In upholding MWP's appeal, the Court of Appeal provided important guidance on the circumstances in which a court claim can be struck out as an abuse of process on the basis that it forms a collateral attack on a prior arbitral award.

Abuse of process

First, the Court held that it was well established that there was no *prima facie* assumption that it is an abuse of process to re-litigate previously decided issues. Although it is in the interests of defendants to ensure that a person is not twice vexed by the same claim and it is in the public interest that the same issue should not be litigated over again, the court's powers of intervention should only be used where justice requires it. In this

respect, the Court was at pains to state that a close, "*merits based*" analysis of the facts was required in each case.

Secondly, the Court held that a prior arbitral award could form the basis of an abuse of process. Simon LJ (with whom Patten LJ and Sir Ernest Ryder (the Senior President of Tribunals) agreed) further explained that, although the Court stated that it would be cautious in finding an abuse of process on this basis, "that caution should not inhibit the duty to act in appropriate circumstances". Agreeing with Teare J, his Lordship further stated that "it will probably be a rare case, and perhaps a very rare case, where court proceedings against a non-party to an arbitration can be said to be an abuse of process".

In overturning Teare J's decision, the Court held that the present claim did not constitute one of those rare cases. In reaching this conclusion, a "highly material, if not dispositive factor" was the lack of mutuality between the parties. Mr Sinclair had been invited to join as a party to the arbitration and agreed to be bound by the award, but had refused to do so. Indeed, he had gone as far as to adopt the position, in collateral proceedings before the Bahamian courts, that the outcome of the arbitration was "totally irrelevant to the dispute" between him and MWP. It would, therefore, be unfair to afford Mr Sinclair the benefit of the arbitral award, in circumstances where he would have suffered no adverse burden if the award had been otherwise determined. Further, this conclusion would not result in the respondents or Mr Emmott being twice vexed. The former were not parties to the arbitration and the latter was not being sued by MWP in the present action.

Addressing Teare J's "special circumstances", Simon LJ was not persuaded that the fact that Mr Sinclair had been a witness in the arbitration and had funded Mr Emmott's "bore any material weight in light of [Mr Sinclair's] equivocal approach to the arbitration". Further, although his Lordship accepted that the arbitral tribunal had made certain findings of fact, it "did not have jurisdiction to adjudicate the claims in a way that bound MPW in relation to a non-party" and could not, and did not, grant any relief as between MWP and the Respondents.

Finally, the court made it clear that the burden was not on MWP to identify circumstances which justified the bringing of the claim, but rather was on the respondents to identify reasons why doing so would be manifestly unfair to a party in the action.

Admissibility of prior arbitration award

The Court of Appeal also dealt briefly with the issue of whether the arbitral award previously issued between MWP and Mr Emmott was admissible for the purposes of the respondents' application and the appeal. The appellant contended that it was not open to the respondents to make use of the contents of the arbitral award for the purposes of their strike out application. In support of this proposition, MWP relied on the principle that, subject to issues of estoppel, factual findings made in one case are inadmissible in subsequent proceedings. However, the Court held that in cases where a claim is said to be an abuse of process because it represents a collateral attack on a prior decision, "it is plainly necessary to look at the earlier decision".

COMMENT

The Court of Appeal's decision serves as a timely reminder of the high threshold which must be met in order for a claim to be struck out under the abuse of process doctrine. In particular, where the parties to a claim are different to the parties involved in any previous proceedings (whether arbitral or curial), it is, in Simon LJ's words, "a rare case, and perhaps a very rare case" in which an abuse of process will be found.

Users of arbitration should take some comfort from the Court's clear confirmation that re-litigating claims in court, which have already been determined via arbitration, can, particularly in circumstances where the parties to both sets of proceedings are identical, constitute an abuse of process. Similarly, parties who lose in arbitration might take comfort from the fact that they are not barred from pursuing separate proceedings against third parties who are closely connected to the case, but who were not ultimately a party to the arbitration.

Conversely, those who are, notwithstanding a connection to a particular case, not a direct party to arbitral proceedings should be mindful that they are unlikely to be able to use a prior arbitral award to claim abuse of process if subsequently sued on the same set of facts. It is not enough to have simply given evidence in the arbitration, even where facts have been determined, at least in part, on the basis of that evidence; nor is it enough to have provided funds for one of the parties. In such circumstances, and where it is open to a connected party to join arbitral proceedings, third parties would be well advised to carefully weigh the risk of an adverse arbitral finding against the risk that they will not be able to take advantage of a positive finding and may remain exposed to future litigation.

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BONA FIDE CHALLENGE TO ARBITRAL AWARD CANNOT BE SUBJECT TO SECURITY ORDER

IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation [2017] UKSC 16, 1 March 2017

In an important judgment, the Supreme Court clarified the interpretation of the New York Convention and its relationship with the Arbitration Act 1996 and remedies available to litigants under the Civil Procedure Rules. The Supreme Court unanimously overturned the Court of Appeal in finding that the latter had no power, under the Arbitration Act or otherwise, to make a *bona fide* public policy challenge to the enforcement of a New York Convention arbitral award conditional on the award debtor providing security in respect of the award.

This is the latest instalment in a long series of English court decisions regarding IPCO's efforts to enforce a 2004 arbitral award against the Nigerian National Petroleum Corporation (**NPCC**), relating to the construction of the Bonny petroleum export terminal in the Niger Delta. The enforcement claim was initially adjourned by the High Court, under s103(5) of the Arbitration Act 1996 (the **Act**), because the NPCC commenced setting aside proceedings before Nigerian courts. One of the conditions for adjournment was NNPC's provision of security of USD 50 million. Following further enforcement efforts by IPCO before the English courts, which led to securing an order for partial payment of the award, new evidence surfaced in 2009 which suggested that IPCO employees had forged a number of documents relied on in the arbitration. This led to a further adjournment, pending determination of the fraud allegations in Nigeria. As a result of the various adjournments, the NPCC was required to provide security in the total amount of USD 80 million.

In July 2012, IPCO issued a renewed application to enforce part of the award that it claimed was due on any view. On appeal to the Court of Appeal, IPCO was successful. It was held that, due to an extraordinary delay before the Nigerian courts, the stay should be lifted, subject to a determination by the High Court – for public policy reasons – of the fraud allegations raised by NNPC in Nigeria (for further details, see Arbitral award enforced despite *bona fide* challenge at the seat). Controversially, the Court of Appeal also ordered, under s103(5) of the Act, that NNPC provide a further USD 100 million in security in respect of the award as a condition for NNPC to continue its challenge of the award on grounds of fraud. If NNPC were to fail to provide this security, the Court of Appeal held, IPCO would be entitled to seek enforcement without any decision of the fraud issue.

NNPC appealed. The issue before the Supreme Court was whether the Court of Appeal was justified in attaching a security condition: (i) by reference to s103(5)

of the Act; and/or; (ii) by reference to general English civil procedural rules.

Security as price for adjournment requested by award debtor

The two relevant sections of the Act are:

- **s103(3)**, which allows the court not to recognise or enforce an award if "it would be contrary to public policy" to do so; and
- **s103(5)**, which empowers the court to adjourn enforcement of an award if a challenge is pending before the courts at the seat of arbitration. Under this section, the court may, on the application of the award creditor, "order the other party to give suitable security".

These provisions implement Articles V and VI, respectively, of the 1958 New York Convention Recognition and Enforcement of Foreign Arbitral Awards (the **Convention**).

The Supreme Court clarified that s103(5) of the Act allows the court to require security from the award debtor only as the "price of an adjournment which an award debtor is seeking, not to be imposed on an award debtor who is resisting enforcement on properly arguable grounds". The court found that s103(3) did not contain any provisions enabling an enforcing court to require an award debtor to post security as a condition for the court to decide a public policy challenge raised under the section. The Court of Appeal incorrectly required security as the price of the decision of a *bona fide* public policy challenge under s103(3). It did not order adjournment pursuant to s103(5) but, on the contrary, lifted an adjournment previously ordered under that section.

New York Convention – a complete code

The Supreme Court held that the Convention is a "complete code" intended to "establish a common international approach" so that Article V challenges may only be made conditional upon provision of security in "one situation falling within [its] scope", namely when an adjournment is ordered under Article VI because of setting aside proceedings at the arbitral seat. Sections 100 - 104 of the Act simply reflect the Convention and were not intended to grant procedural powers to the English courts beyond those envisaged in the Convention.

Given the general scheme, therefore, the Court of Appeal was found to have no discretion under the Act, and no power under CPR 3.1(3), to order security in the circumstances. The purpose of CPR 3.1(3), which IPCO argued empowered the court to attach security conditions in this case, is the "imposition of a condition as the price of relief sought as a matter of discretion or concession", as opposed to relief sought as a matter of right (as in NNPC's case). In other words, CPR 3.1(3) was never meant to make the exercise of rights, such as a *bona fide* challenge under s103(3), conditional.

COMMENT

This authoritative judgment is a welcome clarification in a complex area of law that is of much significance to parties seeking to enforce, or resist enforcement of, international arbitration awards in this jurisdiction and beyond. The English courts will respect the delicate balance between the rights of award creditors and award debtors enshrined in the Convention.

As Lord Mance explained, apart from the power to order security on adjournment under Article VI, the provisions of the Convention "were not aimed at improving award creditors' prospects of laying hands on assets to satisfy awards". This does not mean, however, that the English courts will be unwilling to make use of "other means of assisting award creditors, which do not impinge on award debtors' rights of challenge". This includes interim measures such as disclosure and freezing orders. While no such order was appropriate on the facts, and none was requested by IPCO, the court emphasised that it would be willing to intervene, in appropriate circumstances, to grant relief facilitating the ultimate recovery of an award. Indeed, in the present case the Supreme Court made clear that existing security provided by NNPC should stand, even though the initial adjournment under s103(5) had been lifted.

Because the judgment interprets the Convention generally, and not only in relation to its implementation in England, it can carry authoritative force before courts

in other jurisdictions. This is more likely to be the case if the implementing statute in the relevant jurisdiction reflects Articles V and VI of the Convention closely, as does the Act. Both award creditors and award debtors should therefore consider the judgment's implications for the enforcement proceedings in which they are involved, or in which they are likely to become involved in the future. While the availability of assets is the main (and obvious) driver in choosing the enforcement venue, when faced with the comfort of choice among possible enforcement venues, award creditors may wish to consider whether the courts in the relevant jurisdiction have powers available to them, outside the scheme of the Convention, to facilitate enforcement. The English courts' powers to issue freezing and disclosure orders is a good example.

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Company

NO ENGLISH JURISDICTION OVER NIGERIAN OIL POLLUTION CLAIMS AGAINST SHELL

Okpabi & ors v Royal Dutch Shell plc & anr [2017] EWHC 89 (TCC), 26 January 2017

In a highly mediatised ruling, the English High Court refused jurisdiction over claims brought against Royal Dutch Shell and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Ltd, by over 42,000 claimants affected by oil pollution in the Niger delta. The court considered previous case law concerning the circumstances around when a parent company can be held liable for the acts of its subsidiary. Royal Dutch Shell's corporate structure mitigated against there being an arguable duty of care between it and the Nigerian claimants. A group-wide corporate social responsibility policy was also not enough to suggest that the corporate veil should be pierced.

The English claims against Shell Petroleum Development Company of Nigeria Ltd (**SPDC**) and Royal Dutch Shell (**RDC**) were brought by the Ogale and Bille communities for oil pollution that occurred to their lands in the Niger Delta, a region plagued by oil pipeline sabotage, oil theft and illegal crude oil refining. These criminal activities result in widespread environmental damage, including from the dumping of the by-products of illegal refining into the rivers and creeks of the Delta. The grave extent of environmental damage in the region was not in dispute.

It was likewise common ground between the parties that claims against SPDC were claims under Nigerian law relating to SPDC's actions or omissions in Nigeria and therefore unconnected with England. As such, the only way for the English court to have jurisdiction to hear the claim against SPDC was if the claimants could show that SPDC was a "necessary and proper party"[1] to a claim against RDS, which is domiciled in England. The claimants argued that RDS owed a duty of care to them, which was breached by its negligent supervision of SPDC and its policies.[2]

Under Article 4 of the Brussels Recast Regulation, a defendant may be sued in its place of domicile which, for RDS, is England. While Mr Justice Fraser briefly considered the common law doctrine of *forum non conveniens*, which would allow the court to dismiss a case if a foreign court were a more appropriate forum, he confirmed that the doctrine has no application under the Brussels Recast Regulation (following the ECJ decision in *Owusu v Jackson*).[3]

Duty of care relating to acts of a subsidiary

The applicable test for establishing a duty of care has three components: for the harm to be foreseeable; for there to be a relationship of proximity between the defendant and the victim(s) of harm; and for the imposition of duty in the circumstances to be fair, just and reasonable.[4] The courts are cautious in imposing duties of care in novel circumstances (such as this one) and therefore Mr Justice Fraser had particular regard to prior cases concerning harm caused by subsidiaries.

While case law shows that a duty of care can arise between group companies, for example between a parent company operating in the asbestos mining business and the employees of its subsidiary who were exposed to asbestos (*Chandler v Cape Plc* [2012] EWCA Civ 525), the bar for this is set quite high and the courts are particularly reluctant to recognise a duty *vis à vis* parties not employed by or otherwise related to the subsidiary. Among the various tests set down in the case law, the ratio in *Thompson v The Renwick Group plc* (a case also considering the dangerous handling of asbestos) is particularly instructive in circumstances where: (i) the parent company must be "better placed, because of its superior knowledge or expertise" than the subsidiary is in respect of the harm; and (ii) in addition, "because of that feature, it is fair to infer that the subsidiary will rely upon the parent deploying its superior knowledge" to avoid the occurrence of harm.[5]

RDS just a holding company

RDS, the English "anchor" defendant, was inserted at the top of the Shell Group's corporate structure in 2005 with the sole purpose of holding shares in other companies. In fact, it did not own shares in SPDC directly, but only through another subsidiary.
Mr Justice Fraser found that RDS did not have any operations or infrastructure in Nigeria, nor did it have any of the licences required by the Nigerian authorities to carry out oil production operations. It was SPDC that had the specialist knowledge and expertise, as well as all the necessary licences. The claimants failed to provide evidence of any appreciable level of oversight or control by RDS over SPDC's operations. As such, it could not have been said that SPDC was relying on RDS's knowledge, expertise and oversight to protect the claimants from harm, and therefore no duty arose.

Public statements, group executive committee decisions and uniform policies do not affect separate legal personality

The claimants also tried to establish a duty of care by showing that: (i) RDS made statements on behalf of the entire group, including its Nigerian subsidiary; (ii) decisions of an "Executive Committee" of the Shell Group affected the operations of SPDC; and (iii) corporate social responsibility and environmental policies were uniform throughout the group.

These were found to be insufficient grounds to establish a duty in the circumstances. The judge was unequivocal in finding that public statements made in accordance with listing rules cannot be a significant factor in establishing a duty of care. In any event, the statements made by RDS contained disclaimers that the judge found convincing and effective in upholding the separate legal personalities of the companies constituting the Group. The decisions of the Shell "Executive Committee", on which a minority of members were also directors of RDS, could not be equated with decisions taken by RDS as the two were "not the same legal entity". With regard to group-wide policies, the judge explained that they did not "affect or dilute the concept of separate legal personality of the different companies within the Group. Compliance with Group policies, which is what the RDS Corporate Social Responsibility Committee oversees, or observance of those Group policies, does not either".

COMMENT

The claim against RDS and SPDC is not the only tortious claim relating to environmental pollution brought before the English courts in recent years. These kinds of cases can have enormous cost implications. For example, in 2015, SPDC agreed to settle an action brought by the Bodo community in Nigeria for oil spills from the Trans-Niger Pipeline for USD 55 million and clean-up costs. There is an on-going action against Vedanta Resources plc[6] concerning pollution from copper mining in Zambia. In that case, the court accepted that there was a real issue to be tried between the claimants and Vedanta and that the interests of justice would be served by joining Vedanta's Zambian subsidiary to the English proceedings. It is of note that the English courts' willingness to accept jurisdiction in similar cases may depend on considerations of access to justice in the jurisdiction in which the harm occurred.[7]

That said, the instant decision underscores the careful approach of English courts when establishing new categories of duties of care and the continuing prominence of the doctrine of separate legal personality under English law. Matters of jurisdiction aside, it remains very difficult to pierce the corporate veil under English law absent an element of dishonesty on the part of the corporate group. Group companies conducting themselves in the ordinary course should therefore not be at risk of having the corporate veil pierced. This is particularly the case if local operating subsidiaries are independent and hold the know-how and expertise relevant to their business.

Companies within a corporate group should be entirely free to comply with group policies and implement them as separate legal entities. Likewise, announcements made by holding companies are very unlikely to prejudice the separate personality of the companies, particularly if the language used is carefully chosen to emphasise the relevant distinctions.

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1 Paragraph 3.1(3) of Practice Direction 6B – Service out of the Jurisdiction, also referred to as the "necessary or proper party" gateway.

2 While the parties could not agree on the substantive law governing the claim against RDS, it was common ground that if there was no claim against it under English law there would equally be no claim under Nigerian law.

3 The applicability of the *forum non conveniens* doctrine might change depending on the approach taken to jurisdictional arrangements following Brexit.

4 As laid down in *Caparo Industries plc v Dickman* [1990] 2 AC 605.

5 Citing Tomlinson LJ in *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635, para. 37.

6 *Lungowe & ors v (1) Vedanta Resources plc* (2) Konkola Copper Mines plc [2016] EWHC 292 (TCC).

7 Mr Justice Fraser distinguished the Vedanta litigation from present proceedings on the basis that conditional fee arrangements were available to impecunious claimants in Nigeria but not in Zambia.

Contract

SUBSTANTIVE INCONSISTENCY BETWEEN EXPRESS AND IMPLIED TERMS

Irish Bank Resolution Corp Ltd (In Special Liquidation) v Camden Market Holdings Corp & 7 ors [2017] EWCA Civ 7, 19 January 2017

The Court of Appeal has considered the question of when a proposed implied term should be considered "inconsistent" with an express term of a contract, contrasting direct linguistic inconsistency and substantive inconsistency. The express contractual right of the lender, Irish Bank Resolution Corporation Limited (**IBRC**), to market its loans could not be circumscribed by an alleged implied term that it would not interfere with the borrower's ability to obtain the best price for the properties on which the loan was secured. The alleged implied term was substantively (though not linguistically) inconsistent with the express terms of the facility agreement, and therefore bound to fail as a matter of law.

In 2005, members of the Camden Market Group (**CMG**) entered into a facilities agreement with IBRC's predecessor, the Anglo Irish Bank, who provided financing of approximately GBP 195 million to enable CMG to purchase and develop property at Camden Market. The facilities agreement was restated and amended in 2008 (the **Restated Facilities Agreement**).

The loan facilities were due to be repaid in February 2013, and CMG intended to do so through sale of the properties, rather through refinancing. However, in March 2012, planning permission for a part of the development was refused. CMG believed that permission would still be granted if changes were made to the application, but in light of the delay, sought and obtained a 12-month extension to give it additional time repay the facilities. The extension was formalised by way of a 2012 supplemental deed (the **2012 Supplemental Deed**), which incorporated the Restated Facilities Agreement.

In February 2013, the IBRC was placed in special statutory liquidation by an order of the Irish Minister of Finance. IBRC's liquidators were instructed to sell off all of IBRC's loan book, and they began marketing its loans, including the CMG loan facilities.

Simultaneously, CMG was marketing the properties it had developed using the loan facilities for sale to prospective purchasers. CMG argued that IBRC's marketing of CMG's facilities alongside distressed debt gave rise to an implication that CMG's facilities were in default (which they were not). This had dissuaded potential purchasers from offering the best price for the properties, as they took the view that they could acquire the loan at a discount from IBRC and then enforce the security against CMG, rather than purchasing the properties outright at full price from CMG.

CMG claimed there was an implied term in the 2012 Supplemental Deed that IBRC would not do "anything" to hinder CMG's marketing of the properties under development to achieve the best price, including by marketing the sale of the loans under the Restated Facilities Agreement in competition with CMG.

IBRC applied for summary judgment on the ground that CMG's claim had no real prospect of success, as it was contrary to an express term in the Restated Facilities Agreement which permitted IBRC to assign the loans (with the consent of the parent CMG entity) and disclose "any information" about CMG and the loans it considered appropriate to a potential purchaser. At first instance, summary judgment was refused, and IBRC appealed.

Nature of inconsistency

The Court of Appeal allowed the appeal and granted summary judgment.

It is a "cardinal rule" that an implied term must not contradict any express terms of the contract. Lord Justice Beatson (who delivered the leading judgment) analysed the nature of an "inconsistency" between contractual terms, observing that there could be two types: "direct linguistic inconsistency" and "substantive inconsistency".

His Honour found that the proposed implied term was not linguistically inconsistent with the express terms. On a narrow construction, the proposed implied term did not prevent IBRC from marketing the loans at all: it would only prevent IBRC from marketing the loans in competition with the CMG's marketing of the properties.

However, was the proposed implied term in substance inconsistent with the express terms of the Restated Facility Agreement? Substantive inconsistency is in issue, where, for example, parties have entered into express obligations with respect to a subject matter, but it is argued that a further term should be implied in relation to the same subject matter.

Lord Justice Beatson found that there was such a substantive inconsistency between the pleaded implied term in the 2012 Supplemental Deed, and the express term of the Restated Facilities Agreement. Notwithstanding the business purpose of the 2012 Supplemental Deed, it had been entered into between commercial parties, against the backdrop of and with the incorporation of the earlier detailed Restated Facilities Agreement.

IBRC's "express and unrestricted power" to market the loans by disclosing information to potential purchasers could not, as a matter of law, be circumscribed by an implied term. The Restated Facilities Agreement did contain express restrictions on IBRC's power to market loans (as disclosure of information was limited to potential purchasers). To imply the additional pleaded term in such circumstances would be a significant restriction on IBRC's power to deal with its assets, and would "cut across IBRC's entitlement to provide information [to potential purchasers] … in a way which is redolent of uncertainty". The Court clearly disapproved of the lack of clarity which would arise from implication of the proposed term – as it would be "impossible" for IBRC to know the extent of the prohibited conduct, which would depend on market perceptions (as to whether to loans were being marketed in competition to the properties) outside the control of IBRC.

COMMENT

Where a contract is lengthy and carefully drafted between commercial entities, the courts will be reluctant to imply a further term, even where there is no express conflict. The question of "inconsistency" is not one to be looked at in isolation, or with a narrow approach: rather the Court focuses on the extent to which the parties have otherwise provided for the relevant subject matter in their existing written contractual documents.

In this case, although the commercial purpose in the parties entering the 2012 Supplemental Deed was to enhance the borrower's ability to achieve the best price for the underlying property assets, it was clear that the express words of the prior facility agreement prevailed when it came to the question of any restrictions on the marketing of the loans.

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ESTABLISHING A CONTRACT: SUBSEQUENT NEGOTIATIONS AND INCONSISTENT INTENTIONS

(1) Global Asset Capital Inc (2) Glenn Maud v (1) Aabar Block S.A.R.L. (2) Aabar Investments Pjs (3) Robert Tchenguiz [2017] EWCA Civ 37, 1 February 2017

When determining whether parties had validly entered into a contract, the Court of Appeal held that it was wrong to disregard subsequent communications which were inconsistent with the existence of a contract.

In September 2008, property investors Glenn Maud and Derek Quinlan entered into a series of loans to finance their acquisition of an interest in Santander Banking Group's Spanish headquarters. This financing included personal loans to Mr Maud and Mr Quinlan, which were originally provided by RBS but the interests in which were later purchased by Aabar Block and others. Mr Maud and Mr Quinlan defaulted on payments under the loans and various judgments were obtained against them. Ultimately, when other attempts to settle the liabilities were thwarted, Mr Maud and Global Asset Capital (**GAC**), an American private equity fund, tried to purchase a package of rights and debt interests (the **Aabar Rights**) directly from Aabar Block and Aabar Investments (together, **Aabar**) (the **Alleged Contract**).

The Alleged Contract

Mr Maud stated that he sent Aabar a letter marked "WITHOUT PREJUDICE – SUBJECT TO CONTRACT" offering EUR 250 million in exchange for the Aabar Rights in April 2015 (the **Offer Letter**). On 6 May 2015, the CEO of Aabar Investments, Mohamed Al-Husseiny, telephoned Mr Maud in response to the Offer Letter. Mr Maud and GAC (together, **Global**) argued that it was during this conversation that the Alleged Contract was concluded, subject to two conditions: (i) Mr Maud resending the Offer Letter in "open and binding form"; and (ii) Mr Maud providing satisfactory evidence of his ability to fund the purchase.

On 9 May 2015, Mr Maud emailed Mr Al-Husseiny with two letters, described as "binding and committed letters of finance and offer", and said that he looked forward to receiving Mr Al-Husseiny's "confirmation of acceptance of [the] offer during the course of Sunday" so that they could "agree the mechanics of how to progress to completion". The letter of offer reiterated some of the main terms of the Offer Letter, including the purchase price, but added various additional terms (the **9 May Letter**). The letter of finance was from a real estate investment firm, and Global argued that this was evidence of its ability to fund the purchase. Global contended that the two relevant conditions to the Alleged Contract had therefore been met at this point. On 10 May 2015, Mr Al-Husseiny replied, stating that there was no contract.

On 8 June 2015, Global issued a claim against Aabar for a declaration that the Alleged Contract was valid and binding and for specific performance of its terms. A key issue in dispute was whether the court could consider events after the telephone conversation in deciding whether, during that conversation, a contract had been concluded.

Later conduct relevant to whether a contract has been formed

In the Court of Appeal, it was held that the parties' communications immediately following the 6 May 2015 telephone call should have been taken into account when determining whether the Alleged Contract had been entered into on that date. A court will consider the whole course of negotiations when determining whether a contract has been made, irrespective of whether those negotiations are conducted in writing, orally or by conduct, or by any combination of these methods.

Although the meaning of words used in a contract cannot be interpreted by reference to subsequent events

and further negotiations between two parties cannot negate an earlier contract without consent, both of these principles are irrelevant when considering whether a contract had actually been formed in the first place.

Factors inconsistent with the existence of a contract

The Court considered that certain factors in the communications pre-dating the Alleged Contract were inconsistent with the existence of a contract:

- The use of "subject to contract" wording in the Offer Letter meant that the offer was not open for acceptance by Mr Al-Husseiny on the 6 May call and that any acceptance by Mr Al-Husseiny could only amount to an agreement to agree. The Court stated that it was "well established that dealing on [a "subject to contract"] basis negates contractual intention" and that any supposed waiving of the "subject to contract" status would need to have been unequivocally agreed by the parties; and
- The fact that one of the conditions to the Alleged Contract was to resend the Offer Letter in "open and binding form".

Subsequent events and particularly the following factors in the 9 May Letter were also inconsistent with a contract having been made:

- The reference to the purchase as the "Proposed Transaction" and the fact that certain terms were prefaced with the phrase "Upon your agreement that you are willing to proceed […]";
- The inclusion of a term that the letter would expire unless accepted by Aabar within a certain period;
- The inclusion of terms that were materially different from those terms set out in the Offer Letter; and
- The inclusion of an exclusivity provision, in which both parties would agree not to pursue any alternative transaction regarding the Aabar Rights for a set period.

In particular, the exclusivity provision was held to be "significant" because it suggested that the parties would engage in negotiations about the terms of the proposed purchase during this period, the "obvious purpose" of which was to allow a contract to be made.

The Court rejected Global's argument that the key commercial terms of its offer had already been accepted before Mr Maud's 9 May email and that this email merely sought "confirmation" of acceptance for good order. The Court also rejected the argument that the additional terms in the 9 May Letter were just the "mechanics" of how to progress to completion and that any requirement for Aabar to agree to such terms did not affect the existing binding agreement to the key commercial terms.

COMMENT

This judgment highlights the holistic way in which a court will consider the formation of a contract, taking into account negotiations before and after an alleged contract notwithstanding whether such negotiations are conducted in writing, orally, by conduct or by any combination thereof. If a subsequent communication appears to be inconsistent with the contractual intentions, or indeed presumably if it appears to be consistent, this will be persuasive in determining whether a contract has been formed. Moreover, although the meaning of words in a contract cannot usually be interpreted by reference to later events, such later events can be referenced for the purpose of determining whether an alleged contract had initially been established.

The Court has also reiterated the power of "subject to contract" wording to refute contractual intentions; it is difficult for a party to argue that acceptance of a "subject to contract" offer could amount to the formation of a contract without clear agreement from both parties that this is what was intended. Further, the judgment indicates that the wording used in any offer letter or

alleged contractual communication will be carefully considered by a court and that, for example, terms providing deadlines for acceptance of an offer or exclusivity periods in which negotiations with third parties are prohibited could be fatal to the argument that a contract has already been formed.

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Costs

GRAPPLING WITH SEVERE EXCHANGE RATE FLUCTUATIONS IN ASSESSING THE COSTS OF LITIGATION

Elkamet Kunststofftechnik GmbH v Saint-Gobain Glass France S.A. [2016] EWHC 3421 (pat), 25 November 2016

The English High Court has provided guidance on a novel but practical point, allowing a party benefiting from a costs order to recover additional sums to account for expenditure incurred as a result of exchange rate losses.

Elkamet Kunstofftechnik (**Elkamet**), having succeeded in proceedings in the Patents Court, was entitled to a summary assessment of its costs. As a German company, Elkamet had to exchange euros into pounds sterling to pay its solicitors' bills – and it had suffered from the significant currency fluctuations which struck the market in the second half of 2016. As the costs order was to be made in pounds sterling, Elkamet sought an order to compensate it for losses suffered as a result of movements in the exchange rate.

Noting that there appeared to be no authority on the issue, Arnold J decided the matter on a point of principle. In particular, he found particular force in Elkamet's argument that the point of an order for costs is to put the receiving party back into the position it would have been in had it not had to expend the costs to which the costs order related. Arnold J considered two further points in coming to his judgment: (i) the courts may make orders for damages expressed in foreign currencies (relying on the House of Lords in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443); and (ii) the court has the power to award interest on costs to compensate the successful party.

Taking these principles together, he concluded that it follows as a matter of logic that the court ought to have power, if it decides to make an order in pounds sterling, to compensate for any exchange rate loss. He went on to note that if a foreign company has to exchange its local currency into pounds sterling in order to pay the costs of litigation and that party is successful in the claim, it should in principle be entitled to be compensated for additional expenditure linked to exchange rate losses in much the same way as it is entitled to be compensated by way of interest.

Arnold J was cognisant that exchange rates could also move in the favour of Elkamet by the time the costs order was paid, and took this into account when ordering an additional payment of GBP 20,000 to reflect its currency loss.

COMMENT

Given the impact that the recent – very significant – currency fluctuations can have on the calculation of costs, this decision will no doubt be welcomed by successful non-UK-based parties to a litigation. Indeed, non-UK-based claimants may even consider adding a claim for exchange rate losses as a head of loss in their particulars of claim. On the other hand, for parties provisioning for potential litigation costs orders being made against them, the decision raises uncertainty about the basis on which such provisioning should be conducted.

However, it must be remembered that the decision of Arnold J was made at first instance. Indeed, Coulson J recently declined to make an order to compensate a claimant for exchange rate losses, albeit in circumstances where he was presented with a more general claim on principle that, to the extent that the defendant suffered such a loss, he was entitled to be compensated. In *Bruce MacInnes v Hans Thomas Gross* [2017] EWHC 127 (QB), Coulson J noted that he was "uncomfortable" with the idea that an award for costs should be treated as an order for compensation, as if it were a claim for damages. Further, he said he did not see the close analogy between ordering interest on costs and ordering exchange rate losses, noting that any potential liability to pay for currency fluctuations is uncertain and wholly outside a party's control. He also noted that it could be said that the "generous" rate of interest on costs at 4% over base is designed to provide at least some protection to the payee against such events outside the control of the parties.

Against the background of the more recent decision from Coulson J, it remains to be seen whether arguments in favour of compensation for exchange rate losses will succeed. For a successful party to a litigation who has suffered from currency fluctuations, it is certainty an avenue worth pursuing.

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Crime

THE FUTURE OF DEFERRED PROSECUTION AGREEMENTS

A recent settlement by the SFO with a UK company accused of bribery has resulted in the SFO being accused of suffering a "failure of nerve". In a speech on 7 March 2017 Ben Morgan, Joint Head of Bribery and Corruption at the SFO, spoke about the future of Deferred Prosecution Agreements. The speech highlights some important issues for any company concerned about potential criminal liability exposure.

DPAs can apply in a variety of situations

Although Deferred Prosecution Agreements (**DPAs**) have been available in the U.S. for a number of years, they were only introduced in the UK in early 2014. To date, there have been three DPAs in the UK, all in relation to bribery charges under s7 Bribery Act 2010. Mr Morgan distinguished each case:

- a major bank, within which there was misconduct related to a fund-raising exercise for the government of Tanzania – a "pocket of behaviour", a "narrow self-contained problem in a large and complex business";
- a UK SME which has not yet been publicly identified for legal reasons – an example, according

to Mr Morgan, of where a DPA was used to limit the "negative effects of corporate behaviour on innocent people" eg employees, pensioners and others who are reliant on the future of a company, such as suppliers, manufacturers or customers. This was because the scale of the misconduct was so large, compared to the financial means of the company, that the appropriate financial sanctions "would have put the company out of business". The DPA provided for terms that the "company could just cope with and stay alive"; and

- a major UK engineering company – "an altogether different case again… conduct spreading widely through its business, over several decades and over multiple jurisdictions".

Mr Morgan refers to criticism of the DPA that was entered into with the major engineering company – "if not this case, then when would the SFO prosecute?".

What makes a case suitable for a DPA?

Given the widely varying circumstances of the first three DPAs, does Mr Morgan's speech give us any more clues about when a DPA is (or is not) appropriate?

Mr Morgan's speech highlighted some important factors. Companies must be frank about what has happened and cooperate fully. Examples of excellent cooperation are providing unfiltered access to company records, agreeing to an independent review for privilege, disclosing written accounts of interviews and seeking SFO views on media and government relations. When referring to the most recently implemented DPA, Mr Morgan commented "[t]here was little more they could have done to put right what had happened".

On the future, the speech suggests that:

- DPAs will become increasingly common;
- There is a high bar for cooperation. Mr Morgan refers to the fact that most companies will start with a "deficit" (namely the misconduct) – from that point on, what a company chooses to do in terms of cooperation with the SFO will be taken into account in judging whether the company has "close[d] that deficit";
- those who choose not to cooperate can expect "severe sentencing";
- it is still possible to get some self-reporting credit where the SFO already has some limited information from a third party source: "self-reporting is not dead... it is still a key feature of the profile of a case suitable for resolution by the DPA". Referring to the fact that the SFO had first learnt of issues in one of the organisations granted a DPA from an anonymous blog, Mr Morgan alluded to the idea that, even if the SFO is tipped off by a third party, it is still possible for a company to receive cooperation credit if the information provided goes "far beyond what [the SFO] already knew"; and
- closer and better international cooperation will lead to "choreographed resolutions… there have been, and will continue to be, if not global then at least multi-agency outcomes".

COMMENT

The SFO is clearly keen to address some of the less positive commentary that its recent use of DPAs has attracted. The SFO sees using DPAs as a key part of its future strategy to address criminal misconduct in organisations relating to bribery and corruption. However, this is not to say that the SFO will be entering into DPAs lightly, or making this easier for companies. A company that wishes to qualify for a DPA must still meet the relatively high qualification thresholds expected by the SFO, especially those relating to self-reporting and cooperation.

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Damages

THEFT OF CONFIDENTIAL INFORMATION RESULTS IN ONLY NOMINAL DAMAGES FOR EMPLOYER

Marathon Asset Management LLP & anr v Seddon & anr [2017] EWHC 300 (Comm), 22 February 2017

An employer was awarded only nominal damages from former employees who copied the employer's confidential information but made no use, or limited use, of that information and did not cause any damage to the employer. So called "Wrotham Park" damages reflect how much the innocent party would have asked for to release the defaulting party from an obligation, had it been asked, and can be a useful remedy where it is difficult to show financial loss. The judgment provides a useful review of the court's approach to damages where liability and breach of duty are easily established but showing loss to a claimant is more difficult.

Marathon is an investment management firm. It sued two former fund managers for GBP 15 million after information regarding Marathon's clients, portfolios and business operations was copied onto USB drives from company servers when the managers left the firm. The two ex-employees had resigned to set up a rival fund management business.

It was common ground that only a small number of the copied files were ever accessed and that little or no use was ever made of the confidential information. The ex-employees returned the USBs when these proceedings were threatened.

Assessing damages when it is difficult to show a loss - the "Wrotham Park" approach

Marathon asserted that it did not matter what use was made of the files or that they had suffered no apparent loss: the defendants had unlawfully taken its confidential information and they should pay for the value of what they took, which Marathon estimated at GBP 15 million.

Marathon asked the court to assess damages using the approach in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798, where the court employed the concept of a 'hypothetical bargain' between the parties to license the invasion of the claimant's right. In that case, Brightman J awarded damages for breach of a restrictive covenant attaching to land, assessed by reference to the contract-breaker's gain from the breach, at 5% of the anticipated profit from the wrongful development. The judge considered this to be the sum that the claimant, acting reasonably, could have demanded from the defendant for relaxing the restrictive covenant. Of the various labels, rather than 'Wrotham Park', 'hypothetical bargain' or 'negotiation' damages, Leggatt J preferred the term 'licence fee' damages and used this in this judgment.

As confidential information had been misused, licence fee damages or an account of profits were both potentially available as remedies. Leggatt J noted that Marathon abandoned its claim for an account of profits no doubt given the lack of evidence that the defendants made any profit from any wrongful use of Marathon's confidential information.

No loss and no gain

Leggatt J found the defendants liable for breaches of their contractual and common law duties of confidence in copying and retaining the confidential files. However, Leggatt J decided that as the misuse of confidential information by the defendants had neither caused Marathon to suffer any financial loss nor resulted in the defendants making any financial gain, it was hard to see

how Marathon could be entitled to any remedy other than nominal damages.

Leggatt J concluded that the defendants did not copy files from any of the USB drives to any undisclosed computer or other device and decided that there was a "vast gulf between the extent of the use which Marathon says could potentially have been made of the files… and the very limited use which the evidence shows was in fact made of them". The judge acknowledged that, save in very limited circumstances, punishment and deterrence are not purposes for which damages for civil wrongs can be awarded in English law.

Marathon's wider conspiracy claim also failed, as the copying and retention of files caused Marathon no loss, which is an essential element in the tort of conspiracy.

Other claims also rejected

Marathon raised a number of arguments, each of which was rejected:

- Marathon contended that the conduct of the defendants in copying and retaining Marathon's confidential files was analogous to the conversion or detention of goods and gave rise to a claim for damages representing the value of the information taken. Leggatt J could not see how the defendants actions had made them better off or Marathon worse off.
- By copying Marathon's files onto USB drives which were retained on leaving Marathon's employment, the defendants exposed Marathon to the risk of loss and acquired the opportunity for financial gain. Leggatt J dismissed this argument as threadbare noting that the law does not compensate people for being exposed to a risk of injury.
- Marathon argued that where the use of confidential information and its consequent impact was uncertain, a just solution would be to require the defendant to pay a sum representing the value of the information assessed at the point when the breach of duty occurred on the assumption that the information would thereafter be exploited. Although the judge recognised certain legal principles which assist a claimant who has difficulties proving loss (the difficulty of estimation should not be allowed to deprive a claimant of a remedy; where the defendant has destroyed or wrongfully prevented the claimant from adducing the relevant evidence, the court will make presumptions in favour of the claimant), in circumstances where it was established to a high degree of certainty that the files were never accessed or little use was made of them, Leggatt J could not justify awarding damages.

Leggatt J held that Marathon's approach to the assessment of licence fee damages was flawed for a fundamental reason, namely a failure to identify accurately the wrong for which licence fee damages were being sought and to match the remedy to the wrong. In formulating its claim for licence fee damages, Marathon chose to focus its trigger date for the "hypothetical negotiation" of the licence fee as at the date when the files were "copied" rather that when they were "retained" or "made use of" (to the limited extent that they were). However, when the files were copied, no misuse of the confidential information had occurred and the court would not assume future wrongdoing when assessing a remedy.

In a protracted and no doubt expensive case, Leggatt J held that Marathon had "missed the jackpot" of GBP 15 million and awarded nominal damages of GBP 1 from each defendant.

COMMENT

The case provides a comprehensive review of the court's approach to damages in circumstances where liability and breach of duty is easily established, but establishing a loss to the claimant or gain to the defendant is less clear-cut.

The judgment serves as a warning that even in cases of clear breach of contractual and common law duties of confidence, employers will struggle to assert significant losses for the removal of company documents. The case reinforces the importance of employers considering the practical protocols and steps they can take to protect their business around the time of a resignation.

Leggatt J sets out a framework for an 'account of profits' and 'licence fee' damages and this is likely to be a useful

resource later this year when the Supreme Court considers the case of *One Step (Support) Ltd v Morris-Garner*[1] (covered in the May 2016 Litigation Review), where the Court of Appeal declined to interfere with a decision to award licence fee damages as a remedy for breaches of covenants not to carry on business competing with the claimant and not to solicit customers of the claimant, as well as for wrongful use of market research.

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[1] http://www.allenovery.com/publications/en-gb/Pages/How-much-would-you-charge-to-let-your-counterparty-breach-the-contract-Wrotham-Park-damages.aspx.

Disclosure

USING DOCUMENTS PREVIOUSLY DISCLOSED IN EARLIER LITIGATION

(1) Robert Tchenguiz (2) Rawlinson & Hunter Trustees SA v (1) Grant Thornton UK LLP (2) Stephen John Akers (3) Hossein Hamedani (4) Johannes Runar Johannsson [2017] EWHC 310 (Comm), 22 February 2017

The restrictions on the collateral use of documents previously disclosed in separate litigation have recently come under the judicial spotlight. The word 'use' has been defined extremely broadly to cover even the act of reviewing the documents for relevance to new litigation. Including the documents in a disclosure list and allowing inspection are also caught under such definition. A party holding previously disclosed documents and witness statements will need to consider whether it must seek the court's permission to use them at a very early stage.

CPR restriction on 'use' of disclosed documents and witness statements

Certain documents and witness statements had been disclosed to one of the defendants (the **defendant**) during previous, separate, legal proceedings. When they were disclosed, the documents and witness statements were subject to the collateral use protections under the Civil Procedure Rules (**CPR**). These rules restrict the collateral use to which a party can put documents disclosed to it during litigation. CPR r.31.22 states that a party to whom a document has been disclosed may use it only for the purpose of the proceedings in which it has been disclosed, unless (a) it has been read or referred to at a public hearing, (b) the court gives permission, or (c) the party who disclosed the document and the person to whom it belongs agree. CPR r.32.12 provides the same for witness statements, except that it is the witness himself (rather than the party producing the witness statement) who must give permission under limb (c).

The defendant sought to establish what steps it could take in relation to the disclosed documents without breaching these CPR rules. It applied to the court for a declaration that the following steps did not constitute a 'collateral use':

- reviewing the documents and witness statements for relevance to the current proceedings;
- the inclusion of the documents and witness statements in a disclosure list;
- the provision of the same to the claimants for inspection; and
- the review of the material (by the claimants) upon its provision.

The defendant argued that for a document to be 'used' within the meaning of CPR r.31.22 or r.32.12, it was necessary that the using party sought to rely upon the document, for example by including it in a trial bundle in the new proceedings. Simply reviewing the documents for relevance, the defendant contended, was not a 'use' in this sense. Moreover, the defendant argued that it was bound to review all documents in its possession for relevance to fulfil its disclosure obligations.

Meaning of 'use' is very wide

The court found that all four steps constituted a 'use' and thus were restricted under CPR Part 31. 'Use' has a wide meaning in these provisions of the CPR, and the defendant was obliged to seek permission from the court even to review the documents and witness statements for relevance. Permission was granted.

The judge stated that the only – 'very limited' – use to which a previously disclosed document or witness statement may be put without coming under the scope of r.31.22 and r.32.12 is reviewing it to assess whether it falls under any of the exceptions to those rules: ie determining whether it has been read or referred to at a public hearing, seeking permission of the court to use it, or seeking the agreement of its owners to use it. Anything beyond this, including examination of the document by counsel in order to determine whether other proceedings would be possible or advisable, is a collateral use.

COMMENT

The judge's decision in this case to adopt such a wide interpretation of the word 'use' in relation to r.31.22 and r.32.12 has the effect that a party's ability to review or use a document which has been disclosed to him is very limited. In many respects this is not surprising. However, the decision means that, should subsequent proceedings arise which cause a party to recollect documents he has seen in earlier proceedings, he is not entitled even to re-read those documents to assess their relevance without the permission of the court or the documents' owner (unless they have been read out in open court). This raises the somewhat absurd prospect of a party having to go through the delay and expense of applying to court for permission to review documents, only for those documents to turn out to be entirely irrelevant. A further issue is that any application for permission to review will entail the applicant explaining why permission should be granted, and without some basic analysis of the documents' contents, this would seem to be a very difficult endeavour.

In reality, the permissible use of the documents (ie assessing whether the documents fall under any of the exceptions to the collateral use protections) may allow parties to form an early view on relevance too, but they will need to be aware that on this very strict interpretation, this could constitute a breach of the CPR. Litigants will also need to ensure that they factor in the timing implications of having to apply for the court's permission in relation to any previously disclosed documents.

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Insurance

IS THE PAYMENT OF A SUM INTO AN ESCROW ACCOUNT SUFFICIENT TO ASCERTAIN AN INSURED LOSS?

(1) WR Berkley Insurance (Europe) Ltd (2) Aspen Insurance UK Ltd v Teal Assurance Co Ltd [2017] EWCA Civ 25, 25 January 2017

A settlement that required the defendant to pay a sum into an escrow account which would be paid out to the claimant in certain agreed circumstances did not itself ascertain a loss for the purposes of the defendant's liability insurance. An insured loss would only arise if and when a payment was made from the escrow account to the claimant. The Court of Appeal's ruling is a reminder of the importance of considering insurance arrangements when settling a dispute.

In December 2010 Black & Veatch Group Limited (**BVGL**), an engineering group, settled a dispute with the Emirate of Ajman (**Ajman**) in relation to the construction of a waste water treatment plant. The agreements that gave effect to that settlement (the **Settlement**) required BVGL to deposit USD 13,460,531 into an escrow account on the day the Settlement was signed, and permitted Ajman to draw on those escrow sums from time to time in specified circumstances set out in the Settlement.

The Ajman claim had been notified to BVGL's 2007-2008 professional indemnity insurance cover, along with a number of other claims including two U.S.-based claims. That cover comprised a tower of insurance with five layers, with the second to fifth layers underwritten by Teal Assurance Co Ltd (**Teal**). The fifth layer was reinsured by WR Berkley Insurance Europe Ltd and Aspen Insurance UK Ltd (the **Reinsurers**). The first four layers provided BVGL with worldwide cover, but the fifth layer excluded claims emanating from or brought in the U.S. or Canada.

Teal and the Reinsurers disputed in what order the claims should be applied to the insurance cover, as if the non-US claims were applied first, then the Reinsurers would have no liability due to the U.S. claims exclusion on the fifth layer. This necessitated determining at what point exactly BVGL had suffered an insured loss.

It is an established principle of English insurance law that an insured loss under a liability policy only arises when the insured's liability is established, and the quantum of that liability ascertained, by a judgment, arbitration award or settlement. It was common ground that the Settlement established BVGL's liability to Ajman, but the Reinsurers argued that the quantum of BVGL's loss was also ascertained by the obligation to pay the escrow sum, such that an insured loss arose as at the date of the Settlement. Teal argued that the quantum of BVGL's loss was not ascertained until the later date at which Ajman drew down on the escrow sums.

At first instance Eder J accepted Teal's arguments, holding that an insured loss did not arise until the point in time that Ajman drew down on the sums in the escrow account. On appeal, the Reinsurers argued that an insured suffers loss when it parts with a quantifiable sum of money due to an established liability. They argued that the point in time at which BVGL parted with its money was the date of Settlement when it paid it into the escrow account, and thus that should be taken as the date on which its insured loss arose, not the later date that Ajman took the benefit of that money. Reinsurers relied on the decision of *Phillips J in Cox v Bankside* [1995] C.L.C. 671, which held that a court order for an interim payment was sufficient to establish an insured loss in the sum ordered to be paid.

The Court of Appeal rejected these arguments. The Court held that BVGL's deposit into the escrow account was not itself a payment of damages in respect of an insured liability, but merely a sum from which such subsequent payments could be made. For those payments to be made certain conditions had to be met, and it was possible that some or all of the sums deposited would be returned to BVGL.

The Court distinguished a deposit into an escrow account from an interim payment ordered by the court on basis that "the interim payment order represents a minimum amount which is due or will be payable by way of damages, whereas the escrow amount is a maximum which both may come down and, potentially, may be reduced to zero". The Court considered that a closer analogy was to a judgment of a court for liability but with damages to be subsequently assessed, which in *Burns v Shuttlehurst Ltd* [1999] 1 WLR 1449 was held not to ascertain the quantum of the insured loss.

COMMENT

The Court of Appeal's decision is an important reminder that sums paid to a third party in settlement of a claim will only be recoverable under a liability insurance policy if the insured can demonstrate both that the settlement establishes a legal liability to the third party, and that it ascertains the quantum of that liability. When settling potentially insured claims practitioners need to be alive to the effect on the insurance position of any proposed settlement drafting and mechanics. In this case the consequence of using an escrow mechanism was not to render the settlement sum uninsured, but it did have an effect on the point in time at which an insurable loss arose, which in turn had a potentially significant effect on whether other of the policyholder's claims would be covered. In other circumstances the same point could conceivably create difficult limitation issues in long-running insurance claims.

It is also worth noting that the court did not give any weight to the fact that the Reinsurers' consented to the escrow arrangement. When obtaining an insurer's (or reinsurer's) consent to settle close attention must be paid to the wording both of the consent sought and of the particular policy in issue. Some liability policies will provide that an insurer's consent to a settlement is sufficient for that settlement to be deemed to establish both liability and quantum for the purposes of the insurance. However in other cases an insurer's consent to a settlement simply prevents it from raising a lack of consent as a policy defence, but does not preclude it from arguing that the settlement agreement does not establish either liability or quantum for the purposes of the insurance.

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