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Litigation and Dispute Resolution

Review

EDITORIAL

This edition covers a number of interesting rulings from just before and just after the courts' two month summer break. For finance parties, there was a favourable ruling concerning duties owed by a bank when carrying out a review under a mis-selling consumer redress scheme (see **Tort**), and a decision which prevented a news agency from publishing commercially sensitive investment information that had been provided confidentially by a hedge fund to a select group of potential investors (see **Confidence**).

Those involved with complex design contracts may be interested in a decision from the Supreme Court which considers what happens when prescribed performance requirements do not meet agreed design specifications. A Court of Appeal contract case also reminds us of quite how stringent the test is for implying terms into a contract (see **Contract**).

Privilege is quite a hot topic at the moment – particularly in the investigations context. We cover two more privilege rulings – this time on collateral waiver of privilege (to use a privileged communication in evidence) and the privilege against self-incrimination.

Finally, a reminder that two new corporate criminal offences for failing to prevent the facilitation of UK or non-UK tax evasion come into force at the end of this week. These offences are summarised in our new 'Financial crime and investigations update for corporates'.

Amy Edwards
Senior Professional Support Lawyer
Litigation – London

Contact
Tel +44 20 3088 2243
amy.edwards@allenovery.com

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Confidence

HEDGE FUND STOPS NEWS AGENCY FROM PUBLISHING CONFIDENTIAL INVESTMENT INFORMATION

Brevan Howard Asset Management LLP v (1) Reuters Ltd (2) Maiya Keidan (3) Person or Persons Unknown [2017] EWCA Civ 950, 7 July 2017

Upholding an interim injunction preventing publication of commercially sensitive information provided by a hedge fund manager to potential investors, the Court of Appeal confirmed that the test for restraining publication in breach of a duty of confidence is whether the public interest in disclosure is outweighed by the public interest in maintaining the confidence. The decision highlights the importance of imbuing commercially sensitive information of this kind with the necessary quality of confidence, in order for it to be subject to protection.

Balancing exercise – public interest in publication v public interest in maintaining confidence

The claimant hedge fund manager wanted to restrain the defendants (an international news agency, one of its financial journalists and an unknown person or persons alleged to have disclosed the information in question) from publishing information based upon documents that the claimant sent to 36 potential professional investors on confidential terms.

Interim injunction awarded

At first instance, Popplewell J was satisfied that the claimant would more likely than not establish at trial that it would be entitled to restrain publication, and awarded an interim injunction. The Court of Appeal agreed.

Clear that information was confidential

It was clear that the information in question came from documents disclosed in confidence by the claimant – each potential recipient was informed before receiving the information that it was confidential and highly sensitive and each recipient was provided with a unique password-protected set of documents. The documents were also clearly marked private and confidential, not for onward distribution and with a detailed disclaimer regarding their use. The judge considered that the confidential nature of the information would have been apparent to the defendants even before this was expressly asserted by the claimant.

Hedge funds' effect on economy a matter of public interest

The judge accepted that there was a number of factors supporting a public interest in publication. These included that: hedge funds and their effect on the economy were a legitimate matter of public interest and debate; and the investors in the claimant's funds included institutional investors acting for the benefit of (among others) pension plan holders and public employees who would not otherwise be provided with the information which would enable them to influence and hold the institutional investors to account.

Must be a public interest in breaching confidence

The judge noted that it was not sufficient for the defendants to show that there was a public interest in publication of the information in question; there had to be a public interest in breaching the confidence which attached to the information.

Weighing the public interest in publication against the public interest in breaching the confidence that attached to the information, the judge decided in favour of maintaining confidence as:

- it concerned confidential financial information provided to potential investors relevant to their decisions to invest – potentially concerning investments worth tens of millions of dollars;
- it is important that hedge funds are incentivised to make full and candid disclosure of information to potential investors without fear of publication;
- there was no question of the publication being necessary to correct a false impression created by the claimant, to reveal any illegal or immoral dealing on its part, to expose any hypocrisy or improper practice, nor even to demonstrate incompetence.

On appeal, the Court of Appeal held that the judge had applied the correct test and upheld the interim injunction.

COMMENT

The right to freedom of expression in Article 10 ECHR is not absolute. Certain restrictions to the right may be permissible, including where necessary to prevent the disclosure of information received in confidence. Where interim relief is sought which would restrict a respondent's right of freedom of expression, s12 of the Human Rights Act 1998 requires the court to be satisfied that the applicant is likely to establish at trial that publication should not be allowed.

This case illustrates the factors that the court will take into account when considering whether to grant an interim injunction in a financial services context where it is said that publication would be in breach of a duty of confidence. While a fact-sensitive balancing exercise will always be required, notwithstanding any public interest in disclosure of particular information, it is clear that defendants will need to go further and demonstrate that this outweighs the public interest in maintaining the confidentiality in question.

On breach of confidence more generally, the steps taken by the hedge fund manager claimant to highlight the confidential nature of the documents were important to the judge's conclusions that the documents were probably impressed with a quality of confidence. Financial institutions sharing valuable commercial information should also take note of the importance of highlighting the sensitive and confidential nature of such information at all stages.

Maeve Hanna
Senior Associate
Litigation – Corporate – London

Contact
Tel +44 20 3088 1844
maeve.hanna@allenovery.com

Contract

TERMS OF EARLIER CONTRACT COULD NOT BE IMPLIED INTO LATER AGREEMENT

Stevensdrake Ltd (Trading as Stevensdrake Solicitors) v Stephen Hunt (Liquidator of Sunbow Ltd) [2017] EWCA Civ 1173, 31 July 2017

Inconsistent provisions regarding a fee arrangement could not be fixed by implying terms from a previous agreement into a later, inconsistent one. This Court of Appeal ruling is a good reminder of the stringency of the test for implying terms into a contract, and of the need for parties with long-standing business relationships to ensure that their contractual arrangements are coherent and consistent.

Inconsistent contracts between same parties

Mr Hunt and Stevensdrake Solicitors (**Stevensdrake**) had worked together since 1993. In 2005, Mr Hunt instructed Stevensdrake on the administration of Sunbow Limited, and Stevensdrake sent Mr Hunt a retainer and their standard terms of business. The retainer provided that Stevensdrake would wait for payment of its fees until recovery of any assets in the estate, apart from out-of-pocket expenses. In 2006, further retainers were signed, reiterating Stevensdrake's position that it would wait for payment out of the estate.

Nearly two years later, Stevensdrake and Mr Hunt entered into a Conditional Fee Agreement (**CFA**), which provided that Mr Hunt was personally responsible for any fees incurred under the CFA, which were not limited by reference to the funds in the liquidation. This was inconsistent with the retainers previously signed.

The Sunbow Limited case settled and Stevensdrake claimed payment of their fees in full. Mr Hunt argued that the 2006 correspondence governed the parties' relationship alongside the CFA, so that Stevensdrake's fees were only payable out of realisations received. As no realisations had been received, no fees were due. The court was asked to establish which terms governed the relationship between Mr Hunt and Stevensdrake, in the face of a long-standing relationship and inconsistent contracts.

At first instance, the High Court found that the full terms governing the relationship between Stevensdrake and Mr Hunt could not be ascertained from the CFA alone, and the CFA must implicitly incorporate the terms from the 2006 retainer that (a) Stevensdrake's fees would only be paid out of realisations, and (b) Mr Hunt had no personal liability for those fees.

No implied term

The Court of Appeal disagreed. A term can only be implied into a contract in very limited circumstances.[1] The term must:

- be reasonable and equitable (however this can be disregarded, if it satisfies the other requirements);
- be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- be so obvious that "it goes without saying";
- be capable of clear expression; and
- not contradict any express term of the contract.

The term implied by the High Court contradicted an express term of the CFA, and was neither necessary to give business efficacy to the CFA nor was so obvious that it went without saying (precisely because it

contradicted an express term of the CFA). The High Court had recognised that the CFA was a short, yet clear, signed "legally binding contract". However strong contemporaneous evidence was, it could not result in the implication of a term contrary to principle and authority.

Earlier agreement not an umbrella agreement

The Court of Appeal also pointed out that Mr Hunt's case had not even been argued as one of implied terms, but as the 2006 correspondence being an "umbrella agreement" which governed all subsequent correspondence and prevailed in the event of inconsistency. This argument too was dismissed. The CFA purported to be a complete and self-contained contract, it worked effectively without need for any further terms, it neither referred nor purported to incorporate any other terms and it represented a markedly different basis for payment than that provided in the 2006 correspondence. This latter reason also went against Mr Hunt's argument that the two documents could be interpreted consistently.

Accordingly, the Court of Appeal held that there was no contractual justification for going outside the terms of the CFA.

COMMENT

The decision of the High Court in finding that terms of a previous agreement could be incorporated by implication into a later agreement went against precedent established by the Supreme Court and created uncertainty between contracting parties who had a long-standing and multi-contractual relationship.

Parties with a long-standing business relationship must ensure that their contractual arrangements are coherent and consistent. Entire agreement clauses can be a useful tool to mitigate risk where there are pre-existing arrangements between the parties which are intended to be superseded. There was no such clause in the Conditional Fee Agreement in this case.

Megan Betts
Trainee
Corporate – London

Contact
Tel +44 20 3088 5014
megan.betts@allenovery.com

[1] *Marks and Spencer plc. v BNP Paribas Securities Services Trust Company (Jersey) Ltd (& anr)* [2015] UKSC 72.

BACK TO THE DRAWING BOARD – WHEN PRESCRIBED DESIGN DOES NOT ACHIEVE PRESCRIBED PERFORMANCE

MT Højgaard A/S (Respondent) v E.ON Climate & Renewables UK Robin Rigg East Ltd & anr (Appellants) [2017] UKSC 59, 21 August 2017

The courts are generally inclined to give full effect to a requirement that an item, as produced, complies with prescribed performance criteria, even if the customer/employer has specified or approved the design used to produce that item (and that design resulted in a failure to meet the prescribed performance criteria).

This case arose from the failure of foundation structures at two offshore wind farms at Robin Rigg in the Solway Firth, which were designed and installed by MT Højgaard A/S (**MTH**).

MTH had entered into a contract with two companies in the E.ON Group (**E.ON**) under which MTH agreed to design, fabricate and instal the foundations for the proposed turbines at Robin Rigg. It was accepted by MTH that the "Technical Requirements" (**TR**), a document circulated by E.ON during the tender process and which was included with the contract as Part I, were effectively incorporated into that contract. Paragraph 3.2.2.2 of the TR contained two important provisions for present purposes, labelled (i) and (ii) by the courts for ease of reference:

- part (i) provided that the contractor was required to prepare the detailed design of the foundations in accordance with a document known as J101 (an international standard for the design of offshore wind turbines); and
- part (ii) stated that "[t]*he design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement*".

MTH proceeded with the design and construction, and completed the relevant works in early 2009. However, during 2009 it also came to light that there was an error in J101 – a value in one of the equations referred to in the standard was incorrect (by a factor of about ten). As a result of this error (which was such that the foundations could not fulfil their intended purpose for a period of 20 years), issues arose with the foundations in 2010, and subsequently remedial works were performed. The parties commenced these proceedings to determine which of them should bear the cost of those works.

Decision of the Supreme Court

The central focus of the appeal to the Supreme Court was on paragraph 3.2.2.2(ii) of the TR, and whether MTH was in breach of contract in light of that provision, despite the fact that it used due care and professional skill, adhered to good industry practice and complied with J101.[1]

Lord Neuberger (with whom the other members of the court agreed) considered that the natural meaning of paragraph 3.2.2.2(ii) involved MTH either warranting that the foundations would have a lifetime of 20 years, or agreeing that the design of the foundations would be such as to give them a lifetime of 20 years.[2] As such, in his view there were only two (mutually reinforcing) arguments open to MTH as to why the provision should not be given its natural effect:

- such an interpretation resulted in an obligation inconsistent with MTH's obligation to construct the works in accordance with J101; and
- paragraph 3.2.2.2(ii) was too slender a thread upon which to hang such an important and potentially onerous obligation.

"Inconsistent" obligations

Lord Neuberger began by observing that cases such as this must be determined by reference to the ordinary principles of contractual interpretation (namely, by the courts having regard to the provisions of the particular contract and its commercial context – *Wood v Capita Insurance Services Ltd* [2017] 2 WLR 1095, *per* Lord Hodge).

However, his Lordship then went on to consider a number of authorities in which similar issues had arisen. He concluded that, in cases where a contract contains terms requiring an item: (i) which is to be produced in accordance with a prescribed design; and (ii) which, when provided, will comply with prescribed criteria, and literal conformity with the prescribed design will inevitably result in the product falling short of one or more of the prescribed criteria, it does not necessarily follow that the two terms are mutually inconsistent. Although this may be right in some cases, for many contracts the correct analysis may be that the contractor has to improve on any aspects of the prescribed design which would otherwise lead to the product falling short of the prescribed criteria; or it may be that the requirements of the prescribed criteria only apply to aspects of the design which are not prescribed.

Significantly, Lord Neuberger also observed that the courts are generally inclined to give full effect to the requirement that the item as produced complies with the prescribed criteria, on the basis that, even if the customer/employer has specified or approved the design, it is the contractor who can be expected to take the risk if he agreed to work to a design which would render the item incapable of meeting agreed criteria.

Considering the contractual provisions in this case, his Lordship reached the conclusion that paragraphs 3.2.2.2(i) and 3.2.2.2(ii) of the TR were not inconsistent. Rather, the more rigorous or demanding of the two standards (namely, paragraph 3.2.2.2(ii)) prevailed, and the less rigorous could be treated as a minimum standard. His Lordship felt supported in this analysis by other provisions of the TR, which stated that the relevant requirements were "MINIMUM requirements", and that

it was MTH's responsibility "to identify any areas where the works needed to be designed to any additional or more rigorous requirements or parameters"; although he noted that even in the absence of those other provisions, he would have reached the same conclusion.

Too slender a thread

This argument was also dismissed by Lord Neuberger, who considered a number of the factors relied upon by MTH to support it. In particular, he concluded that:

- the mere fact that the contractual arrangements between parties may be long, diffuse and multi-authored, with much in the way of detailed description and "belt and braces" provisions, does not alter the fact that the court has to do its best to interpret the contractual arrangements by reference to normal principles;
- technical documents which have been incorporated into a contract will be given contractual effect. Lord Neuberger was "not impressed" with MTH's argument that it was surprising that such an onerous obligation was found in only a part of a paragraph of what was essentially a technical document, rather than spelled out in the main contract; and
- the courts will be slow to interpret a contractual provision (such as paragraph 3.2.2.2(ii)) so that it is not given its natural meaning, but instead is "given no meaning or a meaning which renders it redundant".

COMMENT

While this case was decided on its facts, it serves as a useful reminder to employers to ensure their construction contracts include typical protections to minimise uncertainty as regards inconsistent obligations and any consequent liability. For example, the contract should: (i) oblige the contractor to review the employer's design requirements and flag up any inconsistencies; (ii) provide that any such inconsistency is then resolved by the employer as it sees fit (or failing that by reference to a priority of documents provision); and (iii) expressly specify that any warranty is separate and not construed more narrowly than it might otherwise be construed by reference to any other warranty or by reference to where the warranty is set out in the contract. In addition, if the construction contract provides that the works are required to comply with certain codes or standards, the construction contract should make it clear that these are minimum requirements and without prejudice to the employer's other contractual obligations (eg the contractor's fitness for purpose obligations).

Mark Walker
Partner
Banking – London

Contact
Tel +44 20 3088 3316
mark.walker@allenovery.com

Edward McCullagh
Associate
Litigation – Corporate – London

Contact
Tel +44 20 3088 2617
edward.mccullagh@allenovery.com

[1] It had also been alleged below that MTH had been negligent, and liable for other alleged breaches of contract.

[2] There had been argument as to the precise effect of paragraph 3.2.2.2(ii), although ultimately Lord Neuberger considered that it was unnecessary to decide the point, as if paragraph 3.2.2.2(ii) was an effective term of the contract, it was breached by MTH regardless of whichever meaning it had.

Costs

LIQUIDATORS MUST DISCLOSE IDENTITY OF THIRD-PARTY FUNDERS BUT ONLY TO A CONFIDENTIALITY CLUB

In the matter of Hellas Telecommunications (Luxembourg) [2017] Unreported

The English court can order liquidators to disclose the identity of third-party litigation funders in order to facilitate an application for security for costs against the funders. The decision is the latest in a recent series of English court judgments on third-party funding confirming the power of English courts to require disclosure of third-party funding arrangements. This judgment goes further than previous cases by clarifying that the court can limit disclosure of funding arrangements as appropriate, eg by limiting it to a defined "confidentiality club".

The applicants were defendants in litigation commenced by the liquidators of a company. The applicants suspected that the liquidators' claims were being funded by a third party. The applicants wanted to consider whether to apply for security-for-costs against the funders, and so applied for an order for disclosure of their identity.

The respondent liquidators argued that the power to order such disclosure was not expressly conferred upon the court under the security for costs provisions of the Civil Procedure Rules, and could not be implied from its power (under CPR 25.14) to order third-party funders to lodge security for costs.

Liquidators ordered to disclose identity of third-party funders and funding terms

Snowden J ordered the liquidators to disclose the identity of any third-party funders and materials regarding any financing agreement:

- As per *Wall v RBS*, there was a power inherent or implied in CPR 25.14 to make orders to disclose third-party funding arrangements so as to enable an effective application under CPR 25.14 to be made.
- The test was whether there were realistic grounds on which an application under CPR 25.14 might be made and whether such an application would have realistic prospects of success. The applicants had put forward sufficient evidence to meet this threshold requirement.
- The court's power to order disclosure of funders applies even where there is no pre-existing costs order against anyone in the proceedings.

Disclosure may be limited to a "confidentiality club"

Since there was a risk that some of the third-party funders could be creditors of the insolvent company, the court found that there was a legitimate concern of material prejudice occurring to the liquidators if the identity of the funders became widely known. This risk could be mitigated by limiting the disclosure to a narrowly defined group of individuals at the applicant and requiring them to undertake only to use the information for the purposes of determining whether to make a security-for-costs application.

COMMENT

This judgment follows the same reasoning as in *Wall v RBS*: where there exists a power to grant a remedy (in this case, security for costs), there also has to be inherent in that power the power to make ancillary orders to make that remedy effective.

In order for an application for disclosure of third-party funding to be successful, there must be a serious or realistic prospect of successfully obtaining security for costs in a subsequent security-for-costs application.

When considering disclosure applications of this nature, English courts have previously taken into account a number of factors, such as the importance of the amount of costs at stake and the respondent's inability to prove it is independently financing (see *Wall v RBS*), the timing of the disclosure application, the consistency of the claimants' statements as to funding and evidence that funders are located overseas (see *Re RBS Rights Issue* [2017] EWHC 463 (Ch)). As the full case transcript is not yet available, it is not possible to tell exactly which factors Snowden J took into account in this case.

The innovation of limited disclosure to a "confidentiality club" will be welcomed by claimants who are particularly vulnerable to wide disclosure of confidentiality agreements, such as creditor-funded liquidators or intragroup-funded companies.

This judgment serves as a reminder to parties to English court litigation that the other party may be in receipt of third-party funding and that security for costs could be successfully sought from the funders. For third-party funders, it highlights that confidential funding arrangements may have to be disclosed and that funds may have to be readily available to meet a security-for-costs order.

Clients and funders should also be mindful of the scope of a third-party funder's potential liability (possibly on an indemnity basis) as defined in *Excalibur Ventures LLC v Texas Keystone Inc & ors* and recent case law confirming that the cost of third party funding may be recovered from the losing party as part of the costs of the arbitration (see *Essar v Norscot* reported in the October 2016 Litigation Review).

Valeriya Kirsey
Associate
Litigation – Arbitration – London

Contact
Tel +44 20 3088 3196
valeriya.kirsey@allenovery.com

Employment

WHISTLEBLOWER PROTECTION – WHAT DOES "IN THE PUBLIC INTEREST" MEAN?

Chesterton Global Ltd & anr v Nurmohamed & anr [2017] EWCA Civ 979, 10 July 2017

A worker will only be protected from detriment or dismissal if the disclosure is made in the reasonable belief that it was in the public interest. Since its introduction in June 2013, employment tribunals have been applying the public interest test to whistleblowing cases without guidance as to its meaning, as the phrase is not defined in legislation. In the first case to reach the Court of Appeal on the issue, the judgment in *Chesterton* provides helpful direction as to the factors to be considered when assessing whether a worker reasonably believed their disclosure to be in the public interest.

Protection for whistleblowers

The Public Interest Disclosure Act 1998 protects workers who blow the whistle, not just for their own private gain but – as the name suggests – in the public interest.

Estate agency employee complains about dishonest accountancy practices

Mr Nurmohamed was a senior employee of Chestertons, a privately owned estate agency. Chestertons terminated his employment after he made a number of complaints (which he would later allege to be disclosures) to his

employer regarding what he perceived as dishonest accountancy practices, whereby costs and liabilities were overstated in the internal accounts. These accountancy practices impacted negatively on the commission payments awarded to him and 99 other senior employees. The first instance tribunal and the Employment Appeal Tribunal both concluded that Mr Nurmohamed's disclosures were in the public interest, and therefore his dismissal was automatically unfair.

Can the interests of 99 workers amount to being in the "public interest"?

Chestertons argued that, for a disclosure to be truly in the public interest, it would have to serve the interests of non-employees. The fact that 99 other employees' interests were also served by Mr Nurmohamed's disclosure was mere evidence of a "multiplicity of workers sharing the same interest" rather than a public interest being served. The number of workers affected was, Chestertons argued, therefore not relevant.

How to measure public interest

The Court of Appeal disagreed, and considered the following factors, put forward by the employee, as a "helpful tool" for an employment tribunal to use:

- the numbers in the group whose interests the disclosure served – although not in itself a determinative factor;
- the nature of the interests affected and the extent to which they are affected by the wrong doing disclosed – a disclosure affecting a very important interest is more likely to engage the public interest than a disclosure of a trivial nature;
- the nature of the wrongdoing disclosed – especially where it is a deliberate act of wrongdoing; and
- the identity of the alleged wrongdoer – a disclosure concerning a more prominent wrongdoer is more likely to serve the public interest.

The court found that the public interest test was satisfied. A large number of employees was affected by the wrongdoing, which revealed a GBP 2-3 million mis-statement in the internal accounts. It was a deliberate act of wrongdoing, carried out by a prominent high-street firm. Interestingly, Underhill LJ said that had the disclosure related to statutory, rather than internal, accounts, there would have been no question that it would have been in the public interest.

A subjective test

The court emphasised that what is in the public interest cannot be determined by absolute rules, especially in light of the fact that "the decisive question is not what is in fact in the public interest but what could be reasonably be believed to be".

COMMENT

The decision confirms that there continues to be a low threshold for workers to come under the statutory protection regime for whistleblowers. Of fundamental importance is the fact that the disclosure need only be in the public interest according to the "reasonable belief" of the person making the disclosure.

While the "public interest" element is an additional hurdle for whistleblowers, in practice it will not prove too difficult to show that a disclosure that is personal in character may also have certain features that would make it in the public interest. This does not however, as the judgment makes clear, mean a return to employees being able to use whistle-blowing protection as a vehicle for complaints about an individual's own employment contract. The 2002 ruling in *Parkins v Sodexho Ltd* [2002] IRLR 109 expanded whistleblower protection to any employee who made a disclosure about a legal breach of their own terms of employment. The "public interest" requirement was subsequently introduced into the Act in June 2013 as a response to the *Sodexho* ruling, in an attempt to ensure that private workplace disputes with no ostensible public interest angle no longer attract statutory whistleblower protection.

Charlie Bowden
Associate
Litigation – Employment – London

Contact
Tel +44 20 3088 7452
charlie.bowden@allenovery.com

Privilege

SCOPE OF PRIVILEGE AGAINST SELF-INCRIMINATION

R (on the application of River East Supplies Ltd) v Crown Court at Nottingham & ors [2017] EWHC 1942 (Admin), 28 July 2017

Statements that an individual is compelled to make against their will are protected by the privilege against self-incrimination. However, materials that exist independent of the use of compulsory powers (eg pre-existing documents) are not protected by this privilege. In the context of documents sought by U.S. regulators from a UK company, the English High Court also held that a U.S. letter of request is confidential and thus should not be disclosed to the company.

River East Supplies Limited (the **claimant**) sought judicial review of a production order requiring it to produce certain documents in response to a request for mutual legal assistance from U.S. regulators.

Criminal investigation in the U.S.

The United States Food and Drug Administration Office (**FDA**) had been carrying out a criminal investigation into the trade of counterfeit drugs, which included investigating the claimant. The FDA issued a letter of request to the UK Central Authority (the **UKCA**), requesting mutual legal assistance (the **Letter**). The relevant UK police force applied for a Production Order. The application contained a copy of a superseding indictment detailing the allegations made against the claimant, but did not contain a copy of the Letter. The claimant sought disclosure of the Letter in order to check that the material listed in the Production Order matched that detailed in the Letter. The UKCA resisted disclosure on the basis that maintaining confidentiality of letters of request was vital for the UK to provide and receive mutual legal assistance. At first instance, the court refused disclosure of the Letter and granted the Production Order.

The claimant appealed, arguing that:

- the Production Order should have been based on the Letter itself, rather than the UKCA's interpretation of it, ie the Letter should have been disclosed with any necessary redaction applied; and
- the production of the material requested in the Production Order may infringe the claimant's privilege against self-incrimination.

Letters of request are confidential and do not have to be disclosed

Letters of request are confidential and are not disclosed, either to the court or to a party affected, held Simon LJ and Sir Kenneth Parker (sitting as a High Court Judge). In some cases, justice or principles of fairness may require that information as to the nature of a criminal investigation be provided,[1] and in others, the nature of the application might indicate that further information is provided.[2] Moreover, where a witness statement given in support of an application made following a letter of request refers to that letter of request, production of the letter may be ordered (see here for coverage of this issue in a previous edition of this Review). However, no such considerations arose in this case. The UKCA application and the superseding indictment were available to the judge at first instance and to the claimant, and provided a detailed and comprehensive explanation of the criminal investigation. Those documents were sufficient for the Production Order.

Privilege against self-incrimination – an important distinction

There is a clear distinction between statements that a suspect has been compelled to make against its will and so-called "independent" material that has been obtained through the use of compulsory powers:

- statements made against a suspect's will: these would not have existed save for the compulsory discovery process. Such statements are contrary to a suspect's right to remain silent and, therefore, fall within the scope of the privilege against self-incrimination; and
- independent materials that come into existence independently of (and usually prior to) any compulsory discovery process do not fall within the scope of the privilege. Such material can include, for example, pre-existing documents acquired under a warrant or production order.

The material sought by the Production Order, which consisted of the claimant's internal documents created in the years prior to the FDA investigation commencing, was indisputably "independent". As such, the privilege against self-incrimination did not apply. Their Lordships also considered that there are "powerful arguments" (set out in *R (Bright) v Central Criminal Court* [2001] 1 WLR) that Parliament had, under the Police and Criminal Evidence Act 1984, excluded the privilege in the context of production orders, although they didn't decide the issue.

COMMENT

When faced with compulsory discovery (for example, in the form of a production order or warrant) for material that might expose it to the risk of criminal proceedings, a party will usually attempt to resist disclosing such material. This case serves to highlight the difficulties such a party might face in claiming that any such material is subject to the privilege against self-incrimination. It is likely that the material in question will, as it was in this case, be historical and, as such, will have come into existence independently of the compulsory discovery process, ie it will be considered "independent". The weight of judicial authority suggests that, as such, the material will not attract any privilege against self-incrimination. However, although their Lordships considered that there was no uncertainty in this regard, the instant decision was rendered in the High Court and, as such, absolute clarity may only be achieved when a case comes before the Supreme Court.

Where a party has a good claim to privilege against self-incrimination, it is, of course, important to remember that any such claim must be made before the material in question is disclosed. Failure to assert privilege against self-incrimination before material is disclosed will result in a loss of that privilege.

David Baker
Associate
Litigation – Arbitration – London

Contact
Tel +44 20 3088 2580
david.baker@allenovery.com

[1] *R (Evans) v Director of the SFO & ors* [2003] 1 WLR 299.

[2] *National Crime Agency v Abacha & ors* [2016] 1 WLR 4375.

COLLATERAL WAIVER: NOT AS WIDE AS YOU MIGHT THINK

Holyoake & anr v Candy & ors [2017] EWHC 387 (Ch), 27 February 2017

A party may choose to waive privilege over a document in order to use it in litigation. A potential downside is that, in doing so, the party has collaterally waived privilege over other privileged communications that relate, or are needed to fairly interpret or understand, the previously disclosed communications. Nugee J's ruling provides a useful guide as to how the principle of collateral waiver applies and its limitations.

In this interim application, the defendants sought disclosure of privileged communications from the claimants on the basis of collateral waiver.

The principle of collateral waiver requires a party to disclose further privileged material where that material relates to the same "transaction" (or "issue") for which the party has already deployed privileged material in the legal proceedings. It means that if you decide to use privileged material in litigation, you may be required to disclose further privileged material which relates to the same "transaction" so as not to give the court a misleading picture. This principle is also known as the rule against "cherry-picking".

There are two important limitations to this rule which are sometimes overlooked:

- the principle is not engaged unless a party seeks to deploy (or rely on) its privileged material in legal proceedings; and
- collateral waiver only attaches to other privilege communications of that party if they are relevant to the same "transaction" for which the original privileged material was deployed.

Privileged material used to rebut allegation of fabrication

The first claimant, Mr Holyoake, alleged that the defendants had used threatening behaviour against him.

In the course of cross-examination, counsel for the defendants suggested that Mr Holyoake had fabricated these allegations. As evidence of this, counsel put to Mr Holyoake that there was no email between Mr Holyoake and his lawyers recording this sort of behaviour.

On re-examination, in order to rebut this suggestion, counsel for Mr Holyoake referred to a number of emails he wrote to his lawyers which referred to the alleged threats (the **original emails**). The parties agreed that privilege in these original emails had been waived by virtue of this re-examination.

Application for disclosure of more privileged material

On the back of this waiver of privilege, the defendants applied for the disclosure of further privileged emails between Mr Holyoake and his lawyers relating to the alleged threatening behaviour, on the basis that privilege in them had also been waived, under the principle of collateral waiver. The defendants argued that such waiver had occurred because either the further emails had been: (a) referenced in the original emails; (b) concerned the same threats as referenced in the original emails; or (c) concerned alleged threats after the date of the original emails.

Emails had been deployed

Nugee J held that the claimants had deployed the original emails in the legal proceedings. This was an important first finding, as, without deployment, the principle of collateral waiver could not apply.

Extent of the "transaction"

Nugee J then sought to identify the "transaction" to which the original emails had been deployed. Collateral waiver will only apply to further privileged material

relating to that same "transaction." He followed a two-stage process.

Stage one: identify the "transaction"

The "transaction" may be easily identifiable from the nature of the disclosure (eg the particular advice given by counsel on a single occasion). However, it may be apparent from that disclosure, other available material or the purpose of the initial deployment, that the "transaction" is wider than that which is immediately apparent. Whether immediately apparent or not, the privileged communications relating to the whole of the relevant "transaction" must be disclosed.

Stage two: disclosure necessary to avoid unfairness or misunderstanding

In addition, further disclosure may be needed to avoid unfairness or misunderstanding of the deployed privileged communications. Fairness does not generally require the disclosure of later privileged communications on the same "transaction".[1] The occasions where such later communications have been disclosed were because they were alterations, amplifications or extensions of earlier communications already deployed.

Applying this two-stage process to the facts of this case, Nugee J held that the "transaction" for which the original emails were disclosed was the particular communication Mr Holyoake made in the original emails. It did not extend to all communications between the claimants and their lawyers on the topics of the alleged threats. The purpose of the deployment of the original emails did not widen the scope of this "transaction". They were disclosed to rebut the suggestion of recent fabrication by establishing that Mr Holyoake said something similar a while ago. The "transaction" in question therefore remained just the original emails. At this first stage therefore, Nugee J held that the only additional privileged communications to be disclosed were those incorporated in the original emails by reference. As a result, he held that a file note made by Mr Holyoake's lawyers and expressly referenced in one of the original emails should be disclosed.

In relation to the second stage and whether there should be any further disclosure to avoid unfairness, he ruled not. Following earlier case law, he held that fairness did not require the disclosure of later privileged communications between Mr Holyoake and his lawyers concerning the alleged threats.

COMMENT

The certainty and confines Nugee J seeks to bring to the remit of collateral waiver is to be welcomed. Litigants should be able to predict with a degree of confidence the knock-on effect of deploying privileged material in legal proceedings. Although, of course, any question of fairness will turn on the particular facts of a case, it is helpful to be able to look to previous case law for firmer guidance in this area.

After the recent privilege judgments in *RBS Rights Issue Litigation* and *SFO v ENRC*, this decision provides some much-needed judicial support for the right to claim privilege.

Christabel Constance
Senior Professional Support Lawyer
Litigation – London

Contact
Tel +44 20 3088 3841
christabel.constance@allenovery.com

[1] *General Accident Fire and Life Assurance Corporation Ltd v Tanter* [1984] 1 WLR 100.

Tort

NO DUTY OF CARE OWED UNDER MIS-SELLING REDRESS SCHEME

(1) CGL Group Ltd (2) Jacqueline Bartels & Adrian Bartels (3) WW Property Investments Ltd v (1) Royal Bank of Scotland Plc & National Westminster Bank Plc (2) Barclays Bank Plc (3) National Westminster Bank Plc [2017] EWCA Civ 1073, 24 July 2017

Banks which had agreed with the UK Financial Conduct Authority (**FCA**) to carrying out reviews of how interest rate hedging products (**IRHPs**) had been sold to certain of their small and medium-sized business customers (**SMEs**), do not owe a duty of care in tort to those customers in carrying out the reviews. The decision will make it much more difficult to bring tortious claims against regulated entities regarding their conduct of regulatory compensation schemes. The court held that no such duty of care should arise where there is already a comprehensive regulatory scheme in place which defines when breaches of regulatory duties are actionable and by whom.

The appellants had entered into the IRHPs with the respondent banks to hedge variable interest rate risk arising from commercial loans. As a result, the appellants were either unable to benefit from the dramatic fall in interest rates in 2008/2009 or faced significant increases in financing costs under the trades.

Following the FCA finding "serious failings" in the sale of IRHPs to SMEs by a number of banks, in June 2012, the respondent banks (along with seven other banks) agreed with the FCA to carry out a review of sales of IRHPs to "non-sophisticated" customers (the **Review**) and to provide redress to customers where mis-selling was found to have occurred. The Review was conducted under a review agreement between each bank and the FCA, in which the bank undertook to carry out the Review in accordance with specific terms. Of particular importance in this case was the requirement for the banks' Review to be scrutinised by a skilled person (appointed under s166 of FSMA) who would have the final say in any redress determinations and monitor other aspects of the Review process.

The appeals in these separate claims were linked on the basis that they all raised the question of whether the banks owed the appellants a duty of care in carrying out the Review.

Three tests for duty of care

Acknowledging the difficulties in determining when a duty of care arises regarding economic loss, the court applied three tests which are often used interchangeably, and as cross-checks on each other:

(1) whether the defendant assumed responsibility to the claimant;

(2) the threefold test in *Caparo Industries plc v Dickman*[1] which asks whether (a) loss was a foreseeable consequence of the defendant's actions or inactions, (b) the relationship of the parties was sufficiently proximate, and (c) it would be fair, just and reasonable to impose a duty of care on the defendant towards the claimant; and

(3) whether the addition of this duty of care to the existing categories of duty would be incremental.

The appellants' primary case was that the banks had voluntarily assumed responsibility to their customers to perform the Review carefully; accordingly, they owed their customers a duty of care in doing so.

No duty of care

The court held that cumulatively the following factors militated against a duty of care arising in this case.

- *Regulatory context*: The context of the Review clearly weighed against the imposition of a duty of care. To recognise a common law duty of care would undermine a regulatory scheme which has carefully identified which class of customers are to have remedies for which kind of breach (classes which the appellants did not form part of). It was Parliament's intention that only the FCA can require the banks to comply with the schemes; no individual customer could enforce these schemes or sue for breach of their terms.
- *Dealings between the parties*: The communications received by the appellants from the banks regarding the Review (which formed the core of the appellants' case on "assumption of duty") did not suggest a voluntary assumption of responsibility towards the customer. The banks had been obliged to allow the appellants to participate in the Review and its communications were drafted as required by the FCA. The reason why the banks had agreed to conduct the Review was also an important factor: in practical terms, the banks had agreed to do so at the instigation of the FCA following its findings, rather than on a truly voluntary basis.
- *Role of the independent reviewer*: In their communications to their customers, the banks had emphasised that its Review (and the decisions made as part of it) would be scrutinised by an independent reviewer. It was difficult to argue that the banks had assumed responsibility to the customers, and owed them a duty of care, when it had less control over the conduct of the Review than an independent reviewer which itself could not owe a duty of care to customers.
- *Not* "*fair, just and reasonable*": Imposing a duty of care would enable two of the appellants to circumvent the limitation period for their original mis-selling claims (which they accepted were time-barred). Given that the alleged breaches of duty were in substance no more than a restatement of these original claims, and the overall nature of the Review, the court considered that it was not "fair, just and reasonable" to impose a duty of care.
- *No* "*lacuna*": The court did not consider there to be a "lacuna" in the law which required rectification by a common law duty of care. The appellants' attempts to identify a lacuna amounted to no more than identifying the limits of the regulatory regime enacted by Parliament. The court also considered that it would be wrong to regard the position if the Review was conducted badly but the FCA decided not to bring enforcement proceedings as a lacuna.
- *Conflict of interest*: The existence of a conflict of interest (the Review required the banks to assess whether they had acted in breach of their regulatory duties and whether to provide redress) pointed away from imposing a duty of care.

COMMENT

In November 2016, the FCA published a final progress update on the Review stating that, following the completion of their sales review, the nine participating banks had sent redress determination letters to 18,200 businesses and paid GBP 2.2 billion in redress to customers. Banks participating in the Review have faced a number of claims in the High Court in connection with their sales of IRHPs, including *Property Alliance Group v Royal Bank of Scotland plc and Suremime Ltd v Barclays Bank plc*.[2]

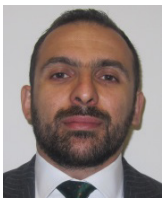
While this decision will be of immediate interest to the banks participating in the Review, it is significant for all regulated institutions. The substance of the appellants' underlying claims was not about the provision of banking services, but about how the banks dealt with their complaints about banking services. It is possible to imagine a large number of similar customer complaints or redress schemes (including consumer redress schemes carried out under s404 FSMA or restitution schemes under s384). Against this background, the imposition of

a duty of care concerning a complaints system could have had far-reaching consequences for all FCA-regulated institutions, and potentially institutions regulated by other authorities with powers to institute complaints schemes. In its decision, the Court of Appeal underlined the fact that Parliament has decided where breaches of regulatory duties are actionable (some breaches are not to be actionable at all, and others are only to be actionable by private persons), thus bringing certainty for FCA-regulated institutions as to who may bring claims against them in connection with their regulatory duties and in what circumstances.

Finally, in the Court of Appeal's judgment, Lord Justice Beatson set out a comprehensive analysis of the general approach of the courts when determining whether a duty of care exists in cases of economic loss. Given that the establishment of a duty of care is an essential element of all such claims in tort, this case will be of interest to both potential claimants and defendants in such cases.

Juliet de Pencier
Senior Associate
Litigation – Banking, Finance & Regulation – London

Contact
Tel +44 20 3088 2014
juliet.depencier@allenovery.com



Arshak Mkrtchyan
Litigation – Banking, Finance & Regulation – London

Contact
Tel +44 20 3088 1376
arshak.mkrtchyan@allenovery.com

[1] *Caparo Industries plc v Dickman* [1990] 2 AC 605.

[2] In the latter case, HHJ Havelock-Allen QC had granted the applicant permission to amend its pleadings to introduce a claim that the Bank owed it a duty of care in relation to the Review on the basis that these claims in tort were arguable.

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Key contacts

If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy, or Karen Birch.

Allen & Overy LLP

One Bishops Square, London E1 6AD, United Kingdom

Tel +44 20 3088 0000

Fax +44 20 3088 0088

allenovery.com