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Litigation and Dispute Resolution

Review

EDITORIAL

Reasonable endeavours, termination provisions (whether they are unenforceable penalties), asymmetric jurisdiction clauses and a Supreme Court ruling on the principles of contractual interpretation are all covered in this edition, and will be of interest to commercial lawyers.

Third party funding is already an established feature in commercial litigation, and we are likely to see class actions featuring more prominently as the Consumer Rights Act 2015 collective proceedings order regime beds down. This edition covers decisions on both – concerning the disclosure of the identity of litigation funders and the first application for a class action.

In the financial crime sphere there is increased collaboration between authorities in different jurisdictions. We consider a recent unsuccessful challenge, by way of a judicial review, of a UK Serious Fraud Office Letter of Request for assistance to a foreign authority (in Monaco) to gather evidence in relation to the Unaoil bribery and corruption investigation.

Another judicial review application which recently failed was of a Financial Ombudsman Service decision (on insurance), with the court holding that the Ombudsman can depart from the "relevant law" in deciding what is fair and reasonable.

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Antitrust

NEW COMPETITION CLASS ACTION REGIME OFF TO A SLOW START

Dorothy Gibson v Pride Mobility Products Ltd [2017] CAT 9, 31 March 2017

The first ever application to create a class action under the Consumer Rights Act 2015 regime, in relation to anti-competitive conduct in the mobility scooter market, has been adjourned following faults found with the applicant's case concerning the definition of the proposed classes and the methodology used to formulate them. The ruling provides the first guidance as to how the CAT will interpret the statutory requirements for granting a collective proceedings order.

The Consumer Rights Act 2015 (**CRA**) introduced significant changes to competition law private actions in the UK, in particular by expanding the jurisdiction of the Competition Appeal Tribunal (**CAT**) and creating a regime for opt-in or opt-out collective proceedings. Collective proceedings are commenced by the person who proposes to be the class representative, but may be continued only on the basis of a collective proceedings order (**CPO**) made by the CAT. In order to make a CPO, the CAT must (i) consider that the claims raise common issues of fact or law and are suitable to be brought in collective proceedings; and (ii) authorise the proposed class representative on the basis that it is just and reasonable for that person to act as class representative in the proceedings.

The Applicant, Ms Dorothy Perkins, General Secretary of the National Pensioners Convention, sought a CPO for certification as the representative of an opt-out class of people who purchased the Respondent's (**Pride**) mobility scooters in the UK during a period in which the Respondent had been found by the Office of Fair Trading (**OFT**) to have been infringing competition law in the mobility scooter market.

Timing

The transitional provisions for claims arising before the CRA came into force (1 October 2015) but issued after that date provide that follow-on claims can be brought under the new CRA regime within two years of the competition authority decision on which they rely becoming final (in this case the OFT decision became final in May 2014 and the claim was issued in May 2016, within the two-year limit). Pride claimed that such retrospectively was contrary to the European Convention on Human Rights, the Human Rights Act, general principles of EU law (in particular legal certainty and legitimate expectation) and/or the EU Charter of Fundamental Rights.

The CAT dismissed these arguments, largely on the basis that the new collective proceedings regime, while being a new form of procedure, does not establish a new cause of action (the claimants could previously have brought their claims, albeit on an individual basis). The CAT also held that Pride's legitimate expectations were not breached when it decided not to appeal the OFT decision, as while no collective proceedings existed in UK law at the time, the new regime was foreseeable at that point, having been published as a bill and read in Parliament by the time of the OFT decision.

Whether to grant a CPO

The CAT considered whether it should grant the Application on the basis of the criteria in the CRA and the CAT Rules 2015. In evaluating the Applicant's proposed subclasses, to determine whether the potential claimants' damages claims raised common issues (one of the requirements for class certification), the CAT considered, among other things, expert economic reports from both parties and oral evidence from the Applicant's expert.

The application for a CPO was, in the CAT's own words "*… not a mini trial, and the essential question is whether the Applicant has established a sufficiently sound and proper basis to proceed, having regard to the statutory criteria*". The CAT also contrasted the UK and U.S. approaches to class certification, noting that the UK regime is intended to proceed to class certification "*with either no or only very limited disclosure and shorter hearings held within months of the claim form being served*".

However, the CAT still considered it necessary to consider complex economic arguments before granting a CPO. The CAT considered that "*appropriate guidance*" could be derived from the position in Canada, which has held that economic evidence is required in order to establish the commonality of loss to the class members which must "*offer a realistic prospect of establishing loss on a class-wide basis… The methodology cannot be purely theoretical or hypothetical, and must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied*".

The CAT concluded that the Applicant's proposed class structure would allow the Applicant to claim damages beyond the scope of the OFT decision on which the claims relied (the Applicant was unable to claim any infringement beyond the scope of the OFT decision due to limitation issues). The OFT decision found that Pride entered into anti-competitive agreements in relation to online price advertising restrictions with 'Relevant Retailers' in relation to 'Relevant Models' of mobility scooter. The CAT held that the Applicant's proposed sub-classes did not distinguish between customers who had purchased from Relevant Retailers and customers who had purchased from other Pride retailers, whose prices may well have been influenced by the online price advertising restrictions, but who had not themselves been found by the OFT to have entered into any anti-competitive agreement with Pride.

Accordingly the CAT adjourned the application to permit the Applicant to re-formulate her definition of sub-classes of claimants and to provide further expert economic evidence in support.

While this may be seen as a victory for Pride and may make other potential claimant representatives hesitate before starting collective proceedings, it should be noted that the CAT found against Pride on a number of other important points, including:

- Pride strongly resisted the adjournment to allow the Applicant to reformulate her case, arguing that the Applicant had had ample time to prepare her claim and that there was no realistic prospect of the Applicant formulating her case in a way that was suitable for an aggregate award of damages. The CAT rejected those arguments, holding that the Applicant should be allowed the opportunity to reformulate her case;
- the CAT held that, if the issues with the proposed class discussed above can be overcome, then the case would be suitable for class certification on an opt-out basis "*given the size of the class, the fact that the class members are individual consumers, and the estimated amount that each represented class member could recover*"; and
- the CAT held that it would be just and reasonable for Ms Gibson to act as the class representative, dismissing Pride's arguments that she was unsuitable and dismissing at this stage Pride's arguments in relation to her ability to potentially pay Pride's costs.

COMMENT

This is the first guidance as to how the CAT will interpret the statutory requirements for granting a CPO. This case was seen by many as a relatively straightforward test case of the new class action regime, involving an established infringement by the Respondent, a relatively unsophisticated product, a proposed class of vulnerable consumer claimants, and a relatively low level of claimed damages (approximately GBP 3 million).

However, the judgment demonstrates that the CAT, while keen to encourage an effective mechanism for collective redress for consumers, will scrutinise the plausibility of the expert methodology used to demonstrate the commonality and viability of the claims.

The numerous factors which the CAT has to weigh before making a CPO show that potential class action claimants will have to be very diligent in preparing their claim. The CAT has said that Ms Gibson's amended claim must address not only questions of quantification, but also of causation and that the revised claim may still face "*considerable difficulties*". Even once the Applicant has reformulated her case, the CAT has said that it may need to further consider the suitability of this case for collective proceedings, depending on the revised assessment of likely costs and damages.

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Conflicts

ASYMMETRIC JURISDICTION CLAUSES PROTECTED BY BRUSSELS RECAST ANTI-TORPEDO RULES

Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc [2017] EWHC 161 (Comm), 3 February 2017

In a helpful decision for financial institutions, the High Court has held that an asymmetric (or 'hybrid') jurisdiction clause is valid under the Brussels Regulation (Recast) (the **Brussels Recast**) and qualifies as an exclusive jurisdiction clause for the purposes of the Brussels Recast's 'anti-torpedo' protections. Asymmetric jurisdiction clauses typically require one party to an agreement to sue in the courts of a specified jurisdiction only whilst allowing the other party (often a bank or financial institution) to sue in any court with jurisdiction. Whilst asymmetric jurisdiction clauses feature widely in international finance agreements, the refusal of the courts in certain EU member states, including France, Bulgaria and Poland, to uphold them has left a question mark hanging over their validity.

In this jurisdictional dispute, Liquimar applied under the Brussels Recast to stay proceedings brought in England by Commerzbank pending the determination of parallel proceedings commenced by Liquimar, in breach of an asymmetric jurisdiction clause, in Greece. The asymmetric jurisdiction clause restricted Liquimar to commencing proceedings in England only.

Under the old Brussels Regulation the second court seised always had to stay proceedings in accordance with the related actions (or *lis pendens*) rules. Article 31(2) of the Brussels Recast introduced a carve-out to the related actions rules to restrict the use of the 'Italian torpedo' in disputes where the parties had agreed an exclusive jurisdiction clause. The changes allow an EU member state court specified in an exclusive jurisdiction clause to determine a dispute, even if proceedings had first been commenced (in breach of contract) before another member state court.

Liquimar made a number of arguments in support of a stay, in particular that the asymmetric jurisdiction clause was not an exclusive jurisdiction clause and therefore the English court as the second-seised court was required to apply the ordinary related actions rules in Article 29(1) of the Brussels Recast to stay the English proceedings until the Greek courts determined jurisdiction. The Bank argued that the jurisdiction clause was an exclusive jurisdiction clause and therefore the Article 31(2) carve-out applied.

Are asymmetric jurisdiction clauses valid?

Cranston J found that asymmetric jurisdiction clauses are compatible with the Brussels Recast, notwithstanding certain French cases to the contrary, including *Mme X v Société Banque Privé Edmond de Rothschild 13* (Case No. 11-26022), which the judge considered was decided on the basis of the French concept of *potestativité*, not an autonomous concept in EU law.

Is an asymmetric jurisdiction clause an exclusive jurisdiction clause under the Brussels Recast?

Cranston J held that an asymmetric jurisdiction clause is an exclusive jurisdiction clause for the purposes of the Brussels Recast. Cranston took the view that the issue was not a question of English law, but rather the autonomous interpretation of the Brussels Recast.

The natural meaning of the words in Article 31(2) – "*an agreement* [which] *confers exclusive jurisdiction*" - includes asymmetric jurisdiction clauses. An asymmetric jurisdiction clause confers exclusive jurisdiction on a Member State, in this case England, and the fact that it applies in respect of a claim by one party only does not change the analysis. The judge found support for this proposition in *Nikolaus Meeth v Glacetal Sarl* [1979] CMLR 520, in which the European Court of Justice held that a jurisdiction clause requiring a French party to sue in Germany and a German party to sue in France conferred exclusive jurisdiction on Germany in proceedings brought by the French party and exclusive jurisdiction on France in proceedings brought by the German party.

In addition the judge took the view that the aims of the Brussels Recast, in particular, party autonomy, enhancing the effectiveness of exclusive choice of court agreements and avoiding abuse tactics, could only be achieved if asymmetric jurisdiction clauses were treated as exclusive for the purposes of Article 31(2).

Cranston J did not consider that the Hague Convention on Choice of Court Agreements (the **Hague Convention**), which only applies to exclusive jurisdiction agreements, assisted with the characterisation of asymmetric jurisdiction clauses under the Brussels Recast. Although the Hague Convention was negotiated in parallel with the Brussels Recast and the Counsel Decision adopting the Convention referred to ensuring coherence between them, there were significant differences between the two, for example the Hague Convention defines exclusive jurisdiction clauses whereas the Brussels Recast does not. Although the Explanatory Report to the Hague Convention suggests that asymmetric jurisdiction clauses fell outside the scope of the Hague Convention, Cranston J found *obiter* that there were "*good arguments*", in his view, that the definition of exclusive jurisdiction clauses in the Hague Convention could cover asymmetric jurisdiction clauses. The judge also took the view that, even if the Hague Convention was to be read as excluding asymmetric jurisdiction clauses, this was "*of no assistance to the quite separate issue of their characterisation under Article 31(2) of the Brussels Recast*".

COMMENT

This is a helpful decision for financial institutions. Whilst there have been *obiter* decisions to suggest that asymmetric jurisdiction clauses benefited from the Brussels Recast anti-torpedo rules, such as *Perella Weinberg Partners UK LLP & anr v Codere SA* [2016] EWHC 1182 (Comm), this is the first EU decision to address the point directly.

The decision indicates that in the English courts it will be difficult for a commercial borrower/guarantor to breach an asymmetric jurisdiction clause to escape the Brussels Recast's anti-torpedo rules. However, it is unclear if the courts of other member states, or the Court of Justice of the European Union, will take the same approach as the English courts.

Asymmetric jurisdiction clauses are used widely in international financial agreements and this decision means they are likely to continue to be a popular option, but parties to finance agreements should be aware that a certain level of risk to the validity of asymmetric jurisdiction clauses remains.

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Contract

SUPREME COURT CONFIRMS THAT BOTH COMMERCIAL COMMON SENSE AND THE NATURAL MEANING OF THE WORDS MATTER IN CONTRACTUAL INTERPRETATION

Wood v Capita Insurance Services Ltd [2017] UKSC 24, 29 March 2017

The Supreme Court has again examined the principles of contractual interpretation. In *Arnold v Britton* (***Arnold***) the Supreme Court had cautioned against commercial common sense overriding the natural meaning of a provision. In *Rainy Sky SA v Kookmin Bank*, it had explained that, if there were two possible constructions, the court was entitled to prefer the construction consistent with business common sense. Now the court has confirmed that textualism and contextualism (*Rainy Sky*), should not be regarded as "conflicting paradigms" in a battle for primacy in contractual interpretation. Rather, they are tools for ascertaining the objective meaning of the language chosen by the parties to express their agreement: the extent to which the court will rely on each tool will vary depend on the circumstances.

An opaque indemnity

The case concerned the interpretation of an indemnity clause in a sale and purchase agreement for an insurance broker. The purchaser was indemnified for loss suffered as a result of claims or complaints for mis-selling registered with the financial services regulator. However, the purchaser had suffered loss as a result of a remediation scheme imposed by the regulator following its self-reporting of mis-selling (rather than through claims or complaints of customers). That remediation scheme had lead to the purchaser paying approximately GBP 1.35 million in customer compensation. Was this loss covered by the "*admittedly opaque*" language of the indemnity?

The Supreme Court held that the loss fell outside the indemnity clause. The text of the clause was key: the circumstances triggering the indemnity were principally found in a careful examination of the language used, and did not extend to loss covered by self-reporting mis-selling. Both on the face of the clause, and following a detailed parsing, the court favoured the seller's narrow construction.

The purchaser's suggested wider reading of the indemnity clause was rejected: it would mean that a part of the clause would be rendered otiose, and failed to identify the persons against whom mis-selling claims or complaints needed to be made (a necessary trigger for the indemnity to operate).

However, the court noted it was still necessary to place the clause in its contractual context and to consider the wider factual matrix. The parties to the contract were commercially sophisticated. In addition to the contractual indemnity covering loss from mis-selling, the seller had also given detailed warranties as to

regulatory compliance. These warranties may have enabled the purchaser to recover for its loss: but for the expired two-year contractual limitation period on warranty claims. The court held it was not contrary to business common sense for the parties to agree wide-ranging but time limited warranties, with the protection of a further indemnity unrestricted as to time, but triggered in more limited circumstances. The court would not improve the bargain for the purchaser.

A unitary exercise

Contractual interpretation is a unitary exercise: it does not matter whether the process commences with the factual background, or a close examination of the relevant language, provided that the court balances the indications given by each method through an iterative process.

Where there are rival meanings, the court can give weight to the construction which is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions, the court must:

- consider the quality of drafting of the clause;
- be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; and
- not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

The type of agreement, and sophistication of parties, may also impact the analysis preferred by the court. For example, sophisticated and complex agreements, negotiated and prepared by skilled professionals, may be more successfully interpreted textually. However, it was accepted that even negotiators of complex formal contracts may not always achieve a logical and coherent text.

The challenge ahead

The court was quick to reject the submission that *Arnold* involved any "*rowing back*" from *Rainy Sky* guidance: it is clear that all is not lost when it comes to considering business common sense. While the pure words of the contract remain important, they do not trump common sense considerations post-*Arnold*. This can be a relief in the context of complex commercial contracts, where a drafting ambiguity can threaten to undermine the wider commercial structure.

The challenge for those drafting contracts is that, when subject to close scrutiny by the courts, different judges, applying the correct principles, can reach different opposing conclusions on the meaning of provisions. There is not a simple solution to this, and this latest update from the Supreme Court means that some of the certainty that *Arnold v Britton* afforded has vanished.

It is clear that the pendulum has swung back away from *Arnold*: the court was quick to reject the submission that *Arnold* involved any "*rowing back*" from *Rainy Sky* guidance. This can be a relief in the context of complex commercial contracts, where a drafting ambiguity can threaten to undermine the wider commercial structure. Importantly, for detailed professionally drawn contracts, the Supreme Court has reiterated the utility of the iterative process (described in *Sigma Finance*) when interpreting ambiguous provisions. This involves checking each suggested interpretation against the provisions of the contract and its commercial consequences. In such contracts, Lord Hodge comments, the lawyer may be particularly helped by considering the factual matrix and purpose of similar provisions in contracts of the same type.

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TERMINATION PROVISION AMOUNTS TO AN UNENFORCEABLE PENALTY BETWEEN LESSOR AND TENANT

Vivienne Westwood Ltd v Conduit Street Development Ltd [2017] EWHC 350 (Ch), 27 February 2017

A termination provision in a side letter, which had the effect of entitling a lessor to increased rental payments in the event of any breach by the tenant, was held to be an unenforceable penalty. This is the first application of the restated test for penalties set out in the Supreme Court's *Makdessi* decision which has resulted in a clause being found to be penal. It is a reminder of the care that should be taken when setting termination payments.

This case concerned a lease and side letter entered into simultaneously between DER Travel Service Limited, a lessor of retail property, and Vivienne Westwood Limited, as tenant. Under the side letter, the lessor agreed that it would accept a lower rent from the tenant than that provided for in the lease if certain conditions were met. The side letter included a provision that if the tenant breached "*any of the terms and conditions*" of the side letter or lease, the lessor could terminate the side letter with immediate effect. In the event of termination, "*the rents will be immediately payable in the manner set out in the lease as if this agreement had never existed*".

The dispute arose between Westwood and a subsequent lessor, Conduit Street Development Limited. Conduit asserted that the tenant had breached the lease and gave notice of termination of the side letter, requiring the tenant to pay the higher rent in the lease. One of the issues for determination by the court – and the focus of this article – was whether the right of the lessor to terminate the side letter upon any breach by the tenant, thereby requiring the tenant to pay the higher rent in the lease, was a penalty.

The *Makdessi* test

The approach to potentially penal provisions in contracts was restated by the Supreme Court in *Cavendish Square Holding BV v Makdessi*. In applying this test, the High Court broke it down into the following stages:

- first, assess whether the provision in question is in substance a secondary obligation that is engaged upon breach of a primary obligation;
- second, identify the extent and nature of the legitimate interest of the innocent party in having the primary obligation performed; and
- third, determine whether, having regard to that legitimate interest, the secondary obligation is exorbitant or unconscionable.

The court contrasted one of the provisions considered in *Makdessi* – a clause providing for a reduction in payments due to a seller who was in breach of contract – with the present case: an obligation to pay a specified sum in the event of a breach.

An unenforceable penalty

The court applied the *Makdessi* test and concluded that the termination provision in the side letter was an unenforceable penalty.

The threshold: a secondary obligation

In order for the *Makdessi* test to be engaged, the provision in question must give rise to a secondary obligation. The court found that the true bargain between the lessor and tenant was that, in return for having a tenant with the reputation of Westwood, the lessor would accept a lower rent. On that basis, the tenant's obligation to pay the lower rent under the side letter was its primary obligation. The obligation to pay the higher rent under the lease upon termination of the side letter was a secondary obligation.

Legitimate interest in performance

A secondary obligation is capable of being a penalty. Determining whether or not it is penal depends, first, on

the lessor's legitimate interest in the tenant's performance of its obligations. The lessor argued that it had a legitimate interest in the rent reverting to the higher rate, whereas the tenant argued that it did not. The court found that the reduced rent agreed under the side letter was a substantial term of the bargain. It concluded that the lessor cannot have had a legitimate interest in the rent reverting to the higher rate; that would give rise to a legitimate interest in non-performance of the tenant's obligations, rather than in their performance.

Exorbitant or unconscionable

Having identified a secondary obligation and established that the lessor's legitimate interest did not extend to the higher rent, the court considered whether the burden of the higher rent, payable by the tenant in the event of termination of the side letter, was exorbitant or unconscionable and therefore penal. First, the court observed that the wording of the side letter appeared to entitle the lessor to terminate in the event of *any* breach by the tenant. After finding that some level of qualification was necessary to give the provision a sensible commercial effect, it concluded that the right to terminate arose on the occurrence of any "*non-trivial breach*". Secondly, the court agreed with the tenant's argument that a natural reading of the termination provision requiring that "*the rents will be immediately payable in the manner set out in the Lease as if this agreement had never existed*" gave it retrospective (as well as prospective) effect. As such, the provision required the tenant to pay additional rent for the preceding years as well as paying the higher rent in the future.

The court concluded that the obligation to pay the higher rent in the event of a breach and termination was "*out of all proportion*" to the lessor's legitimate interest and was penal. In his reasoning, the judge emphasised that: (i) the obligation to pay the higher rent applied regardless of the seriousness of the (non-trivial) breach; and (ii) the higher rent was payable in addition to other remedies provided to the lessor (including interest, costs and damages). He added that he would have reached the same conclusion even if the termination provision had only prospective effect.

COMMENT

This is the first application of the restated test for penalties set out in the Supreme Court's *Makdessi* decision which has resulted in a clause being found to be penal. The ruling highlights the risk for commercial parties in negotiating termination provisions which give them a substantial benefit, or which impose a significant financial detriment on their counterparty, in the event of a breach, regardless of its seriousness. As in this case, the courts may find a clause to be an unenforceable penalty despite the fact that the provision was agreed between two advised parties of equal bargaining power.

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REASONABLE ENDEAVOURS AND WHETHER CONTRACT REQUIREMENT WAS 'FUTILE'

Astor Management AG & anr v Atalaya Mining PLC & ors [2017] EWHC 425 (Comm), 6 March 2017

The High Court has found that even arguably pointless contractual provisions must be met in the context of a condition precedent to payment of consideration, and has offered guidance on the meaning of "*all reasonable endeavours*".

The Claimant (**Astor**) sold its interest in a Spanish mining project to Atalaya in exchange for largely deferred consideration of up to EUR 63.3 million. The consideration was payable in tranches upon the occurrence of certain trigger events.

The key triggers included Astor receiving authorisation for mining from the relevant local authority and Atalaya or one of its group companies securing senior debt finance and guarantee facilities. Atalaya undertook to "*use all reasonable endeavours to obtain the Senior Debt Facilities … and to procure the restart of mining activities … on or before 31 December 2009*". As initially drafted, the agreement prevented Atalaya from borrowing, except by a Senior Debt Facility, without Astor's consent.

The original terms were later amended including, crucially, to allow one of the Atalaya group companies to raise money by issuing new shares and channelling funds to Atalaya without Astor's permission. A further key amendment allowed Atalaya to borrow from other group members. In the event, Atalaya did not get permission to mine until July 2015 and incurred large costs in maintaining the mine and getting it to a state where permits could be obtained. Atalaya entered into a large number of abortive negotiations with various parties in an attempt to raise money as well as undertaking rights issues.

Ultimately the group secured funds through a mix of equity and unsecured debt and entered into intra-group loans with Atalaya. Mining re-started in July 2016.

No "*principle of futility*"

Astor claimed payment of the deferred consideration on two bases:

- that once mining had re-started without the need for a Senior Debt Facility, that pre-condition fell away or, alternatively, that the loans the group had made to Atalaya amounted to a Senior Debt Facility; or
- that Atalaya had not used all reasonable endeavours to obtain such a facility.

In support of the first basis for its claim, Astor argued that there is a "*principle of futility*" in contractual interpretation, relying on Lord Denning MR in *Barrett Bros v Davies* [1966] 1 WLR 1334 that "*the law never compels a person to do that which is useless and unnecessary*".

Giving judgment, Leggatt J rejected the idea of a principle of futility. He said that Lord Denning's remark had been held in later cases to be *obiter* and so should not be followed. Leggatt J also rejected the submission that the parties had never contemplated the possibility that money might be raised by something other than a Senior Debt Facility. The relevant contract had been professionally drafted by people who were well aware that other forms of finance existed. If they had meant *any* form of finance would trigger the obligation to repay, the contract would have said so. The failure to say this "*was plainly a deliberate choice*".

Leggatt J also rejected Astor's claim that the intra-group loans were senior finance as they did not grant precedence for repayment, and he thought that the provisions for a Senior Debt Facility envisaged external financing.

The judgment: "*all reasonable endeavours*"

Astor also argued that Atalaya had failed to use all reasonable endeavours to raise senior debt financing. In response, Atalaya argued:

- the obligation to use all reasonable endeavours was unenforceable because the object of the endeavours – entry into a loan agreement with a third-party – was too uncertain and there were no objective criteria for assessing the reasonableness of the endeavours;
- if it was enforceable, it did not apply after 31 December 2009; and
- if it was enforceable and continuing, Atalaya was not in breach.

As to the first of these, Leggatt J noted that Lord Denning MR had once said that to hold a clause to be too uncertain to be unenforceable was "*a counsel of despair*" (*Nea Agrex SA v Baltic Shipping Co Ltd* [1976] 1 QB). He also referred to Moore-Bick LJ's remark in *Whitecap Leisure Ltd v John H Rundall Ltd* [2008] EWCA Civ 429 that uncertainty was a conclusion "*the courts have always been reluctant to accept … since the very fact that it* [a clause] *was included demonstrates that the parties intended it to have some effect*". Leggatt J held that "*it should almost always be possible to give sensible content to an undertaking to use reasonable endeavours*". The objective was clear, as

there would be no difficulty in deciding whether an agreement with a third-party had been reached, and no uncertainty was created just because there was more than one form which a third-party contract could take. He accepted that it might be difficult to demonstrate that Atalaya had used all reasonable endeavours, but the burden was on Astor to show that it had not, and Astor had failed to do this. The clause was thus enforceable.

As to the argument that the obligation had fallen away on 31 December 2009, Leggatt J held that the date should be read as the earliest occasion on which there could be a breach, rather than the latest. In response to Atalaya's argument that this meant the obligation could be unending, Leggatt J said that "*all reasonable endeavours*" do not require unlimited expenditure, because the cost of such endeavours is itself a factor in deciding what is reasonable. However, it was "*inherently improbable*" that if Atalaya was able to raise finance through reasonable endeavours, it "*should nevertheless be free to arrange some other form of funding instead which would have the effect of leaving Astor unpaid.*" The actual effect of the clause was "*to require* [the Group] *... to use all reasonable endeavours to obtain the Senior Debt Facility ... on or before 31 December 2009 provided that is practicable and, if not, as soon as practicable thereafter*".

As to whether Atalaya was in breach of its obligation to use all reasonable endeavours, "*it was clearly in the defendant's financial interest to fund the restart of mining operations ... without obtaining a Senior Debt Facility, as this would avoid triggering payment of the Deferred Consideration*". There were various considerations: the fact that this would benefit Atalaya "*cannot in itself be a legitimate reason for them to prefer another form of finance*". At the same time, the terms of any financing were relevant: if they were so onerous as to mean the project was not viable, this "*would ... defeat the contractual purpose as the ... Group would not be able to pay the Deferred Consideration if it became insolvent*". On this basis, the Group was not required to obtain a Senior Debt Facility unless "*there was a reasonable expectation*" that the proceeds from mining would be enough to keep the Group as a going concern. On the evidence, it appeared that the Group could not service both senior debt and pay the Deferred Consideration. Atalaya had therefore not been in breach.

In the event, Astor did, however, succeed on its argument that Atalaya was obliged not to make any distributions or repayments to its lenders until the Deferred Consideration had been fully paid.

COMMENT

Leggatt J's findings about "*futility*" are interesting and important. Questions often arise about whether parties must go through what may appear to be purely formal steps, in particular where they are required to follow "*escalation procedures*", before they can begin legal proceedings. There has been limited case law on the topic, and this judgment may have significant implications in many circumstances. In particular, on one view, the effect was that Astor might never be paid even though, in economic terms, Atalaya had received the funding required to trigger a payment obligation. This appears to be an implausible result. However, Leggatt J felt that the parties had deliberately chosen a more limited trigger than Astor said should apply, and that there had been a commercial logic to this.

The case is also a useful exposition of some of the principles to be applied in considering the criteria to be used when judging whether a party has used all reasonable endeavours. This has been another common source of uncertainty for advisers and their clients, partly because it is always context-dependent. In this case, the fact that it seemed unlikely that mining activities could have produced enough revenue to service debt and pay consideration resulted in a fairly clear-cut place to draw the line: it can't be reasonable for a company to make itself bankrupt and therefore never pay outstanding consideration. However, it remains difficult to know what the limits to "*all reasonable endeavours*" are, and contract drafters may want to consider making this explicit, or at least providing some sort of criteria when including this frequently used expression.

All reasonable endeavours was considered in the planning context by the Court of Appeal in *Bristol Rovers (1883) Ltd v Sainsbury's Supermarkets Ltd* [2016] EWCA Civ 160. Parties should be aware that

such an obligation can include having to take steps that are contrary to their own commercial interests – as held in *Jet2.com v Blackpool Airport Ltd* [2012] EWCA Civ 417.

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Costs

DISCLOSURE OF THE IDENTITY OF FUNDERS AND EXISTENCE OF ATE INSURANCE

The RBS Rights Issue Litigation [2017] EWHC 463 (Ch), 9 March 2017

The High Court has set out important principles with respect to the circumstances in which disclosure of the identity of third-party funders and details of any ATE insurance may be ordered in advance of a threatened application for security for costs when trial is imminent.

In December 2016, the defendants in the RBS Rights Issue Litigation settled with all the claimants apart from the SG Group. This reduced the scope of the first trial on liability considerably, but left a complex 12 week proceeding. By December 2016, the defendants' costs − for which all the claimants remain severally liable if an award of costs is made against them – had exceeded GBP 100 million. An additional GBP 25 million is estimated to be incurred by the defendants by the end of the first trial, for which the SG Group alone would be liable.

The SG Group is financed by third-party funders with some control over and/or prospect of benefit from the proceedings. However, the SG Group had provided limited and opaque information on funding and made contradictory statements regarding ATE cover. In light of the changed risk profile caused by the settlements and the SG Group's increased exposure (a potential costs liability of approximately GBP 50 million), the defendants were increasingly concerned as to how any order for costs against the SG Group could be met.

The defendants applied for orders that the SG Group:

- provide the names and addresses of any third-party funders, under the court's inherent jurisdiction ancillary to CPR 25.14 (orders for security for costs against non-parties to proceedings); and
- provide a copy of any ATE insurance policy or confirmation that it (or any funder) would not seek to rely upon such policy in opposition to any application for security for costs, under CPR 3.1(2)(m) (the court's case management powers).

This information was necessary, argued the defendants, for a meaningful assessment of whether to issue an application for security for costs, and justified by efficient case management: "*the 'cards on the table' approach to modern litigation*".

The SG Group argued it was most unlikely that the defendants would proceed with an application for security, which was almost certain to fail. Further, there had been no fundamental change in circumstances to merit the defendants' delay, which was fatal to the applications. Accordingly, both applications were objectionable tactics to distract and destabilise them in their preparations for trial, which was only ten weeks away.

Findings: disclosure of identity of funders

Hildyard J held that, when exercising the court's discretionary jurisdiction to order disclosure of the identity of funders:

- the applicant should be allowed to properly consider the merits of an application for security for costs against the funder, having regard to its "*position, whereabouts and substance*";
- the court need not be satisfied that the applicant had unequivocally determined to bring an application for security – that was neither a sensible nor an easy test to apply;
- the applicant must at least demonstrate that the application for security is a real possibility on realistic grounds with a realistic prospect of success;
- delay is relevant because the order for security is intended to give a claimant a choice as to whether to put up security and continue with the action, or withdraw the claim. The later the application, the less real and fair the choice (and the less likely it can be accommodated in the hearing timetable);
- in the context of a group litigation order, enforcement may be directed against the funders first. Where sophisticated funders substantially control or fund the litigation, acting in their own commercial interests, they have no legitimate expectation to be treated differently to real parties and should be fully aware of the risks. In reality, their choice is made when they agree the funding; and
- the ultimate question is whether, in all the circumstances, it is just to make the order.

The defendant's application was granted on the basis that Hildyard J, sharing the defendants' concerns about the SG Group, held it was neither "*improper or fanciful*", nor "*so unrealistic or hopeless*". The application was limited to the funders so as to minimise the potential distraction to the SG Group.

Findings: disclosure of ATE insurance

Refusing the defendants' application for disclosure of ATE insurance, Hildyard J held that:

- an adequate ATE policy is likely to be treated as a complete answer to a security for costs application against a corporate claimant; and
- the court's case management powers under CPR 3.1 can extend to requiring disclosure, where necessary, to enable the court to exercise its case management functions proportionately and efficiently. However, CPR 3.1 does not extend to any "*cards on the table*" mantra.

The defendant's application was denied on the basis that the primary rationale was not case management but enforcement – namely, efficiencies in making the SG Group determine, at an early stage, their defence to an uncertain application which may not be pursued. Such distractions would not facilitate the first trial. Nonetheless, the SG Group were cautioned that an order for costs may be used as a sanction if the potential "*torpedo*" of an ATE policy was not revealed at an early stage.

COMMENT

The judgment makes clear that the court has discretion to order disclosure of the identity of third-party funders and details of any ATE insurance in respect of a threatened application for security for costs, even when trial is imminent. However, in the interests of justice, the court will consider carefully the real reasons the applicant seeks the disclosure and will not allow third-party funders to hide behind individual claimants (or *vice versa*).

The ability of the claimant to make a real choice whether to pursue the claim, and efficient case management, are the primary considerations when deciding upon whether jurisdiction should be exercised. Tactical ploys by both parties are unlikely to succeed.

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Crime

UNSUCCESSFUL CHALLENGE TO SFO'S LETTER OF REQUEST

The Queen on the application of Unaenergy Group Holding Pte Ltd & Ors v The Director of the Serious Fraud Office [2017] EWHC 600 (Admin), 29 March 2017

The claimants challenged, by way of judicial review, the contents of a Letter of Request issued by the SFO to Monegasque authorities under s7 Crime (International Co-operation) Act 2003. The claim was based on two separate and distinct grounds: (i) that there was a failure to disclose key information; and (ii) that the request was so far-reaching that it amounted to a "fishing expedition". The challenges were dismissed, demonstrating the continued reluctance of the courts to interfere with the powers of the SFO.

The Unaoil Group (**Unaoil**) was established in 1991 and is described by its Chairman Ata Ahsani (also a claimant in the proceedings) as providing "*industrial solutions to the energy sector in the Middle East, Central Asia and Africa*".[1] Broadly speaking, Unaoil acts for major Western companies looking to execute energy projects in the countries in which Unaoil operates and consults with local corporations on their behalf to win contracts.

On 22 March 2016, the SFO launched a criminal investigation into the activities of Unaoil in connection with wide-ranging suspicions of bribery and corruption. The primary suspects of the SFO's investigation are members of the Ahsani family: Ata Ahsani, Cyrus Ahsani and Saman Ahsani (the **Ahsanis**), who respectively act as the Chairman, former CEO and COO of Unaoil.

The request for judicial review

The claimants in this challenge consisted of the Group's holding company, a Monaco-based subsidiary and the Ahsanis themselves. The application for judicial review related to a Letter of Request (**LOR**) issued by the SFO to the authorities in Monaco (the **Monegasque authorities**) the same day that the SFO commenced its investigation into Unaoil's activities. The LOR was issued as a result of the SFO's request for mutual legal assistance – a method of cooperation between states for obtaining assistance in the investigation or prosecution - from the Monegasque authorities.

The claimants sought the quashing of the LOR, together with the return of all the materials obtained from the Monegasque authorities and the destruction of any copies held by the SFO.

The SFO's Letter of Request

Having commenced its investigation on 22 March 2016, the SFO had reason to believe that allegations of Unaoil engaging in bribery and corruption would be published on an international news website on 30 March 2016. Due to concerns that publication of the allegations could lead to the destruction of relevant evidence, the SFO issued an LOR to the authorities in Monaco, where the Ahsanis were believed to reside and operate their business from.

The LOR included a request for "*business records, suspects to be interviewed and searches of premises to obtain evidence*". The LOR went on to include a number of statements indicating the broad nature of the SFO's investigation. The LOR, for example, stated that the SFO was investigating "*wide-ranging allegations of bribery and corruption*" and also requested the presence of SFO officials at interviews given that they had been "*fully involved in the investigation of the allegations of bribery and corruption involving Unaoil in several jurisdictions*". The LOR also referred more specifically to the SFO's suspicions regarding the bribery of Iraqi public officials.

Upon the instructions in the LOR, the Monegasque authorities raided the Unaoil offices and the homes of the Ahsanis in Monaco on 29 March 2016.

In the event, the SFO's concerns were well-founded; on 30 March 2016, Unaoil was at the centre of allegations published by the Huffington Post and Fairfax Media.

Judicial review application

The claimants were granted permission to seek judicial review on two grounds, namely that the LOR was unlawful as it:

- failed to disclose key information, consistent with a "*heightened procedural obligation*"; and
- constituted a "*fishing expedition*", which in itself was an improper exercise of the SFO's powers.

No "heightened procedural obligation" when issuing an LOR

The claimants sought to argue that where the essence of what was sought in an LOR amounted to intrusive searches – akin to domestic search warrants – that a duty of candour (in other words, a duty to be open and honest) ought to rest on the party applying for the LOR; in this case, the SFO.

In response, the SFO divided the matter into a number of stages. At the issuance stage, the party making an LOR is obliged to act in good faith and in accordance with the requirements of the applicable international conventions. Once issued, the requested state then puts the LOR into action. It is only at this stage, argued the SFO, that a duty of candour arises.

Gross LJ found in favour of the SFO:

- an LOR could not be compared to a domestic search warrant sought on an *ex parte* basis. In that situation, the duty of candour requires an applicant to present not only its own case, but also the arguments of an interested party hypothetically answering the application, ie the defence. If this same duty were to apply to the issuance of an LOR, it would require the requesting state to include details of any concerns or difficulties envisaged in the request. The receiving state would likely revert, inviting the requesting state to reissue the LOR once they had resolved these issues. This would encourage a dialogue "*wholly unsuitable for adoption*" in the sphere of mutual legal assistance;
- neither was it possible to find that the issuance of an LOR placed on the requesting state a "*heightened procedural obligation*"; defining such an obligation would be very difficult;
- it would be inappropriate to "*read-in*" an additional common law duty to the international scheme. To introduce an obligation which would require the requesting state to outline why an LOR should not be acted upon would only serve to introduce unwarranted complexity and to increase the scope for challenging SFO investigations; and
- whilst "*a balance must be struck between the public interest in international cooperation in investigating and prosecuting serious crime and the rights of the individual*", those who are the subject of LORs are not without the protections inherent in the international framework governing mutual legal assistance, as well as the European Convention on Human Rights, the right to a fair trial and the availability of the judicial review process.

Even if there had been a "heightened procedural obligation", there had been no breach

Having decided that the SFO was not under a duty to comply with a "*heightened procedural obligation*", the High Court nevertheless went on to consider whether, had there been such a duty, the SFO would have been in breach.

The claimants presented three arguments centred on information missing from, or not clearly characterised in, the LOR, each of which was dismissed:

- in issuing the LOR, the SFO had relied upon the upcoming media coverage of Unaoil as justifying urgent action. The claimants argued that the SFO had not presented a balanced picture given its failure to refer to the longstanding investigation of the Australian Federal Police into the activities of Leighton Holdings' offshore arm (it is alleged that Leighton Holdings paid money to Unaoil with the aim of influencing Iraqi officials). The High Court

held that even if the investigation had been referred to "*realistically, no Judge would have been minded to risk destruction of the evidence*". That being said, "*the SFO may care to reflect that an additional sentence in the LOR, noting the earlier AFP investigation and attendant publicity, would have done no harm and would have avoided unnecessary controversy*";

- the LOR referred to the arrest of Mr Al Jarah (an Iraqi contact of the Ahsanis). At the time of his arrest, Mr Al Jarah had been carrying two substantial cheques made payable to a company to which suspicion attached. The LOR had failed to state the dates of the cheques; and
- the LOR referred to the High Court litigation between Unaoil and Leighton (*Unaoil Ltd v Leighton Offshore PTE Ltd* [2014] EWHC 2965 (Comm). The claimants argued that this section of the LOR had not been clearly drafted.

Despite dismissing the arguments, the High Court did make a number of comments, indicating "*the LOR would have read better had it clearly articulated the SFO's actual thought processes; nothing would have been lost by doing so and no confusion would have been introduced…while it is our view that the LOR could have better been expressed, we cannot agree that it breached a duty of candour (had one existed)*." The High Court also declined to find that the alleged breaches amounted to material misrepresentations.

The SFO had not been fishing

The LOR was specifically focused on the claimants' activities in Iraq, although when read as a whole, it was quite clear that the material relating to matters sought was not limited to Iraq. The claimants argued that it was not open to the SFO to seek the seizure of material wider than those matters which it was investigating. The question for consideration was therefore whether the SFO was investigating Unaoil's conduct in jurisdictions other than Iraq. Relying upon the express wording of the LOR and the witness evidence of the SFO's Case Controller, it was held that the SFO's investigation was wider:

- the LOR was not confined to documents relating only to Iraq;
- the SFO's investigation was not geographically limited to Iraq; and
- there were reasonable grounds for suspecting that offences had been committed outside of Iraq (and it was not incumbent upon the SFO to elaborate upon the grounds for suspicion).

Challenges against the SFO – an uphill battle

The decision in this case is yet another example of the uphill battle faced by claimants seeking to challenge the powers of investigators through the judicial review process.

Following his earlier decision in *R (on the application of Soma Oil and Gas Ltd) v Director of the SFO* [2016] EWHC 2471) (***Soma***), Gross LJ held that "*such challenges to investigators should be very rare; we are not attracted to a development in the law which would encourage their increase*". These statements echo those made in *Soma* where it was held that the applicant faced "*a very high hurdle indeed*" in asking the court to judicially review a discretionary decision of the SFO. An analogy was drawn in *Soma* to the decisions of prosecutors, which may only be challenged in "*exceptionally rare circumstances*". Both cases show a reluctance to permit challenges to the steps taken and discretionary decisions made by the SFO when investigating allegations of serious criminality.

Gross LJ quite clearly held that the LOR did not amount to a fishing expedition. Although the LOR set out the grounds for suspecting that offences had been committed in Iraq, the High Court found no requirement for the SFO to elaborate upon the grounds for its suspicion that offences had been committed in other jurisdictions. Given the international operations of those the SFO investigates, it is rare that the SFO's investigations will be geographically limited. It must also be right that there

is no requirement to set out the basis for suspicion given the sensitive matters which the SFO investigates. Having said this, and taking into account Gross LJ's statements that "*the LOR would have read better had it clearly articulated the SFO's actual thought processes*," we may in future see the SFO taking greater drafting care so as to avoid similar challenges.

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[1] http://www.unaoil.com/about/chairman-s-message/

Damages

PROFESSIONAL ADVISORS NOT LIABLE FOR CLIENT'S POOR COMMERCIAL JUDGMENT

BPE Solicitors & anr v Hughes-Holland (in substitution for Gabriel) [2017] UKSC 21, 22 March 2017

In a landmark decision, the Supreme Court has provided guidance on the application and effect of the well-known, but often misunderstood, 'SAAMCO principle'. In particular, the Court reiterated the distinction between 'information' and 'advice' cases; overturned a previous line of authority seen as creating an exception to the 'SAAMCO principle' in circumstances where fraud or dishonesty would have been revealed had the information provided by a professional advisor been correct; and confirmed that it is for the claimant to establish that the losses claimed fell within the scope of an advisor's duty.

In 2007 Mr Gabriel agreed to lend GBP 200,000 to a friend, Mr Little, a builder and property developer, in the belief that Mr Little would use the funds to develop a property owned by one of Mr Little's companies (High Tech). Mr Little actually intended to use the majority of the loan to fund the purchase of the building by another company he had an interest in (Whiteshore) and the balance to discharge High Tech's VAT liability.
Mr Gabriel retained BPE Solicitors (**BPE**) and instructed them to prepare the loan documentation. Whilst drawing up the documents, BPE were informed by Mr Little of the true purpose of the loan. However, BPE failed to inform Mr Gabriel. BPE compounded its failure by including statements in the loan documentation suggesting the loan would, in fact, be used to develop the property. The loan agreement was signed and Mr Gabriel provided the funds. Whiteshore purchased the building from High Tech, however, no development took place and Mr Gabriel's loan was never repaid.
Mr Gabriel enforced his charge over the property, but failed to recover any funds following the ensuing sale.
Mr Gabriel subsequently sued Mr Little, High Tech and Whiteshore for fraud and negligent misrepresentation

and BPE for dishonest assistance in a breach of an implied trust and for negligence.

At first instance Mr Gabriel succeeded only in his claim for negligence against BPE. The trial judge found BPE acted negligently in failing to inform Mr Gabriel of Mr Little's true intentions and had compounded this error by including the misleading statements in the loan documentation. The trial judge accepted that BPE were only liable for the consequences of the information they provided being wrong, but awarded Mr Gabriel his full losses on the basis that he would not have completed the transaction if he had known the truth. BPE appealed and the Court of Appeal upheld the appeal on the basis that there was no evidence that Mr Gabriel would have recovered the loan monies if they had in fact been applied to the development of the property. The burden was on Mr Gabriel to demonstrate as such and he had failed to discharge that burden. The loss arose from the commercial risk inherent in the transaction and for which Mr Gabriel, and not BPE, had to bear responsibility. The trustee of the now-bankrupt Mr Gabriel appealed to the Supreme Court. In dismissing the appeal, the Supreme Court provided clarification on the application and effect of the principles set out in *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191 (**SAAMCO**). Four key points arise from the Supreme Court's decision.

Nature of the SAAMCO principle

Lord Sumption, delivering the sole judgment of the Court, clarified that the SAAMCO principle is not a matter of causation. Rather, it is a general principle of the law of damages and a method by which a defendant's liability for loss can be restricted, which is based on a "*developed judicial instinct about the nature or extent of the duty which the wrongdoer has broken*". One must ascertain whether any loss claimed for "*flowed from … the particular feature of the defendant's conduct which made it wrongful*" and this requires an analysis of the scope of a professional's obligation to protect his client from risk.

'Information' cases distinguished from 'Advice' cases

In the SAAMCO case, Lord Hoffmann had drawn a distinction between 'information' and 'advice' cases. However, Lord Sumption explained these labels had become the source of some confusion, largely because of "*descriptive inadequacy*". His Lordship emphatically restated the distinction as follows:

- 'advice' cases are those where the professional is under a duty to consider "*all relevant matters and not only specific factors in the decision*" and must protect his client against the "*full range of risks*". In such cases, the professional is responsible for guiding the entire decision-making process and the decision to enter into the transaction itself. Should the professional prove negligent, they will be responsible for all foreseeable losses flowing from the transaction; and
- 'information' cases are those in which a professional has provided a "*limited part of the material on which his client will rely*", but the responsibility for identifying other relevant factors and assessing the overarching commercial merits of the transaction remains with the client. In such cases, the professional will be liable only for the consequences of the information they have provided being incorrect, even if that information was "*critical to the decision to enter into the transaction*".

***Steggles Palmer* and *Portman Building Society* overturned**

The cases of *Steggles Palmer* (a conjoined decision reported under the title *Bristol and West Building Society v Fancy & Jackson (a firm)* [1997] 4 All ER 582) and *Portman Building Society v Bevan Ashford* [2000] PNLR 344 have previously been seen as creating an exception to the SAAMCO principle, whereby an advisor (often a conveyancer) would be liable for the entire loss arising from a transaction if the incorrect information provided would have revealed dishonesty or fraud if it had been correct. Lord Sumption held that

these cases were incorrectly decided. His Lordship held that there is no basis for conducting an assessment of a claimant's damages dependent not upon the scope of the defendant's duty but on the gravity of the particular breach and an assessment of the claimant's reasoning as to why it would not have proceeded with the transaction.

Burden of proof on the claimant

Finally, Lord Sumption explained that it is for the claimant to prove that any losses suffered fell within the scope of the defendant's duty and that those losses would not have been suffered had the defendant not breached the duty owed to the claimant.

COMMENT

The case has provided welcome clarification with respect to the operation of the principles set out in SAAMCO and restates the distinction between 'advice' and 'information' cases. It is now clear that only those professionals who are engaged by a client to assess all factors relevant to a transaction and, ultimately, to make the decision as to whether to enter into the transaction or not on the client's behalf may be liable for all foreseeable losses flowing from a transaction. Those professionals who provide discrete pieces of information (whether or not that information is, in practical terms, 'advice') on a particular part of a transaction will only be liable for the financial consequences of that specific information being incorrect and are not expected to become "*the underwriter of the financial fortunes of the whole transaction by virtue of having assumed a duty of are in relation to just one element of someone else's decision*".

Steggles Palmer and *Portman Building Society* have been consistently relied upon by claimants who have lent money in seeking their full losses suffered as a result of a transaction on the basis that a defendant solicitor failed to provide information that would have identified fraud or dishonesty on the part of the borrower. Such reliance will no longer be possible. Instead, it will be for lenders to demonstrate that any losses they have suffered were a result of the specific information provided by a defendant solicitor being incorrect.

Finally, professionals and their insurers will welcome the Court's clarification that the burden of proving that any loss fell within the scope of a professional's duty, and that such loss would not have been suffered had that duty been properly discharged, rests with a claimant. In effect, claimants will have to prove a negative, namely that they would not have suffered loss had the information provided by the professional been correct. Such a burden is significant, particularly in circumstances where the answer to the theoretical question of what would have happened had the professional not breached their duty is not easily arrived at.

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Insurance

JUDICIAL REVIEW OF FINANCIAL OMBUDSMAN DECISIONS – *WEDNESBURY* UNREASONABLENESS

R (on the application of Aviva Life & Pensions (UK) Ltd) v Financial Ombudsman Service & ors [2017] EWHC 352 (Admin), 27 February 2017

The Administrative Court has held that a decision of the Financial Ombudsman that an insurer's avoidance of a consumer life policy was not fair and reasonable, notwithstanding that the insurer was entitled to do so under the relevant law, was not *Wednesbury* unreasonable. The Financial Ombudsman is free to depart from the relevant law in deciding what is fair and reasonable in all the circumstances.

In November 2013 Mr McCulloch took out a life policy (the **Policy**) with terminal illness benefit with Aviva. When applying he declared that he was not undergoing any medical investigations, experiencing symptoms or awaiting any test or investigation. However, at that time Mr McCulloch had been referred by his GP for psychiatric assessment, and was awaiting a CT scan. Following the CT scan, Mr McCulloch was diagnosed with Fronto-Temporal Dementia, a terminal condition, the effects of which he was suffering from at the time of applying for the Policy. He notified Aviva of a claim for terminal illness benefit in December 2013.

Aviva declined the claim and avoided the Policy for misrepresentation, and in June 2014 a complaint was made to the Financial Ombudsman Service (**FOS**). The FOS upheld Mr and Mrs McCulloch's claim. Whilst acknowledging that the psychiatrist referral and scan were treatments Mr McCulloch should have disclosed, the FOS held the misrepresentation in not doing so was innocent, taking into account Mr McCulloch's condition. The FOS directed that Aviva should reinstate the Policy on its original terms and consider Mr McCulloch's terminal illness benefit claim.

Aviva filed an application for judicial review seeking a quashing order on the basis that the FOS's decision was *Wednesbury* unreasonable. The FOS consented to a quashing order on the grounds that the decision was inadequately reasoned, but denied that it was *Wednesbury* unreasonable.

Rules of the FOS and the relevant law

Section 228(2) of the Financial Services and Markets Act 2000 (**FSMA**) provides that the FOS is to determine complaints "*with reference to what is, in the opinion of the ombudsman, fair and reasonable in all circumstances of the case*". FCA Handbook Rule DISP 3.6.4R clarifies that, in deciding what is fair and reasonable, the Ombudsman will take into account, amongst other things, the relevant laws and regulations.

Sections 2 and 3 and Schedule 1 to the Consumer Insurance (Disclosure and Representations) Act 2012 (**CIDRA**) provide that an insurer is entitled to avoid a contract of consumer insurance for a careless representation, if it would not have accepted the risk at all had the representation not been made. The standard of care required is that of a reasonable consumer.

Do the FOS's Rules permit it to depart from the relevant law?

It was agreed by all parties that Aviva was entitled under CIDRA to avoid the Policy for careless misrepresentation, and thus Aviva's decision to do so was in accordance with the relevant law. Aviva submitted that that was the end of the matter. It submitted that the question for the court was whether it could be rationally (in the *Wednesbury* sense) said that

its decision was not fair and reasonable, and as it had followed the relevant law it could not be so.

The FOS submitted its role was not to conduct a quasi-judicial review of Aviva's decision, but to determine itself whether that decision was fair and reasonable. The question for the court was thus whether that determination was irrational. As DISP 3.6.4R only obliges the FOS to take into account, amongst other things, the relevant law, it was open to a rational Ombudsman to conclude that conduct in accordance with the relevant law was nevertheless not fair and reasonable in all the circumstances.

Mr Justice Jay rejected Aviva's submissions. He held that the logic of those submissions would force the FOS to reject any complaint where the relevant law had been followed. However, s228 FSMA and DISP 3.6.4R were clear that the FOS is to carry out its own assessment of whether a decision was fair and reasonable, in which compliance with the relevant law was but one factor. Following the decision of the Court of Appeal in *R (Heather Moor & Edgecomb) v FOS* [2008] EWCA Civ 642 he held that it was open to the FOS, acting rationally, to find that a decision made in accordance with the relevant law was nevertheless not fair and reasonable in all the circumstances.

Mr Justice Jay thus found that it was open to the Ombudsman to hold that Aviva had not acted fairly and reasonably, despite following the relevant law and practice. Accordingly, the FOS's decision was not *Wednesbury* unreasonable.

COMMENT

This case serves as a reminder to those subject to the jurisdiction of the FOS that there are two related but distinct standards to which they are held: have they complied with the relevant laws, codes of practice and regulatory guidance; and is the outcome fair and reasonable in all the circumstances. Meeting the first does not automatically ensure compliance with the latter and thus financial services firms cannot always rely on their legal rights against a consumer in complaints before the FOS. When considering whether to fight or settle consumer complaints, financial services firms will need to evaluate not only any risk of non-compliance with their legal and regulatory obligations, but, as an independent factor, the risk that the outcome will be viewed by the FOS as not fair and reasonable.

These twin standards create both uncertainty as to the outcome of FOS complaints, and the possibility of diverging outcomes between complaints to the FOS and claims brought in the courts on the same issues. Mr Justice Jay expressed concern on this possible divergence of standards and the lack of clarity in the relationship between what the law proscribes and what is fair and reasonable; he also acknowledged that Aviva would have succeeded had this claim been brought in the County Court. However, as the case law and statutory regime governing the FOS currently stands, it is clear that the FOS does have the discretion to depart from the relevant law in deciding what is fair and reasonable.

This case also serves as a reminder of the respective roles of the FOS and of the Administrative Court in dealing with consumer complaints. The FOS's role is not to judicially review financial services firms' treatment of their customers, but to decide for itself whether that treatment was fair and reasonable in all the circumstances. Thus the FOS will apply objective reasonableness and fairness tests to complaints. However the Administrative Court will only quash a decision of the FOS on reasonableness grounds if that decision was unreasonable in the more limited *Wednesbury* sense. Thus in matters where a number of legitimate decisions or actions were open to the relevant firm, the FOS will not afford the firm the same degree of latitude in judging its decision that the Administrative Court will give to the FOS.

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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* (Mar)

Privilege

Investigations: notes of employee interviews not privileged: *The RBS Rights Issue Litigation* (Jan/Feb)

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.

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