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Review

Contents

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Arbitration

CREEPING EXPROPRIATION OF INVESTMENT BY FOREIGN STATE

GPF GP S.À.R.L. v The Republic of Poland [2018] EWHC 409 (Comm), 2 March 2018

In the first known English court ruling to set aside an investment treaty arbitration award, the court ruled that an investor seeking redress for allegedly wrongful acts by a foreign State, which it claims constitute a creeping expropriation, can rely on the full series of events and measures to make good its claim, even where one of the impugned acts (a decision by a court of the foreign State) may itself be a direct expropriation. The article considers the implications of this ruling for foreign investors, and includes a reminder on the meaning of direct, indirect and creeping expropriation.

A Polish investment and alleged expropriation

In 2008, GPF GP S.a.r.l (**Griffin**), a Luxembourg-incorporated company, invested, through a series of subsidiaries and financial transactions, in a property in Warsaw, Poland, which was to be redeveloped. It had acquired the rights to the property under a Perpetual Usufruct Agreement (**PUA**), a form of quasi-ownership under Polish law. Certain approvals were sought and received from the Polish authorities for the redevelopment plans but, during the course of 2009 and 2010, these decisions were reversed and, among other things, demolition work was ordered stopped by the Warsaw Monument Conservator (the **Prior Measures**).

In 2014, the Warsaw Court of Appeal upheld a judgment of the lower courts terminating the PUA for failure to develop the land and, at the same time, a mortgage over the property securing certain loans made by Griffin was cancelled.

It is Griffin's case that, at this time, its investments lost their entire value. It commenced an investment treaty arbitration against the Republic of Poland under the investment treaty between Belgium, Luxembourg and Poland (the **BIT**).

In the arbitration, Griffin alleged that: (i) Poland had breached the BIT's fair and equitable treatment (**FET**) standard; and (ii) the Prior Measures, combined with the Warsaw Court of Appeal's judgment, constituted a series of acts attributable to Poland which amounted to an indirect expropriation in the form of a creeping expropriation: the Prior Measures prevented construction work taking place and the Warsaw Court of Appeal had terminated the real property rights under the PUA due to the delays in construction.

Jurisdiction challenge

In a jurisdictional award rendered in the arbitration, the tribunal ruled that, under the terms of the BIT, it had no jurisdiction over Griffin's claim for a breach of the FET standard. More pertinently for present purposes, the tribunal also held that a claim for "creeping expropriation" could not be made where the final act in the series of events said to amount to the creeping expropriation (the Warsaw Court of Appeal decision) could amount to an expropriation itself. As such, the tribunal determined that, in considering Griffin's claim for indirect expropriation, it was limited to assessing the effect of the judgment of the Warsaw Court of Appeal and whether it had effects similar to an expropriation. It held that it did not have jurisdiction to consider the Prior Measures. Griffin challenged various aspects of the award before the English High Court, as the court of the seat of arbitration, under s67 (Challenging the award: substantive jurisdiction) of the Arbitration Act 1996.

This article focuses on the expropriation aspects of the case, in which context the English court held that the tribunal was wrong to decline jurisdiction over Griffin's creeping expropriation claim. It should be noted, however, that the English court also ruled that the tribunal wrongly declined jurisdiction over Griffin's FET claim. This aspect of the case, however, turned on a

careful linguistic analysis of the relevant article in the BIT and is not discussed further here.

Expropriation, a refresher: direct, indirect and creeping

Investment protection treaties rarely attempt to define expropriation beyond generic references, since a great variety of state acts and measures may amount to a *de facto* taking of a foreign investment. Direct expropriation involves the seizure – whether legally or factually – of an investor's investment and occurs where, for example, a State seizes by force an investor's property or compulsorily transfers ownership rights away from the investor. Direct expropriations are now increasingly rare, however. By contrast, in instances of indirect expropriation, the investment remains formally the property of the investor but it is deprived of the enjoyment and economic value of the investment. The application of a 95% tax on profits generated by an investment, for example, might be found to constitute an indirect expropriation since the effect of that is tantamount to depriving the investor of the economic value of its property. Creeping expropriation is a form of indirect expropriation and refers to the situation where there may be no single act of expropriation but rather a series of acts that, over time, have an equivalent effect.

Claim for creeping expropriation not prevented because final act in chain also an expropriation

The judge held that it is perfectly possible as a matter of both law and logic:

- for a direct expropriation to be preceded by an indirect expropriation – the former involves the formal taking of title, while the latter does not;
- for there to be a creeping expropriation, ie an indirect expropriation by virtue of a series of measures viewed in aggregate, where the final act in that chain of events also amounts to an indirect expropriation in its own right; and
- to have a creeping expropriation where the act at the end of the chain of events is a specific act of direct expropriation.

In the second and third cases, the fact that the final act in a series of events may amount to an expropriation – whether direct or indirect – does not render all prior events irrelevant and a claim for creeping expropriation is not precluded in such circumstances. The tribunal's ruling to the contrary in Griffin's case does not represent international law, which recognises state responsibility for a creeping expropriation in the concept of a composite act.

The doctrine of creeping expropriation aims to assist an investor whose asset has (allegedly) been expropriated. If it were correct that a creeping expropriation claim was precluded if any act in the chain constitutes an expropriation, this might well leave an investor worse off, depending on the nature of that act. If, as here, that specific act happens to be a court decision, the investor would have to establish a denial of justice on the basis of that single decision, rather than taking account of the aggregate effect of the earlier measures.

The tribunal was directed to continue its proceedings on the basis that it had jurisdiction to consider Griffin's FET and creeping expropriation claims.

Comment

This important judgment – the first known instance of an English court setting aside an investment treaty award – ensures that an investor seeking redress for allegedly wrongful acts by a foreign State can rely on the full series of events which it says amount to a creeping expropriation. The tribunal's ruling potentially prejudiced investors, limiting the claims they could make, and the facts on which they could rely, where a series of events culminates in a single specific act, that could amount to an expropriation. It should also cause tribunals to exercise more caution in pre-judging at the jurisdictional phases, matters better considered in full at the merits stage of a case.

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Confidentiality

CYBERCRIME AND BLACKMAIL – COURT REMEDIES

Clarkson Plc v Person or Persons Unknown [2018] EWHC 417 (QB), 7 March 2018 and *PML v Person(s) Unknown* [2018] EWHC 838 (QB), 17 April 2018

Following blackmail threats against two companies from cyber-attackers who had stolen confidential information, the court granted injunctions against unknown defendants prohibiting publication of stolen confidential information, and made a range of other orders aimed at protecting the victims of the cyber-attacks and ensuring stolen data remains confidential. The rulings show a flexible approach being taken by the courts and demonstrate the range of potential court-based remedies available to victims in the fight against cybercrime.

Cyber-blackmail

In both cases, the claimant companies were hacked by unknown individual(s) who had gained unauthorised access to their IT systems, stolen confidential information and were then blackmailing the claimants by threating to publish the information unless substantial sums were paid.

The court granted interim injunctions preventing publication of the stolen confidential information, interim orders restricting access to documents on the court file and permitted service of the claim forms electronically on the email addresses from which the blackmail threats had been made. In *PML*, the court also made an additional order anonymising the claimant's identity (using the initials "PML") on the basis that it was an apparent blackmail victim and ought to be anonymised to minimise public attention on the attack.

***Clarkson* – Derogations from the principle of open justice:**

In *Clarkson*, the defendants(s) did not respond or serve a defence and the court granted the claimant's application for default judgment and a final injunction prohibiting publication without a hearing. Although proceeding without a hearing was a derogation from the "principle of open justice", the court held that this was within its power where it did not consider a hearing to be appropriate.

The judge noted that the case had not proceeded in secret; there had been two public hearings at which reasoned judgments had been given and the court was satisfied that the claimant had taken all reasonable steps to notify the defendant(s), who had most likely refused to appear in order to avoid identifying themselves as the perpetrators of the apparent blackmail.

***PML* – self-identification order against the unknown defendant(s):**

In *PML*, the court made a number of additional orders, including an order requiring the unknown defendant(s) to deliver up and/or destroy the stolen data, and an order requiring the defendant to identify him or herself and provide an address for service (a **self-identification order**).

The court noted that while the defendant may disobey the self-identification order (and the other orders including the injunction), this was not a reason not to make it and the court should not assume that all defendants would choose defiance. The judge referred to another case he had heard against unknown defendant(s) in which a self-identification order had been complied with.[1]

The court also paved the way for the claimant to apply for default and/or summary judgment (as the claimant did in *Clarkson*) should the defendant continue with its refusal to participate in the proceedings.

COMMENT

As businesses become ever more dependent on technology, the trend of cybercriminals seeking to hide behind the cloak of anonymity in order to evade detection and the reputational, legal and financial consequences of their actions for businesses has become all too familiar. The court's willingness to grant a range of remedies against unknown defendants should therefore be welcomed.

It is an open question whether an injunction is actually effective at preventing publication of information stolen by unknown cybercriminals. The answer in *PML* is that it can be if third parties are likely to comply with an injunction prohibiting publication once notified of it. Upon receipt of the interim injunction, the defendant made good its threat and published the claimants' stolen data on a number of websites and forums. When this came to the claimant's attention, it served copies of the injunction on the companies hosting those websites, who subsequently blocked access to the documents and deleted them in order to avoid aiding a breach of the injunction. Had the third parties been unwilling to do so, the claimant would have been able to seek an order from the court requiring compliance, potentially even if those companies were based outside the jurisdiction. Such an order has the potential to be a very effective tool available to the court to assist in policing compliance with an injunction on publication.

Both cases are useful reminders that there are court procedures available to victims of cybercrime aimed at ensuring their stolen information remains confidential should they seek to protect their position through the courts. In both cases orders were made restricting access to the hearing papers and certain documents on the court file (including documents exhibiting the stolen data), and in *Clarkson* the order also restricted the provision of those documents to third parties and non-parties unless an application was made for permission to inspect the documents.

The difference in approach taken by the claimant in each in response to the cyber-attacks is also noteworthy. In *PML*, the claimant attempted to keep the data breach under control by seeking to protect its anonymity in the courts and by attempting to thwart publication by notifying third parties as and when it became aware of publication. By comparison, the claimant in *Clarkson* took a more openly confrontational approach, issuing a public statement shortly after it became aware of the attack stating that it would "not be held to ransom by criminals", and taking steps to contact potentially affected clients and individuals directly in an attempt to mitigate the potential damage caused by publication.

The approach a victim takes will of course depend on the facts of the case and the nature of the stolen data, but in both of these cases the use of injunctions appeared to be part of a broader strategy designed to keep sustained pressure on the blackmailers in an attempt to make publication as difficult, risky and unprofitable as possible.

In both cases the decision to issue an application to court was taken in conjunction with reporting the blackmail to the police, who then commenced their own criminal investigations. Whether a cyber-attack will be reported to the police is a decision that needs to be taken on a case by case basis, however there are obligations on data controllers, regulated entities and public companies to report data breaches to the competent authorities in certain circumstances (be that the FCA, PRA or ICO), and these obligations are enhanced under GDPR which comes into force on 25 May 2018. Notwithstanding this, there are clear advantages to a victim of seeking to protect its interests through the courts in parallel, for example the fact that an injunction can usually be obtained relatively quickly by comparison to often lengthy criminal investigations, and the fact that injunctions and other court orders can be issued against persons unknown. An injunction's utility may also increase if the cyber-attackers' identities become known in the future. As the judge noted in *PML*, few defendants can remain confident that they will ultimately evade identification, and "If they fail, punishment for contempt of court would then loom large".

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[1] *NPV v QEL & anr* [2018] EWHC 703 (QB).

Contract

CONTRACTUAL DISCRETIONS – WHEN DOES "REASONABLE" MEAN MORE THAN "RATIONAL"?

Lehman Brothers Special Financing v National Power Corporation; Power Sector Assets and Liabilities Management Corp [2018] EWHC 487 (Comm), 12 March 2018

The High Court has considered the meaning of the requirement to "act in good faith and use commercially reasonable procedures in order to produce a commercially reasonable result" when calculating a Close-out Amount in the ISDA 2002 Master Agreement. It was found to require the Determining Party to use procedures which are, objectively, commercially reasonable to produce a result which is, objectively, commercially reasonable. By comparison, in determining Loss under the 1992 ISDA Master Agreement the words "reasonably determines in good faith" have been held to amount to a test of rationality: not a requirement to comply with some objective standard of care as in a claim for negligence, but, expressing it negatively, a requirement not to arrive at a determination which no reasonable Non-defaulting Party could come to.

The case concerned a principal-only forward currency swap that was terminated early due to the collapse of Lehman Brothers in September 2008. Once the swap was terminated, it was for the Non-defaulting Party, National Power Corporation (**NPC**), to determine the Close-out Amount.

The terms of the ISDA 2002 Master Agreement published by the International Swaps and Derivatives Association, Inc. (**ISDA** and the **ISDA 2002 Master Agreement**) require this determination to be made acting in good faith and using "commercially reasonable procedures in order to produce a commercially reasonable result". Lehman Brothers contended that NPC had breached this provision.

Two varieties of reasonableness

The provisions for calculating payments due on early termination differ in the 1992 ISDA Master Agreement (Multicurrency – Cross Border) (the **1992 ISDA Master Agreement**) as compared to the ISDA 2002 Master Agreement. In the 1992 ISDA Master Agreement, where Loss is selected as the applicable payment measure on early termination, the definition of Loss refers to "an amount that party reasonably determines in good faith to be its total losses and costs".

In the ISDA 2002 Master Agreement, the equivalent provision requires calculation of the Close-out Amount to be determined by the Determining Party (or its agent) acting in good faith and using "commercially reasonable procedures in order to produce a commercially reasonable result".

One of the key questions for the court was whether this change in wording altered the standard of reasonableness required.

The court described two possible standards referring to a passage from the judgment of Rix LJ in *Socimer International Bank Ltd v Standard Bank London Ltd (No 2)* [2008] EWCA Civ 116:

- **rationality** meaning not making a determination that no reasonable Non-defaulting Party could come to; or
- **objective reasonableness** meaning the negligence standard of reasonable behaviour.

The court's interpretation

The judgment from *Fondazione Enasarco v Lehman Brothers Finance SA* [2015] EWHC 1307 (Ch) established that the wording from the definition of "Loss" in the 1992 ISDA Master Agreement set the

required standard of reasonableness at rationality. The court in the present case acknowledged this.

The 1992 ISDA Master Agreement was held to be a part of the relevant context for interpreting the ISDA 2002 Master Agreement, along with the accompanying User's Guide to the ISDA 2002 Master Agreement published by ISDA (the **User's Guide**), and the fact that the ISDA Master Agreement is "probably the most important standard market agreement used in the financial world".

The court said that the User's Guide made clear that the change of wording, as compared with the 1992 ISDA Master Agreement, was intended to introduce greater objectivity. Therefore, the ISDA 2002 Master Agreement definition of Close-out Amount must entail a more onerous concept of reasonableness than merely avoiding an arbitrary, capricious and irrational determination.

The court also referred to the statement in *Lehman Brothers International v Lehman Brothers Finance* [2012] EWHC 1072 (Ch) that the change of wording introduced a new requirement that a Close-out Amount calculation must produce a commercially reasonable result. There was no such requirement that the result of the determination be reasonable in the 1992 ISDA Master Agreement.

This additional requirement to produce a commercially reasonable result had to be an objective requirement. If the additional words had only meant that the Determining Party must use procedures that ought to produce a commercially reasonable result, this would add nothing to the requirement to use commercially reasonable procedures, and so the additional words would have been superfluous.

Reasonableness in Close-out Amount in the ISDA 2002 Master Agreement

Accordingly NPC was required to use procedures which were, objectively, commercially reasonable to produce a result which was, objectively, commercially reasonable.

On the facts it had been commercially reasonable for NPC in calculating the Close-out Amount, to obtain the quotations it had and to use the replacement swap it had. Obiter a revised calculation statement which NPC served pursuant to Section 6(d) of the ISDA 2002 Master Agreement (which it turned out it was not entitled to serve) did not use commercially reasonable procedures to produce a commercially reasonable result on the facts of this case as it used a single indicative quotation when a firm quotation and an actual transaction was to be available shortly.

COMMENT

The decision, in the ISDA context, is unsurprising. In commercial contracts more generally (as opposed to in the context of the ISDA 2002 Master Agreement or the 1992 ISDA Master Agreement), it shows how careful you have to be when drafting provisions where one party's decisions or actions can have an impact on both parties: do you want rationality or objective reasonableness to be the standard? Where the provision is more concerned with the process, the standard is likely to be rationality, where it is about the outcome, it is more likely to be objective reasonableness.

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Criminal

COURT CRITICISES SFO'S APPROACH TO PRIVILEGE

R (on the application of AL) v Serious Fraud Office [2018] EWHC 856 (Admin), 19 April 2018

Let there be no confusion: first interview notes in internal investigations are rarely privileged. This is the message of the High Court in a judgment which is heavily critical of the Serious Fraud Office (**SFO**) for failing to take steps to force the disclosure of detailed employee interview notes taken during a company's internal investigation into corruption. The SFO had relied instead on "oral summaries" after the company concerned had asserted privilege over the notes themselves.
The claimant in this case is an ex-employee of the company and is the first individual to be charged with criminal conduct where the SFO has entered into a deferred prosecution arrangement (**DPA**) with a company for related offences. The ruling raises novel issues concerning the extent to which the SFO, in fulfilling its disclosure obligations towards individuals in the claimant's position, is under a duty to obtain documents from a company with which the SFO has concluded a DPA in order to review documents and disclose them.

Company enters into DPA regarding bribery offences

XYZ's bribery offences came to light in 2012 during an internal investigation. XYZ self-reported to the SFO, and, in 2013, the SFO began an investigation. The SFO entered into a DPA regarding the offences with XYZ in 2016.

Employee interview notes taken during internal investigation

During the internal investigation in 2012, several senior employees were interviewed by lawyers from an external law firm. These interviews were not recorded but the lawyers took copious notes. During the SFO investigation, the SFO asked to see the employee interview notes, but the company asserted privilege over the notes and declined to provide them. It offered instead to provide the SFO with "oral proffers", whereby a partner from the law firm would read aloud a short summary of the interview notes. The SFO agreed to this approach. The oral proffers were relativity short. The transcript of the longest was the claimant's in this case, at just three pages. To give some context, the claimant's original interviews (which the oral proffer summarised) lasted around 15 hours.

A term of XYZ's DPA was that XYZ must disclose to the SFO all information and documents 'not protected by a valid claim of legal professional privilege or any other applicable legal protection'.

Ex-employees also charged

In February 2016, the claimant was charged with two counts of conspiracy to corrupt, and one of conspiracy to bribe. Three other employees of XYZ were also charged with similar offences. In order to formulate his defence, the claimant wanted to see the full employee interview notes. The claimant has been charged with conspiracy offences, which require agreement between two or more people to commit an offence: it could therefore be highly important for his defence to have access to the full interview notes of the other employees.

SFO fails to obtain employee interview notes under the DPA

Despite repeated requests from the claimant's representatives, the SFO failed to obtain the full interview notes from XYZ, whose lawyers continued to insist that they were privileged. The SFO instead served the claimant with the written transcripts of the oral proffers. The claimant accordingly began judicial review proceedings to challenge the SFO's decision not to compel XYZ to provide the full interview notes.

The SFO argued that, while it disagreed with the law firm's reasoning regarding privilege, the claims were "not obviously invalid". The SFO contended that its decision not to trigger the breach clause of the DPA required weighing-up multiple competing concerns. Judicial review of the SFO's decision not to trigger a breach of the DPA was, the SFO submitted, a challenge to the exercise of legitimate prosecutorial discretion. Moreover, in the SFO's judgment, there was no need for the claimant to receive the full interview notes because the oral proffers of the interview notes would suffice.

Court expresses concern regarding the SFO's approach

Although the judicial review application was dismissed because the Crown Court, not the High Court, was found to be the appropriate forum to address disagreements regarding disclosure, Holroyde LJ and Green J made clear they had "real reservations as to the position adopted by the SFO in this case".

SFO should have pursued law firm for interview notes

The court criticised the SFO's claim that its decision not to pursue its request for disclosure of the interview notes from XYZ was an exercise of legitimate prosecutorial discretion. The court found that the SFO did not enjoy a broad discretion to decide whether or not to compel XYZ to produce the interview notes – the SFO's discretion was 'circumscribed' by the Attorney General's Guidelines on Disclosure and the claimant's rights, under both Article 6 of the European Convention on Human Rights and common law, to a fair trial. The SFO ought to have been guided by the need to protect the claimant's right to a fair trial, and should therefore have pursued XYZ for the interview notes; the SFO was not free to decide to do otherwise.

Oral proffer process "highly artificial"

The court was similarly critical of the SFO's approach to privilege. They found the oral proffer process to be 'highly artificial'. The SFO had alluded to 'testing' of the oral proffers which, it claimed, had confirmed that they were an accurate reflection of the interview notes. However, the SFO had no access to the interview notes, so the court had "real difficulties in understanding what sort of testing could have been undertaken which would have come up with a reliable answer".

"Settled law" that first interview notes are not privileged

The judges were emphatic in their agreement that "the law as it stands today is settled. Privilege does not apply to first interview notes". The SFO's claim that the law firm's argument regarding privilege was 'not obviously invalid' was therefore incorrect as a matter of law, and the SFO should have challenged the assertion of privilege over the notes. Moreover, by using the "not obviously invalid" test, the SFO failed to assess privilege claims adequately because it had not evaluated the law firm's assertion of privilege on its merits. Even if the "not obviously invalid" test was appropriate, the SFO had offered no evidence whatsoever to suggest it made any reasoned examination of the law firm's claim of privilege.

XYZ's law firm's suggestion that the interview notes contained "lawyers' musings" and therefore were privileged was also rejected. Any genuinely privileged material in the interview notes, the court said, could be redacted prior to disclosure.

Waiver of privilege had also not been properly considered

XYZ's lawyers insisted that the provision of the oral proffers did not mean that privilege over the interview notes had been waived. The court reasoned that, if the interview notes were truly privileged (as the lawyers claimed they were), and the proffers summarised the contents of those interview notes, then it followed that privilege over the contents of the interview notes had been waived. The pertinent question was whether this waiver was on a limited basis (ie for the exclusive use by the SFO).

The court found that there was no evidence that the SFO had considered questions of waiver nor (it followed) whether such waiver was limited. Even if it had, the court would have had "difficulties" accepting any argument that the waiver was limited. At the time the oral proffers were provided, XYZ knew or should have known that they would be used in the furtherance of the SFO's investigation into the employees and that in due course if the employees were charged the SFO would need to disclose the contents of the oral proffers to the employees. Thus even if XYZ's waiver of privilege by providing the oral proffers to the SFO was for a limited purpose, that purpose must have included the subsequent

transmission of the underlying employee interview notes to the charged employees, including the claimant.

"Without prejudice to privilege" wording not effective

It was irrelevant that when the proffers were made by XYZ to the SFO they were said to be without prejudice to privilege. The test for waiver is not subjective; it is objective. If objectively a client waives privilege it cannot then claim that the waiver did not exist simply because it (subjectively) asserts that there has been no waiver.

SFO should have considered duty to cooperation contained in DPA

The judges were also critical of the SFO's failure to consider whether XYZ was obliged to waive privilege over the employee interview notes under its duty to cooperate contained in the DPA.

COMMENT

Given the court's conclusion regarding the matter of the appropriate forum, much of significance in this judgment is strictly *obiter*. However, the judgment is a good indicator of judicial opinion on privilege, in particular in relation to materials created during internal investigations.

A company will often want (and in some cases will be obliged due to regulatory obligations) to investigate internally suspicions or allegations of bribery and corruption. Such an investigation must take into account the possibility that materials produced, including employee interview notes, may need to be disclosed in any subsequent external investigation by investigators such as the SFO.

The issue of whether such materials have to be disclosed to an investigating authority (or indeed to parties to subsequent civil litigation) is both topical and controversial. Recent case law has tended to favour disclosure of employee interview notes where no claim to litigation privilege can be made out. In the RBS Rights Issue Litigation, the High Court held that employee interview notes produced during a bank's internal investigation (where litigation was not in contemplation) did not attract privilege because the notes were not lawyers' working papers and the employees were not the lawyers' client. This ruling on interview notes was followed by Andrews J in the *SFO v ENRC* decision last year, the appeal of which is due to be heard in July. The judges' remarks in the XYZ judicial review application do not bode well for those still hoping that interview notes may be found to attract legal advice privilege – the law firm's claim that the law remained unclear as to whether interview notes were *per se* privileged was resoundingly rejected by the court.

The SFO has appeared willing to accept oral summaries of witness interviews in the past, both in this case and others (eg Standard Bank). The judges' criticism of the SFO's acceptance of oral proffers in this case may affect the SFO's willingness to do so in the future.

XYZ's DPA was approved by Lord Justice Leveson, as was the DPA with Standard Bank. So while oral proffers have been viewed as acceptable in the context of previous DPA negotiations, the judges' comments in this case make it very unlikely that oral proffers could be considered suitable to be disclosed in future cases instead of the underlying interview notes or transcripts in the context of criminal proceedings involving third parties (eg, as in this case, an ex-employee).

Finally, the claimant is the first individual to be prosecuted for a crime where a corporate entity has concluded a DPA for the same offence. The case therefore establishes an important precedent regarding the scope of the SFO's duties of disclosure towards third parties who are being prosecuted regarding the misconduct of a company which has entered into a DPA.

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Data Protection

GOOGLE UNSUCCESSFUL IN ITS DEFENCE TO THE "RIGHT TO BE FORGOTTEN"

NT1 & NT2 v Google LLC (The Information Commissioner intervening) [2018] EWHC 799 (QB), 13 April 2018

In the first two "right to be forgotten" claims brought in the UK, the English court has confirmed that in certain circumstances an internet search engine (**ISE**) operator can be required to delist links in its search results, in this case, relating to "spent" criminal convictions. Although ISE operators can take some comfort from the fact Google was not ordered to pay compensation, the judgment shows the detailed balancing exercise that must be undertaken.

Each case involved a businessman, referred to respectively as NT1 and NT2, who had been convicted for unrelated conspiracy crimes. Both convictions are now deemed to be "spent" under the Rehabilitation of Offenders Act 1974, which allows prior convictions to be effectively ignored after a period of time. However, content about the criminal actions of NT1 and NT2 remained online, and links to that content could be found on Google when the individuals' names were searched. NT1 and NT2 requested that Google delist the links; these requests, save one, were rejected.

The respective claimants commenced proceedings against Google claiming a "right to be forgotten" and seeking the removal and/or erasure of this content, an injunction, compensation due to the misuse of private information and damages.

Right to be forgotten

In 2014, the European Court of Justice (**ECJ**) considered a claim brought by a Spanish national who wanted to remove two links on Google that referred to his previous indebtedness.[1] The ECJ found that a "right to be forgotten" existed and held that data subjects could compel ISE operators to remove search results about them that are "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing".

Any claim to the "right to be forgotten" requires a Member State court to conduct a balancing act: the legitimate interests of internet users having access to the information weighed up against an individual's rights to privacy. This assessment depends on a number of factors including the nature of the information and its sensitivity.

Google could not rely on the journalism exemption

Although Warby J agreed with Google's submissions that the concept of journalism under EU law is broad, he drew a distinction between journalism and communication. He concluded that Google's activities as an ISE operator could not be equated with journalism and therefore Google could not benefit from the exemption at s32 Data Protection Act 1998 (**DPA**).

NT2 succeeds

Applying the balancing act required by the ECJ, Warby J found that NT2's case for the "right to be forgotten" was made out, and that Google could be compelled to delist the links complained of (one of which was found to be inaccurate). The reasoning was based on an assessment of the relevant facts, in particular: NT2 acknowledged his guilt (having pleaded guilty at a relatively early stage of the criminal proceedings) and showed genuine remorse for his previous actions. He was also no longer involved in the same line of work and the court found no basis to think he would reoffend and therefore pose a risk to the public. Warby J concluded that "the crime and punishment information has become out of date, irrelevant and of no sufficient legitimate interest to users of Google Search to justify its continued availability, so that an appropriate delisting order should be made". Warby J also commented that the existence of a young

family (favouring a reasonable expectation of privacy) was a decisive factor in favour of delisting.

NT1 fails – information still relevant

In contrast, NT1's claims were dismissed as it was found that the information complained of "retains sufficient relevance today". Warby J determined that at the time of his conviction, NT1 and his role in the controversial property business was reasonably well known. He did not accept his guilt and had shown the court no evidence of remorse for these actions. Further, he remained in business, and the information about his conviction was therefore relevant to the assessment of his honesty by members of the public.

No compensation or damages payable by Google

Although NT2's claim for delisting succeeded, Warby J found that Google was an organisation that was committed to compliance with the relevant requirements and cannot be said to have failed to take "such care as in all the circumstances … reasonably required". As such, NT2's claim to compensation under s13(3) of the DPA failed.

COMMENT

There is no doubt that the factual matrix of each case played a decisive role in Warby J's decision-making. It is apparent from the reasoning that the element of dishonesty (in the case of NT1) in the historic crime and the perceived risk of reoffending, as well as the conduct of the claimants since their convictions played a vital role in the outcome. It is clear therefore that any similar future cases will have to undergo the same detailed analysis of the factors surrounding the previous offences. It should also be noted that the "right to be forgotten" is not a right to change the past. The content complained of in these cases will not be removed from the underlying online sources; the links will simply not be revealed following a search on Google for NT2.

Bearing in mind the strengthened rights that individuals will enjoy under the GDPR (which comes into force on 25 May 2018) relating to the processing of their personal data (in particular, Article 17 provides expressly for a "right to be forgotten"), it is advisable that organisations examine whether they have adequate processes in place dealing with data subjects rights.

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[1] *Google Spain SL v Agencia*.

Privilege

LIMITED WAIVER, INADVERTENT WAIVER AND "CHERRY PICKING"

(1) Abdel Hakim Belhaj (2) Fatima Boudchar (Claimants) v Director Of Public Prosecutions (Defendant) & (1) Sir Mark Allen Cmg (2) Commissioner Of Police Of The Metropolis (3) Secretary Of State For Foreign & Commonwealth Affairs (Interested Parties) (2018) (Belhaj and Boudchar v DPP) [2018] EWHC 513 (Admin), 15 March 2018 and [2018] EWHC 514 (Admin), 15 March 2018

Recent decisions concerning the disclosure of privileged material in litigation, either deliberately or by mistake, illustrate the application of rules on inadvertent disclosure and limited waiver. Anyone involved in disclosure, especially electronic disclosure involving many documents, should be aware of how these rules operate.

Scope of limited waiver and consequences of inadvertent waiver

In a judicial review of the Director Of Public Prosecutions' (**DPP**) 2016 decision not to prosecute former senior MI6 officer, Sir Mark Allen CMG, for alleged involvement in unlawful rendition of the two claimants to Libya, the claimants sought access to certain documents that had been considered by the DPP when deciding not to prosecute. Some of these documents had already been accidentally disclosed to the claimants.

The privileged materials

When deciding whether or not to prosecute, the DPP had considered certain materials provided by the Foreign and Commonwealth Office (**FCO**). The materials included legal advice that the FCO had received. The provision of that legal advice to the DPP was subject to a limited waiver of privilege by the FCO. The claimants wanted to see this legal advice. They challenged the scope of the limited waiver and argued that privilege had also been waived for the purposes of the judicial review proceedings so these documents should be made available to the claimants.

The DPP had disclosed in closed judicial review proceedings, mistakenly, it said, some of the privileged material to the claimants and sought to reassert privilege over it (on the basis that it was privileged to the FCO and was inadvertently disclosed by the DPP).

The FCO (as interested party) supported this claim to privilege. The claimants argued that the DPP couldn't "cherry pick" which privileged material to disclose.

Inadvertent waiver – current law

Under CPR 31.20, if a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court.

However, as the court noted, the case law is not entirely reflective of the terms of CPR 31.20. Rather it adopts a less favourable position towards the party who has inadvertently provided privileged material. The starting point being that the solicitor receiving the inadvertently disclosed material owes no duty of care to the other party and is generally entitled to assume privilege has been deliberately waived. There are only limited circumstances in which the court may intervene to prevent the privileged material being used.[1] Other than where disclosure was procured by fraud, this will be where there has been an obvious mistake. This is both a subjective and objective test – did the solicitor receiving the documents appreciate a mistake had been made and would it be obvious to a reasonable solicitor that a mistake had been made?

In the present case, the argument on inadvertent waiver succeeded – an obvious mistake had been made. The court found that a reasonable lawyer receiving the material that the DPP and FCO say was privileged to the

FCO would be aware of both the law on inadvertent disclosure and, crucially, the very sensitive nature of the material disclosed in this closed process. In this context the court found that any reasonable lawyer receiving this information "would know or believe that the provision of material otherwise covered by [privilege] was inadvertently provided".

Cherry-picking – requires deliberate deployment

The claimants argued that it would be unfair for the DPP to reassert privilege over the inadvertently disclosed materials since this prevented the claimants from seeing the full context of the legal advice of which those materials formed part (this is the so called 'cherry picking' argument). The court was clear that cherry-picking "concerns a policy or strategy by the client to use legal advice in a selective manner to obtain a forensic advantage" and in this instance there was no contention that the DPP had been seeking to tactically deploy part but not all of its legal advice. The issue of cherry-picking does not arise without "knowing, deliberate deployment resulting in partial disclosure". There was no such intention here.

The limits of a limited waiver of privilege

The claimants challenged the scope of the FCO's limited waiver of privilege over the privileged material. The claimants argued that the limited waiver should be extended to permit the use of the privileged documents in the judicial review proceedings.

The documents were provided by the FCO to the DPP expressly on a limited waiver basis, under the following wording:

> *"There are some documents provided to the investigation that may be subject to legal professional privilege. The FCO provides these papers for the sole purpose of assisting with this investigation and do not consider to have waived legal privilege for any other purpose, including any future prosecution or civil claim".*

The claimants argued that the original investigation, the DPP's decision not to prosecute and the judicial review of that decision, were all part of one process. It was in the interests of justice, said the claimants, for them to be able to access the legal advice that the FCO relied on and that the DPP reviewed in making the decision not to prosecute.

The court disagreed. It found the terms of the limited waiver to be very clear. Privilege is not waived generally because a privileged document has been disclosed for a limited purpose. It is in the interests of justice for a party to be able to make such a limited waiver of privilege without contemplating privilege being lost entirely.

There was no previous authority cited that addressed squarely the question of whether the process of decision-making and judicial review of that decision formed one single composite process "such that waiver for one meant waiver for all". The court found no "inevitable or necessary nexus" between the advice provided to the DPP together with the decision on prosecution on the one hand, and the judicial review of that decision on the other. Rather, between the process of decision-making and the challenge of that decision there is in fact "a fundamental separation of function and responsibility". The latter is not a "composite part of the former". The court felt it would be "strongly against the public interest" if whenever one government department waives privilege to assist another, that waiver might be extended to cover subsequent judicial reviews.

COMMENT

These decisions are helpful reminders of the risks inherent in deliberate or inadvertent partial waiver of privilege, and the opportunities available to the party receiving such documents to challenge the extent of the waiver.

The clear decision on the scope of the Government's express limited waiver provides useful guidance about the high threshold that needs to be met for a limited waiver of privilege in respect of one set of proceedings, or one aspect of a judicial process, to be extended by the court to cover related proceedings or processes.

With respect to inadvertent disclosure of privileged material, while many practitioners are familiar with the concept of "obvious mistake" on inadvertent disclosure, the judgment is a helpful reminder that (despite CPR 31.20) this is not a straightforward test and only if the mistake would be obvious both subjectively to the solicitor receiving the disclosure, and objectively to any reasonable solicitor, will the disclosing party be likely to succeed in persuading the court to prevent this material being used.

The firm dismissal of the cherry-picking argument raised in the same hearing, however, provides comfort that inadvertent waiver is unlikely to have wider ramifications in terms of unpicking privilege over related documents. It is clear that cherry-picking arguments will only succeed in circumstances where the selective deployment of privileged material is intentional, not inadvertent.

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[1] *Mohammed Al Fayed et ors v The Commissioner of Police for the Metropolis et ors* [2002] EWCA Civ 780.

EMPLOYEE LITIGATION AND WAIVER OF PRIVILEGE OVER INTERNAL INVESTIGATION REPORT

FM Capital Partners Ltd v Marino & ors [2017] EWHC 3700 (Comm), 15 December 2017

Documents created during an internal corporate investigation were protected by litigation privilege. Although the documents, including an internal investigation report, were also used during an employee disciplinary process, the dominant purpose of the documents was to investigate complaints (and threats of litigation) from a client. However, litigation privilege in the internal investigation report had been waived because the company (employer) had provided it to one employee, without any limitations, during disciplinary proceedings. During subsequent litigation, that employee had disclosed the report to a co-defendant thus privilege was lost as against that other defendant. The ruling provides a cautionary tale about why it is important for any party disclosing a privileged document to be very careful about the terms of the waiver.

This was a dispute between an asset manager (the **claimant**) and its former CEO Mr Marino (the **first defendant**) and others in relation to Mr Marino's alleged breaches of duties to the claimant by taking unlawful commissions from investments made on behalf of one of the claimant's clients (a Libyan sovereign wealth fund, Libya Africa Investment Portfolio (**LAP**)). The third defendant, Yoshiki Ohmura (a former banker alleged to have dishonestly assisted Mr Marino), applied for specific disclosure of documents created in the course of an internal investigation carried out by BDO, for the claimant, into Mr Marino's conduct.

Dominant purpose of the investigation report

The third defendant's first basis for seeking disclosure of documents relating to BDO's investigation was that they were not covered by litigation privilege, because preparing for litigation was not the "dominant purpose" of the investigation.

BDO were appointed by the claimant's solicitors in 2014 to investigate Mr Marino's conduct, following a series of complaints made by LAP. The claimant argued that the dominant purpose of the BDO investigation was to ascertain its liabilities in potential litigation; and therefore materials created as part of that investigation were subject to litigation privilege. When BDO were instructed, litigation was seriously contemplated, as correspondence from LAP expressly threatened proceedings against the claimant, and the allegations about Mr Marino's conduct made it likely that the claimant may want to bring proceedings against Mr Marino too (as indeed happened).

The third defendant argued that a disciplinary process against Mr Marino was at least an equal purpose of the BDO investigation. The court disagreed, and found that it was "inherently less likely that a company faced with serious allegations and a serious potential claim against it from one of its clients would be predominately or even equally concerned with disciplining its own employee".

Waiver of privilege by disclosure to one party to the proceedings

Having failed to establish that the BDO investigation materials were not subject to litigation privilege, the third defendant sought disclosure of one particular document – BDO's investigation report – on the alternative basis that by providing that report to Mr Marino as part of his disciplinary process, the claimant had waived privilege over it in the context of the litigation.

The court considered previous case law which found that disclosing a privileged document for the purpose of one proceeding did not necessarily mean privilege had been waived so far as other related proceedings were concerned.[1] The question of waiver depends on whether there is "an express or implied restriction on the subsequent use of the document".

In this case, the BDO report was provided to Mr Marino during the disciplinary process with *no* express limitations on his use of the document, and the court refused to infer any such limitation. Mr Marino was therefore entitled to use the document as part of his own disclosure in these proceedings and, Mr Marino having disclosed the document in these proceedings, privilege had been lost as against the other parties to these proceedings.

COMMENT

The decision that litigation privilege should apply to these documents was uncontroversial, given that the claimant was already in receipt of a letter raising complaints that had the potential to give rise to litigation.

The more significant point in this decision is the importance of carefully managing litigation risks in an employment context. Litigation frequently runs side by side with internal disciplinary processes, as facts emerge about employees during the course of investigating the facts pertaining to a dispute. This decision highlights the importance of keeping disclosure and loss of privilege risks in mind when deciding what documents to create, and whether and how to share those documents with an employee who may be or become a defendant in the litigation.

Close cooperation between internal employment and litigation teams in these situations is vital to protect the company's interests.

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[1] *British Coal Corporation v Dennis Rye Ltd* [1998] 1 WLR 113, in which disclosure for the purpose of a criminal prosecution did not mean a waiver in respect of a connected civil action; and *Berezovsky v Hine* [2011] EWCA Civ 1089, in which privilege was not waived for the purpose of a civil litigation over documents disclosed for the purpose of an asylum claim.

Public Law

WHEN TO CHALLENGE PUBLIC CONTRACT AWARDS – LESSONS LEARNED FROM THE UK PASSPORT SAGA

Following its initial outcry and garnering of (some) public support, the current UK passport manufacturer De La Rue backed down from its challenge of the Government's decision to award the new post-Brexit blue passport contract to Germalto UK Ltd, a Franco-Dutch company. While this is a politically emotive topic for some, for procurement lawyers the outcome is not necessarily surprising. The very purpose of EU procurement law is to ensure that public authorities do not unlawfully favour national interests.

The current contract between the Home Office and British company De La Rue International Limited (**De La Rue**) to design and produce UK passports was entered into in 2009 and is due to expire in July 2019.

Following the launch of a tender for the new contract in early 2017, Germalto was appointed the preferred contractor by HM Passport Office on 22 March 2018 and was subsequently awarded the contract on 18 April 2018. In the intervening period, De La Rue started a very public campaign against the provisional decision to award the contract to Germalto which included a 300,000 strong petition demanding that the Government change its mind.

As the new passport contract is worth approximately GBP490 million, the Government was required to run a formal procurement process where Europe-wide entities could tender. As explained in further detail below and notwithstanding the UK's decision to leave the EU, UK public authorities must still comply with EU procurement law at least until any alternative arrangement is put in place post-Brexit. In light of this, provided the UK government complied with the procurement rules and applicable laws, De La Rue had limited scope to challenge the decision, as it ultimately came to accept.

EU public procurement rules – securing the "most economically advantageous tender"

Public procurement is the process by which public authorities purchase work, goods or services from companies. To create a level playing field for businesses across Europe, EU public procurement law requires that the award of contracts by EU public authorities must be non-discriminatory and comply with a set of minimum rules. This is to promote the free movement of goods, services and establishment between EU countries.

The tender for the new UK passport contract was run under EU Directive 2014/24/EU on Public Procurement, incorporated in the UK by the Public Contracts Regulations 2015 (the **PCR**). The particular competition for the contract required it to be awarded on the basis of the "most economically advantageous tender". This enables the government to secure its objective of achieving value for money, achieved through competition, and pursuant to a specific set of award criteria of which price was just one factor.

There are various grounds on which an economic operator (any person or public entity which offers works, products or services) can challenge a decision under the PCR. Usually claims are brought where unsuccessful tenderers claim a breach of public procurement rules (typically that the process was flawed) led them to suffer, or risk suffering, loss or damage as a result.

The procurement rules also require a ten-day standstill period between the decision to award the contract to a preferred bidder and formal contract award. This offers unsuccessful bidders a key opportunity to bring a claim before the contract is signed. If they do commence proceedings, there is an automatic suspension of the contract award and the public authority cannot enter into the contract until the suspension is lifted by agreement or order of the court. If a claim isn't brought in this window, a potential claimant can still bring a damages claim within 30 days from the date when they first knew or ought to have known that the grounds for starting the proceedings had arisen.

UK passport tender

De La Rue claimed that their bid was "the highest quality and technically most secure bid" and they questioned the sustainability of Germalto's bid given its allegedly low costs. However, throughout the public debate over its decision, the Home Office maintained that Germalto was selected following a rigorous, fair and open competition. As Immigration Minister Caroline Nokes said, "in a fair procurement process, we had to look at quality, security and price, and [Germalto's bid] was the contract that provided the best value on all counts". On costs specifically, the Home Office claimed that changing the contractor would save the taxpayer GBP100-120m, depending on the volume of passports produced during the lifetime of the contract.

Despite its public protestation, the legal basis for De La Rue's threatened challenge was not always clear. In order to give De La Rue additional time to consider its position and to seek additional information on the Government's decision-making process, the Home Office extended the ten-day standstill period for two weeks. Following pre-action correspondence and the parties taking procurement law advice (including HM Passport Office and Germalto publically instructing leading procurement law QCs[1]), De La Rue subsequently decided not to pursue the threatened litigation. Following the expiry of the extended standstill period, the Government promptly announced on 18 April 2018 that the contract had been awarded to Germalto.

COMMENT

Despite some of the emotive issues raised by this contract award, from a procurement law perspective the issues were relatively clear cut. De La Rue needed an argument other than its own nationality if it stood any chance of success.

Moreover, the risks for the Government of awarding a contract and improperly preferring national interests were recently highlighted by a decision of the CJEU in which Austria was found to have breached the applicable procurement rules for awarding ID document contracts without first conducting an open procurement competition (*Commission v the Republic of Austria* (ECLI: EU: C: 2018/194)).Austria's arguments that the service contracts protected its security interest and therefore did not require an open procurement process failed as it was unable to demonstrate any risks to national security from conducting an open competition. Indeed, UK passports were previously required to be made in the UK but since 2009 a proportion has been made overseas. As the Home Office has said, there have been no security or operational concerns since then, and the UK would have real difficulty raising any national security concerns now.

What was often overlooked in the public debate is the many benefits that UK companies gain from participating in EU procurements. The post-Brexit procurement landscape is not yet clear, however if the UK really does wish to be "open for business" then it will need to have some form of procurement rules both to encourage competition and secure value for money within the UK and to ensure UK companies can compete on a level playing field in Europe.

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[1] monckton.com/de-la-rue-abandons-blue-passport-procurement-challenge/

Service

SERVICE OF ENGLISH PROCEEDINGS ON A FOREIGN STATE MADE EASIER

Certain Underwriters et al v Syrian Arab Republic et al [2018] EWHC 385 (Comm), 1 March 2018

The procedure for serving English proceedings on a foreign State under s12 State Immunity Act 1978 (**SIA 1978**) has been helpfully clarified. Where a claimant has to rely on the Foreign and Commonwealth Office (**FCO**) to effect service on the foreign Ministry of Foreign Affairs of that State, the High Court has held that potential options for effecting such service include service via delivery by courier. The court held that service had been effected when the documents were received by the Syrian Ministry of Foreign Affairs (**SMFA**) in Damascus even though Ministry representatives refused to accept the delivery on the basis documents "were not needed". Notwithstanding this useful clarification, when contracting with a State commercial parties should keep in mind that the inclusion of a process agent provision is prudent. Such a contractual provision will reduce the risk that service will need to be effected via the FCO on the foreign State's Ministry of Foreign Affairs.

There are specific requirements set out at s12 SIA 1978 for service of English proceedings on a foreign State. Subject to one exception, s12 requires the proceedings to be served by "being transmitted through the [FCO] to the Ministry of Foreign Affairs of the State". The SIA 1978 requires that the documents are "transmitted" to the Ministry. Service is deemed to have been effected when the proceedings are received at the foreign State's Ministry. CPR 6.44 requires a party wishing to serve a claim form on a State to file it in the Central Office of the Royal Courts of Justice with a request for service to be arranged by the FCO.

The exception to this rule is where there is a contractually agreed method of service, most commonly via the appointment of a process agent.

Transmission of documents under SIA 1978

In this case, the claimants tried to serve an English claim form (seeking to enforce a U.S. judgment) on the Syrian Arab Republic (**Syria**), in accordance with the requirements of the SIA 1978. The claimants asked the FCO to serve the documents on Syria, and the FCO instructed a courier company to deliver the documents to the SMFA in Damascus. The courier attempted delivery but the SMFA officials refused to accept the documents. According to a letter from the FCO, SMFA officials were apparently aware that the documents had been sent by the FCO but insisted the courier remove the documents from the premises. The FCO also indicated that the courier had said it would not be able to leave documents on the street outside the SMFA for staff welfare reasons.

Various other steps were taken to bring the proceedings to the Defendants' attention.

The claimants asked the Court to order that service had been effected, or alternatively dispense with the need for service.

Andrew Henshaw QC (sitting as a High Court Judge) held that service under s12 SIA 1978 had been completed despite the fact that the SMFA had refused to accept the documents from the courier, on the basis that the documents had been "received" at the Ministry for the purposes of s12. The Court relied on the Oxford English Dictionary definition of "receipt" and found it likely that the word "received" is intended, at least, to indicate that it is not sufficient merely for documents to be transmitted in the sense of being dispatched: they must actually reach the relevant Ministry.

The court also referred to the judgment of Teare J in *EIB v Syrian Arab Republic* [2018] EWHC 181 (Comm), in which it was held that service on Syria was achieved when the FCO sent the documents to SMFA's email address and no undeliverable notification had been

received indicating that the email had been received in the electronic repository or server.

The court held that while s12 required the documents to reach the relevant Ministry, it did not require the documents to be accepted upon delivery. No further steps could have been taken or needed to have been taken to effect service and, accordingly, service under s12 was complete when the courier proffered the package to the SMFA.

Dispensing with service

The court went on to consider the claimants' fall back position. It concluded that if it were wrong in its conclusion that service had been effected, it would nevertheless permit service in this case to be dispensed with on the grounds that there were exceptional circumstances given the withdrawal of UK diplomatic personnel from Syria, the SMFA's refusal to accept delivery, and the fact that there was no further step the claimants or the FCO could reasonably take. Mr Henshaw QC found that if, exceptionally, the court makes an order dispensing with service of the claim form instituting the proceedings, then it is not a document "required to be served" within s12 and an order dispensing with service was therefore not inconsistent with the requirements of s12 of the SIA 1978.

The judgment also addresses the requirements for enforcement of a foreign (U.S.) judgment but this summary does not deal with those issues.

COMMENT

The facts relating to service in this case were notable. The court found the proceedings were not merely transmitted to the SMFA but also arrived within the SMFA's premises in a manner such that they were "received" by the SFMA. The fact that the courier was turned away by the SFMA's representative and the representative refused to take the package into his hands did not prevent it from having been "received" at the SMFA for the purposes of s12 of the SIA 1978.

The court's decision has clarified the requirements of s12 SIA 1978 in the context of delivery by the FCO of documents required to be served to initiate English proceedings. The judgment confirms that the FCO can serve a State's Ministry of Foreign Affairs in a number of different ways and, to the extent that the Ministry refuses to accept delivery of a courier's package, the court's judgment that such service can be effective as the documents had been "received" under s12 is helpful. This decision may assist prospective claimants contemplating litigation in the English courts against foreign States in circumstances where they do not have the benefit of a contractual process agent provision (or service on a process agent is not an option).

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Tort

NO VICARIOUS LIABILITY FOR FRAUDULENT FINANCIAL ADVISER USING COMPANY ONLINE PORTAL

Frederick & ors v Positive Solutions (Financial Services) Ltd [2018] EWCA Civ 431, 13 March 2018

No vicarious liability arises for a company where one of its agents perpetrates a fraud in the course of a recognisably independent business. This applies even where, to facilitate the fraud, the agent uses an online portal which he or she only has access to because they are an agent of the company.

The appellants had invested in a fraudulent investment scheme perpetrated by a Mr Warren and another individual. In doing so, the appellants had re-mortgaged their property in order to raise money to invest. They lost all their money.

As well as being a fraudster, Mr Warren was an independent financial adviser engaged by the respondent company, Positive Solutions (Financial Services) Ltd (**Positive Solutions**). By virtue of his position, he had access to an online mortgage portal.

Mr Warren arranged the re-mortgages for the appellants with what was then Abbey National, via this online portal. Abbey National paid a commission to Positive Solutions via an automated system. Unknown to both the appellants and Positive Solutions, Mr Warren had fraudulently misrepresented the appellants' occupations and salaries on the application. The appellants advanced part of the mortgage monies to Mr Warren. These funds were subsequently misappropriated by Mr Warren and his accomplice.

The appellants obtained summary judgment against Positive Solutions for their loss, on the basis that (1) it was vicariously liable for the loss caused by Mr Warren; and (2) it had assumed responsibility for Mr Warren's actions, and therefore owed a duty of care to the appellants.

On appeal, the Court of Appeal dismissed the claim to a duty of care on the grounds that there was no proximate relationship between the appellants and Positive Solutions, and maintained summary judgment against the appellants on vicarious liability.

Test for vicarious liability

The Court of Appeal cited the guidance laid down in *Various Claimants and Catholic Child Welfare Society & ors* [2012] UKSC 56, as interpreted and re-stated by Lord Reed in *Cox v Ministry of Justice* [2016] UKSC 10. This set out the two factors which establish vicarious liability in the absence of an employment relationship. As Mr Warren was an agent of the company and not an employee, the relevant tests were as follows: (1) where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party); and (2) where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.

A recognisably independent business – "moonlighting"

The Court of Appeal accepted Positive Solutions' argument that Mr Warren was engaged in a "recognisably independent business". Mr Warren's use of the online portal to make fraudulent applications to Abbey National was only the means by which he was able to obtain funds for the appellants to invest. Interestingly, the Court of Appeal did not disapprove of the terms "moonlighting" and "frolic of one's own" – these were convenient colloquial shorthand for the "activities being entirely attributable to the conduct of a recognisably independent business". Neither the fact that Positive Solutions received commission nor that Positive Solutions had the benefit of an indemnity from Mr Warren relating to fraudulent conduct impacted this conclusion.

Not all the acts had occurred within the course of employment

The Court of Appeal also accepted the argument that not all of the necessary acts and omissions for Mr Warren to be held personally liable had occurred within the course of his agency, and thus Positive Solutions could not be held vicariously liable for his conduct. A necessary element of the appellant's claim was the inducement to invest in the property development scheme, which was committed by Mr Warren's accomplice. The loss was caused by the appellants advancing the money to Mr Warren; the appellants did not claim that the re-mortgaging itself caused loss. This misappropriation of the monies could not in any sense be described as an integral part of Positive Solutions' business activities, and therefore did not occur within the court of Mr Warren's agency.

Mere opportunity insufficient

Further, merely providing the opportunity to commit the fraud was not sufficient without more to give rise to vicarious liability in the absence of Mr Warren holding himself out as having the authority to act for Positive Solutions.

COMMENT

The High Court recently addressed the question of vicarious liability in *Various Claimants v Wm Morrisons Supermarket PLC* [2017] EWHC 3113 (QB). In that case, Morrisons was held to be vicariously liable for its employee who had intentionally and maliciously posted payroll data to a file sharing website using his own equipment outside of office hours.

It is interesting to contrast the present decision with that in *Morrisons*. In *Morrisons*, the employee in question was entrusted with sensitive data as part of his employment so the unlawful actions were closely associated with the tasks he was required to perform. The same is not true of Mr Warren's engagement in the investment scheme and his access to the portal.

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Morrisons found vicariously liable for rogue employee's misuse of personal data: *Various claimants v Wm Morrisons Supermarket PLC* (Jan)

Disclosure

E-discovery – how to use predictive coding: *Triumph Controls UK v Primus International Holdings* (Mar)

Employment

Restrictive covenants, Brexit, and the war for talent – why protecting your confidential information has never been more important: *Dyson Technology Ltd v Pellerey* (Jan)

Evidence

The inviolability of diplomatic mission documents: *R (on the application of Bancoult No. 3) v Secretary of State for Foreign and Commonwealth Affairs* (Mar)

Privilege

Employee litigation and waiver of privilege over internal investigation report: *FM Capital Partners Ltd v Marino & ors* (May)

Limited waiver, inadvertent waiver and "cherry picking": *(1) Abdel Hakim Belhaj (2) Fatima Boudchar (Claimants) v Director Of Public Prosecutions (Defendant) & (1) Sir Mark Allen Cmg (2) Commissioner Of Police Of The Metropolis (3) Secretary Of State For Foreign & Commonwealth Affairs (Interested Parties)* (May)

Legal advice privilege did not protect facts about client's assets: *Anthony David Kerman v Tatiana Akhmedova* (Mar)

No litigation privilege for controller of litigation under conduct of claims clause: *(1) Minera Las Bambas SA (2) MMG Swiss Finance AG v (1) Glencore Queensland Ltd (2) Glencore South America Ltd (3) Glencore International AG* (Mar)

Litigation privilege: applying the law post-ENRC: *Bilta (UK) Ltd (in liquidation) & ors v Royal Bank of Scotland Plc & anr* and *Health and Safety Executive, R (on the application of) v Jukes* (Feb)

Public law

When to challenge public contract awards – lessons learned from the UK passport saga (May)

Service

Service of English proceedings on a foreign state made easier: *Certain Underwriters et al v Syrian Arab Republic et al* (May)

An unusual order for alternative service: *Koza Ltd & anr v Akcil & ors* (Mar)

Tort

No vicarious liability for fraudulent financial adviser using company online portal: *Frederick & ors v Positive Solutions (Financial Services) Ltd* (May)

No parent company duty of care for Niger Delta claims: *Okpabi & ors v Royal Dutch Shell Plc & anr* (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.

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