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Review

Contents

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Top finance litigation and contractual developments in 2018

This is a round-up of the most interesting finance litigation and contractual developments in 2018. The selection is necessarily subjective and draws from a wide range of cases and developments that are of direct relevance to finance parties. Full coverage can be found in our monthly Litigation and Dispute Resolution Review.

Contract – good faith, implied representations, no variation clauses

Following the decision in *Marks & Spencer v BNP Paribas* [2015] UKSC 72, it is generally challenging to imply terms into contracts, especially agreements between sophisticated parties. However one development running counter to this trend in recent years has been the implication of a duty of good faith into certain types of so called "relational" contracts (see for instance *Yam Seng Pte Ltd v International Trade Corp* [2013] EWHC 111 (QB)).

In ***Nehayan v Kent* [2018] EWHC 333 (Comm)** the court, in implying a duty of good faith into an oral joint venture contract, considered what factors might constitute a relational contract. The overarching framework was one where a contract might demand "a high degree of communication, cooperation and predictable performance based on mutual trust and confidence". The court found that in the context of the oral joint venture agreement between the parties, a duty of good faith was fundamental to ensure that the parties' reasonable expectations were met.

This was an unusual case where a significant business joint venture was agreed via an oral agreement, and clearly that had an influence on the court's decision. Nevertheless, joint venture agreements are likely to be the sorts of long term relational contracts into which the courts may be persuaded to imply a duty of good faith. It may be difficult to avoid entirely the risk that a counter party may later seek to argue later that a duty of good faith should be implied into a long term supply agreement or joint venture – for instance who is going to agree to a right to act in bad faith? Therefore, parties would be well advised to set out their respective rights and obligations clearly, not least because the implication of terms (including of good faith) is much more difficult in the case of a carefully drafted written agreement between two well advised commercial parties.

Another development which runs counter to contractual certainty came in ***PAG v RBS* [2018] EWHC 3137 (Ch)**. There, PAG threw the proverbial kitchen sink at RBS to try to avoid its obligations under an interest rate swap, including arguments that RBS had made implied fraudulent misrepresentations in respect of the LIBOR benchmark. Although at first instance this argument was rejected, the Court of Appeal agreed with PAG that RBS had in fact impliedly represented at the time of agreeing the swaps that it was not seeking to manipulate LIBOR and had no intention of doing so in the future. While on the facts here, the implied representation had not in fact been false (and as such the court found in favour of RBS), this finding is potentially very concerning for those parties involved in setting benchmarks who would have been hoping that this case would have drawn a line under these sorts of claims.

More reassuring was the decision in ***Rock Advertising v MWB Business Exchange Centres* [2018] UKSC 24**. There, MWB was able to rely on a "no oral variation" clause to defeat an argument by Rock that a lower rent had been agreed orally. Unfortunately (for contract lawyers at least), the Supreme Court's decision on the "no oral variation" clause meant that it opted not to engage with the more interesting argument raised by MWB: that Rock was not entitled to rely on the oral

variation because it had not given any additional consideration for that promise. The decision means that parties will find it difficult to rely on informal changes to contracts where there is a "no oral variation" provision in place.

Data protection – vicarious liability, right to be forgotten

With GDPR in force since May 2018, firms now face the possibility of a fine totalling the greater of EUR20 million or 4% of annual global turnover for breaches of the regulation. Firms therefore need to be ever more careful as to how they hold and use personal data (which has a very broad definition under the regulation) and vigilant as to how they protect the data that they hold from, for instance, misuse and/or cyber attacks.

In ***WM Morrison Supermarkets PLC v Various Claimants* [2018] EWCA Civ 2339**, Morrisons lost their appeal against a finding of vicarious liability after the actions of a vindictive employee, Mr Skelton, caused the sensitive personal data of approximately 100,000 employees to be posted online. At first instance it was held that Morrisons had no primary liability, which was not contested on appeal. Rather, Morrisons challenged the finding of vicarious liability. The Court of Appeal held that Mr Skelton's actions were within the course of his employment owing to the fact that his job required him to disclose the relevant data to third parties – albeit prescribed third parties as opposed to the internet at large. Further, Morrison's attempt to contest that Mr Skelton had to be "on the job" for his actions to constitute behaviour during the course of employment was rejected. The success of the group litigation against Morrisons is likely to embolden class actions in respect of future data breaches (although it is worth noting that the case was decided under the Data Protection Act 1998 rather than GDPR).

In ***NT1 and NT2 v Google LLC* [2018] EWHC 799 (QB)**, the English courts heard follow-on actions (one successful, the other unsuccessful) from the 2014 European Court of Justice ruling that there is a so-called "right to be forgotten". This case underscores the renewed importance of the rights of so-called data subjects. Data privacy is entering a new era and firms need to be mindful of the new topography to avoid pitfalls.

Privilege – good and bad news on litigation privilege

The twin decisions in recent years of (i) *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch), which followed Three Rivers No 5 [2003] EWCA Civ 474, that legal advice privilege could not be obtained of a solicitor's notes of an interview with his client's employees, and (i) *SFO v ENRC* [2017] EWHC 1017 (QB), which significantly limited the availability of litigation privilege in the context of corporate criminal investigations, have given rise to considerable concern. Just as corporate civil and criminal liability expanded, the scope for parties claiming privilege in investigations seemed to be getting ever narrower.

In ***ENRC v SFO* [2018] EWCA Civ 2006** the Court of Appeal overturned the second of these decisions, finding that lawyers' notes of employee interviews, generated in the context of an internal investigation, attracted litigation privilege. The Court of Appeal held that a criminal prosecution was reasonably in contemplation by ENRC at the point that it launched its internal investigation (even though this preceded the commencement of the SFO investigation). Furthermore, the interview notes were created for the purpose of resisting or avoiding proceedings. They were therefore covered by litigation privilege.

The Court of Appeal, however, did not rule on the question as to whether the notes were covered by legal advice privilege. While the Court of Appeal did offer non-binding comment, such that it would have departed from *Three Rivers No 5* if it could have done, it noted that such a decision ought to be made by the Supreme Court. We understand that the SFO has decided not to appeal this decision, so the current uncertainty in relation to legal advice privilege remains.

In a contrasting development, a different composition of the Court of Appeal refused to extend the scope of litigation privilege in ***WH Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652.** In that case, in the context of a dispute over the number of seats in the London Olympic Stadium, the Landlord (**E20**) asserted privilege over emails between the E20 Board Members

and its stakeholders. The Court of Appeal found that such documents, while created in the context of litigation, nevertheless did not themselves involve the seeking of advice or evidence for the purpose of the litigation and therefore did not attract litigation privilege. This decision, which seems to have been driven by a resistance on the part of the court to granting parties blanket privilege over documents created in the context of litigation, is likely to create uncertainty about what is covered by litigation privilege. The court appeared to accept that this ruling might lead to some difficult privilege calls, indicating that other material might also attract litigation privilege where it was mixed in with advice or information that did attract litigation privilege, and could not be disentangled, or where that other material might reveal the privileged information or advice.

Insolvency – controversial CVAs and some speedy action by the English courts

The insolvency space was increasingly active in 2018, and this trend looks set to continue particularly if Brexit hits the economy as hard as some are predicting. Headlines were captured in particular by controversial CVAs of heavily indebted retailers, such as Mothercare, Homebase and House of Fraser. These involved the landlords of these retailers having their property rights compromised through the votes of other creditors who were not being required to take a similar devaluation in their claims. We still await a challenge to one of these CVAs to come to fruition (although we understand that a challenge to the House of Fraser CVA was settled out of court).

One example of an insolvency dispute which did come to court in very short order was ***Citibank v Oceanwood Opportunities* [2018] EWHC 448 (Ch)**. The matter concerned a Norske Skog, a Norwegian paper company in severe financial difficulties, whose restructuring risked being scuppered by a technical argument on the wording of a New York indenture, which would have meant that the majority noteholders could never in practice give instructions to the agent (Citibank) to effect the sale required for the restructuring. The court not only was prepared to accept jurisdiction (having heard evidence that the Norske Skog would have been hopelessly insolvent by the time the New York courts heard the issue), but also was able to resolve the matter on the basis of expert evidence on New York law, within just nine weeks of proceedings being issued. The result was that the restructuring completed and significant value was recovered for creditors.

A similarly expedited matter was ***Heis & ors v Financial Services Compensation Scheme Ltd & anr* [2018] EWCA Civ 1327**. In that case the question was whether the MF Global CVA, under which a small group of "Participating Creditors" had agreed in effect to buy out 3000 "Exiting Creditors", should be implemented following the emergence of a new claim which had the potential to wipe out the participating creditors' investment entirely. This case turned on the construction of a condition precedent which stated that if there was a Disputed Claim, the CVA would not come into effect unless the Administrators confirmed that it should not preclude the CVA from becoming effective. The Participating Creditors argued that the clause required the Administrators to perform a cross check against the Disputed Claims identified in the CVA, and to decide whether any increase was so great that it would be unfair to proceed with the CVA. The Exiting Creditors by contrast viewed this as a far more limited technical clause to do with late challenges to the CVA. Although the High Court favoured the narrow construction of the Exiting Creditors, the Court of Appeal ultimately decided the matter in favour of the Participating Creditors.

This case was notable not only for speed of justice - a drop dead date in the CVA meant that High Court and Court of Appeal proceedings had to be squeezed into 11 weeks from the Administrators first issuing an application for directions; but also for the difficulty of predicting how the courts will interpret contractual provisions. Indeed, the Court of Appeal thought the High Court's preferred reading of the relevant condition precedent was "absurd", while the reading rejected by the High Court was in fact "obvious".

Developments on Jurisdiction

2018 saw a variety of jurisdictional disputes litigated in the courts of England and Wales. Judgments have provided welcome clarity in respect of jurisdiction

clauses in market-standard documentation and in relation to the limits of non-exclusive jurisdiction. Various disputes have involved the application of the Brussels Recast to contractual exclusive jurisdiction clauses. Although these decisions may soon prove obsolete in light of the UK's decision to leave the EU, conversely, they also provide insight as to how EU courts could apply the same provisions to the UK if, as anticipated, the UK ceases to be an EU Member State.

In ***Angola v Perfectbit*** **[2018] EWHC 965 (Comm)**, one of the co-defendants was unable to obtain a stay of the proceedings even though he had the benefit of an exclusive jurisdiction clause in favour of the Angolan courts. This was because, under the Brussels Recast, the fact that one or more of the other defendants were domiciled in the UK (ie in a Member State) meant that the English courts did not have the discretion to stay the proceedings.

Similarly, in ***UPC plc v Nectrus Ltd*** **[2018] EWHC 380 (Comm)**, the fact that there was a non-exclusive jurisdiction clause in favour of the English courts, meant that the English courts had no discretion to stay the proceedings commenced before them, even though there were prior filed proceedings on foot in the Isle of Man.

These cases are good examples of how exclusive and non-exclusive English jurisdiction clauses may not be infallible, once the UK becomes a third country post Brexit. As things stand, while Britain is a member of the EU, under the Brussels Recast the courts of EU Member States have to stay their proceedings if faced with an exclusive jurisdiction clause in favour of the English courts or if the jurisdiction clause is non-exclusive and there are prior filed proceedings on foot in England. This is due to end on Brexit day, so unless (a) the Hague Convention on Choice of Court Agreements applies, (b) national law in the relevant EU Member State applies and would allow the relevant court to respect the clause, or (c) the UK signs up to the Lugano Convention, there will be an increased risk of parallel proceedings. The flip side is that, post Brexit, the UK courts should regain their powers to make anti-suit orders against parties that commence proceedings in Member States courts in breach of exclusive English jurisdiction clauses.

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Contract

NO DUTY OF RATIONALITY IMPLIED IN "ABSOLUTE DISCRETION" TO DEMAND EARLY REPAYMENT OF COMMERCIAL LOAN

UBS AG v (1) Rose Capital Ventures Ltd (2) Vijay Mallya (3) Lalitha Mallya (4) Sidartha Vijay Mallya [2018] EWHC 3137 (Ch), 21 November 2018

The English High Court has provided guidance on implying a *Socimer/Braganza* duty of rationality into contractual discretions in a commercial context, concluding here that no duty of rationality should be implied or construed into the mortgage lender's decision to call in its loan.

A dispute of the meaning of "absolute discretion"

A mortgage lender claimed for repayment of a commercial loan and possession of mortgaged property under a clause in the contract that gave the lender "absolute discretion" to demand early repayment on three months' notice. The borrower's defence alleged, amongst other points, that a duty of rationality should be implied or construed into the lender's right to demand early repayment, and that this duty had been breached; alternatively, that the lender had breached a duty of good faith.

The law on contractual discretion – a reminder

The Court of Appeal's statement in *Socimer International Bank Ltd (In liquidation) v Standard Bank London Ltd* [2008] EWCA Civ 116 is often quoted: "*…a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality*".

This statement was subsequently cited with approval by the Supreme Court in *Braganza v BP Shipping* [2015] 1 WLR 1661, but Baroness Hale noted that "*whatever term may be implied will depend on the terms and the context of the particular contract involved*".

Principles underlying the law on duty of rationality

The court reviewed key authorities on the duty of rationality and held that:

(a) Not every contractual power or discretion is subject to a *Braganza* limitation. The language of the contract is important.

(b) The types of contractual decisions that are amenable to the implication of a *Braganza* term are decisions which affect the rights of both parties to the contract and where the decision-maker has a clear conflict of interest. This does not mean all decisions under a contract, but rather the type of decision where one party is given a role in the on-going performance of the contract, such as where an assessment has to be made. No *Braganza* term can be implied into a unilateral right given to one party to act in a particular way, such as a right to terminate a contract without cause.

(c) The nature of the contractual relationship, including the balance of power between the parties, is a factor to be taken into account. It is more likely for a *Braganza* term to be implied in a contract of employment than in other less "relational" contracts such as mortgages.

(d) The scope of the term to be implied will vary according to the circumstances and the terms of the contract.

No basis for implying *Braganza* term

The court held that it was not easy to contemplate that a *Braganza* type clause could be found in a contract of the type under consideration as a matter of the proper construction of the contract, in light of the applicable

legal principles on construction. As a general proposition, the *Braganza* clause would only find its way into a contract by way of an implied term.

The court applied the established *Marks & Spencer* test for the implication of terms into contracts.[1] The test for implication is one of business necessity and whether, without the term, the contract lacks commercial or practical coherence, ie whether it is necessary to imply the term to make the contract work.

The court did not see a basis for implying a *Braganza* term, given the words agreed by the parties, the nature of the contract and the relative equality of bargaining power. Moreover, the duty of good faith in mortgage lending relationships also pointed against the possibility of a *Braganza* clause being imported.

Scope of any duty of rationality same as duty of good faith anyway

Even if the court were wrong on the application of the duty of rationality, it considered that the scope of any *Braganza* term to be implied in the mortgage contract would be no wider than the scope of the duty of good faith. The lender was only required to exercise the power for proper purposes and not for the sole purpose of vexing the mortgagor.

Burden of proving a breach and relevance of disclosure

The borrower asserted that the lender had no legitimate reasons for calling in the loan, on the basis that the lender had given no reasons for its decision thus it was appropriate to infer that it was in breach of a duty of rationality or bad faith. The borrower argued that this shifted the burden to the lender to justify its decision.

The court noted that the defendants were unable to point to any principle of law or equity which entitled them to require the lender to provide reasons for its decision to call in a loan. The defendants were required to plead facts to make a case for there being a breach. It was not sufficient to say that the defendants needed disclosure to make out their case: standard disclosure was responsive to a party's case, not a case that a party has not made but hopes to make.

On this basis, the court struck out the part of the defence which alleged that a lender's decision to call in a mortgage had breached a duty of rationality to be implied or construed into the contract.

COMMENT

Alleging breach of an implied duty of rationality is becoming increasingly popular in contractual disputes. In a series of cases, varying formulations as to application and scope have been applied to fact patterns ranging from employment law to arm's length loan disputes. The result: commercial uncertainty.

The court's approach in this case was distinctly pro-lender, both as regards the application of general rules on the construction and implication of terms (including business necessity) taking into consideration the parties' agreed language and the type of contractual relationship, and the more limited scope of any duty to be implied. In addition, given the practical difficulties that may be faced by a party seeking to establish the basis for their counterparty's decision, decision-makers will have a significant advantage if they can strike out allegations of irrationality before the disclosure stage.

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[1] *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742

PROCURING A BREACH OF CONTRACT: INDUSTRY EXPERIENCE RELEVANT TO KNOWLEDGE OF CONTRACT

Michael Fielding Wolff v Trinity Logistics USA Inc [2018] EWCA Civ 2765, 12 December 2018

This ruling on the tort of inducing a breach of contract illustrates how industry knowledge can help fix a party with the requisite knowledge of the existence and terms of a contract, breach of which it is alleged to have procured. A company director was personally liable for procuring a breach of an agency agreement by obtaining early release of imported goods from shipping agents in return for prompt payment of their fees. The director's experience in contracting with freight forwarders meant he must have known such an arrangement was outside the usual contractual structure or he was, at the very least, recklessly indifferent as to whether the agents were in breach of their agency agreement.

Goods produced by a foreign supplier (the **supplier**) were shipped to the UK by agents (the **agents**) of the respondent, Trinity, to the Fielding Group (**TFG**) of which the appellant, Mr Wolff, was a director. In breach of the agency agreement between the respondent and the agents (the **agency agreement**), the goods were released by the agents without TFG producing the original bill of lading or air waybill indorsed by TFG's bank evidencing payment by TFG to the supplier as is standard practice in relation to carriage of goods by sea or air. The agents had offered to TFG to release the shipments early in return for prompt payment of their fees. As the respondent was liable to the supplier, it successfully brought a High Court claim against Mr Wolff (TFG having become insolvent) for procuring the breach of the agency agreement. Mr Wolff appealed.

Elements required for the tort of procuring a breach of contract: a reminder

The tort of procuring a breach of contract is an accessory liability, dependent upon the primary wrong of a third party breaching its contract with the claimant: without primary liability, there can be no accessory liability. The necessary elements are: (i) breach of contract between the claimant and a third party; (ii) an act which amounts to intentional inducement/procurement of the breach; and (iii) proof that the defendant knew it was inducing/procuring an act that was a breach of contract and that it intended to procure that breach. Knowledge includes "reckless indifference".

Appeal

Mr Wolff relied on three grounds of appeal: (i) his arrangement with the agents did not amount to an act of inducement; (ii) the High Court's decision that he "must have known" of the agency agreement and its terms was insufficient to prove the mental element of the tort which had to be actual knowledge or blind-eye recklessness; and (iii) the agency agreement only came into existence after the alleged acts of procurement.

Acts of inducement/procurement

The court decided Mr Wolff's arrangement with the agents amounted to an act of inducement. The agents were not acting "benevolently" when they agreed to release the goods early; this was a business decision because, as a result, they received continued business from TFG and were paid promptly. The "bounty" offered by Mr Wolff was clearly an important, if not the most important, incentive for the agents' willingness to breach the agency agreement. That the initial offer came from the agents was also not relevant: Mr Wolff had offered a sufficiently enticing incentive (prompt payment of the fees) and it was that "final step" which had induced the agents to breach the agency agreement.

Degree of knowledge required

The judge at first instance emphasised Mr Wolff's familiarity with contracts (and their customary terms) with freight forwarders; he was aware of other parties in

the supply chain and had many years' experience of importing goods. The tenor of his emails indicated he "well understood" his arrangement with the respondent's agents was "outside the contractual structure" and would lead to later claims. These facts, together, meant he "must have known" of the existence of the agency agreement and its terms and that the agents were acting in breach of it. This contrasted with TFG's shipping manager who did not have training in the business or mechanisms of international trade, and only acted in a "ministerial" capacity; he may have had some awareness of the existence of the agency agreement and that it precluded early release, but did not have the critical extra degree of knowledge to carry him into the "must have known" category.

On appeal, Mr Wolff submitted that the High Court's decision that he "must have known" amounted to a finding of deemed (rather than actual) knowledge, but that only actual knowledge or reckless indifference would suffice. The Court of Appeal disagreed: the first instance court had made a finding of actual knowledge. It would "fly in the face of reality" that Mr Wolff "well understood" the agents were acting outside the contractual structure in a way that could lead to later claims and then say he should not be fixed with that knowledge. At the very least he was recklessly indifferent as to whether the agents were acting in breach: this was the whole point of the arrangement.

Relevance of date of contract

Mr Wolff submitted that there was no relevant breach of contract as the acts of procurement had preceded the coming into existence of the agency agreement. The court rejected this argument: the inducement continued thereafter and occurred every time the goods were released early.

COMMENT

The case is a cautionary tale about the personal liability of directors for the commission of a tort. A director can be sued in his personal capacity if he was sufficiently bound up in the company's acts to make him personally liable. In considering Mr Wolff's knowledge and intention, the court relied on several emails which clearly demonstrated he was the driving force behind the arrangement with the agents.

Whilst a defendant's subjective knowledge and intention is a question of fact, this ruling shows that, in certain industries, a defendant's knowledge and experience in that industry is a relevant consideration when deciding whether a director has the requisite knowledge, for the tort of inducing a breach of contract, of the existence and terms of a contract. Directors should therefore be wary of closing their eyes to the obvious. There are various reasons why a claimant may sue the party who procured the breach, either instead of or in addition to the contracting party, including the latter's impecuniosity or because damages recoverable from the procurer may exceed those recoverable for the actual breach. Had TFG not become insolvent, one can assume that the respondent would also have sued it as a joint tortfeasor.

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Disclosure

USING DOCUMENTS DISCLOSED IN ENGLISH PROCEEDINGS TO SEEK LEGAL ADVICE IN RELATED FOREIGN PROCEEDINGS – CAUTION REQUIRED

The ECU Group v Plc v HSBC Bank Plc [2018] EWHC 3045 (Comm), 9 November 2018

Glaxo Wellcome UK Ltd & anr v Sandoz & ors [2018] EWHC 3229 (Ch), 30 November, 2018

Two recent cases have considered applications by litigants wanting to use documents disclosed in English proceedings (or information derived from them) to seek foreign legal advice in related on-going or contemplated foreign proceedings. In cross-border litigation there is often an analysis of where claims should be brought and against whom: this often requires foreign legal advice. These rulings highlight how the English court rule against collateral use of disclosed documents (under CPR 31.22) operates in this context, and the pitfalls of ignoring it.

Restrictions on collateral use – a reminder

Disclosed documents may only be used for the "purpose of the proceedings in which they are disclosed" (CPR 31.22) except in certain circumstances including where the court's permission is granted (CPR 31.22(1)(b)). CPR 31.22 covers, not just use of the documents themselves, but also any information derived from those documents. CPR 31.22 is one of the few provisions to be retained by the Disclosure Pilot Scheme in the Business and Property Courts which commenced on 1 January 2019.

The ECU Group v HSBC Bank

The ECU Group (**ECU**) obtained documents (the **Documents**) from various HSBC Bank entities (**HSBC**) by way of pre-action disclosure. ECU's solicitors shared their analysis and conclusions in relation to them (but not the Documents) with two U.S. law firms in order to seek advice on: (i) possible claims in the U.S. against HSBC U.S. N.A. (**HSBC U.S.**); and (ii) guidance on dealing with the U.S. authorities.

ECU's solicitors wrongly believed that using information derived from the Documents did not constitute "use" of the Documents themselves under CPR 31.22. Upon realising their mistake, they applied for retrospective permission for the prior use of the Documents. Since there were not yet any proceedings on foot, the "proceedings" for the purposes of the application were the proceedings yet to be commenced against HSBC.

Retrospective permission

Whilst acknowledging that it does have the power to grant retrospective permission, the court agreed with counsel for HSBC that this will rarely be granted. The question of whether permission would have been granted prospectively is very important, but a positive answer is not, of itself, sufficient to justify granting retrospective permission; nor is it a necessary element of an application for retrospective permission. However it will be rare for the court to grant permission retrospectively where it would not have granted it prospectively.

Purpose of U.S. advice

The court emphasised that CPR 31.22 operates by reference to the purpose for which there is or has been collateral use. The judge observed that it was possible for there to be a breach of the collateral use rule if the advice was obtained for one purpose, but that the same advice could have been obtained without there being a breach if the purpose had been different.

One of ECU's avowed "purposes" for which the Documents were used in seeking the U.S. advice was in order to consider and, depending on the advice, commence U.S. proceedings against HSBC U.S. This was, the court said, a collateral use of the Documents. However, given that English proceedings had not yet been commenced, the court pointed out that ECU could have obtained the same advice from the same U.S. lawyers without breaching CPR 31.22; this was because, in considering what claims to bring in the contemplated English proceedings, it would have been "perfectly permissible" for it to consider where else, and against whom, claims could be brought. Had this been the purpose in seeking U.S. advice, then there would have been no collateral use of the Documents.
In concluding that the advice was unlikely to have gone further than it might have done if ECU had limited itself to a proper purpose, the court was reassured that the advice which ECU's solicitors had sought and obtained (leaving aside their improper purpose in doing so) was limited to where claims against HSBC U.S. could be brought. Furthermore, ECU had no current intention to commence U.S. proceedings and ECU had confirmed that HSBC U.S., if sued, would be added as a co-defendant in the English proceedings. The court therefore granted retrospective permission for the prior collateral use of the Documents to obtain the U.S. advice, but only in so far as it could be used in relation to the contemplated English proceedings.

The court was concerned that ECU should not be allowed to benefit from the U.S. advice in so far as it had been sought for an improper purpose (the possible commencement of U.S. proceedings) in case it should commence U.S. proceedings in the future. Therefore ECU was required to terminate its retainer with the U.S. attorneys, could not reinstruct them and could not share their advice with any third parties without the court's leave.

Glaxo Wellcome v Sandoz

In this case, the key question was whether documents, obtained in English proceedings, could be made available to the claimants' foreign legal advisors for advice regarding on-going related IP litigation in a civil law jurisdiction (where disclosure is very limited in scope). Unlike the ECU case, this was an application for prospective (not retrospective) permission.

There is related IP litigation between members of the GlaxoSmithKline and Sandoz groups across several jurisdictions. The claimants applied, under CPR 31.22, for permission to use around 50 documents (the **Documents**), out of a total of 75,000 documents disclosed by the defendants in the English proceedings, to obtain Belgian legal advice in connection with related Belgian proceedings against Sandoz Belgium. The claimants wanted the advice in order to decide whether to adduce any of the Documents in the Belgian proceedings and whether they should commence further proceedings in Belgium against any of the defendants in the English proceedings. The Belgian court had already indicated that it would abide by the English court's decision in this application.

Likely relevance of the Documents to the Belgian proceedings

The English court said it first needed to be satisfied that the Documents were likely to be of relevance to the Belgian proceedings by way of an "initial threshold". Each of them needed to be individually reviewed as a sampling approach was not appropriate because the Documents did not fall into homogenous classes, they were sought for two distinct uses (depending on the legal advice) and there were nine different reasons for relevance put forward by the claimants. The court found that, with a few exceptions, all the Documents were of likely relevance to the Belgian proceedings therefore the initial threshold was satisfied.

The fact that the claimants were very selective in identifying the Documents was a key factor. The claimants' initial application sought permission for 100 documents, but it later halved that figure in light of the court's decision that the Documents would first have to be individually reviewed.

Special circumstances required to obtain permission

In applications for the court's permission to use documents for a collateral purpose, the overarching requirement is for the court to balance the parties' competing interests of justice; the court will only grant permission if the applicant demonstrates "special circumstances" which constitute a compelling reason for permitting collateral use.

The court concluded that there were ample special circumstances which meant that the interests of justice came down firmly in the claimants' favour in permitting them to use the Documents:

- the parties are very substantial businesses, with equal resources; therefore the application was not oppressive;
- given that the majority of the Documents were of likely relevance to the Belgian proceedings, it was in the interests of justice that the claimants should be allowed to obtain legal advice: the court should be slow to stand in the way of a party who wishes to seek advice about pursuing a lawful course of action; and
- the number of the Documents was relatively small and not disproportionate to what was at stake in the Belgian proceedings; there was therefore "no real danger" that the Belgian proceedings would be overwhelmed with additional documents – even taking into account that the defendants might have to adduce additional documents to counter any of the Documents which might deployed in the Belgian proceedings.

The court acknowledged that the marked contrast in the way litigation is conducted in England and Belgium (and other civil law countries), particularly in relation to the ability to obtain disclosure of documents adverse to the other party's claim, was a relevant – but not a material – factor. There was no suggestion that the documents obtained in the English proceedings were an abuse of the process (as would be the case if a claim were brought in England for the principal purpose of obtaining disclosure and using it elsewhere). The court also felt that the risk of the Belgian court's procedures being undermined by the introduction of any of the Documents was marginal, particularly given the Belgian lawyers' involvement.

COMMENT

These are both cases in which a litigant is trying to use (or has already used) documents, disclosed in on-going English proceedings, or by way of pre-action disclosure, in order to obtain foreign legal advice concerning contemplated or on-going related foreign proceedings. Whilst these cases are particularly pertinent to cross-border proceedings, the same principles derived from these cases will apply equally to documents, disclosed to a party in one set of English proceedings, which are then provided to that party's lawyers to advise on different English proceedings – perhaps against a different party and/or in relation to a different cause of action.

In the first we see ECU trying to get retrospective permission and the court focussing on "purpose", and in the second we see Glaxo trying to get prospective permission and the court focussing more on whether Glaxo could demonstrate any special circumstances which constitute a compelling reason for permitting collateral use.

The *ECU* decision is a reminder of the importance of organisations not using an opponent's disclosed documents, and information derived from them, whether stored in writing or 'in the mind', to instruct lawyers in relation to foreign proceedings without obtaining the court's permission first. Although this case involved an inadvertent disclosure, a party that deliberately decides to take this course of action, without obtaining permission first, risks retrospective permission being declined, having to terminate the foreign lawyer's retainer (wasted costs) and having to pay indemnity costs (more waste).

The *ECU* decision turned very much on the fact that, had permission been prospectively sought and the purpose reframed (ie in order to decide which claims to bring in England, rather than to decide on possible claims in the U.S.), the result could well have been to allow the information to be used to obtain U.S. advice very similar to that actually obtained. In cross-border litigation there is often an analysis of where claims should be brought and against whom; this often requires foreign legal advice. In practical terms, this ruling highlights that a litigant, or prospective litigant, needs to take care when using disclosed documents (or information derived from them) to seek legal advice from foreign lawyers, unless the purpose is to help understand which claims can be bought in England. This purpose will obviously be easier to show in a pre-action context (ie before English proceedings have been commenced).

The *Glaxo* case shows an altogether more informed approach to the rules on collateral use. Of importance here was the fact that there were already related proceedings on foot in Belgium, and the claimants only wanted to disclose a small number of documents to their Belgian lawyers. Had the number of Documents not been so reasonable, the court may well have attached more importance to the differences in the approach to disclosure and the likely effect of the Documents on the Belgian proceedings in coming to its decision.

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Privilege

INTERNAL COMMUNICATIONS REGARDING COMMERCIAL SETTLEMENT OF DISPUTE NOT PROTECTED BY LITIGATION PRIVILEGE

(1) WH Holding Ltd (2) West Ham United Football Club Ltd v E20 Stadium LLP, [2018] EWCA Civ 2652, 30 November 2018

The Court of Appeal held that for litigation privilege to apply the communications must always be made for the dominant purpose of obtaining information or advice in connection with the conduct of litigation (which includes avoiding or settling litigation). Internal emails at a corporate client to discuss a commercial settlement proposal would not therefore be covered by litigation privilege.

The issue arose in the context of an underlying dispute between West Ham United Football Club (**West Ham**) and its landlord (**E20**) regarding the number of seats West Ham was eligible to use at the London Olympic Stadium for its home matches.

The privilege dispute centred on just six emails sent between E20 board members and between E20 board members and stakeholders "composed with the dominant purpose of discussing a commercial proposal for the settlement of the dispute…at a time when litigation was in contemplation". E20 claimed litigation privilege over these emails.

West Ham challenged this claim to privilege and applied for the court to inspect the emails to determine

whether the claim to privilege had been correctly made. It argued that litigation privilege can only ever apply to communications made for the dominant purpose of obtaining advice or evidence (including information which may lead to evidence) for the conduct of litigation.

West Ham argued that given these emails (by E20's own admission) were made for the dominant purpose of discussing a commercial settlement proposal, rather than obtaining advice or evidence for the conduct of litigation, they could not be covered by litigation privilege.

E20 disagreed. It submitted that to be covered by litigation privilege the communication merely needed to be for the dominant purpose of "conducting litigation" and that included not just advice and evidence gathering for the litigation, but also internal discussions to formulate a purely commercial settlement proposal. E20 said this position followed the recent ruling of the Court of Appeal in *SFO v ENRC* [2018] EWCA (Civ) 2006 that the conduct of litigation included avoiding or compromising litigation.

E20 also argued that, in any event, all internal communications within a corporation made for the dominant purpose of conducting litigation are subject to privilege (following the 19th century ruling in *Bristol v Cox* (1884) 26 Ch D 678).

Court of Appeal disallows privilege claim

The Court of Appeal agreed with West Ham (overruling the first instance decision).

Obtaining information or advice in connection with litigation

For litigation privilege to apply the communication must be made for the dominant purpose of "obtaining information or advice" in connection with litigation.

The Court of Appeal endorsed Lord Carswell's formulation of the scope of litigation privilege in *Three Rivers 6* UKHL 48. That test starts with the general proposition that litigation privilege only applies where the communications are made "for the purpose of obtaining information or advice" in connection with litigation (emphasis added):

> "*...communications between parties or their solicitors and third parties* ***for the purpose of obtaining information or advice*** *in connection with existing or contemplated litigation are privileged, but only when the following are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been for the sole or dominant purpose of conducting that litigation; (c) that litigation must be adversarial, not investigative or inquisitorial*".

The Court of Appeal said that the mistake E20 made was to the treat the restriction at (b) (ie that the communication must be for the sole or dominant purpose of conducting litigation) as being an extension of the general proposition rather than a restriction on the width of that principle.

The Court of Appeal said that the *SFO v ENRC* ruling that the "conduct of litigation" encompassed avoiding or settling litigation was not authority for extending the scope of litigation privilege to internal client communications discussing commercial settlement proposals. The only possible change attributable to that case was confirmation that the conduct of litigation includes its avoidance or compromise. It did not affect the general proposition. In any event, all the disputed documents in that case satisfied the general proposition.

The Court of Appeal noted that it might still be possible to claim litigation privilege over a communication that did not satisfy the general proposition where it could not be "disentangled" from a communication covered by litigation privilege or "would otherwise reveal" the content of the privileged material. It also noted that a document not covered by litigation privilege may still be covered by legal advice privilege.

Internal corporate communications

The Court of Appeal gave short shrift to E20's remaining argument that all internal confidential corporate communications within a corporation made for the dominant purpose of conducting litigation are covered by litigation privilege (in order that the corporation can consider its position and act). The court held that there is no separate head of privilege which covers internal corporate communications falling

outside the ambit of litigation privilege described above. *Bristol v Cox* was wrong on this point.

Inspection by the court

Given its ruling on the scope of litigation, the Court of Appeal did not need to rule on the question of when a court should inspect documents to ascertain whether a claim to privilege had been correctly made. However, its *obiter* remarks are worth noting as they show the court may take a more interventionist approach to inspection in the right circumstances.

The Court of Appeal said the court's power to inspect is "a matter of general discretion". It is not limited to cases in which (without sight of the documents in question) the court is "reasonably certain" that the test has been misapplied (in contrast to the ruling at first instance and the narrow formulation set out by Beatson J in *West London Pipeline v Total* [2008] 2 CLC 258).

The Court of Appeal, however, also noted that this general discretion should be exercised cautiously. The court should be alive to the dangers of looking at the documents out of context and must act in accordance with the overriding objective of dealing with cases justly and proportionately. Inspection may possibly be a bit easier to obtain but the floodgates are by no means opened.

COMMENT

This judgment is one in a recent flurry of rulings on privilege. It pulls back any suggestion that there has been a fundamental reformulation of the test for litigation privilege following *SFO v ENRC*. The Court of Appeal is clear that for litigation privilege to apply there is no escaping the need for the communication to be primarily for the purpose of obtaining information or advice in connection with the conduct of litigation (which, following *SFO v ENRC*, now clearly includes the avoidance or compromise of litigation).

The spotlight is yet again put on the difficulties of claiming privilege over internal corporate communications. How then can a corporate internally consider the commercial implications of a settlement offer without risking having to disclose those communications in the litigation? As the Court of Appeal suggests, it may be that those internal considerations are so entangled with privileged content that they cannot be extracted for disclosure or they would reveal privileged content. However, what is more likely to be of help is that those considerations are probably not responsive to any disclosure order in the litigation as they are unlikely to go to the issues in dispute. The test for privilege may be strictly applied but so too are a party's disclosure obligations especially under the new Disclosure Pilot Scheme in the Business and Property Courts. Although this judgment reminds corporate parties to be cautious about the creation of internal communications it is not as unworkable as it may first appear.

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DUAL USE DOCUMENTS DID NOT MEET "DOMINANT PURPOSE" TEST FOR LITIGATION PRIVILEGE

Sotheby's v Mark Weiss Ltd [2018] EWHC 3179 (Comm), January 2019

Correspondence passing between a claimant and art experts was not covered by litigation privilege as it was not created for the dominant purpose of litigation. The correspondence was created for two purposes of equal importance. The decision underlines the fact-sensitive nature of the court's analysis in determining privilege and the difficulty for commercial parties in establishing that where documents are prepared for more than one purpose, including commercial decision making, the dominant purpose is for use in contemplated litigation.

The claimant acted as exclusive agent to the first defendant (the **seller**) to sell a painting. The painting was sold, and the purchase price paid to the seller.

The sale contract between the claimant and the buyer contained an offer by the claimant to rescind the sale and return the purchase price if the buyer provided written evidence raising doubts about the painting's authenticity and the claimant determined it to be a counterfeit.

The buyer obtained a report from an art expert which concluded that the painting was not authentic. The claimant commissioned a separate art expert to conduct a peer review of the buyer's report. As a result, the claimant determined that the painting was a counterfeit, rescinded the sale and repaid the purchase price to the buyer.

The claimant then sought rescission of its contract with the seller and repayment of the purchase price.

Defendant seeks correspondence between claimant and experts

The seller applied for inspection of the correspondence between the claimant (itself, or through its solicitors) and the two art experts. The claimant refused, relying on litigation privilege. By way of reminder, litigation privilege protects communications between clients or their lawyers and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation when, at the time of the communication in question:

- litigation is in progress or reasonably in contemplation;
- the communications are made with the sole or dominant purpose of conducting that anticipated litigation; and
- the litigation is adversarial, not investigative or inquisitorial.

Claimant argued that dominant purpose was contemplated civil litigation

The claimant's solicitor provided a witness statement setting out the basis of the claim to litigation privilege over the correspondence. The main points were:

- "All the way through the preparation of the report, the fact that the matter was likely to end up in court…was the perspective from which the report was being prepared";
- the claimant's solicitors "were advising on the report, and on its role in the forthcoming decision as to whether to rescind (which would almost inevitably result in proceedings being issued), from the perspective of how it would be used as evidence in the litigation"; and
- "…had litigation not been contemplated, then findings from Mr Martin would have been sought, but no detailed written report of this kind would have been embarked upon and [the Claimant's solicitors] would not have been engaged to undertake this exercise with Mr Martin".

The claimant submitted that the high profile *SFO v ENRC* privilege ruling and the present case were analogous, in that litigation would "inevitably" follow from the taking of a particular commercial decision.

The claimant said that in the present case the "stick" which motivated the correspondence with the experts was the contemplated civil proceedings and so, using the same reasoning as the Court of Appeal in *SFO v ENRC*, the dominant purpose of that correspondence was to assist the claimant in that litigation.

Assessment of dominant purpose very fact-sensitive

Teare J noted that the assessment of dominant purpose is fact-sensitive and so it is unsafe to use the determination of dominant purpose in one case to assist in identifying the dominant purpose in another – this is particularly so where the facts of the two cases are so very different and the "stick" analogy was more appropriate to criminal proceedings rather than civil litigation.

Two purposes – neither was dominant

Teare J found that the correspondence with both art experts had taken place for two purposes. The first was that the claimant had a commercial decision to make as to whether the painting was counterfeit and whether the sale would be rescinded. The second was that the reports would be used in the contemplated litigation with the seller. Both purposes were of equal importance. Teare J did not find the claimant able to establish that the second purpose was the dominant one, so he ordered inspection of all correspondence. Factors taken into consideration included:

- The terms of engagement of the art experts and the purpose of their work as set out in the letters from the claimant's solicitors in both cases referred to the use of their work in relation to the commercial decision to be taken.
- A committee had been specially convened by the claimant to take the decision as to whether the painting was a fake, which showed the importance of that decision.
- It was unrealistic to suggest that had there been no threat of litigation there would have been no correspondence with the experts beyond requesting and receiving the reports.

COMMENT

This judgment shows the English courts' strict approach to analysing the reason or reasons why a document is prepared, when determining whether it is protected by litigation privilege. Teare J referred to and followed the guidance in *Starbev* that it is necessary to subject the evidence to "anxious scrutiny". He also referred to *SFO v ENRC Ltd*, in which it was stated that "*The exercise of determining dominant purpose in each case is a determination of fact, and that the court must take a realistic, indeed commercial, view of the facts*".

It is important for those asserting litigation privilege over a document to put forward clear and precise evidence of the dominant purpose for its creation. It is therefore advisable to keep a written record of the context and purpose for documents being created, preferably prepared at the time of creation or contained within the document itself. If recording that a document is being prepared for the dominant purpose of contemplated litigation, it is important to consider whether this triggers any other obligations – such as the serving of document preservation notices, or notification of a possible claim to insurers.

Where it is anticipated that an expert report is needed for more than one purpose, it is worth considering whether to have separate correspondence and (if necessary) a separate report relating to the issues over which litigation privilege may later be claimed.

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Procedure

CORPORATE TRUSTEES – CONSIDERATIONS IN SEEKING DECLARATORY RELIEF

Bank of New York Mellon v Essar Steel India Ltd [2018] EWHC 3177 (Ch), 21 November 2018

Despite valid service on the issuer, the English court refused to grant declarations sought by a corporate trustee as to amounts outstanding under unsecured notes issued by a now-insolvent issuer. The declarations would be inappropriate as the issuer did not participate in the court process, and the impact of the declarations on a foreign insolvency process was uncertain – they could potentially interfere in that process. On an important procedural point, the court concluded that service on a process agent appointed irrevocably in a finance document was valid notwithstanding unilateral action by the issuer to terminate that appointment.

In December 2003, Essar Steel India Limited, an Indian company (the **Issuer**) issued USD31,580,000 in 0.25% unsecured 15 year notes (the **Notes**), constituted under the terms of a trust deed (the **Trust Deed**) appointing The Bank of New York Mellon as trustee (**Trustee**). The Notes were governed by English law, the English courts were vested with non-exclusive jurisdiction, and the Issuer irrevocably both submitted to English jurisdiction and appointed an English process agent for the purpose of accepting service.

In August 2017, insolvency proceedings were initiated against the Issuer in India. The Trustee submitted proofs of claim in India in relation to the amounts outstanding under the Notes. However, there was some dispute in the Indian proceedings as to the Trustee's standing to file such claims.

Separately, the Trustee commenced a claim in England, seeking declarations against the Issuer as to the amounts due and payable under the Notes. The English claim was a "Part 8" claim, an alternative and more efficient procedure available in the English court where the dispute involves questions of law and no substantial dispute of fact. The Issuer took no steps in the English proceedings, and was not represented. Before reaching final judgment at the trial in the absence of the Issuer, the judge considered three questions:

(1) Did the Trustee have standing to bring the claim for declaratory relief?

(2) Had the Issuer been properly served and brought before the court even though the Issuer had revoked the authority of the process agent?

(3) Was it appropriate to make the declarations sought by the Trustee?

Trustee had clear standing to bring a claim

In the usual fashion, although the noteholders were the beneficial owners of the Notes, their interests were held on trust by the Trustee under the terms of the Trust Deed. This had the legal effect that the beneficiary under the trust (ie the noteholders) could not sue in relation to the trust property. As such, any suit in respect of the trust property should be brought by a trustee, absent a wrongful failure to act on the part of the trustee, which would entitle a beneficiary under the Vandepitte procedure to take over the trustee's claim.

The court recognised that this prima facie legal position had been codified contractually in the Trust Deed by virtue of the 'no-action' clause. The clause (a standard version of which will appear in most capital markets trust deeds) provided that the Trustee shall not take steps to enforce performance of the Notes unless it was so directed by an Extraordinary Resolution of noteholders, and the Trustee was not obliged to act unless indemnified to its satisfaction. Only if the Trustee failed to act in those circumstances would a

noteholder become contractually entitled to institute proceedings directly against the Issuer.

As such, with the benefit of an Extraordinary Resolution sanctioning the claim against the Issuer, the Trustee clearly had standing to bring the claim, with Mr Justice Marcus Smith adding the postscript comment that the Trustee would be the "only" person with standing to bring the claim.

Irrevocable appointment of process agent in Trust Deed binding on Issuer despite unilateral withdrawal of authority to accept service

Under the Trust Deed, the Issuer irrevocably appointed an English process agent to accept service of process in any proceedings in England. Upon receipt of the claim, however, the process agent notified the Trustee that the Issuer had previously terminated its appointment as process agent and that it was therefore unable to accept service.

The court found that service on the process agent was good and sufficient service. The irrevocable appointment of a process agent in the Trust Deed constituted a promise from the Issuer to the Trustee to accept service through that process agent. The agency relationship between the Issuer and the process agent was irrelevant for the purpose of that promise. The Issuer was therefore precluded from disputing service even though it may have withdrawn its authority from the process agent to accept service.

Court declined to make the "inappropriate" declarations sought

The Trustee only sought declaratory relief, specifically declarations as to the amounts due and payable under the Notes (just over USD31 million comprising outstanding principal and interest). The court's power to grant declaratory relief is discretionary. As such, the onus was on the Trustee to persuade the court that it was appropriate for the court to exercise that discretion. The court refused, because:

- ***Both sides of the argument would not be put before the court***: although the Issuer had been properly served and appeared to have chosen not to engage in the case, the Issuer's arguments would not be heard by the court. This weighed against the granting of the declarations. The court should exercise great care and approach the request for a declaration with a conservative mindset.
- ***Potential effect on a third party (Indian insolvency professional) not represented in court***: the claim had been commenced in England in light of the uncertainty regarding the Trustee's status in the Indian insolvency process. The legal effect of the English court making the declarations sought on the Indian process was unclear. There were two alternatives; either the declarations:
  - would not have an impact on that process, in which case the utility of making declarations was questionable and weighed against the court doing so; or
  - would have an impact on that process, also weighing against the court making declarations, as the Indian Insolvency Resolution Professional affected by the declarations was not represented in the English proceedings.
- ***Lack of a real and present dispute and the potential for interference in a foreign process***: the court could not identify a real and present dispute between the Issuer and Trustee as to the terms of the Notes or the Issuer's obligations regarding payment under the Notes. The Issuer was simply unable to pay, as evidenced through the Indian insolvency process and the granting of a declaration would not alter or resolve that. If the court could not be certain whether or how the declarations would impact the Indian insolvency process, there was a risk that that the declarations would amount to an improper interference in those proceedings being conducted by a party not before the court.

As such, despite having no qualms about the substance of the declaration or the Issuer's obligation to pay, the court declined to make the declarations, concluding that any dispute which arose in the context of the Indian insolvency proceedings should be resolved in that proceeding.

Important lessons for corporate trustees and finance parties

The clear recognition of the Trustee's standing to bring a declaratory Part 8 claim is unsurprising, although Marcus Smith J's postscript comment that the Trustee was the "only" party who could have brought such a claim under the Trust Deed may be limited to the facts of this case and the specific terms of the Trust Deed. Where only a declaration is being sought, rather than the commencement of active enforcement action, the position under other capital markets instruments may be different based on a narrower restriction. The specific drafting is key here.

Furthermore, the court robustly and helpfully confirmed that unilateral action taken by an issuer to de-authorise a service process agent is ineffective at avoiding valid service in England (following a number of similar findings, eg *Cargill v Uttam*). If the appointment of a process agent is described as irrevocable in a trust deed, financing document or any other commercial agreement governed by English law, proceedings will be validly served notwithstanding a party's unilateral action to revoke that appointment (although this could lead to difficulties in circumstances where there is a change in circumstances of the process agent, rather than an action of the finance party to attempt to alter the relationship).

However, the "conservative mindset" adopted by the court in refusing to grant the declarations sought is surprising. The decision should not be taken to stand for a broader proposition that the court will not grant declaratory relief to trustees unless the issuer (or its insolvency professional) is present, but rather as a reflection of the facts and evidence before the court in this particular case. Trustees and/or noteholders should, in contentious situations, be able to obtain declarations, even in the absence of an insolvent issuer, as a matter of English law from courts. The court's focus appeared to be more on the broader potential impact of the declarations on Indian proceedings, rather than the more limited question being put as a matter of English law (rather than Indian insolvency law) as to the amounts outstanding and to whom it was owed under English law-governed contracts. In any case, the decision should be considered carefully when shaping declarations to be sought from the courts in similar circumstances and the nature of the evidence to be put before the court as to the utility or impact of such declarations.

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Litigation Review consolidated index 2019

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