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Litigation and Dispute Resolution

Review

Contents

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Contract

LANDMARK BENCHMARK MANIPULATION CLAIM FAILS

Marme Inversiones v Natwest Markets plc & ors [2019] EWHC 366 (Comm), 25 February 2019

The court dismissed Marme's misrepresentation claims regarding the EURIBOR benchmark, in which Marme had sought the rescission of interest rate swaps with five banks, and granted the defendants' requests for declaratory relief in relation to the validity of the termination of those swaps. Although there has been a raft of cases involving allegations of implied misrepresentation relating to benchmark manipulation, this is only the second case (after *Property Alliance Group Ltd v Royal Bank of Scotland* (***PAG***)[1]) in which a final judgment following trial has been handed down. Allen & Overy LLP acted for four of the successful defendants.

These high-value, complex and long-running proceedings concerned one of Europe's largest-ever property deals whereby Marme purchased the real estate and buildings comprising the headquarters of the Santander Group known as the Ciudad Financiera.

Marme's acquisition of the Ciudad Financiera was financed in part by a EUR1.575 billion loan from a syndicate of eight lenders, including the five Defendants (Natwest Markets plc, Hamburg Commercial Bank AG (formerly HSH Nordbank AG), Bayerische Landesbank, ING Bank NV and Caixabank SA), which was entered into a few days before the collapse of Lehman Brothers in September 2008 (the **Senior Loan**). The interest rate payable under the Senior Loan was set by reference to the Euro Interbank Offered Rate (**EURIBOR**) and was hedged under five interest rate swaps entered into between Marme and each of the Defendants (the **Swaps**).

Marme sought rescission of the Swaps and/or damages of up to EUR996 million on the alleged basis that Natwest, fraudulently or otherwise, made certain implied representations regarding EURIBOR (the **EURIBOR Representations**), both on its own behalf and as agent for the other Defendants (the **Non-Natwest Banks**), that were false. In respect of its allegations as to the falsity of the EURIBOR Representations, Marme relied exclusively on the conduct of one ex-Natwest employee, Mr Phillippe Moryoussef, who was convicted (in his absence) in July 2018 of conspiracy to defraud in respect of EURIBOR.

As well as defending Marme's claim, the Defendants sought declarations as to Marme's liability to each of them under the Swaps, following their early termination in accordance with the terms of their respective ISDA Master Agreements after Marme's payment default.

Judgment

In its judgment dismissing Marme's claim and upholding the Defendants' declaratory counterclaims, the Court made the following key findings:

Alleged implied representations not made

- The Court held that the EURIBOR Representations could not be implied because:
- There were no clear words or specific clear conduct identified from which the wide-ranging EURIBOR Representations could be said to arise. The broader and more complex the alleged representations, the more active and specific must be the conduct giving rise to the implication.
- Although Marme sought to rely on the Court of Appeal's decision in PAG, this provided no support for its case due to the differences with the implied representation formulated there. For example, Marme's EURIBOR Representations extended: (i) to the conduct of banks other than Natwest; (ii) to the past; and (iii) beyond actual manipulation to

attempted manipulation. The Court would have found a much narrower implied representation (based on that found in *PAG*) from Natwest's conduct in "going along" with the Swaps. However, it noted that such a representation was not alleged.

There was a distinct lack of certainty (and associated lack of obviousness) as to what the EURIBOR Representations entailed. The Court stated that the more ambiguous or uncertain the representation the less likely that it would be implied.

Marme had not considered that the EURIBOR Representations were being made at the time. Instead, Marme's witness had thought that EURIBOR was a 'true and honest' rate but had not been thinking about how EURIBOR was set or the possibility that it might be manipulated.

Falsity

The Court found that, if the EURIBOR Representations had been implied, they would have been falsified because the communications involving Mr Moryoussef whilst at Barclays and from his first few months at Natwest showed him engaged in attempted manipulation/manipulation of EURIBOR.

The Court noted, however, that there would have been no falsity in respect of the narrower representation that it would have implied (as set out above) as there was no evidence that Natwest itself was manipulating or attempting to manipulate EURIBOR.

No reliance

The Court found that Marme's case also failed because, even if the EURIBOR Representations could be said to have been made, Marme would not have relied on them in entering into the Swaps for the following reasons:

- Marme was not aware of the EURIBOR Representations at the time that they were allegedly made. Marme's witness had made certain assumptions about EURIBOR but the EURIBOR Representations (or something approximating them) were not 'actively present' in his mind. The Court rejected Marme's submission that, in an implied representation case, a representation could be regarded as having been present in the representee's mind even if the representee did not give the representation any contemporaneous conscious thought.
- There was no causal link between the EURIBOR Representations and Marme entering into the Swaps, not only because it was not aware of them, but also because there was no evidence that Marme would have acted differently had those representations not been made.
- Rescission was barred
- It was held that, even if contrary to its findings the EURIBOR Representations had been made, falsified and relied upon, the remedy of rescission would have been barred because:
- Marme had affirmed the Swaps on the basis that Marme's witness, a former solicitor, believed in early 2014 that Marme had the right to rescind but made the tactical decision to go ahead and make the payments due under the Swaps in February 2014 anyway; and
- Marme had sought to rescind the Swaps but not the associated Senior Loan, which engaged the De Molestina 2 rule against partial rescission, which prevents a claimant from seeking to rescind a contract which forms an inseparable part of a wider transaction in relation to which rescission was not sought.

No entitlement to damages

Marme alleged that, had it known the truth regarding Natwest's alleged involvement in the manipulation of EURIBOR, it would have entered into the transaction on terms more advantageous to Marme. Therefore, if it was not entitled to rescind the Swaps, it should still have been able to recover damages on the basis that it would have entered into the transaction without the Swaps or, alternatively, would have negotiated a reduction in the credit spread applicable to each Swap.

The Judge noted that the correct question to ask was not "*what would have happened if Marme had known the truth*?" but "*what would have happened had the EURIBOR Representations not been made*?", and that Marme therefore technically needed to prove that, if the EURIBOR Representations had not been made, the truth would have been discovered, in order to establish the

requisite causation for its damages case. However, he chose not to base his decision on this point.

It was held that Marme was not entitled to damages as it had failed to show that, on the basis of the evidence before the Court, even if it had known the truth about the alleged EURIBOR manipulation, this would have given it sufficient additional bargaining power to force the Defendants to agree to either of the alternative transactions. In reaching this conclusion, the Judge noted that it was not sufficient from a causation perspective for Marme to show that it *might* have been able to do so.

No agency relationship between Natwest and the Non-Natwest Banks

The Court held that the case against the Non-Natwest Banks also failed because there was no agency relationship between Natwest and the Non-Natwest Banks for the following reasons:

- There was no relevant "holding out" of Natwest by the Non-Natwest Banks as having the power to represent them, which would have been required for Natwest to have the "apparent authority" to do so. Natwest's role as joint Mandated Lead Arranger on the Senior Loan, in discussing the terms of the Swaps (in particular the credit spread) with Marme and establishing the market mid-rate and steps for the Swaps on an execution call not involving the Non-Natwest Banks, did not mean that it was acting as agent for the Non-Natwest Banks. Instead, the Court categorised Natwest's role as a "middleman" or conduit of information. The Court referred to UBS v KWL3 and the proposition that the Court "should not impose an agency analysis upon a relationship which may better be analysed in other terms", particularly where the person alleged to be an agent had its own interest in the transaction as principal.
- The making of the EURIBOR Representations would not have been within the scope of the apparent authority if any had been created. There was no reason why the Non-Natwest Banks should be taken as holding Natwest out as having the authority to make representations regarding something about which they would have no knowledge, namely Natwest's own knowledge of or involvement in EURIBOR manipulation.
- Marme did not rely upon any alleged holding-out of Natwest as having authority to make the EURIBOR Representations in entering into the Swaps. On his evidence, Marme's witness would still have entered into the Swaps if he had known that Natwest was not speaking for or making representations on behalf of the Non-Natwest Banks.

Defendants entitled to declaratory relief

Marme's defence to the Defendants' claims for declarations failed for the reasons set out above, apart from a subsidiary defence against Natwest's declaration claim only, which was that Marme had accepted Natwest's repudiatory breach of certain implied terms regarding the integrity of EURIBOR in its Swap with Natwest before the bank served its termination notice.

However, this defence also failed at every stage. The Judge was not persuaded that the relevant terms were implied as they were far too wide and imprecise, nor that they would have been breached even if they were implied. Furthermore, even if such terms could be implied and had been breached, Marme had affirmed the contract for the reasons set out above.

Accordingly, the Court did not need to reach a determination on a further argument by Natwest based on the terms of the ISDA Master Agreement, but the judge noted that he would have been inclined to conclude that those terms did not oust the right to allege a repudiatory breach but did require the aggrieved party to follow the termination procedure in the ISDA Master Agreement.

At the consequentials hearing, the Judge granted the Defendants indemnity costs on the basis of certain provisions of the ISDA Master Agreements and the Senior Loan, and refused permission for Marme to appeal.

Conclusion

This decision has clarified a number of points regarding claims for misrepresentation against financial institutions in the context of allegations of benchmark rate manipulation. It is notable that, in reaching its conclusion that the EURIBOR Representations had not

been made, the Court distinguished them from the narrow representation that was established in the Court of Appeal decision in *PAG*, on the basis that they extended: (i) to the conduct of banks other than Natwest; (ii) to the past; and (iii) beyond actual manipulation to attempted manipulation. It is perhaps less surprising that the Court also found in this case that a much narrower representation would have been implied along the lines of the one identified by the Court of Appeal in *PAG*, namely that Natwest was not itself manipulating and did not intend to manipulate or attempt to manipulate EURIBOR.

Another notable point is that the Court agreed with the view expressed by Asplin J in *PAG* (the Court of Appeal in that case did not deal with this issue) that in cases of implied representation, it was still necessary to show that the claimant was aware that the representation had been made. This may yet prove to be the biggest barrier to claims of this sort succeeding.

It will also be of some relief to entities involved in arranging syndicated financing and coordinating interest rate hedging that the Court was reluctant to find that such roles involved acting as an agent, particularly in circumstances where the relationship could be better analysed in other terms.

The Non-Natwest Banks were represented by Allen & Overy Partner Andrew Denny, Senior Associate Kate Gee, and Associates Rosie Hoskins, Becky Valori and Georgina Thomson, instructing Timothy Howe QC and Adam Sher of Fountain Court Chambers.

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[1] *Property Alliance Group Ltd v Royal Bank of Scotland* [2018] 1 WLR 3529.

[2] *De Molestina v Ponton* [2001] CLC 1412.

[3] *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567.

Contract

BREXIT NOT A FRUSTRATING EVENT FOR AN EU AGENCY'S 25-YEAR LEASE:

Canary Wharf (BP4) T1 Ltd v European Medicines Agency [2019] EWHC 335 (Ch), 20 February 2019

Although the UK has not yet left the EU, the English court has had to consider for the first time whether Brexit could result in the frustration of a commercial agreement. In this case, the contract in question was a 25-year lease taken by the European Medicines Agency (**EMA**) over premises in London. The court found that Brexit would not result in the lease being frustrated. The court's decision (which may well be appealed) is not surprising. In most cases it is going to be an uphill struggle for a party to argue that Brexit will frustrate its contract, rather than merely leaving it with a bad bargain. The fact that the EMA, an EU institution that owes its presence in London to the UK's EU membership, could not do so, serves to underline this difficulty.

One of the consequences of the UK's vote in favour of leaving the EU has been the EU's decision to relocate the headquarters of the EMA from London to Amsterdam. In 2017, in anticipation of this relocation, EMA informed its London landlord, Canary Wharf (**CW**), that "if and when Brexit occurs, [EMA] will be treating that event as a frustration" of the 25-year lease it had agreed with CW in 2011.

CW sought a declaration that Brexit would not frustrate the lease. EMA's principal argument was that Brexit would trigger legal changes which would undermine the EMA's legal capacity to continue with the lease, and so the lease would be frustrated by Brexit. The EMA also argued that Brexit would frustrate the common purpose of the lease.

The doctrine of frustration: a reminder

The nature and effect of frustration was described in *National Carriers v Panalpina* [1]: "*Frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances: in such case, the law declares both parties to be discharged from further performance.*"

According to the judge, the "prevailing wisdom" as to the juridical basis for the doctrine of frustration was the question of whether performance was rendered "radically different" by a fundamental change in circumstances. A multi-factorial approach is required, which includes considering (i) the terms of the contract; (ii) its matrix or context; and (iii) the parties' knowledge, expectations, assumptions and contemplations, objectively assessed at the time of the agreement. What is clear is that the doctrine will not be lightly invoked and the courts will not allow frustration to be used as a "get-out-of-jail free card" for a party who has made a bad bargain.

Frustration due to subsequent illegality

EMA's main argument for frustration was that of supervening illegality – that, upon Brexit, it would no longer have the capacity as a matter of EU law to continue to use the Canary Wharf premises or perform under the lease. In rejecting this point, the judge made three findings:

(i) EMA would not lack capacity (ie there would be no illegality). The EU Regulation which established the EMA conferred on it legal capacity, including the power to "acquire and dispose of …property". This

capacity was not entirely inward looking; it applied whether EMA was acting inside or outside the EU. Further, while the effect of Brexit would be to "substantially degrade" EMA's immunities and privileges under the EU Treaties in the UK, EMA at least had capacity to dispose of property it held in a third country (for instance by assigning or sub-letting the entire premises, as it was entitled to so under the lease). Further, the EU itself had capacity to maintain its agencies' headquarters in a third country.

(ii) Even if EMA would lack capacity under EU law, this would be irrelevant for the purposes of determining whether the lease had been frustrated. The judge held that, while EU law may be relevant to EMA's capacity to enter *into* the lease, it was only English law which was relevant to the *consequences* of a lack of capacity, namely whether the subsequent illegality had caused the lease to be frustrated.

(iii) Even if he was wrong on (i) and (ii), the EU could have taken steps to ameliorate the negative legal effects of Brexit on EMA but did not do so (in fact the EU legislated in 2018 with the effect that the EMA was required to leave London for Amsterdam). Such "self-induced frustration" (EMA being an emanation of the EU) could not be a reason for bringing the contract to an end.

Frustration of a common purpose

As its alternative argument, EMA essentially maintained that one of the purposes of the lease was to provide a permanent headquarters for EMA for the next 25 years, and that if that could not be achieved, the common purpose of the lease would fail.

The judge noted that the "common purpose" of the parties to a contract in the context of frustration is something "more elemental" than "the individual terms and conditions" of the contract. If there is a common purpose (and many contracts will not have one), it may exist not just within the normal factors relevant to contractual interpretation (ie the words used and the "matrix" or "context") but also within "the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, at any rate so far as these can be ascribed mutually and objectively".

However, here, there was no such common purpose. Rather the negotiation had been the product of two parties having different and divergent purposes: "The EMA was focussed on bespoke premises, with the greatest flexibility as to term, and the lowest rent. CW was focussed on long-term cash flow, at the highest rate, and was prepared to allow the EMA its say in the building's configuration, provided that this was not adverse to CW's interests."

Moreover the occurrence of Brexit would not render EMA's performance under the contract "*radically different*" from that envisaged at the time of contracting. The judge found that Brexit itself was foreseeable only as a "theoretical possibility" at the time of the relevant agreement but that it was perfectly foreseeable that, over the 25-year lease, EMA might have to abandon the premises. Indeed the alienation provisions in the lease expressly contemplated this possibility.

COMMENT

The fact that EMA, with its special status as an EU institution, could not establish frustration in this case reinforces how difficult it is likely to be for parties to argue that Brexit has frustrated their contracts. As such, unless the contract specifically addresses Brexit, parties are likely to be held to their contracts even if Brexit has made performance much more difficult or expensive. It is also apparent from the judge's comments that it will be a very rare case indeed in which the frustration of common purpose argument will succeed – here the EMA didn't even "come close" to establishing it. There may be more mileage in arguments based on supervening illegality (or impossibility) but only in the clearest cases and where the risk has not been allocated in the contract.

The judge's finding that Brexit was not foreseeable in 2011, was perhaps not surprising, even though it was a theoretical possibility. The position would likely be harder to maintain in relation to contracts entered into nearer the date of the UK referendum (perhaps those after David Cameron's Bloomberg speech on 23 January 2013 announcing his party's policy to have an EU referendum), and impossible in relation to contracts

entered into after the referendum result. The judge himself commented: “These days, and for the last two or so years, parties to contracts have no doubt been considering with some care what their contracts should say as regards the United Kingdom’s withdrawal from the European Union. Thus, the failure of the parties to a contract, post-referendum, to consider the inclusion of a “Brexit clause”, might be considered relevant to the allocation of risk”.

The judgment is also interesting because it is one of the first cases where the High Court (albeit at a relatively high level) has had to consider the meaning and effect of the key legal instrument in the UK that will give effect to Brexit (the European Union (Withdrawal) Act 2018 and also the draft Withdrawal Agreement agreed politically between the UK and the EU) and the impact that these documents may have in practice, depending on how events unfurl.

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[1] [1981] 1 AC 675.

Disclosure

COMPANY REFUSED PERMISSION BY ENGLISH COURT TO COMPLY WITH U.S. DOCUMENT SUBPOENA

ACL Netherlands BV (as successor to Autonomy Corporation Ltd) & Hewlett-Packard The Hague BV (as successor to Hewlett Packard Vision BV) & ors v Michael Lynch and Sushovan Tareque Hussain [2019] EWHC 249 (Ch), 12 February 2019

The English court refused permission for claimants in English civil proceedings to disclose documents and witness statements (provided by the defendants) to the FBI for a separate U.S. criminal investigation into the defendants, despite the claimants (companies in the Hewlett Packard Group) arguing that the disclosure was required to comply with a U.S. Grand Jury Subpoena. The decision follows a number of recent cases highlighting the care required by a party seeking to use or pass on, voluntarily or under compulsion, documents disclosed or witness statements provided by an opposing litigant.

Both the English civil proceedings and the U.S. criminal investigation relate to the acquisition of Autonomy Corporation Limited (**Autonomy**) by Hewlett Packard Vision BV. The claimants in the English civil case are various Hewlett Packard group companies and Autonomy. The defendants are two individuals alleged to have fraudulently misrepresented Autonomy’s financial position prior to the acquisition. During the English litigation the defendants disclosed documents to

the claimants and served witness statements (the **Documents)**.

In the U.S., the second defendant had already been convicted of wire fraud, although he was awaiting sentencing. There was an on going investigation into the first defendant for wire fraud. A Grand Jury Subpoena (**Subpoena)**, issued at the request of the U.S. Attorney's Office (**USAO**), sought the Documents. The claimants applied to the English court for permission to disclose the Documents to the FBI, stating that this was necessary to comply with the Subpoena.

Restrictions on collateral use

Disclosed documents and witness statements may only be used for the "purpose of the proceedings in which they are disclosed" (CPR 31.22 and 31.12) except in certain circumstances, including where the English court's permission is granted.

In deciding whether the court should grant permission for the Documents to be disclosed, Hildyard J summarised the test that the court must apply:[1]

- whether, having regard to any element of compulsion, the applicants (here the claimants) have discharged the burden of satisfying the court that there are sufficient "cogent and persuasive reasons" for permitting the collateral use sought; and
- whether permission could result in injustice.

Permission refused – no compulsion and no necessity

The court found that the claimants had failed to demonstrate any sufficient necessity or urgency to outweigh the UK's public policy and interest which the restrictions against collateral use are intended to promote, and the claimants had also failed to show any compulsion. The following factors were taken into account:

- there was no evidence as to why the material was needed by the USAO or the Grand Jury;
- the Subpoena cannot have been necessary to inform the decision to charge the defendants – the first defendant's indictment was issued before the date due for production of the documents, and the second defendant had already been convicted;
- there was no evidence that the Subpoena had received any material U.S. judicial input – there was no evidence of any involvement of the Grand Jury/U.S. Court in deciding whether to pursue the Subpoena or in the formulation of its scope – the USAO had completed the form;
- there was nothing to suggest that the USAO had been directed to or had considered protections afforded under English law;
- the Subpoena was in very broad terms. There was no attempt to tie the request to any issues or areas of further investigation – "the firm impression is of a trawl". Hildyard J remarked that "some confirmation of due consideration and some explanation of perceived need surely could have been offered";
- the Subpoena was not in fact addressed to any of the claimants, but instead to "The Custodian of Records, Hewlett Packard Enterprises (**HPE**)", the wholly owning parent company of each of the claimants. There was no suggestion that it was to be served overseas. Hildyard J stated that it seemed very likely that it was only HPE which was subject to a legal obligation under the Subpoena; and
- HPE did not have legal control of the Documents because the permission of the English court is required to enable their collateral use.

Hildyard J concluded that the evidence failed to show that the claimants were under a compulsion to provide the Documents, and it was also unclear whether there was any real need for the Documents to be provided for the investigation and prosecution of fraud in the U.S.

Given that the claimants had failed to satisfy this limb of the test, Hildyard J refused permission for disclosure, however, *obiter*, he went on to consider whether, if permission had been granted, it might give rise to injustice in the U.S. or UK proceedings.

Risk of injustice should permission be granted

The judge regarded as a "fair point" that the disclosure of the witness statements could give rise to injustice in the US proceedings as the USAO would know the people prepared to give evidence for the first defendant. The release of disclosed documents was less

objectionable unless third parties were implicated and thereby exposed to investigation, speculation or prosecution where otherwise they might not have been so – but there was little or no evidence for this.

As regards prejudice in the UK proceedings, Hildyard J thought there was some force in the first defendant's argument that some witnesses might withdraw their witness statements if they were concerned about them being provided to the USAO. Also, the giving of permission might unsettle the imminent trial – the required focus on consulting witnesses, collating documents and seeking advice on confidentiality would be distractions.

Comment

Much is written about what a litigant may and may not do with its own discloseable documents both before and during litigation. Less is written about what a litigant may and may not do with documents and witness statements provided by the other side. Can/should they be disclosed to investigators overseas to aid a criminal investigation? What if the documents have been disclosed in confidence by an investigating authority, which itself obtained them from third parties using its document compulsion powers? Can the information in the documents be used to instruct foreign lawyers to advise on possible proceedings abroad or help in on going related foreign proceedings in which there is no disclosure?

This ruling shows the English court being willing to go behind a US Subpoena to examine its scope, purpose and the circumstances in which it was given in deciding whether or not to allow the Subpoena to trump English court restrictions on the collateral use of disclosed documents and witness statements. It also emphasises the importance of a party, on the receiving end of such a Subpoena, not assuming that it automatically takes priority over obligations owed by that party under English law.

Another recent case,[2] in which the interplay between English civil procedure disclosure rules and powers to compel the production of documents in criminal investigations was considered, found that documents obtained from individuals using the SFO's compulsory powers, and provided by the SFO in confidence to a company previously under investigation, can be disclosed by that company in later English civil proceedings with unrelated parties.

A number of recent cases on the restrictions on collateral use also highlight the need for caution when considering whether to send, or use information from, such documents to lawyers or authorities abroad in connection with possible or on going related proceedings.

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[1] *Crest Home Plc v Marks* [1987] AC 829.

[2] *Omers Administration Corporation v Tesco PLC* [2019] EWHC 109 (Ch).

Insurance

PROFESSIONAL INDEMNITY INSURER LIABLE UNDER NON-PARTY COSTS ORDER

Various Claimants v Giambrone & Law & ors [2019] EWHC 34 (QB) 11 January 2019

A professional indemnity insurer was liable under a non-party costs order to pay half the claimants' costs despite having limited its liability to its insured by aggregating claims under the policy and despite having ceded control over the underlying litigation to the insured. An insurer who relinquishes control of litigation cannot expect immunity from costs liability, particularly if it is aware that there was never any reasonable prospect of successfully defending the claim. The decision shows that even when an insurer has limited its liability to its insured, it remains potentially on the hook for costs.

Non-party costs orders: a reminder

The court's jurisdiction to award non-party costs orders (**NPCOs**) derives from its general power on costs in section 51 Senior Courts Act 1981 (**section 51**) which states that the court has power to determine "by whom and to what extent the costs are to be paid"[1]. Section 51 is supplemented by Rule 46.2 Civil Procedure Rules which refers to the section 51 power "to make a costs order in favour of or against a person who is not a party to proceedings". Although such orders are "exceptional", this means no more than "outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense"[2]. The ultimate question is whether it is just to make such an order in all the circumstances. The discretion will not usually be exercised against "pure funders". If, however, the non-party not only funds but controls or benefits from the proceedings, justice requires that it must pay the successful party's costs since the non-party is "not so much facilitating access to justice as…gaining access to justice for his own purpose"[3].

The underlying litigation involved a class action in which negligence claims (the **claims**) were brought by a number of claimants (the **claimants**) against Giambrone & Law (**Giambrone**), a law firm with professional indemnity insurance with AIG (Europe) Limited (**AIG**). The litigation was fiercely contested at an 18-day trial, despite Giambrone having little confidence in the success of major issues and despite many other, similar claims having been settled before trial. The claimants succeeded on all counts and substantial costs were awarded against Giambrone which it failed to satisfy, leading to the claimants' application against AIG.

Agreement to aggregate claims

Two years before trial, following a dispute between AIG and Giambrone as to the right of AIG to aggregate claims, the parties entered into an agreement (the **Agreement**) to settle their dispute. It included two principal terms: (i) cover for the claimants' damages would be limited to GBP3 million (of which around GBP1.89 million had already been paid out on claims which were settled); and (ii) under clause 2.4, AIG was obliged to fund Giambrone's defence costs, subject to a right to withdraw funding if it reasonably considered that there was "no realistic prospect of defending the [claims]" (**clause 2.4**). At this point, AIG was aware of the number of claims and, in view of its dispute with Giambrone, this was an incentive for it to enter into the Agreement. AIG alleged that the Agreement prevented it exercising sole, or even dominant, control, over the way the defence was conducted and that an NPCO should not be made against it.

Was the Agreement relevant to the exercise of the court's discretion?

The court accepted that, as a result of the Agreement, Giambrone effectively controlled the defence to the litigation. Regarding clause 2.4, AIG could not have thought (whether reasonably or otherwise), that there was a realistic prospect of successfully defending the

claims given that they, and their merits, were materially the same as previous cases which had settled. It was also clear that AIG knew "the defence was much more likely to fail than succeed". A conscious decision was made by AIG not to withdraw funding.

Whilst the Agreement was "commercially sensible" it could not protect AIG from section 51 simply because Giambrone had controlled the litigation. AIG had failed to control Giambrone's conduct of the defence, either by entering into the Agreement, under which AIG had ceded control of the litigation, or because it had failed to invoke clause 2.4. Given AIG's awareness of the prospects of success and the tenacity with which Giambrone would protect its interests, it was foreseeable that large sums of money would be expended. In these circumstances, AIG could not expect immunity from costs liability, particularly since the prospects of success were poor. The court also relied on the principle of reciprocity derived from *Travelers Insurance v XYZ*[4] (another indemnity insurance case) in which the Court of Appeal held that any party who benefits from litigation can be made to bear the burden of costs. The court relied on the benefit to AIG of the Agreement in that it resolved any doubts in relation to the validity of the aggregation arguments; had Giambrone's defence been successful, AIG's right to aggregate would never have been tested. Whilst it was not for AIG's sole benefit, it did derive some material benefit from it.

The court did not accept AIG's argument that the claimants' failure to engage with AIG's efforts to settle the underlying litigation should prevent it exercising its discretion: it was not possible to discern from the "without prejudice" correspondence which party was responsible for the failure of the negotiations in a way which would affect the application. The court also did not accept that the fact the claimants had known and maintained the claims, knowing the terms of the Agreement, was relevant. They had made clear early on their intention to make a section 51 application; AIG had therefore taken the risk that the Agreement might not have the impact on the application that it subsequently alleged.

Causation

AIG argued that its funding had not caused the claimants to incur more costs, as it could be inferred that Giambrone had the funds to pursue its defence, since it had funded an appeal to both the Court of Appeal and the Supreme Court. The court disagreed: an appeal usually costs significantly less than a trial. Furthermore, had Giambrone funded the litigation itself, it would have been much more circumspect about its potential exposure to an NPCO. AIG's funding did therefore materially increase the claimants' costs.

Quantification of claimants' costs incurred as a result of AIG's funding

Every possible point was taken by Giambrone at trial which would probably have been avoided if AIG had not provided funding and had exercised proper control. The court concluded the claimants had broadly spent twice as much as they would otherwise have done and ordered AIG to pay half their costs.

COMMENT

This case illustrates the courts' increasing willingness to grant NPCOs, both against insurers as well as against funders of corporate litigation such as directors, shareholders or parent companies, who either control or benefit from proceedings. Whilst commonly made against funders of claims, orders can also be made against defence funders. The availability of NPCOs should always be borne in mind, both where an unsuccessful opponent appears not good for the money and where a party is considering funding litigation.

For insurers who agree to hand over control of the litigation to their insured, whilst continuing to fund it, they should include a clear proviso allowing funding to be withdrawn if the prospects of success fall below a certain level. They should also regularly reassess the likely prospects of success; even if they do not withdraw funding, evidence that they considered whether the claim was defensible will be helpful in resisting any subsequent section 51 application. Where the agreement

limits insurers' liability to the insured, funding the defence of uninsured claims still leaves them at risk on costs even for those claims which exceed the indemnity limit.

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[1] Section 51(3).

[2] *Dymocks Franchise Systems (NSW) Pty v Todd* (costs) [2004] UKPC 39.

[3] *Dymocks Franchise Systems (NSW) Pty v Todd*.

[4] [2018] EWCA 1099 – currently on appeal to the Supreme Court.

Privilege

LEGAL ADVICE PRIVILEGE CLAIMS SUBJECT TO "DOMINANT PURPOSE" TEST

R on the Application of Jet2.com Ltd v CAA [2018] EWHC 3364 (Admin), 5 February 2019

Claims for legal advice privilege were said to be subject to a dominant purpose test, namely whether the communication or document was brought into existence with the dominant purpose of it or its contents being used to obtain legal advice. In the instant case, any drafts of a letter sent by the Civil Aviation Authority (**CAA**) to Jet2.com that were created before the CAA's in-house lawyers had been consulted on its terms (and therefore not drafted for the dominant purpose of giving or obtaining legal advice were not privileged.

Jet2 brought judicial review (**JR**) proceedings challenging the CAA's decision to publish a press release (in which the CAA was critical of Jet2's refusal to participate in a new ADR scheme proposed for the aviation authority) and the CAA's decision to publish *inter partes* correspondence regarding that press release.

By way of reminder, disclosure is not required in JR proceedings unless the court orders otherwise. However, where the court is required to resolve factual disputes, disclosure will be ordered where it appears to be necessary in order to resolve the matter fairly and justly. Here such an issue of fact was whether the decision to publish the press release and *inter partes* correspondence had been taken for an improper purpose (as was claimed by Jet2).

Documents sought by Jet2, and resisted on privilege grounds

Jet2 sought disclosure of documents which included (i) all drafts of a letter from the CAA to Jet2 dated 1 February 2018 (the **Letter**) which criticised Jet2's decision not to participate in the ADR scheme; and (ii) all records of any discussions concerning those drafts.

The CAA asserted legal advice privilege over drafts of the Letter, where they were prepared for the purpose of obtaining legal advice, and also where they were drafted in the knowledge that a lawyer was going to look at them. Further, discussions of the drafts with others, the CAA argued, remained covered by privilege because they were covered by the continuum of communications with the in-house lawyer.

Legal Advice Privilege

Legal advice privilege (**LAP**) applies to confidential communications between a client and its lawyer made for the purpose of giving or obtaining legal advice.

There has long been an academic debate as to whether the test for determining the scope of LAP includes a "dominant purpose" element. Many had thought this had been put to bed following obiter comments by the Court of Appeal in *SFO v ENRC* [2017] EWHC 1017 (QB): "In our judgment, however, it is hard to see why the suggested additional qualification is necessary, when the privilege can, by definition, only be claimed when legal advice is being sought or given. It is one thing to say that litigation privilege can only be claimed where the communication is created for the dominant purpose of the litigation, but entirely another to say that legal advice privilege can only be claimed where the communication is created for the dominant purpose of seeking legal advice. The second is tautologous."

Morris J disagreed and did not feel constrained by the Court of Appeal "given the particular facts of that case" (which he did not elaborate on). He held that on the current state of authorities, claims for LAP are, in principle, subject to a dominant purpose test, namely whether the communication or document was brought into existence with the dominant purpose of it or its contents being used to obtain legal advice.

Application of dominant purpose test

Morris J acknowledged that in normal cases of an email sent by a client to an external lawyer, the issue of dominant purpose is unlikely to arise. However, the question of dominant purpose may be more relevant where material is sent internally to in-house lawyers, who may have a dual role in the company.

Lawyers, particularly in-house solicitors, may often take part in general business discussions which do not involve legal advice. Where the in-house lawyer is clearly being asked for legal advice, privilege is likely to attach. However, where the in-house lawyer is being consulted also as an executive about a largely commercial issue, then, according to Morris J, the dominant purpose test will apply.

Communications to legal and non-legal people

There is no established authority regarding the privilege analysis of a communication (such as an email) sent by an internal employee to multiple addressees, where some are lawyers and others are not. Morris J's view was that if the dominant purpose of the email is to seek legal advice from the lawyer and others are copied in for information only, then the email is privileged, regardless of who it is sent to. If on the other hand, the dominant purpose of the email is to seek commercial views, and the lawyer is copied in, whether for information or even for the purpose of legal advice, then the email, in so far as it is sent to the non-lawyer, is not privileged. Further, if sent to the non-lawyer for a commercial comment, and sent to the lawyer for legal advice, then, in his judgment, the email in the hands of the non-lawyer is not protected by privilege, unless it or the non-lawyer's response discloses or might disclose the nature of the legal advice sought and given.

Morris J concluded that drafts of the Letter which were created prior to consultation with the in-house lawyers were not privileged. That was the case even if it was known that legal advice would be taken on the draft in due course, or that the in-house lawyers were later shown the draft.

Further drafts of the Letter would also not be covered by privilege unless specifically drafted by the lawyers or for the dominant purpose of obtaining legal advice.

Consequently, the CAA was directed to reconsider the materials over which it had claimed legal advice privilege and to disclose further documents or to provide a witness statement to explain what has, and has not, been disclosed.

Comment

Whilst almost all communications with external lawyers will be for the dominant purpose of seeking legal advice, the issue may be more fact sensitive for communications between a client and its in-house lawyers. In this scenario it is not uncommon for an executive to seek some commercial advice from the in-house lawyers at the same time as the legal advice is also sought. It may therefore be best in future if such commercial advice

was discussed separately to ensure that the legal advice sought and provided retains its privileged status.

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Procedure

DISCLOSURE TO NON-PARTY NGO OF EVIDENCE RELIED ON AT COURT

British American Tobacco (UK) Ltd & ors, R (on the application of) v Secretary of State for Health [2018] EWHC 3586 (Admin), 20 December 2018

A non-governmental organisation (**NGO**) has been granted disclosure of evidence relied upon by litigants in concluded judicial review proceedings concerning tobacco packaging (**JR**). The NGO was not party to the JR. Much of the evidence, which was of central importance to the JR, had not been read out in open court during the JR, but had been referred to in oral and written submissions and read by the judge in pre- and post-hearing reading. The ruling shows the court using its inherent powers to order disclosure in aid of open justice, even where the documents might fall outside the scope of the non-party access rules in the CPR.

The application was made by an NGO for documents that had been relied on in judicial review proceedings by a number of tobacco companies against the Secretary of State for Health, in which the tobacco companies claimed, unsuccessfully, that proposed legislation to standardise packaging of tobacco products was unlawful. The NGO, Campaign for Tobacco Free Kids (**CTFK**), applied on the basis that the issues raised in the JR – and the documents sought – had significant implications for the wider global debate about standardised packaging of tobacco products.

Court may order disclosure of court documents to non-parties

CTFK brought its application under 5.4C(2) of the Civil Procedure Rules (**CPR**) which provides that "a non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party ...". The court also has inherent jurisdiction to order disclosure of documents to give effect to the principle of open justice, even where an application falls outside the scope of the CPR. This power requires the court to balance the need for open justice with the need for efficiency in legal proceedings.

Documents were important, but not necessarily referred to in open court

The application was for documents filed by the claimants and the defendants in the JR, including witness statements, expert reports, letters from the World Health Organisation and civil servant submissions following a consultation on the proposed legislation (the **Documents**). The witness statements and expert reports included numerous exhibits.

The Documents were "of central relevance" to the JR. All of them had been referred to in the pleadings (which CTFK had obtained separately, under CPR 5.4C(1)) and had been read and considered by the judge. The judge (Green J, who heard both the JR and the application) acknowledged that, increasingly, given the volume of material in modern litigation, judges are required (or invited) to read important documents outside court. Therefore, documents that are relied upon are not necessarily read aloud in court (as was the case in

relation to the Documents, since the volume of evidence in the JR was vast). Such documents may nevertheless be integral to the proceedings and should be treated accordingly. In relation to exhibits, the court relied on *Cape Intermediate Holdings v Dring*[1] in which the Court of Appeal said there is no general right of access to such exhibits, simply because they are attached or referred to in witness statements or expert reports, but that it would be different if they were read, or treated as read, in open court. (*Cape* is currently on appeal at the Supreme Court.)

Disclosure granted

The application was granted under the court's inherent jurisdiction. The key reason was to give effect to the principle of open justice. CPR 5.4C(2) was not considered (the Secretary of State had opposed the application on the basis that the Documents sought did not fall within CPR 5.4C(2)). The judge described as "immaterial" the fact that the Documents might not fall within the scope of the CPR and held that, in circumstances where the Documents were relied upon in the underlying proceedings and the applicant had an unfettered right to attend the hearing, it was entitled to the Documents.

A rebuttable presumption in favour of disclosure

In such circumstances, the court's power is effectively subject to a rebuttable presumption in favour of the applicant: "documents should be made available absent some good reason to the contrary." Good reasons may exist in some cases, but those will be the exception rather than the rule. By way of example, the judge acknowledged that his ruling may have been different if the documents had been treated as subject to an overriding security or confidentiality claim in the JR.

Although the judge concluded that CTFK should be entitled to the Documents "without more", he set out a number of reasons which, to the extent they were germane, were "compelling". These included: (i) the Documents were all referred to in pleadings, evidence and submissions before the court and they were all read and taken into consideration by him in preparing the judgment following the JR; (ii) the Documents raised issues relating to public safety and health; (iii) the issue of standardised packing is an issue of broad continuing importance to the international community; (iv) conclusions arrived at in the JR judgment about this evidence are better understood with the actual evidence itself being available in the public domain; and (v) wider transparency might thereby assist other interested persons, countries and courts to form their own views about the merits or otherwise of the competing arguments.

COMMENT

This case confirms that, when dealing with third party applications of this kind, the court's focus will be to uphold the principle of open justice by enabling transparency. Its rationale is that "transparency" goes beyond allowing the public access to the court room; it is also about providing those who need to understand how justice is performed with the information which facilitates that understanding. It may therefore use its inherent jurisdiction to order disclosure even when outside the scope of the CPR.

Whilst the decision is plainly helpful for non-parties with an interest in court documents, it is important to note that there were several features of this case that may have coloured the judge's decision to allow disclosure. First, the Documents were significant in the JR, therefore this approach may not apply to applications for peripheral documents. Secondly, the judge appeared to attach importance to the fact that the applicant in this case was an NGO; in the broader judicial context, NGOs and pressure groups play an important public function in that they bring pressure to bear on particular issues. Lastly, the fact the underlying proceedings were judicial review proceedings was important as the court said the principle of open justice applies "forcefully" where decisions of public bodies are in issue.

On the other hand, the judgment serves as a reminder that documents relied upon in court are potentially publically available, even where they are not read aloud.

To the extent a party to litigation is sensitive about third parties obtaining copies of certain documents (and subject to that party's disclosure obligations) careful thought should be given to whether and to what extent reliance should be placed on those documents.

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[1] [2018] EWCA Civ 1795.

Tort

SWAPS CLOSE-OUT COSTS: AUDITOR NOT RESPONSIBLE FOR FINANCIAL CONSEQUENCES OF DECISION TO ENTER INTO SWAPS

Manchester Building Society v Grant Thornton UK LLP [2019] EWCA Civ 40, 30 January 2019

Incorrect advice given by an auditor as to the accounting treatment of interest-rate swaps did not make it liable for the close-out costs of those swaps which became necessary, following the application of the correct accounting treatment. The Court of Appeal restated and applied the *SAAMCO*[1] principles for determining the limits of the foreseeable losses recoverable from a negligent professional adviser. It emphasised the distinction, originally drawn in *SAAMCO*, between "advice" cases, where the adviser assumes responsibility for the entirety of a decision-making process and thus for the losses that flow from the decision taken, and "information" cases, where the adviser provides discrete advice or information and only assumes responsibility for the losses flowing from that advice or information being wrong. This ruling will be of interest to auditors, particularly in relation to advice as to how clients' business activities can be treated in their accounts, as well as to other professional advisers who provide information to clients on the basis of which they will take other business decisions.

Accounting standards and interest rate swaps

Grant Thornton UK LLP (**GT**) audited the accounts of Manchester Building Society (**MBS**) from 1997-2012. During this time MBS issued a number of fixed interest lifetime mortgages in the UK and Spain. From 2006, MBS hedged its resulting interest rate risk by entering into certain long-dated interest rate swaps. GT negligently advised that MBS could apply hedge accounting to these swaps under the International Financial Reporting Standards, such that MBS's accounts did not recognise the volatility of the fair value of the swaps. When GT informed MBS in 2013 that it could not apply hedge accounting, interest rates had fallen to historically low levels, thus recognising the fair value of the swaps in MBS's 2011 accounts resulted in a regulatory capital deficit of GBP17.9 million. Under regulatory pressure to address that deficit, MBS closed out the swaps, incurring GBP32.7 million in close-out costs, alongside significant transaction fees.

High Court decision: Causation but no assumption of responsibility

By way of a reminder, in the High Court, GT accepted that its advice was negligent, and Teare J found that that advice was both the factual and an effective legal cause of MBS's losses in closing out the swaps, and that those losses were the reasonably foreseeable consequences of GT's negligence. Following the Supreme Court's decision in *Hughes-Holland v BPE Solicitors*[2], Teare J then identified the key question for the court as being whether GT had assumed responsibility for the particular losses claimed by MBS, and in particular "whether the

loss flowed from the particular feature of the defendant's conduct which made it wrongful". In doing so he rejected the distinction between "information" and "advice" cases that *SAAMCO* and *Hughes-Holland* had established. The court held that, although negligence, foreseeability and loss were all present, "in the round" the loss resulted from a business decision by MBS to enter into the swaps and from a change in the market forces, for which GT did not assume responsibility, rather than the negligent accounting advice given by GT. MBS appealed.

Court of Appeal decision: GT's duty limited to provision of "information"

MBS argued that Teare J had failed properly to approach the case on the basis of whether this was an "advice" or an "information" case, as required by *SAAMCO* and *Hughes-Holland*. It argued that this was an "advice" case and, as a result, GT had assumed responsibility for all foreseeable consequences of its advice, including the close-out costs of the swaps.

The Court of Appeal agreed that Teare J had erred in his approach, and confirmed that the Supreme Court in *Hughes-Holland* had clarified that the application of the *SAAMCO* principle involves considering, first, whether each case is an "information" or "advice" case, as the scope of the defendant's duty, and thus the measure of liability, differs between the two.

"Advice" cases

In an "advice" case the adviser assumes responsibility for the decision to enter into a transaction, and is thus liable for the foreseeable financial consequences of entering into the transaction. A particular case will be an "advice" case if it can be shown that the decision-making process had been left to the adviser, whose duty it is to consider all relevant matters to the decision and, in turn, who is "responsible for guiding the whole decision making process".

"Information" cases

If the test for an "advice" case is not satisfied, then it is an 'information' case, and the adviser is not responsible for the financial consequences of the decision to enter into the transaction being taken, only for the foreseeable financial consequences of the information or advice provided being wrong. The foreseeable financial consequences are only those that would not have been suffered if the correct advice or information had been provided.

Applying this approach to the facts, the court held that this was clearly an "information" case. Whilst GT had assumed responsibility for the provision of correct accounting advice, it did not assume responsibility for the decision-making process by which MBS had entered into the swaps. The Court of Appeal thus upheld the High Court's decision that GT was liable for the transaction costs of MBS exiting the swaps, but not for the far greater close-out costs, notwithstanding that the High Court had erred in its approach in arriving at that decision.

The court commented, citing the judge at first instance, that it would be a "striking conclusion to reach that an accountant who advises a client as to the manner in which its business activities may be treated in its accounts has assumed responsibility for the financial consequences of those business activities".

COMMENT

This case is helpful to practitioners as a clear restatement of the principles and approach to be taken in applying the *SAAMCO* principles. It makes clear that the critical question is whether the scope of the particular advice provided by the defendant is sufficient to make the case an "advice" case, or is more limited such that it is an "information" case. The role of the concept of assumption of responsibility is an element of this question, and not the critical question itself.

This case also clarifies the importance in professional negligence cases of the requirement for the claimant to show, not only that the defendant's negligence caused it loss and that that loss was foreseeable, but also that the professional adviser was sufficiently central to the decision-making process such that the case amounts to an "advice case". If the professional adviser's role is more limited such that the case is properly characterised as an information case, the recoverable losses are likely to be more limited. Causation, foreseeability, and the *SAAMCO* principles each act as (in Hamblen LJ's words) "a legal filter used to eliminate certain losses

from the scope of a wrongdoing defendant's responsibility". A damages claim for professional negligence must pass each filter to succeed.

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[1] *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 91.

[2] [2017] 2 WLR 1029.

MINING COMPANY NOT LIABLE FOR ACTS OF POLICE

Kadie Kalma v African Minerals Ltd & ors [2018] EWHC 3506, 19 December 2018

This case deals with several key tortious principles relating to acts of third parties and will be of particular interest to companies in the extractive industries monitoring their exposure to human-rights-related risks. Here, an iron ore mining company, African Minerals Ltd (**AML**), created the infrastructure to mine and transport iron ore in Sierra Leone, leading to significant local unrest. The court held AML was not liable to the claimant local residents for the acts of brutality towards them by the Sierra Leone police (**SLP**) who were attempting to restore law and order.

AML's project, to construct a mine and build a railway to transport the ore to the coast, had a major impact on the local community's traditional ways of life. This factor, plus resentment over compensation payments by AML, led to serious conflict which came to a head when disputes between AML and the local community led to a reaction by the SLP, whose response degenerated into violent chaos (including rape, beatings and shootings). The 142 claimants, who alleged they were among the victims of these abuses, claimed for compensation against AML. Although they recognised that the SLP had perpetrated the worst of these excesses, they alleged that AML was liable to compensate them by the application of seven alternative common-law grounds. Only vicarious liability, accessory liability and negligence liability are considered in this article.

The case had a number of unusual features, including the fact that the English court sat in Sierra Leone for part of the hearing. Although the acts alleged took place on Sierra Leonean soil, the English court agreed to hear the case because the actual iron ore producer (the third defendant, Tonkolili Iron Ore Limited) (**Tonkolili**) was previously a subsidiary of AML, which had its head office in London before going into administration in 2015. As a preliminary point, the relevant governing law of the dispute – both of liability and quantum – was the law of Sierra Leone. The parties agreed, however, that in respect of liability, the law of Sierra Leone could be treated for all practical purposes as being identical to that of England and Wales.

Since Tonkolili had inherited, over time, the rights and obligations of the first and second defendants, the

judgment (and so this article) refers to the defendants generically as "the defendant".

Defendant not vicariously liable – no relationship akin to employment

The claimants argued that the defendant was vicariously liable for the torts of the SLP (so-called "non-employee vicarious liability") because the defendant had provided monetary support for specific SLP investigations, some financial backing to the SLP, and vehicles. While the SLP was not employed by the defendant, the courts noted that this is no longer a pre-requisite for vicarious liability; it is now well established that the relevant test is whether the "non-employment relationship" is "akin to that between employer and employee".

The court decided that, while the relationship between the defendant and the SLP was "far removed from what would be considered to be appropriate" in England and Wales, nevertheless it was not so different as to create a relationship akin to employment. The SLP was discharging a public duty and its authority was derived from constitutional powers; it was not acting under any quasi-employment relationship on the defendant's behalf. Further, it was not acting as part of any business activity of the defendant, and the defendant did not exercise any significant degree of control over the SLP.[1]

No accessory liability – no common design

The claimants alleged, in the alternative, that the defendant was an accessory to the torts committed by the SLP as it had acted in furtherance of a common tortious design with the latter (**accessory liability**). For example, it was alleged that the SLP's use of unlawful force on the protesters was part of a common plan between the defendant and the SLP, the execution of which rendered the defendant liable for the entirety of the harm caused.

Accessory liability requires proof that the defendant: (i) acted in a way which furthered the commission of the tort by the tortfeasor; and (ii) did so in pursuance of a common design to do or secure the doing of the acts which constituted the tort.[2] The court considered that the defendant's provision of vehicles and drivers to the SLP was sufficient to facilitate the tort of the SLP (thus, the first limb of accessory liability was met). It was not satisfied, however, that the defendant intended the SLP to act tortiously at any stage (and hence there was no finding of the second limb of common design). Indeed, "at all relevant times the solutions [the defendant] was striving to apply were directed at conciliation and not at the deployment of unlawful means".

No duty of care in negligence for acts of third party

The claimants put forward three possible bases for the alleged duty of care owed by the defendant: (i) the defendant did not merely omit to prevent SLP from committing torts, but carried out certain positive acts which therefore took the case out of the scope of those authorities concerned with a mere failure to act in relation to the third party's criminal act; (ii) in any event, the circumstances of the case fell within one of the established exceptions to the general rule that there is no duty of care for the acts of third parties; or (iii) this was a novel case which justified the imposition of a duty of care by the application of the principles identified in *Caparo Industries plc v Dickman*[3] (**Caparo**).

The court acknowledged that circumstances may arise in which a defendant may be liable in negligence for the deliberate, and even criminal, acts of a third party in the absence of a common design or any element of incitement or encouragement. However, the defendant argued that it is only in particular and limited circumstances that a duty of care arises with respect to the deliberate acts of others and that none of those circumstances were present.

Acts and omissions necessary to find duty of care

The claimants argued that the fact the defendant called the SLP and provided it with material assistance in conducting its operations (even after it knew that the SLP had been using excessive force) meant that, when set against the background of the relationship between the defendant and the SLP, this was a case involving negligent acts by the defendant, rather than omissions. They sought to argue that this meant that the normal rule that a defendant is not liable for the acts of a third party did not apply. The court noted, however, that most of the claimants' particulars in their pleadings were more in the nature of omissions rather than acts, and the general rule that there was no duty of care for the acts of third parties therefore still applied. Any acts relied upon (for example, the provision to the SLP of vehicles) could all be analysed by the application of the test as to whether

they fell within the exception to that rule on the basis that they "created a source of danger" (see below).

No "established exceptions" applicable

The court considered the following exceptions to the general rule that there is no duty of care for acts of third parties:[4]

- The defendant "creates the source of danger that would not otherwise have existed". On the facts, while the defendant's management was aware of the risk of violence, it did not create that risk. The provision of vehicles, food and financial support was not "a source of danger".
- The third party who causes damages was under the "supervision or control" of the defendant. The defendant had not exercised any such supervision or control; individual employees did not give directions to the SLP and the responses of the SLP were, operationally, entirely of its own choosing.
- The defendant has "assumed a responsibility to the claimants[s] which lies within the scope of the duty" alleged. While the claimants occupied homes in the vicinity of the defendant's mine this was not sufficient to bring them within a class of people to whom the defendant had assumed a responsibility. While the SLP was present because of the defendant's activities, the circumstances fell "far short" of establishing such an assumption for the actions of the SLP. The court further noted that finding an assumption of responsibility "would open up the defendant to almost unlimited liability to a broad swathe of potential claimants within a class almost impossible to define".

Caparo

In the alternative, the claimants argued that a duty of care should be established on the basis that the case was a novel one and the so-called *Caparo* duty of care test applied (namely: that the damage was foreseeable, there was a proximate relationship, and the imposition of the duty is fair, just and reasonable). While acknowledging that the facts of the case were "undoubtedly novel", the scope of the legal duties arising were not and so the court considered that "no purpose would be served" by a detailed hypothetical consideration of what the application of that test would produce.

COMMENT

African Minerals is an interesting case for companies, particularly in the extractive industry sector, concerned about their exposure to human-rights-related risk including in relation to the acts of security forces. While, in this case, no vicarious liability or duty of care was established for the acts of third parties, the court's approach was heavily fact-driven. It is not difficult to speculate about other instances where the facts might be sufficient to establish, say, supervision or control by the defendant company over the third party necessary to show a duty of care.

On the issue of whether parent companies may be liable for the acts of foreign subsidiaries, in January 2019 the Supreme Court heard the respondents' appeal in *Lungowe v Vedanta Resources plc*.[5] The Court of Appeal in that case had confirmed that a UK parent company's duty of care may, in certain circumstances, extend to employees of a foreign subsidiary (see here).

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[1] Applying the factors identified in *Cox v Ministry of Justice* [2016] AC 660.

[2] *Fish & Fish v Sea Shepheard* [2015] AC 1229.

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

[4] Recognised in *Mitchell v Glasgow City Council* [2009] 1 AC 874.

[5] *Vedanta Resources PLC & anr v Lungowe & ors* [2017] EWCA Civ 1528.

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