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Litigation and Dispute Resolution

Review

Contents

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Anti-trust

COURT UPHOLDS CMA FINE FOR ANTI-COMPETITIVE INFORMATION EXCHANGE

(1) Balmoral Tanks Ltd (2) Balmoral Group Holdings Ltd v CMA [2019] EWCA Civ 162, 15 February 2019

The Court of Appeal has upheld the Competition and Markets Authority's (**CMA**) GBP130,000 fine against a steel water tank supplier, Balmoral Tanks Ltd (**Balmoral**), for exchanging commercially sensitive information around pricing with its competitors. The information exchange occurred at a one-off meeting at which Balmoral had refused to participate in a price-fixing cartel with these competitors. The ruling will be of particular interest to businesses which operate in a competitive market and which might be tempted to exchange pricing information or other competitively sensitive confidential information with rival businesses.

The appeal stems from a CMA investigation into a cartel arrangement between suppliers in the cylindrical galvanised steel tanks (**CGSTs**) market in the UK.

In 2016, the CMA issued two competition law infringement decisions which found that:

- four CGST suppliers had engaged in price-fixing, bid-rigging and market sharing by way of customer allocation (the **Main Cartel**); and
- three of the parties to the Main Cartel, along with Balmoral, had also exchanged commercially sensitive information regarding their current and future pricing intentions for certain types of CGSTs (the **Information Exchange Decision**).

In both cases, the CMA concluded that the parties had participated in a concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of CGSTs.[1]

The underlying facts of the Information Exchange Decision

The CMA found that the information exchange took place at a single meeting in July 2012 which lasted only 90 minutes. Balmoral had only entered the market six months previously and had been competing vigorously with the Main Cartel members, reducing prices by as much as 20%.

No doubt to restore prices to cartel levels, Balmoral was invited to join the cartel arrangement at the meeting, but declined the offer. Nonetheless, the meeting continued and the participants exchanged information relating both to specific contracts for which they were supposed to be submitting competing bids and to generic pricing strategies for certain type of CGST. The meeting was secretly recorded by the CMA.

Balmoral and its parent company (the **appellants**) were fined GBP130,000 under the Information Exchange Decision while the other undertakings were fined pursuant to the Main Cartel decision. Following an unsuccessful appeal to the Competition Appeal Tribunal (**CAT**), the appellants appealed to the Court of Appeal.

Grounds of appeal

The appellants argued that the CAT had:

- failed to recognise that the CMA's Information Exchange Decision was inconsistent with its decision that Balmoral had not been involved in the Main Cartel;
- adopted an impermissibly strict approach to the test for object infringement in the context of information exchanges;

- failed to undertake the necessary analysis on whether the information exchange had reduced uncertainty regarding pricing among the participants; and
- had erred as a matter of law in concluding that the CMA could impose a fine on Balmoral, and Balmoral alone, for its role in the information exchange infringement.

The Court of Appeal held that:

No inconsistency

The CMA's approach meant that Balmoral was held liable for no more or less than what it had done. Although the two infringement decisions had elements in common, it was appropriate to distinguish them. The Main Cartel had involved longstanding arrangements for bid-rigging, customer allocation and price-fixing whereas the information exchange involved no more than an exchange of commercially sensitive information which reduced uncertainty as to pricing. The court considered that it would have been unfair to find Balmoral complicit in the Main Cartel given that it had refused to join it.

The legal test for "object" infringement not impermissibly strictly approached

The CAT had not come close to suggesting that any exchange of pricing information between competitors constituted an "object" infringement. Instead, the CAT had provided an explanation as to why it considered the specific exchange of pricing information to be harmful to competition, for example the fact the prices discussed "went well beyond generic pricing".

A single meeting can give rise to a concerted practice

Balmoral submitted that the CAT had not considered the participants' state of knowledge before the meeting and that a single meeting, such as this one, was less likely to raise concerns than a series of meetings. The court gave this short shrift, confirming that a single meeting is capable of giving rise to a concerted practice.[2]

Fining Balmoral alone did not offend equal treatment principle

Balmoral argued that the CMA had breached the principle of equal treatment as it had only fined Balmoral under the Information Exchange Decision, and not the other participants, whose conduct at the meeting had been more egregious than that of Balmoral. The court dismissed this argument on the basis that the Main Cartel participants were in a different position to Balmoral. They had had large penalties imposed on them for their involvement in the Main Cartel and these were attributable to anti-competitive behaviour over a period that encompassed the July 2012 meeting. The CMA could not justify imposing an additional fine on these participants.

COMMENT

The ruling is a clear reminder to businesses and individuals that exchanging commercially sensitive information with a competitor, even if it is only at one meeting, can amount to a breach of competition law. It is not enough to refrain from "hard-core" cartel infringements such as price-fixing or market-sharing; rather, businesses must ensure they avoid sharing any commercially sensitive information with competitors.

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[1] Thereby infringing the Chapter 1 prohibition of the UK Competition Act 1998 and/or Article 101 of the Treaty of the Functioning of the European Union.

[2] Relying on *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* (C-8/08) EU:C:2009:343.

Arbitration

UNNAMED PRINCIPAL CAN SUE UNDER ARBITRATION AGREEMENT FOR FOREIGN LAW REMEDY

Filatona Trading Ltd & anr v Navigator Equities Ltd & ors [2019] EWHC 173 (Comm), 7 February 2019

An unnamed disclosed principal of a party to a shareholders' agreement (**SHA**) could sue under an arbitration agreement; the tribunal could also order a buy-out of shares of a foreign company, despite the remedy not being available under English law. This ruling, in which a tribunal's award was unsuccessfully challenged under the Arbitration Act 1996 (the **Act**) on the grounds of both its substantive jurisdiction (s67) and serious irregularity (s68), illustrates the English court's willingness to give effect to arbitral awards.

The dispute concerned an SHA relating to a valuable site of a textile company based in Moscow. The SHA named Mr Deripaska and Mrs Danilina (and others) as parties and provided for all disputes to be referred to arbitration under the rules of the London Court of International Arbitration.

Mr Chernukhin (not a party to the SHA) commenced arbitration proceedings against Mr Deripaska, claiming that Mrs Danilina was his nominee or agent and that, by virtue of being Mrs Danilina's disclosed principal, he was the true party to the SHA and therefore the beneficial owner of her shares (the **Shares**) in a Cypriot entity. The tribunal issued an award in favour of Mr Chernukhin and ordered Mr Deripaska to buy-out Mr Chernukhin's shares for approximately USD95 million, a Cypriot company law remedy.

The tribunal's award was subsequently challenged in the English courts by Mr Deripaska on two separate grounds: (i) under s67 of the Act (substantive jurisdiction), on the basis that the Tribunal lacked jurisdiction to adjudicate on the dispute, Mr Chernukhin not being a party to the SHA; alternatively (ii) under s68 of the Act (serious irregularity), on the basis that the tribunal had acted beyond its powers in ordering a buy-out of shares in a foreign company.

Unnamed disclosed principal can sue under an arbitration agreement

S67 challenges are conducted as *de novo* re-hearings and evidence was therefore heard from several witnesses. The court concluded, on the evidence, that Mr Chernukhin was Mrs Danilina's disclosed principal and, therefore, the true party to the SHA. However, the decision on the facts was not, of itself, determinative of the challenge to the tribunal's jurisdiction.

To that end, the Court went on to consider English case law as to whether a principal not named as a party can sue on a contract entered into by his agent, including *Aspen Underwriting Ltd & ors v Credit Europe Bank NV*[1] and *Kaefer Aislamientos de CV v AMS Drilling Mexico SA de CV*.[2] These cases had held that an undisclosed principal can sue and be sued on a contract subject to the following conditions: (i) the terms of the written contract did not confine it to the named parties; (ii) at the time of the relevant contract, the agent intended to contract on the principal's behalf; and (iii) entering into the contract was within the actual authority of the agent.

Applying conditions (ii) and (iii) to the facts, the court concluded that Mr Chernukhin had authorised Mrs Danilina to sign the SHA as his nominee, Mrs Danilina agreed to do so and Mr Deripaska knew that she did so.

As to condition (i), Mr Deripaska argued that the terms of the SHA, particularly the entire agreement clause, precluded the intervention of a disclosed principal. The court held that "very clear words" were required to show that only the named party rather than its principal was intended to have the right to perform the contract. There was nothing in the SHA which made clear that Mr Deripaska was only prepared to accept Mrs Danilina as the beneficial owner of the relevant shares. Furthermore, the terms of the SHA did not unequivocally and exhaustively identify the contracting parties.

Dismissing the s67 challenge, the court concluded that Mr Chernukhin was entitled to sue upon the SHA.

The arbitration proceedings had therefore been validly constituted.

The tribunal did have power to make buy-out order in respect of a foreign company

Mr Deripaska further submitted that the tribunal had neither jurisdiction (s67) nor the power (s68) to make a buy-out order, a remedy available under Cypriot company law in circumstances of shareholder oppression. The court considered s68 to be the more relevant provision under which to consider this challenge. It was common ground that the English court did not have the power to make a buy-out order in respect of a foreign company. Consequently, under s48(5) of the Act, which extends the powers of the English court to the tribunal, the tribunal did not have the power to do so either. However, the court considered s48(1) of the Act to be relevant. This provides that "the parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies". Thus, the question was whether the arbitration clause in the SHA, properly construed, provided the tribunal with the relevant power.

The arbitration agreement provided for "all disputes and disagreements arising from [the SHA] or in connection therewith" to be settled by arbitration. Therefore, a dispute concerning shareholder oppression under the SHA would not come before a Cypriot court but instead before an arbitral tribunal. The court held that the parties would reasonably be considered to have provided for "one-stop" adjudication. Since a buy-out remedy was the relief that could have been ordered if the dispute had been referred to a Cypriot court, the "reasonable man" would have understood that the parties intended to confer on the tribunal the power to settle the dispute through the buy-out process.

Mr Deripaska's s68 challenge on this point was therefore dismissed as were two other challenges under s68 on other grounds.

COMMENT

The court's decision to permit an unnamed disclosed principal to pursue proceedings under an arbitration agreement which does not explicitly identify him as a party confirms the court's willingness to apply agency principles in an arbitration context. This is despite the absence of Mr Chernukhin's express consent to arbitration (as a non-party to the SHA).

The case also shows the willingness of the English courts to apply the Act in support of arbitration, recognising the power of the tribunal to grant a remedy not otherwise available under English law or in the English courts. It is also a further reminder of the English courts' reluctance to allow challenges to arbitral awards.

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[1] [2018] EWCA Civ 2590.

[2] [2019] EWCA Civ 10.

Contract

DEFAULT INTEREST RATE OF ONE-MONTH LIBOR PLUS 12% NOT A PENALTY

Cargill International Trading PTE Ltd v Uttam Galva Steels Ltd [2019] EWHC 476 (Comm), 28 February 2019

In *Cargill International Trading v Uttam Galva Steels*, the High Court decided by summary judgment that a default interest rate of one-month LIBOR plus 12% was valid and enforceable. It did not amount to a penalty, it was validly incorporated into the contract and it was not illegal under Indian law.

In 2015, Cargill International Trading PTE Ltd (**Cargill**) entered into two agreements to buy steel from Uttam Galva Steels Ltd (**Uttam**). If Cargill made advance payments and Uttam then failed to either deliver the steel or pay back the money received, default compensation would accrue at a default interest rate of one-month LIBOR plus 12%. Uttam failed to fulfil its obligations and Cargill was granted summary judgment for both the advance payments and the default compensation.

On the default compensation, the High Court held as follows:

(1) The default interest rate did not amount to a penalty because: (i) Cargill's advance payments were essentially unsecured lending, which attracts a higher interest rate due to the lack of security; (ii) it was in line with the commercial norm for Indian companies comparable to Uttam; (iii) it was not imposed as a deterrent because, by defaulting, Uttam became a significantly greater credit risk (see eg *Lordsvale* v *Gambia*); (iv) there was no evidence of oppression; (v) higher default interest rates have been upheld by the English courts; and (vi) Cargill and Uttam are sophisticated parties who freely negotiated at arm's length the two agreements.

(2) The term was validly incorporated into the agreements and it was neither onerous nor unusual. Cargill and Uttam had conducted business on similar terms for the past ten years and Uttam stamped and signed every page to signify acceptance.

(3) The default interest rate was not illegal under Indian law, which only imposed a limit on non-default interest rates. Additionally, Cargill's bank account was in Singapore, not in India.

This article first appeared on Compact Contract, a blog where experts from Allen & Overy analyse the latest contract law themes and developments, and what they mean for your business.

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THIRD PARTY RIGHTS: IDENTIFICATION OF THIRD PARTY

Chudley & ors v Clydesdale Bank Plc (T/A Yorkshire Bank) [2019] EWCA Civ 344, 6 March 2019

A letter of instruction (**LoI**) between a bank and its client, which envisaged a segregated bank account for the receipt and protection of third party payments, conferred rights on the third parties under the Contracts (Rights of Third Parties) Act 1999 (the **Act**). This was despite the fact the third parties were unaware of the LoI when it was entered into. In a rare example of judicial commentary on the Act, the Court of Appeal has also held that when considering whether there is express identification of third parties as a member of a class, this can be done by construing the contract as a whole. This ruling is a helpful reminder, both to those involved in drafting commercial contracts and to potential third parties who may wish to rely on the Act.

The Act: a reminder

The Act enables a contract to confer a benefit (but not a corresponding burden) on a non-party to a contract (the **third party**), enforceable against the contractual parties, as an exception to the common law doctrine of privity of contract. Under section 1 of the Act, there are two elements that the third party must satisfy:

- intention to benefit the third party: the contract must expressly provide that the third party may enforce a term of contract, or the term purports to confer a benefit on the third party (s1(1)(a) and (b)); and
- express identification: the third party must be "expressly" identified in the contract by name, as a member of a class or as answering a particular description (s1(3)).

The facts

The case concerned the appellants' investment in a fraudulent investment property scheme in Cape Verde called Paradise Beach (the **PB project**), operated by Arck LLP (**Arck**) on behalf of the developers. The appellants deposited their investment with Arck's bank, Yorkshire Bank (the **Bank**) which it placed into Arck's general account (the **General Account**). Unbeknown to the appellants, Arck and the Bank had signed a LoI, which instructed the Bank: (i) to hold the appellants' money in a separate account (the **PB Account**); and (ii) not to allow any withdrawal before 1 August 2010 except on receipt of a solicitor's undertaking. In breach of the LoI, the Bank: (i) failed to open the PB Account, instead paying the appellants' money into the General Account which had no withdrawal safeguards; and (ii) allowed Arck to withdraw the appellants' money from the General Account without any solicitor's undertaking.

In 2012, the individuals behind Arck were convicted for fraudulently withdrawing investors' money and Arck subsequently went into liquidation. When they became aware of the existence of the LoI, the appellants issued High Court proceedings against the Bank to recover their losses. By way of reminder, the High Court found that: (i) the LoI did not constitute a binding and unconditional contract between Arck and the Bank, as there was an unsatisfied condition precedent; (ii) if, however, there had been a binding contract, then (*obiter*) the appellants would have been entitled to claim under it under the Act; and (iii) even if the Bank had been in breach of contract from which the appellants could benefit, the breach had not caused the appellants' loss.

The appellants appealed. The Court of Appeal (Flaux LJ giving the leading judgment) identified three principal issues to be determined: (i) did the LoI constitute a binding contract; (ii) if so, could the appellants benefit from it under the Act; and (iii) did the Bank's breach of contract cause the appellants' loss?

LoI constituted a binding contract

The court held that the LoI was a binding contract: there was nothing to support the existence of a condition precedent in the LoI. It was the first instance judge who had introduced the contention of a condition precedent so this point had never been pleaded and there was no

evidence put forward by the Bank as to any such condition, therefore the judge had erred in law.

Appellants could benefit from LoI under the Act

Appellants "expressly" identified as a class

The Bank argued that the use of the word "client" in "Client Account" in the LoI was insufficient to amount to the express identification of a class under s1(3): it was just part of the name of the account. To equate "client" with a class of investors (including the appellants) involved a process of implication, which was not consistent with the language of the Act, which required "express" identification: *Avramides v Colvill*.[1]

The appellants submitted that whether a third party is a member of a class can be determined by construction of the contract as a whole, relying on a different Court of Appeal case, *The Laemthong Glory (No.2)*.[2] The whole purpose of the LoI was to benefit and protect investors; as a matter of construction, the class expressly identified was Arck's clients who had invested in the PB project including the appellants.

The court recognised that implication could not be used, but stated that it was not necessary: it agreed with the appellants that the correct approach is to construe the contract as a whole. Given the purpose of the LoI, the reference to "Client Account" was therefore "express" identification of the class, namely Arck's investors in the PB project. Since the appellants were within that class, s1(3) was satisfied. The court also helpfully clarified that *Avramides*, which appears to prohibit the use of construction, in fact does allow it.

LoI was intended to benefit third party

The Bank argued that even if the appellants could rely on the word "client" to satisfy s1(3), they could not also rely on it to satisfy s1(1)(b) since the two sub-sections were cumulative. The court disagreed: given the LoI was intended to protect investors' money, the provision of a segregated account (the PB Account) was clearly intended to benefit those investors (albeit it had not been opened). Whilst it was "serendipitous" that the appellants could benefit from the LoI, given they had not been aware of it when it was entered into between the Bank and Arck, it was not a requirement of the Act that a third party had to be aware of the contract when it was entered into, or at any particular time thereafter.

Bank's breach of contract caused appellants' loss

The loss suffered by the appellants as a result of the Bank's breach was the payment out of their monies without the required solicitor's undertaking. Contrary to the judge's decision, it was not necessary for them to show what would have happened to the monies if there had not been a breach: ie they did not have to prove the investment would otherwise have been successful.

COMMENT

This case illustrates the court's willingness to adopt an adaptable and commercial approach in looking at the purpose of a contract when considering third party rights. It is also helpful that the court has clarified two hitherto apparently conflicting Court of Appeal judgments, by holding that construction of the whole contract can be deployed to ascertain whether a class is expressly identified under s1(3).

On the other hand, given that the court has demonstrated a more flexible approach to the Act, particular care should be taken when drafting contracts not inadvertently to create third party rights if this is not what is intended: consider, if necessary, including a clause which makes it clear that the parties did not intend the contract (or specific terms of it) to be enforceable by third parties in accordance with s1(2) of the Act.

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[1] [2006] EWCA Civ 1553.

[2] [2005] EWCA Civ 519.

BREACH OF WARRANTY REGARDING PROJECTIONS AS LABOUR AND OTHER COSTS NOT INCLUDED

Triumph Controls UK Ltd & anr v Primus International Holding Co & ors [2019] EWCH 565 (TCC), 11 March 2019

Triumph v Primus included all the usual elements of a warranty dispute: an attempt to avoid the limitations by arguing a claim was not a "warranty claim"; an argument over disclosure; and a defence around the service and contents of the notice of breach. Ultimately though, it was a warranty about the careful preparation of projections that was the seller's downfall.

Triumph bought shares in three Primus companies for USD76.5m. They manufactured components for the aerospace industry. They were loss-making, but projected to become profitable in a few years. In the event, the financial performance of the target companies significantly worsened.

Triumph claimed breach of various warranties, including that there had been no breach of material contracts as at completion and that the forward-looking financial projections for the target companies had been honestly and carefully prepared. It also claimed that Primus had breached its obligation to notify Triumph immediately before completion of any breach of warranty. Triumph argued that this was, technically, not a claim for breach of warranty, and so not subject to the USD15m cap (or the other limitations, such as the USD1.5m deductible and 18-month time limit) on Primus' liability for breach of warranty.

In its defence, Primus argued that the notice of breach had not been served on the right people, was not adequate and that any breaches of material contracts had been disclosed.

Inadequate notice of breach of warranty

It is very common in a warranty dispute for the seller to claim that the notice requirements have not been complied with. On this occasion the seller's arguments were unsuccessful, but the case is a reminder that courts interpret notice provisions strictly, and compliance with the precise wording is key.

Avoiding the limitations

Another tactic, this time by buyers, is to try framing a claim so that it is not caught by the cap, time limit or limitations. Here Triumph's approach failed. The court held that to say that a failure to notify immediately before completion of any breach was not a claim for breach of warranty under the sale and purchase agreement would defeat the commercial purpose of the limitations.

Adequacy of disclosure

The warranties were subject to matters "fairly and clearly disclosed … (with sufficient detail to identify the nature of the matter disclosed)". The more usual formulation "nature and scope of the matter disclosed" was not used. Nor did the formulation "fully and fairly disclosed" appear. So disclosures about the nature of operational failings at the target companies were sufficient, even though they didn't necessarily reveal the full extent of those failings or of their impact on the targets' business.

In other words, the drafting really matters: the adequacy of disclosure will always be judged against the specific wording.

Forward-looking warranties

The warranty was not that the projections were accurate, only that they had been "carefully prepared". But that still led to liability when additional labour and other costs were incurred but had not been built into the projections.

This article first appeared on Compact Contract, a blog where experts from Allen & Overy analyse the latest contract law themes and developments, and what they mean for your business.

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Disclosure

DISCLOSURE OBLIGATIONS OVERRIDE FOREIGN CRIMINAL LAW BREACH

Bank Mellat v HM Treasury [2019] EWCA Civ 449, 15 March 2019

The Court of Appeal has ordered production of unredacted documents, subject to confidentiality measures, in the interests of ensuring a fair trial, even though complying with this order would place the disclosing party in breach of Iranian criminal law. The case illustrates how the English court exercises its discretion to make such an order, concluding here that the importance of the documents to the fair disposal of the proceedings outweighed the risk of prosecution.

Iranian bank, Bank Mellat (the **Bank**), brought proceedings in the English court against HM Treasury (**HMT**) claiming that sanctions imposed by HMT in 2009 (the **2009 Sanctions**), subsequently found by the Supreme Court to be unlawful, had cost it a number of transactions that would otherwise have completed. The Bank produced redacted customer banking data in thousands of documents on the basis that it had a "right or duty to withhold" inspection pursuant to CPR Part 31.19(3), because they contained confidential information. HMT subsequently sought - and was granted – an order (the **Order**) that unredacted versions of these documents be produced for inspection (through a confidentiality club) with each customer's details replaced with a cipher, along with a master list of the customers to whom each cipher related. This master list would be provided only to members of the confidentiality club and not used in open court. The Bank appealed, on the basis that complying with the Order (in particular, providing the master list that would enable the customers to be identified) would place it in breach of criminal law in Iran.

The Court of Appeal unanimously dismissed the appeal (Gross LJ giving the leading judgment). The principal issues on the appeal were: (i) the actual risk of prosecution faced by the Bank in Iran should it comply with the order; (ii) the importance of production of the documents in unredacted form to the fair disposal of the trial; and (iii) the discretionary balancing exercise for the Court, weighing the risk under (i) against the need for the documents under (ii).

No actual risk of prosecution

It was common ground that providing the unredacted documents and master list would place the Bank in breach of Iranian law; however, the question for the court was whether there was an *actual* (not hypothetical) risk that this breach would lead to *prosecution*. The likelihood of any subsequent sanction arising from prosecution was not a relevant factor.

The Court was critical of the Bank's expert, whose evidence about whether production of the unredacted documents would be a breach of Iranian law was not sufficient to support his conclusion that this would carry a "very real" risk of prosecution, when no relevant examples of prosecution were cited. The court also doubted the expert's expertise in relation to the "real risk" point. Further, there was "no reason to suppose" that the Iranian prosecuting authorities lacked discretion as to whether to prosecute, and the court observed that it "cannot be overlooked" that compliance with the Order "would assist in the prosecution of the Bank's very substantial claim." As such, it expected a "consideration of this nature to weigh with the Iranian prosecution authorities".

The Court concluded that, in the circumstances, there was an actual risk of prosecution that was more than "purely hypothetical" (in contrast with authorities on the 'French Blocking Statute', which prohibits the use of certain documents as evidence in foreign proceedings but has been held by the English court to present only a hypothetical risk of prosecution). Nonetheless, the Court agreed with the High Court that this actual risk was less serious than suggested by the expert. Even if there had been compelling evidence to the contrary, it would not necessarily have been determinative.

Production of unredacted documents necessary for fair disposal of trial

Much of the Bank's case against HMT related to some 2,361 transactions it said it had lost because of the unlawful sanctions. There was a vital need for HMT to be able to test the claim against it, by establishing whether the 2009 Sanctions were indeed the reason that certain transactions did not complete. The court accepted that unredacted customer information would help HMT test whether in fact some of the transactions did not complete for other reasons, which may have been customer-specific (such as insolvency) or related to other sanctions, or alternatively to discover whether some of the transactions did in fact complete but by other means or with other companies in the same group. Given the vast number of documents involved and the likely need for sampling, the trial would be "fraught with risk" if only ciphers and no master list were disclosed, and such a decision would be almost impossible to undo should it later transpire that the customer identities were essential. The court concluded that "the fair disposal of this trial cries out for production of the Iranian documents unredacted".

Striking the right balance: unredacted documents should be produced

The Court of Appeal upheld the Order finding that, while there was an actual risk, this did not outweigh the need for the documents to be produced to ensure a fair trial. In reaching this decision, it stressed that it took "comity very much into account" and intended no disrespect for the relevant principles of Iranian law. Among the features of the case particularly relevant to the court's conclusion were the following:

- With regard to the actual risk of prosecution, particularly since no evidence had been adduced to show that the Iranian prosecuting authorities lack discretion as to decisions to prosecute. In addition, the Iranian court could override confidentiality by a domestic court order.
- The Order provided for a confidentiality club which meant that the unredacted information would not be ventilated in open court.
- The need for production of the documents arose from procedural requirements to ensure a fair disposal of the trial. Such procedural requirements are a matter for the law of the forum, and the court was entitled to conclude in this case that its procedural requirements should not be overridden by foreign law.

COMMENT

In deciding this appeal, the Court of Appeal was unapologetic about the primacy of English procedural law in the English court proceedings and the need for parties engaged in litigation in this jurisdiction to play by the "rules of the game". This case serves as a useful reminder of the principles that will guide the court's decision to exercise its discretion in these situations. In particular:

- disclosure is a procedural matter, and foreign law cannot be allowed to override the English court's

ability to conduct proceedings in accordance with English procedural law;

- while the court will carefully weigh the actual risk of prosecution against the importance of the documents to the proceedings, the existence of an actual risk will not necessarily be enough to persuade the court not to order disclosure: it will, however, be "mindful" of it in the balancing exercise; and
- an order that would put a party in breach of foreign criminal law will not be made lightly by the English court, but the important message is that it is certainly not precluded from doing so.

Expert evidence of foreign law played an important role in this case. Foreign parties seeking to challenge the production of documents on this basis should consider at the outset any potential consequences in their home jurisdiction which may be relevant, and bear in mind the importance of adducing factual evidence of past prosecutions that goes beyond the theoretical breach of foreign law.

Parties in this position should also consider ways in which an order for production could be tailored to address their concerns about foreign law breach. In this case the court noted, disapprovingly, that the Bank had adopted an "all or nothing" approach and had not engaged with HMT in relation to the creation or constitution of a confidentiality club.

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Privilege

"WITHOUT PREJUDICE" COMMUNICATIONS INADMISSIBLE TO ANSWER ALLEGATIONS OF REASONABLENESS OF SETTLEMENT

Christopher James Briggs & ors v Alexander Clay & ors [2019] EWHC 102 (Ch), 25 February 2019

"Without prejudice" (**WP**) communications cannot be admitted to answer allegations made in related proceedings where the rights of the party to the WP communications had not been finally determined. It was not necessary to admit the WP communications in order to resolve the issues in question, and moreover this would adversely affect the legitimate protection afforded to the parties to the WP communications. This decision demonstrates the court's focus on preserving public policy when considering exceptions to the WP rule and that, whilst exceptions to it are not closed, they will only be applied in very limited and precise circumstances.

The claimants sued, *inter alia*, both Aon (**Aon**) and its ex-lawyers (the **Lawyer Defendants**) in professional negligence in relation to a pension scheme. The Defendant Lawyers had represented the claimants in WP negotiations with Aon, but these failed (the **Failed Settlement**) and led to the negligence proceedings. In its defence, Aon alleged, *inter alia*, that the Lawyer Defendants had been negligent in relation to the Failed Settlement. The Lawyer Defendants, who had represented the claimants, therefore sought to rely on the WP communications between the claimants and Aon (the **WP Communications**) which preceded the Failed Settlement. Aon applied for a declaration that the WP Communications were inadmissible. The Lawyer Defendants relied, *inter alia*, on the *Muller v Linsley*[1] exception to the WP rule.

***Muller:* a reminder**

In *Muller*, the Court of Appeal ordered WP correspondence between A and B to be produced to C,

as part of a different, but related, claim between A and C, as to whether the settlement reached between A and B had been reasonable. This was because C had pleaded the issue of the reasonableness of the settlement between A and B on which the court could not adjudicate unless the WP correspondence was disclosed.

***Muller* exception did not apply**

The court held that the Lawyer Defendants could not rely on *Muller*, because: (i) Aon's rights had not yet been finally determined; and (ii) the issues were justiciable without the need for the WP Communications to be disclosed.

Aon's rights had not been finally determined

The court noted that the WP Communications in issue were still 'live' as they were made in an attempt to settle current negligence claims between the claimants and Aon. Where negotiations are being relied upon to prove some collateral matter (eg reasonable mitigation of loss) and the other party to the WP Communications is unaffected by the claim, the *Muller* exception is "readily applicable".

However, Aon's rights had not been finally determined; the very claim against Aon being negotiated in the WP Communications was pending and if no compromise was reached it would have to be decided by the court in these proceedings. This was a "significant and potentially important difference" from *Muller*. Aon therefore had a "legitimate continuing interest" in the broad protection conferred by the WP rule. If the WP Communications were deemed admissible, then Aon would lose the very protection the WP rule was intended to confer: namely the confidentiality of the negotiations to try to settle the negligence claim against it.

The issues were justiciable without disclosure of the WP Communications

The court also decided that the fact it was Aon which had made the allegations of negligence against the Defendant Lawyers made no difference: "if making allegations against another party to proceedings takes one outside the operation of the [WP] rule, the very foundation of the rule would be undermined". However, there might be qualifications to this, for example, if (as in *Muller*) an issue would *only* be justiciable upon proof of WP negotiations: a party "cannot at one and the same time raise an issue to be tried and rely on [WP] privilege to prevent the court from seeing the evidence that is needed to decide it". However, the court pointed out that the *Muller* exception has not previously been held to apply in cases of WP negotiations relating to the very claim before the court (as was the case here). For the exception to arise it must be necessary that the material be admitted to resolve an issue raised by a party to the WP negotiations (which here would be Aon's allegations as to the Defendant Lawyers' negligence), in circumstances where the legitimate protection given to the parties to the negotiations was not adversely affected. On the facts the court found it was not necessary to admit the WP Communications in relation to any elements of the claim as this could be objectively determined from other documents and open correspondence.

COMMENT

In concluding that *Muller* did not apply on the facts, the court sent out a strong message that the application of *Muller* will be kept within narrow limits. Whilst the exceptions to the WP rule are not closed, a party seeking to establish an exception will have an uphill struggle: the court made it clear that a case would have to fall within one of the recognised exceptions to the WP rule or else amount to a "principled and incremental extension of one". Had the WP Communications been treated as

admissible this would have created a potentially broad exception to the WP rule, one where the interests of justice require it. The court was clearly mindful that admitting such negotiations "would be likely significantly to undermine the policy of encouraging parties to attempt to settle disputes in any multi-party litigation".

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[1] [1994] EWCA Civ 39.

Procedure

VEDANTA: SUPREME COURT RULES THAT ZAMBIANS CAN SEEK LEGAL REDRESS IN THE UK AGAINST PARENT COMPANY

Vedanta Resources Plc & anr v Lungowe & ors [2019] UKSC 20, 10 April 2019

The UK Supreme Court has decided that a claim for negligence and breach of statutory duty against a Zambian mining company and its English parent can be heard by the English courts. The much anticipated decision has important ramifications for British multinationals whose subsidiaries and suppliers operate abroad, particularly in those regions where there is a higher risk of adverse environmental and human rights impacts and claimants face practical barriers to accessing effective judicial remedies. It also is an important decision for potential claimants motivated to seek access to judicial remedies against multinational corporations in their home jurisdictions. Here we discuss the most salient points from the decision and what it means for the environmental and human rights policies and practices of UK domiciled multinational companies, and the litigation strategies of potential claimants.

Background

The claimants in this case are 1,826 villagers from the Chingola District of Zambia, home to a copper mine operated by Zambian company Konkola Copper Mines plc (**KCM**). In 2015, these villagers lodged a claim in the English courts against KCM and its English parent company, Vedanta Resources PLC (**Vedanta**), alleging that their health and farming activities had been damaged by toxic water pollution caused by the mine. KCM and Vedanta challenged the jurisdiction of the English courts to hear this claim.

The main findings

The Supreme Court held, in line with the High Court and the Court of Appeal, that the English courts may hear the claim against both Vedanta and KCM. It made three important findings, each considered in more detail below:

(i) it affirmed the potential liability of parent companies in relation to the activities of their subsidiaries, noting that everything depends on the extent to which, and the way in which, the parent company takes over, intervenes in, controls, supervises or advises on the relevant operations of the subsidiary;

(ii) it overruled the lower courts and found that, where a parent company has submitted to the jurisdiction of the relevant foreign court, the risk of irreconcilable judgments may be said to arise from the claimant's choice to, nevertheless, sue the parent in England and therefore may not justify the English court accepting jurisdiction over a foreign subsidiary; **but**

(iii) it also found that, where there are serious practical barriers to claimants obtaining substantial justice in their home jurisdictions, their claims against the foreign subsidiary may still be heard by the English courts.

In all areas of the case, the Supreme Court was reluctant to interfere with the findings of fact made by the High Court. It emphasised that the standard of proof is very low at this jurisdictional stage – it is merely designed to root out cases that are not fit for trial. The case can now proceed to a full trial on the merits and the focus can turn to the resolution of factual disputes between the parties.

Claim against Vedanta could not be stayed

Before making its main findings, the Supreme Court first dealt with a preliminary issue as to whether it should exercise jurisdiction over Vedanta. It observed that it essentially had "one hand tied behind its back" with respect to this question. Even if it wanted to, it could not have stayed the proceedings against Vedanta on the grounds that Zambia was a more convenient forum to hear claims against it (a *forum non conveniens* argument). It had to accept jurisdiction over Vedanta because of EU law, in particular Article 4.1 of the Recast Brussels Regulation[1], which provides that claimants have the right to sue EU-domiciled defendants in their home country courts, and a European Court of Justice decision, *Owusu v Jackson*[2] , establishing that proceedings brought in reliance on Article 4.1 cannot be stayed on *forum non conveniens* grounds. It was not an abuse of EU law for the claimants to take advantage of this right, as Vedanta contended.

The situation was not so simple with respect to KCM, however. Jurisdiction over a non-EU-domiciled defendant, whom the claimants seek to join to a case against a defendant who is domiciled in England (the "anchor defendant"), is obtained by satisfying the so-called "necessary or proper party" gateway tests.[3] One of those tests requires that there is "a real issue…which it is reasonable for the court to try" between the claimant and the English anchor defendant (in this case, Vedanta). The claimants therefore needed to show that it was at least arguable that Vedanta could be held liable for the alleged acts of its Zambian subsidiary, KCM.

Vedanta was potentially liable for KCM's activities

The Supreme Court dismissed the popular, but misguided, notion that the English courts would be imposing a new duty of care on parent companies in relation to harm caused to third parties by the activities of a subsidiary. The parent-subsidiary relationship (essentially, the ownership by one company of all or the majority of the shares of another company) by its nature may afford the parent the opportunity to assume such a duty. Whether it actually has done so depends on the extent to which, and the way in which, the parent has in fact availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of that third party. The Supreme Court suggested that there was nothing novel in this at all.

After affirming that it all depends on the facts, the Supreme Court cautioned against attempts to identify general principles to guide the factual analysis. The Court of Appeal had attempted to "shoehorn" all cases of the parent's liability into instances where the parent had engaged in "management" or given "advice"; while in an earlier case it had used the "straitjacket" of "superior knowledge" of systems of work.[4] The Supreme Court observed that, while these were helpful categories for the purposes of analysis, they were merely examples. There is no limit on the types of activities that might demonstrate that a parent exercised *de facto* control over, or close involvement in, the activities of a subsidiary.

In the instant case, the Supreme Court agreed with the High Court that certain materials showed that there was a triable issue as to whether Vedanta had intervened sufficiently in the conduct of the operations of the mine to have assumed a duty of care. The Supreme Court focused in particular on a report (entitled "Embedding Sustainability") in which it found Vedanta to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, including their implementation by training, monitoring and enforcement.

Risk of irreconcilable judgments not a "trump card"

Although the English courts' hands are tied with respect to jurisdiction over EU-domiciled defendants, the *forum non conveniens* argument remains open to non-EU-domiciled defendants. Thus, a further requirement that had to be satisfied under the "necessary or proper party" gateway for jurisdiction over KCM was whether Zambia was the most appropriate forum to hear the case against it, even though there was a real issue triable issue to be heard in the UK against Vedanta.

A *forum non conveniens* analysis requires a summary examination of connecting factors between the case and the jurisdictions in which it could be litigated. Those factors include matters of practical convenience, the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred. Zambia was the proper place for the claim against KCM to be tried according to these connecting factors. However, the High Court had concluded that, despite this, the case against KCM should proceed in the UK simply because a case would also proceed against Vedanta in England, and the risk of irreconcilable judgments was "unthinkable". The Court of Appeal affirmed this decision.

The Supreme Court overruled the lower courts on this point and, in doing so, has changed English *forum non conveniens* jurisprudence. It held that, if an English anchor defendant indicates that it is willing to submit to the jurisdiction of a foreign court (as Vedanta did), the risk of irreconcilable judgments would no longer be a "trump card" to assert jurisdiction over a subsidiary in the UK. The risk of irreconcilable judgments becomes a risk of the claimants' own making and may not justify the courts' acceptance of jurisdiction over the subsidiary (in this case KCM).

Claimants unlikely to obtain substantial justice in Zambia

After concluding that Zambia was the proper place for the case against KCM to be tried, the Supreme Court still had to satisfy itself that there was cogent evidence that the claimants could not obtain substantial justice against KCM in Zambia. If so, the Court could still permit service of English proceedings on KCM.

The Supreme Court agreed with the High Court that the enquiry was not about the independence of the Zambian judiciary or the availability of procedures for mass claims in Zambia. The English courts were not reviewing the Zambian legal system, but rather evidence about whether the particular claimants would get access to justice if their claims were pursued in Zambia. On that basis, despite an intervention by the Zambian Attorney General, the Supreme Court upheld the High Court's finding that there was a real risk that the claimants would not have access to substantial justice in Zambia.

The Supreme Court cited two principal factors:

- legal aid was unavailable and conditional fee arrangements are illegal in Zambia, meaning that, even if lawyers were willing to act *pro bono*, the claimants would still have had to partially fund the litigation, which would have made it essentially impossible for the villagers to bring their claims to court; and

- the claimants would have been unlikely to find a Zambian legal team with suitable expertise, sufficient resources and experience to manage an environmental case of this scale and complexity against a sophisticated and well-resourced opponent.

Thus, the Supreme Court found that, overall, Zambia was not the proper forum for the claim against KCM on the grounds that the claimants would have been unlikely to obtain substantial justice there. As a result, the claims against both Vedanta and KCM can now proceed to a review of their merits in the English courts.

COMMENT

In the hours after the judgment in *Vedanta* was handed down, commentators began raising concerns about the Supreme Court's finding that Vedanta's group-wide sustainability policy and method of implementing it suggested that there was a triable issue as to whether Vedanta had assumed a duty of care to the claimants. These commentators fear that the decision will prompt companies to scrap their environmental and social policies and take a hands-off approach towards the risks associated with their subsidiaries.

This concern seems overblown. Most companies will realise that the legal risks associated with not adopting such policies, and seeking to exercise or gain leverage to influence their subsidiaries' conduct with respect to them, far outweigh the legal risks of being seen to have assumed a duty of care. Even if the English courts are unwilling to impose such a duty, it is, in essence, no longer an option for companies today to avoid adopting such policies and practices, as regulators, legislators, shareholders, contractual counterparties, lenders and insurers demand that they do so and mete out penalties if they do not.

Moreover, the potential existence of a duty of care is not the end of the story: even if one can be established, no finding of negligence will be made unless it can also be shown that the parent company breached that duty, causing harm to a claimant. Most companies recognise that an important way to mitigate the risk of being sued successfully in England is to take positive steps to ensure compliance with group-wide policies. The primary aim is, naturally, to avoid any breach, but the ancillary effect may be to ensure that, if there is a breach, the parent company can show that it discharged its duty of care to the required standard.

The other concern that has been expressed arises from the Supreme Court's approval of the Court of Appeal's comments in *Unilever*[5] that the legal principles that apply to whether a duty of care is owed by a parent for the actions of a subsidiary "are the same as would apply in relation to the question whether any third party … was subject to a duty of care in tort owed to a claimant dealing with the subsidiary". This might be taken to suggest that a company could have a duty of care in relation to the actions of, for example, its suppliers, if it requires those suppliers to comply with its environmental and social policies and enforces such compliance. However, while the same legal principles will apply, the factual circumstances are obviously quite different. The Supreme Court noted that the level of management and control of a parent over a subsidiary will vary from, at one extreme, where the parent is "no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries" to, at the other end, where the group's businesses are "carried on as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant".

While the Supreme Court did not seek to draw a firm line as to where on this continuum a duty of care might be said to arise, it is likely to be a rare situation where the level of control of a customer over its supplier is such that it can be regarded as akin to being part of the same corporate group, let alone to such an extent that the legal boundaries between the entities have started to break down.

A few companies may be relieved by the one definitive change in the law brought about by the *Vedanta* decision. With the risk of irreconcilable judgments no longer a determinative factor in English *forum non conveniens* analysis, more parent companies are likely to submit to the jurisdiction of the courts where the subsidiary is located when being sued jointly with their subsidiaries in England.

This change will be of little comfort, however, to those companies that operate in the poorest countries of the world where similar arguments as to what the court termed "access to justice" are likely to be relevant. This decision suggests that the English courts may be more willing to hear claims against English parent companies of multinationals in respect of activities undertaken by their subsidiaries. Thus, despite the new law on irreconcilable judgments, the decision suggests that there is likely to be an increase in the cases before the English courts regarding the alleged environmental and human rights impacts of multinational businesses. For many, this will be a reminder to ensure that the highest standards of environmental behaviour are applied when operating internationally. It also confirms that companies should devise robust environmental and human rights policies and ways to enforce them without taking control of the operation and day-to-day activities of their subsidiaries.

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[1] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[2] (Case C-281/02) [2005] QB 801.

[3] Paragraph 3.1 of CPR Practice Direction 6B.

[4] This was a reference to the four *indicia* in *Chandler v Cape plc* [2012] EWCA Civ 525 when considering whether a parent company assumes liability for the actions of its subsidiary. These are: (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge.

[5] *AAA & ors v Unilever Plc & anr* [2018] EWCA Civ 1532.

Litigation Review consolidated index 2019

Procedure

Vedanta: Supreme Court rules that Zambians can seek legal redress in the UK against parent company: *Vedanta Resources PLC & anr v Lungowe & ors* (Apr)

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* (Mar)

Corporate trustees – considerations in seeking declaratory relief: *Bank of New York Mellon v Essar Steel India Ltd* (Jan)

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* (Mar)

Mining company not liable for acts of police: *Kadie Kalma v African Minerals Ltd & ors* (Mar)

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

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