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Litigation and Dispute Resolution

Review

Contents

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Arbitration

DEFINING THE SEAT OF ARBITRATION: WHEN 'VENUE' MEANS LEGAL SEAT

Process & Industrial Developments Ltd v Nigeria [2019] EWHC 2241 (Comm), 16 August 2019

In proceedings to enforce a USD6.6 billion arbitration award against the Federal Republic of Nigeria (**Nigeria**), which was resisted on the grounds that the arbitration was not seated in England, the court held that a reference to 'venue' in an arbitration agreement referred to the legal seat. Nigeria further argued that enforcement should nevertheless be refused on public policy grounds because of the allegedly excessive amount awarded. That was rejected, with the court reaffirming the strong public policy in favour of enforcement.

The claimant, Process and Industrial Developments Ltd (**P&ID**) applied to the English court to enforce a USD6.6bn arbitration award against Nigeria. Nigeria resisted enforcement, claiming that the arbitration was seated in Nigeria and so enforcement in the English court was not an option under s66 Arbitration Act 1996. Nigeria also contended that, even if enforcement were possible, it should be refused on public policy grounds.

The "venue" of the arbitration

The arbitration concerned a Gas Supply and Processing Agreement (the **GSPA**) relating to the supply and processing of natural gas in Nigeria. The GSPA was governed by Nigerian law and provided that, in the event of dispute, a party could serve notice of arbitration under the rules of the Nigerian Arbitration and Conciliation Act (Cap A18 LFN 2004) (the **Nigerian ACA**) which, unless otherwise provided in the GSPA, would apply to the dispute. The arbitration agreement also provided that "[t]he venue of the arbitration shall be London, England or otherwise as agreed between the Parties".

A dispute arose and P&ID commenced arbitration in London. Nigeria participated in proceedings and the appointed tribunal issued two part final awards, the first with regards to preliminary matters, and the second with regards to liability, finding in favour of P&ID (the **Liability Award**). The final phase on damages was to follow.

Nigeria applied to the English courts to set aside the Liability Award on the grounds of serious irregularity. That application was rejected. Nigeria then applied to the Nigerian courts to set aside the award. Before the Nigerian courts ruled on the set aside application, the tribunal issued a procedural order confirming that the seat of arbitration was London, England.

The application to set aside the Liability Award in Nigeria was successful. However, because the tribunal had found that the legal seat was England, it did not consider the Nigerian courts to have the power to set aside the award. The arbitration therefore continued, with Nigeria participating but maintaining its position with regards to the set aside of the Liability Award. The tribunal issued its Final Award. P&ID applied to the English courts to enforce that award, leading to the current decision.

Determining the seat of the arbitration

The issue of the legal seat arose in enforcement proceedings. Nigeria argued that the seat was Nigeria, and that "venue" in the arbitration agreement was intended to refer only to the physical location of hearings. Conversely, P&ID maintained that the seat was England and that "venue" referred to the legal seat of the arbitration. As the tribunal had already ruled on the matter (and this has not been challenged by Nigeria) the court considered that it was no longer open to Nigeria

to re-open this question. The court went on to confirm that, in any event, the tribunal had reached the correct decision on the seat. It was agreed that the principles of construction under Nigerian law were the same as under English law. The court also took into account the incorporation of the rules of the Nigerian ACA, which included rules for determining the legal seat. The court concluded that the seat was England because:

- The clause referred to venue "of the arbitration", implying that it would apply to the whole proceedings. This was compared with the language used in the Nigerian ACA to refer to the physical location, for example where a tribunal may "meet" or "hear witnesses, experts or the parties".
- The clause stated that the venue of the arbitration "shall be" London. If the reference to "venue" was to where the hearings would take place, it would be inconvenient for this to be in London given the location of the parties. The court reasoned that this was not something that the parties were likely to have intended. In addition, the arbitration agreement allowed the "venue" to be changed only by the parties, not the tribunal. The selection of the hearing venue is typically decided by the arbitrators, further indicating that the parties intended to refer to the legal seat.
- Reference to the rules of the Nigerian ACA was not inconsistent with the choice of England as the seat. Any non-mandatory provisions of the Arbitration Act 1996 were displaced and only the mandatory provisions would continue to apply.

Public policy reasons to refuse enforcement

The court then turned to Nigeria's argument that enforcement should be refused on public policy grounds because the damages awarded were so high that that they amounted to an unenforceable penalty. The court accepted that, in principle, it could refuse enforcement of an award on public policy grounds. However, there was no public policy requiring the court to refuse to enforce an award which is intended to award compensatory damages, even if the tribunal had made an error of fact or law in arriving at those damages. The court emphasised that the award could have been challenged by Nigeria prior to the enforcement proceedings, but Nigeria had failed to do so.

COMMENT

The seat is a key factor in any arbitration. It provides a "home" for the arbitration, determines the law governing the relationship between the tribunal and the courts, and also determines which court has supervisory jurisdiction over the arbitration (giving them the power to, among other things, set aside an award). The seat will also determine where the award has been made, which is significant when trying to enforce the award.

The physical location of an arbitration does not have the same legal significance. Generally speaking, the location is decided based on convenience of all involved. It does not need to be (and frequently isn't) the same as the legal seat of the arbitration.

It is important for parties to designate the legal seat of an arbitration in their arbitration agreement. This case underlines the benefits of using clear terms when referring to the intended seat in an arbitration agreement to ensure that the legal seat is where the parties intended and to avoid unnecessary procedural disputes.

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Conflict of laws

ENGLISH JURISDICTION CLAUSE BINDING ANCHOR DEFENDANTS DECISIVE IN COURT'S CONCLUSION THAT ENGLAND IS PROPER FORUM

E, D & F Man Capital Markets Ltd v Come Harvest Ltd & ors [2019] EWHC 1661 (Comm), 4 July 2019

The High Court distinguished the Supreme Court decision of *Lungowe v Vedanta Resources plc* (***Vedanta***)[1], giving more weight to the desirability of avoiding multiplicity of actions and the risk of inconsistent judgments when concluding that England was clearly the proper place to bring claims against a defendant against whom proceedings had previously been issued in Singapore. The presence of an exclusive English jurisdiction clause between the claimant and the anchor defendants made England the only jurisdiction where a single composite forum for all claims against all parties could be achieved.

In 2016, the claimant (**MCM**) entered into various commodities agreements (the **Master Agreements**) with two Hong Kong companies, Come Harvest (**D1**) and Mega Wealth (**D2**). The Master Agreements were governed by English law and contained exclusive English jurisdiction clauses. Under the Master Agreements, subsequent contracts were entered by which D1 and D2 sold nickel to MCM and MCM made payments upon provision of warehouse receipts. The warehouses which stored the nickel were located in Malaysia, Singapore and South Korea. A dispute arose as to the authenticity of these receipts, the majority of which had been issued to the order of a Singaporean entity (**Straits**).

In May 2017, MCM commenced pre-action disclosure proceedings against Straits in Singapore (the **Singapore proceedings**). Subsequently, MCM issued proceedings against D1 and D2 in the English courts. MCM had indicated to the Singaporean court that it intended to commence substantive proceedings against Straits there.[2] MCM did not reveal the existence of the English proceedings to Straits or to the Singapore court until March 2018. After documentation came to light which appeared to implicate Straits in the alleged fraud, in September 2018 MCM sought to join Straits to the English proceedings. Although the Singapore proceedings were still on foot at this time, MCM accepted as part of its application that it would discontinue the Singapore appeal if so required, and ultimately did so in February 2019.

On 23 November 2018, the English court granted MCM permission to serve proceedings out of the jurisdiction on Straits in Singapore. Straits then challenged the jurisdiction of the English court.

Jurisdiction challenge

The challenge came before Daniel Toledano QC (sitting as a deputy Judge of the High Court). The judge formulated the issue as being whether MCM was entitled to change its mind so as to pursue Straits in England or whether its conduct (ie conveying the impression to the Singapore court that it intended to bring substantive proceedings against Straits in Singapore) precluded such a change of mind or had the effect of rendering Singapore and not England the proper place in which to pursue Straits.

Grant of permission to serve out of the jurisdiction

To obtain permission to serve out, MCM needed to satisfy the court (on paper and without notice) of three matters (as restated in *AK Investments v Kyrgyz Mobil*[3]):

- there is a serious issue to be tried on the merits in relation to each alleged cause of action;

- there is a good arguable case that each cause of action falls within one or more jurisdictional gateway/s; and
- in all the circumstances, the court ought to exercise its discretion to permit service out of the jurisdiction. The court will only do so if it is satisfied that England is the proper place in which to bring the claim.

The principal gateway relied upon by MCM was that Straits was a "necessary and proper party" to a claim that had been served on D1 and D2 (and that is reasonable for the court to try).[4] Straits accepted that the first and second limbs had been satisfied. The jurisdiction challenge focused on the third limb of this test.

Proper place in which to bring the claim – consider all defendants

CPR 6.37(3) provides that "The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim". This gives expression to the well-established *forum conveniens* test whereby the court must consider the interests of all parties and the ends of justice in identifying a suitable forum.[5] In *Vedanta*, the Supreme Court found that the *forum conveniens* test is applicable to a case as a whole. In other words, the court should consider the interests of all parties, including any anchor defendants.

Multiplicity of proceedings – are they a trump card?

In *Vedanta*, the Supreme Court held that the risk of irreconcilable judgments by different courts is not a "trump card" in favour of having proceedings all in one place if that risk arises purely from a party's choice to sue one of the parties in England rather than, as was possible in that case, against both of the parties in Zambia.

Straits sought to rely on this concept of choice, claiming MCM exercised a choice at the outset to commence the Singapore proceedings and should have been held to this choice which it said continued to exert a "gravitational pull" towards Singapore. Straits even suggested MCM could have requested that D1 and D2 forgo their rights under the exclusive English jurisdiction clauses so all claims against all parties could be brought in Singapore.

The court rejected Straits' submissions, holding that MCM never had a straightforward choice that would have enabled it to sue all parties in Singapore. Rather, it was at all times bound by the English exclusive jurisdiction clauses in the Master Agreements in relation to claims against D1 and D2 (the anchor defendants). There was no evidence to suggest that either party would have been willing to give up their rights under those exclusive jurisdiction clauses. MCM was therefore entitled to conclude it had no choice but to sue D1 and D2 in England. The court found there was real force in its submission that England was the proper place for all claims against all parties because it was the only jurisdiction where a single composite forum could be achieved. This was a case where a single overarching conspiracy was alleged against D1 and D2 and Straits and those claims needed to be considered together. The multiplicity point was "a factor of great significance" in the present case which pointed "strongly" to England as the proper place for resolving the claims against Straits.

In contrast, in *Vedanta*, the claimants did have a straightforward choice between Zambia and England for all claims against all parties. The dispute was overwhelmingly Zambian in focus and nature and the UK domiciled defendant offered to submit to the jurisdiction of the Zambian courts to enable the whole case to be tried there.

Change of mind allowed

As to MCM's change of heart on forum, the court concluded that MCM need not be stuck with its originally contemplated choice of Singapore for claims against Straits. The court was only concerned with whether, as at the date permission was granted, MCM had demonstrated that England was the proper forum. By that date, MCM had already changed its mind and indicated that it wished to bring all claims against all parties in England.

Governing law and other factors

The parties had made submissions on the applicable governing law of the claims, as this can be a factor when evaluating the proper forum. However in this case, although the court concluded that English law governed the claims, this was largely academic as the case was more likely to turn on factual rather than legal issues.

Moreover, the court stated that it would have reached the same conclusion on forum even if some or all of the claims against Straits were governed by Singapore, Malaysian or Korean law.

There was a related dispute about the use by MCM in the English permission application of material disclosed subject to restrictions in the Singapore proceedings. The court accepted this was an error on MCM's part and noted the material had been redacted in any event.

COMMENT

This case highlights the scope of the court's discretion in deciding whether to grant permission to serve out of the jurisdiction. Even though the claimant had made a previous representation that it would not be pursuing Straits in England, avoiding multiplicity of proceedings and the risk of inconsistent judgments proved critical to the court's decision to allow service out. The case is a useful reminder that the court will assess *forum conveniens* factors as a whole, meaning, as in the present case, the fact the anchor defendants are subject to an English jurisdiction clause may be decisive.

This decision also illustrates what appears to be the constructive interplay between senior courts of two common law jurisdictions, England and Singapore. The English judgment references Singaporean rules and authority and cites the Singapore court's decision to refuse to grant Straits an anti-suit injunction, on the basis the Singaporean court was not persuaded that Singapore was clearly the more appropriate forum.

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1 [2019] UKSC 20.

2 See Singapore Rules of Court O. 24 r. 6 and *Dorsey James Michael v World Sport Group Pte Ltd* [2014] SGCA 4.

3 [2011] UKPC 7.

4 MCM also relied on two alternative gateways: unlawful means conspiracy (the tort claims gateway 9) and constructive trust (the trust claims gateway 15).

5 *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, per Lord Collins JSC at para [88].

Contract

UNILATERAL NOTICE UNDER AN SPA NOT SUFFICIENT TO STOP LIMITATION PERIOD EXPIRING

(1) Stobart Group Ltd (2) Stobart Rail Ltd (formerly WA Developments Ltd) v (1) William Stobart (2) William Andrew Tinkler [2019] EWCA Civ 1376, 31 July 2019

A unilateral notice relating to a tax liability under a share sale and purchase agreement was not a valid notice within the relevant limitation period for a claim. The construction of a unilateral notice must be viewed objectively, having in mind the relevant factual context. As a matter of construction, the notice had not been sufficiently clear as to which provision of the SPA it related to. The case is a cautionary tale for those involved in sending (or receiving) notices under a contract.

The respondents, Mr Stobart and Mr Tinkler, agreed to sell to Stobart Group Limited (**SGL**) the entire issued share capital in Stobart Rail Limited (**SRL**). The Share Purchase Agreement (**SPA**) included a covenant by the vendors to pay SRL's tax liabilities incurred prior to the sale.

Paragraph 6.3 of the SPA provided that the vendors would not be liable in respect of a "Tax Claim" (ie a claim by SGL against the vendors) unless SGL had given written notice of that "Tax Claim" within seven years of completion of the sale (the **Limitation Period**).

Paragraph 7.1 of the SPA stated that, upon the purchaser or SRL becoming aware of any "Claim" (ie a claim by a tax authority against SRL), the purchaser should (within ten business days) give notice of the "Claim" to the vendors. In contrast to a notice under paragraph 6.3 relating to "Tax Claims", the giving of notice (and timing for doing so) in paragraph 7.1 was not a condition precedent to any liability on the part of the vendors.

The issue for the Court of Appeal was whether a letter sent on 24 March 2015 (the **March Letter**), ten days before expiry of the Limitation Period, was valid notice of a "Tax Claim" under paragraph 6.3. The vendors argued that the letter was no more than a notice of a "Claim" under paragraph 7.1, and that that they could not be liable for the "Tax Claim" as the Limitation Period had since passed, and no paragraph 6.3 notice had been served.

Construction of a unilateral notice

The Court of Appeal considered the construction of a unilateral notice, noting the following:

- The approach to construing a unilateral notice is similar to that taken on construing a contract: both the meaning of the words used (objectively construed) and the context in which they are written are relevant (*Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] UKHL 19).
- The order in which the analysis (ie construing the meaning of the words and considering the context) is carried out is immaterial (*Wood v Capita Insurance Services* [2017] UKSC 24).
- The subjective intention of the parties is generally irrelevant, except where it is clear that the parties have a common understanding as to the effect of a term, then the courts should construe in accordance with that understanding (ie without the need for rectification).
- The purpose of the notification provisions in this case was to make it clear in sufficiently formal terms that a claim was being made against the vendors – ie to give some certainty to the party being notified.

On considering the objective meaning of the notice in this case, Simon LJ noted that the March Letter had clearly been drafted by a lawyer, but made no reference

to a "Tax Claim", nor to a claim being made under paragraph 6.3. The letter referred only to a "potential liability to taxation" rather than an actual claim against the vendors. Simon LJ considered that a reasonable person would have understood the letter to be a notice under paragraph 7.1 rather than under paragraph 6.3.

As to the factual context, the purchasers argued that the vendors would have understood the letter to be a paragraph 6.3 notice because an earlier letter had been sent requesting an extension of the Limitation Period, which would have put the vendors on notice to expect a paragraph 6.3 notification before the end of the Limitation Period. Simon LJ disagreed, noting that there was still time for SGL to send a valid paragraph 6.3 notice even following the March Letter, so the vendors could not have been expected to realise that no further notice would be received.

The court concluded that the March Letter, as a matter of construction, was not a valid paragraph 6.3 notice.

COMMENT

There is a disproportionate amount of litigation relating to the validity of notices for warranty claims. This is because you can win on a technicality (a non compliant notice) without having to get into the substance of the issue in dispute. This means that, if you are serving a notice, you need to be careful to comply exactly with the letter of the contract. You generally cannot hedge your bets, so when making a claim, it is important to clearly identify to which warranty/ies it relates. If the relevant clause requires you to include "reasonable details", you need to think more in terms of a formal pleading than a letter. If you are the recipient of a notice, it is worth checking these points to see if there are any grounds for challenge.

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RECTIFICATION REVISITED BY THE COURT OF APPEAL

FSHC Group Holdings Ltd v GLAS Trust Corp Ltd [2019] EWCA Civ 1361, 31 July 2019

The Court of Appeal has clarified that the correct test for rectification of a contract for common mistake will depend on whether or not there is a prior concluded contract (eg an oral agreement). If there is, an objective test will continue to apply. Where there is not, the court will need to decide whether the parties subjectively had a mutually acknowledged common intention that mistakenly was not reflected in the contract ultimately agreed. This endorsement of a subjective test will place a higher evidential burden on parties claiming common intention mistake. Keeping detailed and contemporaneous records of negotiations will be even more important in the future.

Rectification – a reminder

Rectification is an equitable remedy and is triggered where a mistake has caused a discrepancy between a written agreement and the true agreement between the parties. If a court orders rectification, the written agreement will be amended to reflect the true agreement.

Mistakes can be common or unilateral. The present case concerns common mistake. There are two situations in

which a written contract may be rectified on the basis of common mistake:

- The document fails to give effect to a prior concluded contract, eg where a binding contract is agreed orally but then "reduced to writing" in a formal document that does not accurately reflect the terms of the oral agreement (**Common Agreement Mistake**).
- The parties had a common intention, continuing at the time of execution, in respect of a particular matter which, by mistake, the document did not accurately record (**Common Intention Mistake**).

This case was about Common Intention Mistake.

Missing security

The claimant, FSHC Group Holdings Limited (**FSHC**), agreed to grant security over a shareholder loan, as part of a corporate acquisition in 2012. In 2016, it became apparent that FSHC could not locate the relevant security documents. To address this, FSHC agreed to enter into two deeds to accede to two pre-existing security agreements with the security agent (GLAS Trust Corporation Limited (**GLAS**) at the time of the dispute). The problem was that, unbeknown to either of the parties, the pre-existing security agreements to which FSHC acceded did not just cover the missing security, which neither party had identified when they sought to fill the specific gap of the missing security. They also had the effect of placing additional, far more onerous, obligations on FSHC.

FSHC claimed rectification of the two deeds of accession to exclude these additional obligations. At first instance, the High Court found that, at the time of execution, both parties understood and intended the deeds to do no more than provide the missing security. It ordered rectification on the basis that it was both "objectively" and "subjectively" the common intention of the parties to execute a document which did no more than grant security over the shareholder loan.

On appeal, GLAS did not challenge the High Court's findings of fact but instead argued that the test was purely objective and that an objective observer would have concluded that the purpose of the deeds was to procure FSHC's accession to all the terms of the pre-existing security agreements.

Court of Appeal rules on intention

The Court of Appeal upheld the High Court decision but clarified that the correct test for identifying the common intention was subjective.

The applicable test for rectification in cases of Common Intention Mistake had been a battleground for commentators ever since *obiter* comments of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38. In that case, he stated that the test for common mistake was objective and involved asking what the reasonable observer would have understood the intentions of the parties to be. This analysis was applied by the Court of Appeal in *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153.

The Court of Appeal in *FSHC* disagreed with Lord Hoffmann and held that different tests are applicable to Common Agreement Mistake and Common Intention Mistake because of the different underlying principles justifying rectification:

- An objective test applies to Common Agreement Mistake because the rectification is based on the principle that agreements should be kept and the terms of the prior agreement should therefore be objectively determined.
- However, for Common Intention Mistake, the test is subjective because the rectification is based on the equitable principle of good faith and therefore it has to be proved that the parties are actually mistaken as a matter of fact.

Requirements for rectification based on Common Intention Mistake

The requirements for rectification based on Common Intention Mistake are therefore as follows:

- The parties had a subjective common intention in respect of a particular matter in the instrument.
- There was an outward expression of accord (ie as a result of communication between them, the parties understood each other to share that intention).

- The intention continued at the time of execution of the instrument.
- By mistake, the instrument did not reflect that common intention.

It goes without saying

Importantly, the Court of Appeal also clarified that "an outward expression of accord" need not involve an express declaration and that a shared understanding may be tacit, such as where the understanding is so obvious as to go without saying. While FSHC's intention had been communicated to the security agent, it had never explicitly been stated that FHSC were **not** intending to do any more than this. However, the Court of Appeal observed that parties entering into a contract do not spell out the fact that they lack intentions which no reasonable observer would imagine them to have and that the absence of reference to the additional obligations "spoke louder than words" and evidenced the intention to only provide the missing security.

COMMENT

This decision, which has the effect of restricting the availability of rectification, is a welcome clarification of the law in the area. It makes good sense too.

The objective test is clearly appropriate in the case of Common Agreement Mistake, because all the court is being asked to do is to ascertain what the parties actually agreed and whether the written contract reflected that prior agreement. By contrast, in the case of Common Intention Mistake, the court is tasked with looking beyond the contract itself and correcting an unfairness that should not be allowed to stand notwithstanding what the parties have objectively agreed in writing. Therefore the more demanding subjective test is appropriate for cases of Common Intention Mistake.

As the Court of Appeal itself made clear: rectification in cases of Common Intention Mistake should be difficult to prove because appropriate respect should be afforded to the "primacy of final, agreed, written terms of a contract". The objective test could have the unfair consequence of treating a party as bound to the objective meaning of communications that were not intended to be binding, rather than the objective meaning of the final document.

Unlike cases involving contractual construction, evidence of prior negotiations and post-execution conduct is admissible in rectification and may be decisive in establishing the common intention and the outward expression of accord. Contemporaneous notes of conversations are therefore advisable and steps should also be taken to preserve evidence of communications.

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Crime

FAIR CORPORATE CRIMINAL LIABILITY TRIAL DESPITE ABSENCE OF COMPANY'S DIRECTING MIND

Regina v Alstom Network UK Ltd [2019] EWCA Crim 1318, 23 July 2019

The Court of Appeal has refused to grant a company leave to appeal its conviction for conspiracy to corrupt, notwithstanding that the directors who constituted the company's directing mind were not present at the trial and did not give oral evidence.

Alstom Network UK Limited (**Alstom UK**), a UK subsidiary of the French multinational engineering company, was convicted in April 2018 of conspiracy to corrupt, contrary to s1 Criminal Law Act 1977. The corruption concerned bribes, disguised as consultancy payments, to public officials in Tunisia in order to win an infrastructure contract.

As the events pre-dated the advent of the "failure to prevent bribery" offence contained in s7 Bribery Act 2010, the prosecution needed to rely on the identification principle to attach criminal liability to Alstom. The principle provides that a corporate body is deemed to act and acquire knowledge through those individuals who can be identified as 'the directing mind and will of the corporation'. As the Court of Appeal put it "Simply put, the guilt of Alstom turns on the guilt of one or both directing minds and wills".

At trial in 2018, Alstom was convicted of conspiracy to corrupt even though the two directors who were the "directing minds and wills" were not present and had not given oral evidence. One could not be extradited and the other declined to give evidence. Hearsay evidence from these two directors had however been admitted in evidence (in the form of interviews with the Swiss police and evidence given in other proceedings).

Alstom UK challenges conviction

Alstom UK applied for leave to appeal its conviction for conspiracy to corrupt, arguing that the trial of a corporate defendant for conspiracy in the absence of its directing minds was unfair.

The company argued:

- The prosecution case was based on inference rather than direct evidence. Hearsay evidence had been admitted in the form of the first director's interview with Swiss police and representations given by the second director in other proceedings.
- The court had failed to direct the jury adequately as to the absence of the directors and that this exacerbated the unfairness.

Directors' absence did not render the trial unfair

The court considered whether there could be a fair trial of a company for conspiracy where its guilt depended on the guilt of an individual as the company's directing mind, in circumstances where that individual is neither indicted as a co-conspirator nor otherwise available to give evidence at the trial. It found that the directors' absence did not render the trial unfair, given that Alstom UK was a separate legal entity and there was no rule of law or practice which required a directing mind to be indicted with the company or available to give evidence. The court also found that the jury had been adequately directed as to the absence of the directors. The judge had given clear directions on how the absence of the directors should be addressed and had made the relevant factual matters clear in the summing up. The Court of Appeal refused leave to appeal.

COMMENT

The judgment demonstrates the difficulties faced by corporate entities when defending themselves at criminal trial where their directing mind and will, through the relevant directors, are not actively involved in the proceedings. The SFO failed previously to secure convictions against Alstom on two other counts of conspiracy to corrupt where the 'directing minds' had given evidence at trial.

The case was decided under the previous bribery laws and therefore only has limited application to bribery matters, given that s7 Bribery Act 2010 applies to conduct post July 2011. s7 removes the need for the prosecution to rely on the identification principle in cases where a corporate entity has failed to prevent bribery.

However, the ruling does have a wider impact on corporate prosecutions where "failure to prevent" offences do not apply.

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BANK TERMINATES CUSTOMER RELATIONSHIP WITHOUT NOTICE FOR "EXCEPTIONAL CIRCUMSTANCES" ON SUSPICION OF FINANCIAL CRIME AND MONEY LAUNDERING

N v The Royal Bank of Scotland [2019] EWHC 1770 Comm, 8 July 2019

The High Court has held that a bank's right to terminate a customer relationship without notice in "exceptional circumstances" covers a situation in which an authorised payment institution's accounts have been determined by the bank to be vulnerable to fraud and money laundering. Although this case was decided on its facts, it will be a welcome judgment for banks seeking to take a robust approach to preventing financial crime and mitigating money laundering risk.

The claimant (**N**) was an authorised payment institution which carried out a "Money Service Business" of providing foreign exchange and payment services to its clients. From January 2013, N banked with the defendant, The Royal Bank of Scotland (**RBS** or the **Bank**).

N held two types of accounts with the Bank: (i) four main accounts (the **Main Accounts**); and (ii) several underlying client sub-accounts (the **Sub Accounts**). The transactions on the Main Accounts primarily involved payments into and out of the Sub Accounts.

One of the key terms governing the relationship between the Bank and N was Clause 9.4 of RBS' "Bank Account Terms", which provided:

> "*The Bank will give the Customer not less than 60 days' written notice to close an account,* ***unless the Bank considers there are exceptional circumstances***." (emphasis added)

Suspicion of financial crime and money laundering

In September 2015, RBS froze seven of the Sub Accounts associated with certain clients of N suspected of investment fraud (the **Suspect Sub Accounts**). By October, RBS had become aware that N

was banking nine separate "boiler room" businesses. These are businesses which fraudulently sell fake investment products. N accepted that, based on the information known to N and the Bank, the Suspect Sub Accounts should remain frozen.

In October 2015, the Bank identified that, prior to the freezing of the Suspect Sub Accounts, there had been money flows between the Suspect Sub Accounts and the Main Accounts. This made it difficult for the Bank to separate, in the Main Accounts, potential proceeds of crime from legitimate funds.

Later in October, there was an attempted payment of GBP500,000 into one of the Main Accounts (**Attempted Payment**). RBS suspected the Attempted Payment was an effort to use that Main Account to circumvent the freezes on the Suspect Sub Accounts. It was the "straw that broke the camel's back". This led the Bank to suspect that the Main Accounts contained at least some proceeds of crime and that N was engaged in money laundering. RBS froze the Main Accounts and terminated its relationship with N immediately, on the basis that there were "exceptional circumstances" justifying this action.

N sues the Bank

N sued RBS for breach of contract and negligence. N argued that RBS had been wrong to terminate the relationship without notice because the circumstances were not "exceptional". In particular, N argued that: (i) there was no suspicion of complicity by N in money laundering; (ii) the Bank failed to investigate the commingling issue and ascertain the extent of it; and (iii) there were at least six ways the Bank could have mitigated its financial crime and money laundering risk without freezing the Main Accounts and terminating its relationship with N.

N also argued that RBS was required (and failed) to exercise its discretion under clause 9.4 of the Bank Account Terms: (i) reasonably; (ii) after consideration of the material circumstances; (iii) in a way which would be legally correct and based on a sound understanding of the relevant legal principles; and (iv) in a way which was proportionate taking into account any impact on N's business.

Were the circumstances "exceptional"?

RBS relied on the following factors to form a view that there were "exceptional circumstances" justifying immediate termination:

- If N's clients had attempted to transfer suspect funds directly into the Main Accounts (ie the Attempted Payment) then it was reasonable to conclude they may have done so previously and would continue to attempt to do so going forward. This meant that the Main Accounts could no longer be adequately ring-fenced by freezing the Suspect Sub Accounts. RBS could therefore no longer continue operating the Main Accounts without placing the Bank at risk of committing money laundering and facilitating financial crime.
- The relevant events had created an exceptional level of concern at the Bank about both N and its clients. This meant that, in RBS' view, the relationship between N and the Bank had broken down and that the relationship would need to be terminated. The other two mechanisms available to the Bank to terminate the relationship (ie other than immediate termination for "exceptional circumstances") were not tenable. These were:
  - **Termination with standard notice (unfreezing the accounts)**: this option would have required the Bank to operate N's accounts during the notice period. This would mean that the Bank would have had to seek consent from the National Crime Agency for every single suspicious transaction on the accounts. This would have been practically unworkable and an abuse of the Suspicious Activity Report regime.
  - **Termination with standard notice (keeping the accounts frozen)**: this option would have exposed the Bank to an unacceptable level of litigation risk from both N and its underlying clients.

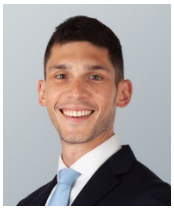
The court agreed that the above factors were sufficiently exceptional as to warrant immediate termination of the Bank's relationship with N. It was therefore not necessary for the court to decide whether N's position on the proper application of clause 9.4 was correct.

COMMENT

Although this case was decided on its facts, it is a useful precedent for banks seeking to establish that suspicion of financial crime and money laundering can create "exceptional circumstances" warranting the immediate termination of a customer relationship (where the contractual arrangements permit such action to be taken).

The following actions will be helpful in establishing that exceptional circumstances exist:

- taking appropriate legal and forensic accounting advice before arriving at the decision;
- documenting the decision and the process undertaken to arrive at that decision; and
- assessing (and documenting) why less extreme alternatives to the decision are either not possible or practical.



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Data Protection

DATA PROTECTION REPRESENTATIVE "CLASS" ACTION GETS THE GO AHEAD

Lloyd v Google LLC [2019] EWCA Civ 1599, 2 October 2019

Did you have an iPhone in 2011/2012? I still had a BlackBerry. If I had had an iPhone, I would have been a member of the class of more than four million users on whose behalf Mr Lloyd makes this claim. It is alleged that Google tracked, surreptitiously, some of the internet activity of those users, so infringing rights protected by data protection legislation. The litigation is interesting for two reasons: it shows that you can claim damages under data protection legislation without proving any financial loss or even distress; and, it considers what is required for a representative action to be brought for this claim.

Google's "DoubleClick Ad" cookie

At the time Apple's Safari web browser, by default, blocked all third party cookies. However this prevented some popular websites from working. Consequently Apple introduced some exceptions. Google, it is alleged, used these to enable its "DoubleClick Ad" cookie to be put on a user's device without their knowledge or consent whenever the user visited a site with Google's content. This, according to the judge, allowed Google to tell, among other things, the date and time of any visit, how long the user spent there, which adverts were viewed and for how long, and the approximate geographical location of the user (from the IP address). Over time, it seems, Google was able to build up profiles of the users who were grouped as, for example, "football lovers", or "current affairs enthusiasts".

Was damage sustained by iPhone users in the UK?

The backdrop to the case is that Lloyd was seeking permission to serve the claim out of the jurisdiction on Google in the U.S. To do that he had to show that the claim had a reasonable prospect of success, that there was a good arguable case that the claim advanced fell within one of the jurisdictional gateways, and that England was the appropriate place to try the claim. The jurisdictional gateway in question – for the tort of breach of statutory duty – required that damage be sustained in the jurisdiction. The question for the Court of Appeal therefore was whether the impact of the Safari workaround meant that there was a good arguable case that damage was sustained within the jurisdiction.

Damage was loss of control of data

A previous decision of the Court of Appeal, also about the Safari workaround (but not a representative action), had held that damages for distress were recoverable (*Google v Vidal-Hall*). But Lloyd's argument here was that you did not need to show distress, as the breach alone was sufficient.

The Court of Appeal stated that the question of whether or not the claimants had "suffered damage" under the Data Protection Act 1998 and the Data Protection Directive 95/46/EC that stood behind it (this being a pre-GDPR cause of action) was an autonomous question of EU law that could differ from domestic law.

Having analysed case law on misuse of personal information, referencing the importance of there being a damages award for breach of data protection legislation, and the GDPR, the court held that damages were capable of being awarded for loss of control of data under the Data Protection Directive 95/46/EC and the Data Protection Act 1998 even if there was no pecuniary loss and no distress.

In principle, the court said, the damages claimed could be assessed as "negotiating damages" under the principle set out by the Supreme Court in *One Step v Morris-Garner*: a fee for the notional release of the right. In other words

the court could ascertain what price the iPhone user would reasonably have asked for ceding control of their personal data.

Who is in the class?

Once the court had analysed the claim as one of compensation for loss of control of browser-generated information, many of the concerns of the judge at first instance – about whether there was the "same interest" as is required to bring a representative action – fell away. Lloyd had deliberately framed the claim as one that would not take account of any special or individual circumstances.

The judge had also been troubled by how the class would be identified. He described the idea of relying on disclosure by Google as "Micawberite" and felt that self-certification by iPhone users was open to honest error and abuse.

The Court of Appeal disagreed. The data that Google held would identify who was within the class and each affected person would know whether they satisfied the criteria.

Discretion in favour of allowing claim to proceed

The court held the judge was justified in observing that the main beneficiaries of the claim would be funders and lawyers, that litigation would be costly and individual compensation modest, and that none of the millions of the class had come forward to complain. However the judge had been wrong to say that you could not identify the class and to require that the class authorise the claim (since there was no such requirement).

On this basis the Court of Appeal granted permission to serve proceedings out of the jurisdiction on Google.

COMMENT

In *Morrisons* (which is going to the Supreme Court), the mechanism for gathering together claimants, for a breach of data protection legislation, was a Group Litigation Order. The number of claimants was around 5500 employees. Here, the claimants are using the representative action mechanism to create a sort of opt-out class with over four million members.

The finding in relation to damages is, perhaps, less surprising, at least when viewed from an EU data protection perspective as opposed to a common law one.

The combination of these two elements is no doubt encouraging to the "plaintiff bar" that is increasingly active in the UK.

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Fraud

ENGLISH COURT GRANTS ASSET PRESERVATION ORDER OVER BITCOIN

Robertson v Persons Unknown, unreported, CL-2019-000444, 15 July 2019

The English High Court has granted an asset preservation order over Bitcoin finding that there was a serious issue to be tried concerning a proprietary claim. In this case, the proprietary question was relevant to whether the order should be granted. More widely, the status of Bitcoin as property goes to the competing rights parties may have in it.

According to Decrypt Media, following a phone call and so when he was expecting to make a transfer of 100 Bitcoins to a fund, Mr Robertson received an email requesting a transfer which he duly made. It transpired the request was a cloned email and that the Bitcoins had been sent to a hacker's wallet.

Having traced 80 Bitcoins to a wallet held at Coinbase UK, Robertson applied for a freezing order and an asset preservation order over the Bitcoins in Coinbase's wallet.

The claim form, filed after the application, included the following brief details of the claims:

- a claim for rescission of the transaction by which Robertson was fraudulently induced by Persons Unknown to transfer 100 Bitcoins and restoration to Robertson of those Bitcoins;
- a claim for a declaration that a *Quistclose* trust arose over the transferred Bitcoins of which Robertson was the beneficiary;
- damages for deceit; and
- a claim for the return of the value of the Bitcoins on the basis that Persons Unknown had been unjustly enriched as a result of the mistaken transfer of the Bitcoins.

A third category of personal property?

One of the challenges for Robertson, when seeking the interim orders, was addressing the question of whether the Bitcoins were property.

According to an eighteenth century decision of the Court of Appeal in *Colonial Bank v Whinney*, "all personal things are either in possession or in action". This means that a personal thing must be either a "chose in possession" – something over which physical possession can be taken, or a "chose in action" – something which can only be claimed or enforced by action as opposed to by taking physical possession.

Bitcoin does not fall neatly into either category. It is not obviously something over which possession can be taken. Neither, since it is decentralised, is it a claim on any person that can be enforced by an action. This begs the question whether there is a third category of personal thing?

The Patents Act 1977 suggests there may be such a third category. It provides that "[a]ny patent or application for a patent is a personal property (without being a thing in action)". Additionally, two cases – one a 1980s decision of the Privy Council concerning export quotas under Hong Kong legislation and the other a 2012 High Court decision concerning EU carbon trading allowances – contemplate something that is not a chose in action but rather some form of "other intangible property".

However, in 2014, in *Your Response v Datateam* the Court of Appeal held that an electronic database was not capable of being possessed and so could not be subject to a common law lien. In reaching this conclusion it emphasised the orthodox approach: "[*Colonial Bank v Whinney*] makes it very difficult to accept that the common law recognises the existence of intangible

property other than choses in action (apart from patents, which are subject to statutory classification)".

There is a fair amount of academic and other commentary on how Bitcoin should be characterised. According to Stewarts Law's website (who acted for Robertson), the court was referred to the Financial Markets Law Committee 2016 report on virtual currencies which stated that "it may be convenient to understand [virtual currencies] … as a kind of hybrid: "virtual choses in possession"". The court was also referred to the 2019 decision of the Singapore International Commercial Court in *B2C2 v Quoine* which agreed, though the matter was not disputed, that Bitcoin was personal property that could be the subject of a trust (relying on the classic definition of a property right set out in the House of Lords decision in: "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability").

Ultimately the court was satisfied that there was a serious issue to be tried concerning a proprietary claim allowing it to grant an asset preservation order. According to Stewarts Law, the court declined to grant a freezing order on the basis that a risk of dissipation could not be shown.

COMMENT

In this case there is no reported judgment, being an interim without notice application heard on an urgent basis.

In any event, the application seems to have achieved its aim as we understand that the Bitcoins (or at least the majority of them) have been returned to Robertson.

In some ways, when faced with a fraud, the legal issues – in particular whether or not Bitcoin is property – are not so difficult to resolve against the fraudster. The more difficult case will be where the two or more parties competing for an interest are innocent and the court has to determine the priority of those claims and whether or not they are proprietary. For answers, we may have to wait for the authoritative legal statement that the UK Jurisdiction Taskforce of the LawTech Delivery Panel has promised this autumn.

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Procedure

NON-PARTY ACCESS TO COURT DOCUMENTS

Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK) [2019] UKSC 38, 29 July 2019

The Supreme Court has ruled that the court has far reaching jurisdiction to allow non-parties access to court documents, but it will only allow such access where doing so furthers the principle of open justice.

An insurer sued an asbestos manufacturer (**Cape**) for contributions to pay-outs it had made for mesothelioma contracted from Cape's products. Trial happened, but before judgment the proceedings were settled.

An asbestos victims' forum (the **Forum**) sought non-party access to the documents referred to at trial. The Forum believed that these documents would show the asbestos industry's knowledge about the dangers of asbestos which would help with other (unspecified) claims.

The Forum relied on CPR 5.4C. This is the court rule that allows non-parties access to (a) statements of case, judgments and orders given or made in public without the permission of the court and (b) "from the records of the court a copy of any other document filed by a party" with the permission of the court. The Forum also argued the court had jurisdiction to grant access under its common law inherent jurisdiction.

At first instance the Forum was granted access to all the documents referred to at trial under both CPR 5.4C and at common law. The Court of Appeal however reined in the court's jurisdiction. It held that the "records of the court" referred to in CPR 5.4C would not normally include trial bundles, trial witness statements, trial expert reports, trial skeleton arguments or written submissions. Access to many of these documents could be allowed under the court's inherent jurisdiction, but that jurisdiction would not cover trial bundles or documents referred to in skeleton arguments, written submissions, witness statements, expert reports or in open court, simply because they had been referred to at the hearing.

Both Cape and the Forum appealed. Cape said the court had less jurisdiction and the Forum more.

Limited meaning of "records of the court" under CPR

The Supreme Court considered the court's jurisdiction to grant non-party access. Whilst CPR 5.4C clearly encompassed statements of case and public judgments and orders, it was less clear what constituted "records of the court" filed by a party. Conceptually, these must be those records kept for court purposes (as opposed to a party's purposes). As a result not every document filed by a party is a "record of the court" under CPR 5.4C (eg it will not include all evidence filed by a party as, although the parties may need a record, the court does not).

Inherent jurisdiction much wider – covers all documents "referred to" at a hearing

However, the Supreme Court held that the court's inherent jurisdiction went much further. It includes all documents that the court is "referred" to at a hearing (as opposed to "read"; a non-party's rights of access should not be reduced when faced with a less conscientious judge not reading the documents to which they were referred).

Non-party must show access will advance open justice

The Supreme Court then looked at when the court should exercise its discretion and allow non-party access. It said the guiding principle for granting access must be that it furthers the principle of open justice.

The principle of open justice has two main purposes. First, to enable public scrutiny in order to hold the court to account. Secondly, so that the public can understand how the justice system works and why decisions are taken. To achieve these purposes the public needs to understand the issues and evidence put before the court. In the past a great deal of argument and evidence was put before the court orally, but now this is often just considered in written form. It can therefore be difficult (especially in complicated cases) to know what is going on without access to this written material.

Even where no judgment is ultimately handed down, the Court of Appeal made clear (and this was not reconsidered by the Supreme Court) the principle of open justice is engaged once a hearing has taken place.

Once the non-party has satisfied the court that access furthers the principle of open justice, the court must go on to consider whether the risk of harm to the effective judicial process or the legitimate interests of others (eg privacy expectations and the protection of trade secrets and commercial confidentiality) means that access should be denied. In addition, the practicalities and proportionality of allowing non-parties access may also mean access should not be granted. Logistical difficulties will be particularly acute where the documents are sought after the end of trial (although the digitalisation of documentation may eventually alleviate this consideration).

Supreme Court orders non-party access to documents referred to at trial

On the facts of this case the Supreme Court was clear that, under its inherent jurisdiction, it had the power to grant non-party access to the documents as they were all referred to at trial.

What was less clear was whether it should exercise its discretion to allow access. The Supreme Court did not need to grapple with whether the principle of open justice was furthered by granting access. Cape had attacked the Court of Appeal's ruling on jurisdiction (rather than on its merits) and had not set up any countervailing rights of its own. In these circumstances, the Supreme Court said there was no realistic possibility of a more limited order being made than that given by the Court of Appeal (with its more limited view of its jurisdiction and the principles governing the exercise of that jurisdiction). It therefore allowed access to the same documents as the Court of Appeal and, in relation to the remaining documents sought, ordered the trial judge to reconsider whether disclosure should be granted in accordance with the principles it had laid down.

COMMENT

Non-party access is a significant issue to many litigants who understandably have serious concerns that sensitive material before the court will end up in the hands of journalists, pressure groups or future litigants. This judgment does nothing to dispel those concerns. The litigant will need to show a compelling reason why the principle of open justice should be displaced and access restricted. Although there is little litigants can do to prevent such access they should be aware of this risk whenever they are involved in litigation.

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Sanctions

SANCTIONED ENTITY CANNOT CLAIM INTEREST FOR PERIOD WHEN PAYMENT IS PREVENTED BY FINANCIAL SANCTIONS

Ministry of Defence & Support for Armed Forces of the Islamic Republic of Iran v International Military Services Ltd [2019] EWHC 1994 (Comm), 24 July 2019

A sanctioned entity was not entitled to post-award interest on an arbitral award for the period that EU financial sanctions were imposed on that entity. The decision provides useful guidance on the interpretation of "no claims" and "non-liability" provisions, which are commonly found in sanctions legislation.

This decision concerned post-award interest on a 2001 ICC arbitral award for GBP140m in favour of the Iranian Ministry of Defence against an English company (International Military Services Ltd, **IMS**) owned by the UK Ministry of Defence and HM Treasury.

The arbitration had concerned contracts for the supply of military vehicles by IMS to the Iranian Ministry that were terminated following the Iranian revolution in 1979.

The Iranian Ministry sought to enforce the award against IMS in the English courts. However, the English enforcement proceedings were stayed pending the outcome of challenge proceedings brought by IMS before the Dutch courts, on the condition that IMS paid security into the English court. Continued accrual of interest on that security means that its value now stands at over GBP500m. The Dutch courts set aside part of the award, but it was otherwise upheld.

In the meantime, sanctions were imposed on the Iranian Ministry under EU Council Regulation 423/2007 (presently Regulation 267/2012; the **Regulation**). In light of those sanctions, it was common ground that IMS could not, and cannot, pay the award, and that the court could not enforce payment. Nonetheless, the Iranian Ministry made an application to the English court seeking to have judgment entered in terms of the award, and a declaration that the security at court was held for its benefit.

A key question at issue for the court was whether the Iranian Ministry was prevented from enforcing the interest component of the award which accrued when it was subject to EU sanctions. (Determination of this issue would allow the parties to agree the total quantum, and consequently the balance of funds held as security could be returned to IMS, it being agreed that the amount of security exceeded the Iranian Ministry's claims against IMS.)

"No claims" clause prevents a claim for interest during the sanctions period

IMS relied on Article 38(1) of the Regulation, which provides as follows:

> "*No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by: (a) designated persons, entities or bodies …*"

In interpreting Article 38(1), Phillips J considered the language and purpose of the provision. He found that the Iranian Ministry's application to enforce the interest component of the arbitral award was "affected" by the measures imposed under the Regulation. He based this on

the "in whole or in part" language of Article 38(1), as well as on Article 38(2) of the Regulation (which provides that performance is regarded as having been affected where "the existence or content of the claim results directly or indirectly from those measures"). Although the "existence" of the claim may not have been based on the sanctions, the claim's "content" (insofar as it related to interest) did result from the sanctions. Phillips J also held that the relevant "transaction" was the arbitral award which the Iranian Ministry sought to enforce. He relied on the relatively broad definition of "transaction" in the Regulation, as well as making reference to the definition of "claim".

As regards the purpose of Article 38(1), Phillips J referred to a number of sources, including the Recitals to an earlier version of the same Regulation, and English and European case law considering similar provisions. He concluded that the purpose of Article 38 was "to prevent civil claims being brought against a party as a result of the fact that their performance of a contract or transaction was impeded by the operation of the sanctions". He found that preventing the Iranian Ministry from enforcing the interest component of an award for the sanctions period fell well within that purpose.

Different purposes for different sanctions provisions

The Iranian Ministry argued that this interpretation of Article 38 would give it "confiscatory effect", and that this ran counter to the "carrot and stick" approach envisaged by the sanctions (permanent confiscation being only "stick"). Phillips J did not agree. He found that, independent of the purpose of the Regulation as a whole, Article 38 served a specific purpose – "to ameliorate the impact of the sanctions regime on private relationships". Phillips J also noted that, in any case, the longer sanctions remained in place (in light of Iran's conduct), the longer the Iranian Ministry would be deprived of its post-award interest, which in his view was consistent with the "carrot and stick" approach.

The Iranian Ministry also argued that other provisions of the Regulation demonstrated that it does not prevent interest from accruing when sanctions are in force. Article 29(2) provides that the prohibition against making funds or economic resources available to sanctioned individuals or entities does not apply to "the addition to frozen accounts of: (a) interest or other earnings on those accounts …". However, Phillips J held that Articles 29 and 38 deal with different scenarios – Article 29(2)(a) is "a statement of the general rule that Article 23(3) does not prevent the addition of interest or other earnings into a frozen account", whilst the application of Article 38 is only engaged if the interest claim is a claim "in connection with any contract or transaction the performance of which was affected" by the sanctions.

"Non-liability" clause only provides protection where sanctions are incorrectly applied

IMS also sought to rely on Article 42(1), which provides as follows:

> "*The freezing of funds and economic resources or the refusal to make funds or economic resources available, carried out in good faith on the basis that such action is in accordance with this Regulation, shall not give rise to liability of any kind on the part of the natural or legal person, entity or body implementing it, or its directors or employees, unless it is proved that the funds and economic resources were frozen or withheld as a result of negligence.*"

Phillips J acknowledged that this provision was expansively drafted, and that (read literally) it would preclude the Iranian Ministry's claim for interest during the sanctions period. However, he concluded (*obiter*) that the proper scope of Article 42(1) was to provide protection for those who have incorrectly (but non-negligently) frozen funds or economic resources, or refused to make them available, by reference to the sanctions regime. Accordingly it had no application in cases such as the present one, which involved a correct application of the relevant sanctions.

COMMENT

Phillips J's decision provides useful guidance for parties on the application of these and similar provisions in sanctions legislation.

His conclusions (as well as his emphasis on the protection of private parties) are likely to give non-sanctioned parties more comfort that steps they may have previously taken to comply with sanctions will not

lead to them subsequently being penalised before the civil courts. The decision suggests that even where a party fails to apply the relevant sanctions correctly, it will still enjoy the benefit of protection under Article 42 provided that its behaviour was not negligent (a possibility considered by Gloster J to be arguable in the earlier case of *Soeximex SAS v Agricorp International Pte Limited*). As Phillips J noted, his decision in respect of Article 38(1) is also consistent with earlier OFSI Guidance issued by HM Treasury. This will reassure parties who previously acted in accordance with that Guidance that they are less likely to face historic claims based on non-payment to designated parties while sanctions were in force.

On the flipside, the decision is likely to be less welcome for sanctioned parties. The Iranian Ministry argued that IMS's interpretation would be "confiscatory", permanently depriving the sanctioned party of a property right rather than temporarily freezing assets. However, this may simply be a consequence of adopting sanctions provisions of this nature – in the earlier case of *Shanning Ltd v Lloyds TSB Bank plc*, the House of Lords adopted a purposive approach to the interpretation of a similar provision, and concluded that its effect was to permanently extinguish relevant claims. Further, it is notable that the scope of Article 38(1) extends beyond claims brought by designated parties – it also covers claims made by "any other Iranian person, entity or body" (Article 38(1)(b)). In future, non-sanctioned parties may go to greater lengths to characterise their performance of a contract or transaction as having been "affected" by sanctions, in an attempt to escape from their legitimate obligations (including obligations owed to non-designated parties). However, in a less clear-cut case (for instance, where the claiming party is not an arm of the Iranian government, or where the effect of sanctions on the relevant contract or transaction is less obvious), the courts may be more reluctant to accept that a transaction was affected by sanctions.

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Key contacts

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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