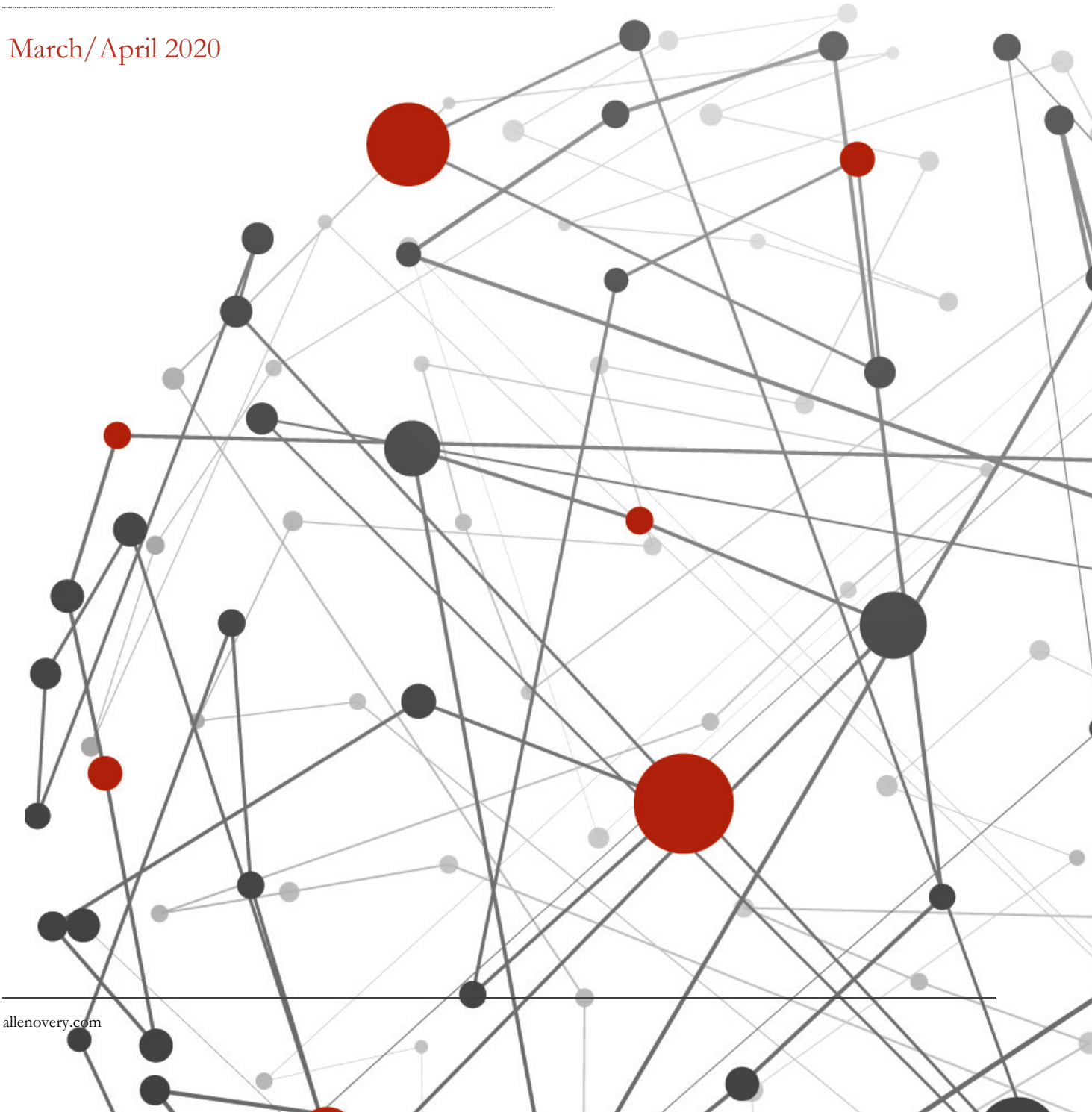
ALLEN & OVERY

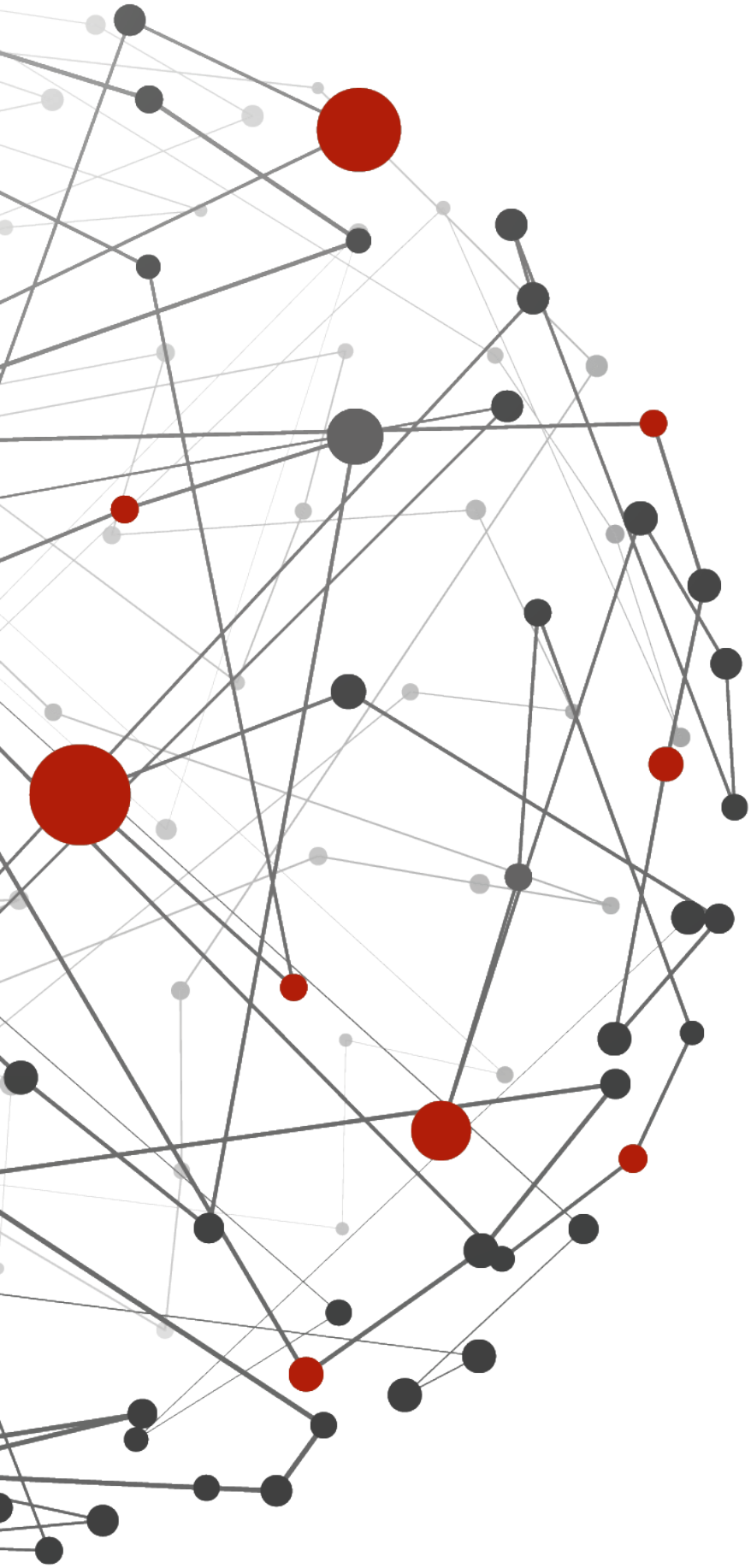
Litigation and Dispute Resolution

Review

March/April 2020



allenovery.com



Contents

Amy Edwards

Senior PSL Litigation – London
Tel +44 20 3088 2243
amy.edwards@allenovery.com

Arbitration

Which law governs an arbitration agreement where the governing law of the main contract and the seat of arbitration do not match?:

Kabab-Ji S.A.L. v Kout Food Group [2020] EWCA Civ 6, 20 January 2020

The Court of Appeal held that the choice of English law to govern a franchise development agreement extended to the parties' agreement to resolve disputes by ICC arbitration in Paris, which was contained in the same document. A choice of governing law for the main contract can amount to an express choice of law for the arbitration agreement and, in such circumstances, will not be displaced by the parties' choice of an arbitral seat in a different jurisdiction.

The appellant, Kabab-Ji S.A.L. (**Kabab**), entered into a franchise development agreement (**FDA**) with Al Homaizi Foodstuff Company (**Al Homaizi**). Following a corporate reorganisation, Al Homaizi became a subsidiary of the respondent, Kout Food Group (**Kout**).

During the performance of the FDA, and after the corporate reorganisation had taken place, a dispute had arisen under the agreement and Kabab commenced arbitration directly against Kout, rather than against its newly acquired subsidiary, Al Homaizi, even though the latter remained the named licensee. The FDA contained an arbitration agreement which specified the seat of arbitration to be Paris. An arbitration tribunal seated in Paris applied French law to the question of whether Kout had become party to the arbitration agreement, and held that it had, based on the parties' conduct. The tribunal then found Kout liable for breaching the FDA.

Kout successfully resisted enforcement of the award before the High Court in London on the grounds that:

- English law (rather than French law) governed the validity of the arbitration agreement; and
- under English law, Kout was not a party to the arbitration agreement.

Kabab appealed on both points. The Court of Appeal's reasoning in dismissing the appeal on the first ground is explored in more detail below.

On the second ground, the Court of Appeal agreed with the judge that a no "oral modification" clause in the FDA was effective in preventing Kout from becoming a party to the arbitration agreement through its conduct.

We consider this aspect of the decision in more detail here.

Which law governs the arbitration agreement?

The starting point in answering this question is to recognise that an arbitration agreement is separable from the main contract in which it is contained so that, for example, it can remain effective even if the main contract did not come into existence or has become ineffective (s7 Arbitration Act 1996). This is referred to as the "separability doctrine".

It follows that a governing law clause in the main contract does not necessarily cover the arbitration provision. Indeed, arbitration clauses often contain their own governing law provisions. The arbitration clause (Article 14) in the FDA did not specify its governing law.

The Court of Appeal focused on the following provisions in other parts of the contract:

- Article 1: "*This Agreement consists of… the terms of agreement set forth herein below*" – which the court construed as extending to the arbitration provision; and
- Article 15: "*This Agreement shall be governed by and construed in accordance with the laws of England*" – because the provision used the capitalised "Agreement", the court construed it as extending to all of the terms, including the arbitration clause.

Based on these provisions, the parties were found to have made an express choice of English law to govern the arbitration agreement. This conclusion was reinforced by the arbitration clause itself, which

provided, at Article 14(3), that: "*The arbitrator(s) shall apply the provisions contained in the Agreement*". The court construed this as requiring the arbitrator to apply all the provisions, including the English governing law clause, not just to substantive disputes but also to matters of jurisdiction.

Following the Court of Appeal in *Sulamérica*,[1] the court explained that the concept of separability cannot be used to prevent a court from construing the arbitration provision together with the remainder of the main agreement.

An express choice of governing law cannot be displaced by the choice of a different curial law (determined through the seat of arbitration – here Paris).

Comment

The question of which law governs an arbitration agreement can be important, as plainly demonstrated by this case. The outcome determined whether an entity was party to an arbitration agreement. While there is a degree of discord in case law dealing with this issue, the (complex) hierarchy of considerations is relatively clear:

- If the parties make an express choice of the law governing the arbitration agreement, the courts will respect that choice.
- The *Kabab v Kout* decision shows an increased willingness of the courts to construe a governing law provision in the remainder of the agreement as *expressly extending* to the arbitration clause. Given the complexity of the considerations that follow, and the comprehensiveness of the judicial enquiry that they require, this is a welcome development.
- In the absence of an express choice, the court will determine whether the parties made an implied choice of the law governing the arbitration agreement. In accordance with the *Sulamérica* decision, the starting point is a rebuttable presumption that the governing law of the main agreement extends to the arbitration clause. A different choice of seat, on its own, will not be sufficient to rebut that presumption, but it may do so in combination with other factors. (In *Sulamérica*, the presumption that the parties' choice of Brazilian law to govern the main agreement would extend to the arbitration agreement was rebutted on the basis that the arbitration clause provided that the seat of arbitration was in London and under Brazilian law the arbitration agreement was at risk of being ineffective.)
- In the absence of an express or implied choice of law, the court will consider with which system of law the arbitration agreement has the closest and most real connection. At this stage of the enquiry, the choice of the arbitral seat is likely to be the decisive consideration. An important reason for that is that the choice of a country as the arbitral seat will import into the agreement the law of that country insofar as it relates to the supervision and conduct of arbitrations. Most such laws, including the Arbitration Act 1996, contain mandatory provisions that extend to the validity of the arbitration agreement and the jurisdiction of the arbitrators.
- In proceedings concerning the recognition and enforcement of foreign arbitral awards, the final step in the analysis is simplified. Section 103(2) of the Arbitration Act 1996 (which mirrors article V.1(a) of the New York Convention) provides that, in the absence of an express or implied choice, the relevant law will be the law of the seat.[2]

In light of these complex rules, it is best practice to expressly set out the governing law(s) of the main contract and, separately, of the arbitration agreement. This will help to minimise the scope of disputes in court proceedings relating to interim measures, as well as at the jurisdictional and enforcement stages.

Tomasz Hara
Senior Associate
Tel +44 20 3088 4469
tomasz.hara@allenovery.com

Godwin Tan
Trainee
Tel +44 20 3088 1791
godwin.tan@allenovery.com

1 *Sulamérica CIA Nacional de Seguros SA & ors v Enesa Engenharia SA & ors* [2012] EWCA Civ 638.

2 Under s103(2) of the Arbitration Act 1996, recognition and enforcement may be refused if "*the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made*". It was confirmed by the High Court in *Kabab v Kout* that the expression "*the law to which the parties subjected it*" extends to an express as well as an implied choice of law.

Contract

English law aircraft lease valid despite alleged breaches of foreign procurement laws

Wallis Trading Inc v (1) Air Tanzania Co Ltd and (2) The Government of the United Republic of Tanzania [2020] EWHC 339 (Comm), 21 February 2020

The claimant aircraft lessor succeeded in its damages claim under an English law governed aircraft lease agreement for non-payment of rent and other payment obligations. The Tanzanian lessee had sought to avoid its contractual obligations by arguing, amongst other matters, that the lease was void for illegality (breach of Tanzanian procurement laws) and lack of authority. The court held that any mandatory laws of Tanzania were irrelevant as the contract was governed by English law and the place of performance of the payment obligation was not Tanzania. Standard representation and warranties as to authority meant that the defendant was contractually estopped from claiming lack of authority. The judgment is a good reminder of the utility of such representations and warranties.

Aircraft lease negotiations

The first defendant (a company wholly owned by the Government of Tanzania) entered into an aircraft lease agreement with the claimant, backed by a guarantee from the second defendant. Prior to entry into the lease, the first defendant had sought commercial proposals from Airbus, Boeing and Embraer for the lease of aircraft, but had only received a proposal from Airbus, which later effected an introduction to the claimant. The Attorney General for Tanzania and the board of the first defendant approved the lease on the condition that the management team of the first defendant would try to re-negotiate certain terms of the lease, which were thought to be too favourable to the claimant. The management team successfully re-negotiated some, but not all of these provisions.

The board of the first defendant delegated authority to its management to sign the agreement. Both the lease and the guarantee contained the usual representations and warranties regarding authority, legal and valid effect, and illegality. The lease also contained condition precedents which required the first defendant to provide evidence, by way of a board resolution, of the delegation of authority to management to sign the lease. The board resolution was provided shortly after execution of the lease.

The proceedings were issued for breach of contract when the first defendant stopped paying rent under the lease and a related settlement agreement.

Defences raised by the defendants

The first defendant raised 11 defences or counterclaims. The most important of these defences were claims that the lease was invalid by reasons of: (i) breaches of the Tanzanian Public Procurement Act 2004 (the **PP Act**); and (ii) a lack of authority on behalf of the management of the first defendant who executed the lease. The first defendant also raised issues regarding misrepresentation, non-compliance with conditions precedent under the lease and unconscionability. This article focuses on the key illegality and authority defences raised by the first defendant.

Alleged invalidity by reason of non-compliance with Tanzanian law

The first defendant argued that the lease was invalid and null and void as it was entered into in breach of the PP Act. The defendants claimed that, as the first defendant had the same status as a public entity, under Tanzanian law it should have gone through a proper tender process before entering into the lease and its failure to do so rendered the lease invalid.

The judge dismissed this argument because, under Article 8 of the Rome Convention on the law applicable to contractual obligations (given the force of law in the United Kingdom by the Contracts (Applicable Law) Act 1991), the material validity of a contract is to be determined by the law which would govern the contract under the Convention if the contract were valid. The lease is governed by English law and therefore the laws

of Tanzania were irrelevant to the question of validity of the lease.

However, the judge also held that, even if this was not the case, the first defendant was contractually estopped from relying on such a breach of Tanzanian law by virtue of: (i) the authorisation; and (ii) the legal and valid binding effect representation and warranties it gave in the lease.

Alleged unenforceability by reason of illegality

The first defendant also argued that non-compliance with the PP Act would activate the English law principle that the English courts will not enforce an obligation which requires a party to undertake an act which would be unlawful in the law of the place of performance. However, as lease payments were to be made to the claimant's bank account in Switzerland, the judge dismissed this argument on the basis that the first defendant did not suggest that making payment under the lease was illegal as a matter of Swiss law. Further, the defendants had failed to show, in any case, that entering into a contract in breach of the PP Act was illegal.

Alleged lack of authority

By way of secondary argument, the first defendant argued that Mr Mattaka (who signed the lease on its behalf) lacked authority to do so because: (i) he acted in breach of his fiduciary duties to act in good faith; (ii) any delegation of authority was conditional upon Mr Mattaka re-negotiating certain unfavourable provisions of the draft lease; and (iii) Mr Mattaka should have complied with the PP Act.

The judge held that there was no evidence to show that Mr Mattaka had acted dishonestly or otherwise than in good faith. In fact, the evidence showed that he had tried to further the first defendant's interest by negotiating the terms of the lease despite ATCL being in a weak negotiating position. The commercial terms of the lease reflected the shortage of Airbus A320 aircraft at the time and the credit and other risks associated with ATCL. The judge noted that, even if he had found that Mr Mattaka had acted in breach of his fiduciary duties, this would not have been sufficient to render the lease void as a matter of English law.

The judge held that the delegation of authority being conditional argument failed because the claimant was not aware of any such conditions being imposed on Mr Mattaka's authority and as such Mr Mattaka had ostensible authority to enter into the lease. Even if this was wrong, the first defendant had ratified the execution of the lease, by, inter alia, accepting the aircraft and flying it.

The judge held that the first defendant was contractually estopped from arguing that Mr Mattaka lacked authority, due to him acting in breach of the PP Act, by the authority representations and warranties it had given in the lease.

Comment

This decision highlights the utility of including standard representations and warranties regarding validity and authority in helping to defeat later illegality/lack of authority claims. The judgment also reconfirms the position that illegality defences will only be successful if performance of the contractual obligations is illegal under the laws of the place of performance or the law governing the contract.

Helen Biggin
Senior Associate
Tel +44 20 3088 3045
helen.biggin@allenovery.com

Costs

No guaranteed "cap" on a third party litigation funder's liability for adverse costs

ChapelGate Credit Opportunity Master Fund Ltd v (1) James Money (2) Jim Stewart-Koster (Joint Administrators of Angel House Developments Ltd) (3) Dunbar Assets Plc [2020] EWCA Civ 246, 25 February 2020

The Court of Appeal has reconsidered the binding nature of the *Arkin* cap. A court need no longer cap commercial litigation funders' liability for adverse costs where it would be unjust to do so, for example, (i) where the funded party would otherwise be unable to pay an adverse costs award in full; (ii) the funded party has not obtained ATE insurance; and (iii) the terms of the funding arrangement are particularly favourable to the funder.

ChapelGate Credit Opportunity Master Fund Ltd (**ChapelGate**), a commercial funder, appealed against an adverse costs award against it in *Davey v Money*.[1] Ms Davey had sued the joint administrators of a company and the creditor appointing them (together, the **Defendants**) for breach of duty and improper conduct amounting to dishonesty during the administration.

ChapelGate had entered into a funding arrangement with Ms Davey whereby it initially funded GBP2.5 million in return for 30% of its committed funding (in addition to repayment of the principal amount) and the greatest of 300% of its committed funding, or 25% of the total recovery if the case was won or settled. The High Court found in favour of the Defendants on the substantive merits and subsequently ordered ChapelGate to pay the Defendants' costs on the indemnity basis by way of a non-party costs order under s51 Senior Courts Act 1981.

ChapelGate argued that, as a third party funder, its liability should be capped at the amount it provided to Ms Davey in accordance with the *Arkin* cap.

The *Arkin* cap

In *Arkin v Borchard Lines Ltd* (*Costs Order*),[2] Mr Arkin persuaded a commercial funder to fund expert evidence in support of his claim that could not have otherwise been obtained. Mr Arkin then lost on the substantive merits of the claim and a costs award was rendered against him and the litigation funder.

The Court of Appeal held that the funder's liability for costs under s51 should be capped at the funding it contributed to Mr Arkin's costs. Phillips LJ anticipated that the *Arkin* cap would encourage third party funders to: (i) self-limit the amounts provided, thereby reducing their possible exposure and keeping costs in the case proportionate; and (ii) consider more acutely whether the "prospects of the litigation are sufficiently good to justify the support that they are asked to give" and, in so doing, act in the public interest. These predictions were made in 2005, when the market for third party funding in this jurisdiction was still in its infancy, with a view to facilitating access to justice. Since Phillips LJ's early prognoses, the market has significantly commercialised and no longer consists of a limited number of funders.

No hard and fast rule for capping third party funders' liability

The decisions in *Davey v Money* and *ChapelGate* confirm that the *Arkin* cap should not apply automatically in all cases involving commercial funders, whatever the facts and however unjust doing so would be. This is a significant change.

The Court of Appeal agreed with the first instance Judge, Snowden J, who identified some key factors that would justify a court's departure from *Arkin*, including where:

– **The primary driver for funding is commercial:** While it was not in and of itself wrong for ChapelGate to approach the litigation as a

[1] [2019] EWHC 997 (Ch).
[2] [2005] EWCA Civ 655.

commercial investment, Ms Davey's access to justice "came a clear second to ChapelGate receiving a significant return on its commercial investment". In that sense, ChapelGate was the party with the "primary" interest in the claim, and accordingly it was right that it should bear liability for the successful Defendants' costs.

- **The funded party is unable to pay the full adverse costs award:** ChapelGate must have been aware that Ms Davey was impecunious and would be unable to pay the full amount of any adverse costs award rendered against her. The Defendants' costs were awarded on the indemnity basis principally because Ms Davey had made what the court found to be "wholly unfounded" allegations of dishonesty, against multiple Defendants (including "professional persons" operating in regulated industries), who could not be expected to share legal expenses. Even though ChapelGate did not drive the conduct of the litigation, it had every opportunity to investigate and form a view on the nature of the claim and the lack of evidential support for the allegations, before choosing to fund it. Accordingly, it bore the full liability for the Defendants' costs incurred after the date of its investment on the indemnity basis.
- **The funded party fails to obtain ATE insurance:** In return for waiving the requirement on Ms Davey to obtain ATE insurance, ChapelGate halved its funding commitment (to GBP1.25m) whilst retaining the same rights to the potential share of any recoveries. In reducing its funding exposure, ChapelGate consequently increased the exposure of the Defendants, who no longer had the protection of ATE insurance.
- **The funder is set to receive significant returns far in excess of its committed funding:** If successful, ChapelGate would have received a substantial commercial profit in priority of any recovery received by Ms Davey (and indeed, in advance of her lawyers, who were acting on Conditional Fee Agreements).

Snowden J considered that the clear commercial self-interest of ChapelGate contradicted the outcomes originally anticipated by Phillips LJ in his support of the *Arkin* cap.

Comment

As these cases and the original *Arkin* decision demonstrate, third party funding is supported by the English courts. However, the courts no longer consider third party funding to be a nascent concept and are alive to the commercial self-interests of funders.

For litigants engaged in disputes against a party backed by a commercial funder, the Court of Appeal's decision offers reassurance that the *Arkin* cap will not be applicable in every case, particularly where its operation would likely leave the successful party out of pocket on costs. The courts will not apply the *Arkin* cap where doing so would result in an unjust outcome, nor will they allow the cap to act as a funding stimulus for claimants to pursue spurious claims.

Litigants should note that, while the Court of Appeal has resolved that the *Arkin* cap is not a binding rule, this does not render it redundant. There may still be cases where the approach laid down in *Arkin* remains appropriate, particularly where there are comparable facts.[3]

The case also serves as a poignant reminder to funders that they may ultimately be the ones on the hook for costs, including on the indemnity basis, even where they do not drive the litigation strategy.

The *Arkin* cap was only ever intended to be applicable to professional funders. Applying *Davey v Money*, in *Kazakhstan Kagazy Plc & ors v Baglan Zhunus & ors*,[4] the Commercial Court agreed that the *Arkin* cap should not apply to limit certain family members' liability for costs under s51 where they had financed a fraudster's unsuccessful defence. Jacobs J noted that the *Arkin* cap did not have any real relevance in a case that did not involve a professional funder, but that in any event it was not, in his view, an "inflexible rule". Allen & Overy LLP acted for the successful Claimants.

Alex Mobbs
Associate
Tel +44 20 3088 3602
alex.mobbs@allenovery.com

Elliott Glover
Trainee
Tel +44 20 3088 1769
elliott.glover@allenovery.com

3 See, *Burnden Holdings (UK) Ltd v Fielding* [2019] EWHC 2995 (Ch).
4 [2019] EWHC 2630 (Comm).

Data protection

Company not vicariously liable for data breach but Supreme Court does not rule out the possibility in future cases

Wm Morrison Supermarkets plc v Various Claimants [2020] UKSC 12, 1 April 2020

The UK Supreme Court unanimously overturned a 2018 Court of Appeal ruling that had found Wm Morrison Supermarkets PLC (Morrisons) vicariously liable for its employee's misuse of private information, breach of confidence and breach of statutory duty under the Data Protection Act 1998 (DPA).

Although this case was brought by reference to the DPA, it is likely that the analysis would apply equally under the GDPR.

After examining the facts of this case, the Supreme Court found that Morrisons was not vicariously liable (in summary that is, not, as employer, liable for the tortious acts of its employee, carried out in the course of their employment). However, it was clear that it remains possible for an employer to be held vicariously liable for a data breach under the DPA, for misuse of private information or breach of confidence in other circumstances.

Back in 2014, a disgruntled Morrisons senior internal auditor, Andrew Skelton, leaked the payroll data of almost 100,000 Morrisons employees to an online file-sharing site and subsequently to various newspapers. Skelton was prosecuted and sentenced to eight years in prison.

Separately, a group action was brought against Morrisons, with over 9,000 current and former employees seeking damages for distress as a consequence of the leak of their personal data. Whilst the High Court, and subsequently the Court of Appeal, did not consider Morrisons to be directly liable for such damages, they did hold that Skelton was acting in the course of his employment and therefore Morrisons could be liable for misuse of private information, breach of confidence and breach of statutory duty under the DPA on a vicarious basis.

The Supreme Court disagreed, noting that the Court of Appeal had misunderstood the test of vicarious liability and that to consider Morrisons vicariously liable in this case would amount to a "major change in the law".

The court confirmed that "Skelton's wrongful conduct was not so closely connected with acts which he was authorised to do that, for the purposes of Morrisons' liability to third parties, it can fairly and properly be regarded as done by him while acting in the ordinary course of his employment". Whilst Skelton was legitimately given access to the payroll data for onward provision to Morrisons' external auditor, his subsequent disclosure of the data online did not fall within his "field of activities". The fact that there was a "close temporal link and an unbroken chain of causation" between his receipt of the payroll data and the unlawful disclosure was not, in itself, sufficient to meet the close connection test and establish vicarious liability. The Supreme Court also took account of the fact that Skelton was acting for personal reasons and not for Morrisons' business.

Importantly however, although Morrisons was not held to be vicariously liable on the facts of this case, the Supreme Court did not consider that vicarious liability was excluded as a general principle in circumstances in which an employer was not in breach of the DPA. It rejected the argument that because the DPA contemplates fault-based liability, common law should not impose additional no-fault strict liability on an employer of an employee who has become a data controller in their own right (just as in the case of Skelton). Given that the DPA was silent on this issue, the Supreme Court determined that when an employee is a data controller, it remained possible, depending on the facts, for an employer to be considered vicariously liable for their breach of the DPA, misuse of private information or breach of confidence.

Emma Keeling
Senior Professional Support Lawyer
Tel +44 20 3088 2182
emma.keeling@allenovery.com

Disclosure

When does a parent "control" its subsidiary's documents for disclosure purposes?

Pipia v BGEO Group Ltd [2020] EWHC 402 (Comm), 26 February 2020

Whether a parent company has sufficient "control" of its subsidiary's documents for that material to fall within its disclosure obligations is a hotly disputed question. The parent litigant wants to avoid opening up a new channel of potentially damaging documents, whereas its opponent wants to access a larger pool of documents and increase the disclosure burden on its adversary. In this judgment the Commercial Court demonstrates that the parent litigant may find it hard to argue that it does not have the requisite control over its subsidiary's documents. Although a parent company does not automatically have such control, all that is needed for control to exist is an existing arrangement or understanding (whether or not legally enforceable as a contract) which, in practice, provides the parent with a right of access.

A company (the **claimant**) brought proceedings against a parent company (the **parent**) and its subsidiaries in relation to the allegedly unlawful enforcement of security.

After the claim was served, the parent sent letters to two of its subsidiaries requesting it be provided with "*all the documents pertaining to [the claim] as requested by us or our advisers*". The subsidiaries agreed to this access by request arrangement.

The claimant subsequently discontinued its claim against the subsidiaries. The claim continued against the parent and over a year later the parent wrote again to the two subsidiaries regarding document access. This time the parent asked the subsidiaries to provide it with "open access" to their documents so it could "search for documents that relate to the issues in dispute". The subsidiaries refused this open access request. No mention was made to the earlier access by request arrangements.

A dispute arose between the claimant and the parent as to whether the parent had control of the two subsidiaries' documents for disclosure purposes. The claimant said it did, either because wide-ranging control arrangements could be inferred from the facts or by virtue of the access by request arrangements. The parent disagreed. It said, as a matter of principle, an arrangement would only give rise to the requisite control where it provided an unfettered right of access to the documents in question. No such right existed as the subsidiaries had refused the open access request and the access by request arrangements did not provide unfettered access and were, in any event, no longer current.

"Control" is widely defined

A party's disclosure obligations in English civil litigation bite on all documents within its "control". Control is widely defined and "includes documents: (i) which are or were in a party's physical possession; (ii) in respect of which a party has or has had a right to take possession; or (iii) in respect of which a party has or has had a right to inspect or take copies".[1]

No automatic control, but access arrangement sufficient

The court started by noting that a parent company does not automatically have control of its subsidiaries' documents. To have control the parent either needs to have: (i) an enforceable legal right to access the documents; or (ii) an arrangement which provides, in practice, a right of access. This arrangement does not need to be enforceable as a contract, but needs to be more than just that the subsidiary would probably provide the documents if asked.

[1] This definition is taken from the Disclosure Pilot Scheme (PD 51U), but very similar provisions appear in CPR 31.8.

To determine whether a subsidiary's (or any third party's) documents are within the "control" of a parent company by virtue of a standing consent, the court said it may be helpful to ask:

- What is the scope of the standing consent? Are the documents within its scope?
- What type of standing consent is it? How is the party to get hold of the documents? Is the party to conduct its own searches or must it request the document (possibly to match certain criteria)?
- What is the quality of the standing consent? Does the party have an unfettered right of access – this can be to all documents or to particular documents?

On the facts of this case, the court ruled that the access by request arrangements constituted control for disclosure purposes. They provided the parent with standing consent for upon request unfettered access to the subsidiaries' documents relating to the claim.

Unrestricted access to the subsidiaries' documents was not necessary for there to be control. Sufficient control would exist even if the standing consent related to a single document. It was not necessary for the standing consent to be enforceable as a contract.

The court dismissed the parent's argument that the access by request arrangements were no longer current. The access by request arrangements were not conditional on the subsidiaries being defendants. Although the open access arrangements were rejected, there was no reference to prior arrangements being terminated when the open access arrangements were proposed and rejected. Indeed the continuation of the access arrangements was not surprising given it was in the subsidiaries' interests for the parent to have the material it needed to fight the claim.

What did the parent's control of its subsidiaries' documents mean for its disclosure obligations? There is going to be a further disclosure hearing to decide this point, but the court was clear that it does not mean that the same disclosure obligations are imposed on the subsidiaries as for the parties. It is not expected that they will have to retrieve or restore deleted files, or to conduct wide-ranging keyword searches across huge email or other electronic documentary records.

Comment

This judgment provides a salutary reminder that a parent may well have control of its subsidiary's documents for disclosure purposes even where no enforceable legal right exists and where wholesale access is not granted.

There is a risk that adverse inferences may be drawn against a parent which doesn't make "sensible requests" for pertinent documents from its subsidiary. Although the court recognised that there is no obligation for a party to disclose documents which are not within its control, it warned that there are limited circumstances where adverse inferences could be drawn. These include: (i) where the reason why a sensible request was not made was because it would reveal the party did in fact have control of the third party's documents; (ii) where (although this will very much turn on the facts) there is a lack of evidence and the third party holds documents going to the merits and that third party would have likely helped if requested; and (iii) where an arrangement which gave access was terminated because the third party held documents which would be unhelpful.

Interestingly, the court provided some important thoughts on Model C of the Disclosure Pilot Scheme. Under this model the court may order a party to disclose particular documents or narrow classes of documents relating to a particular issue for disclosure. The court observed that, for this model, the relevance of the documents to the issue for disclosure is determined at the time Model C disclosure is settled. Once ordered, all documents which are responsive to the Model C request must be disclosed. The court continued that a request for "any or all documents relating to" a topic is not a Model C request at all. If this is the correct understanding of Model C, the ambit of any Model C requests must be tightly drawn as there is no flexibility to hold back documents that are responsive to Model C but not relevant to the issues for disclosure.

Christabel Constance
Senior Professional Support Lawyer
Tel +44 20 3088 3841
christabel.constance @allenovery.com

Fraud

Banks liable for dishonest assistance and fraudulent trading

Bilta (UK) Ltd (in liquidation) & ors v NatWest Markets plc & anr co [2020] EWHC 546 (Ch), 10 March 2020

A bank and its subsidiary were held vicariously liable, as employers of two traders, for knowing participation in fraudulent trading and dishonest assistance of fiduciary breaches by the directors of the insolvent claimant companies relating to carbon credit trading. The case demonstrates the breadth of the concept of dishonest assistance – the traders were found to have "assisted" fraud at the other end of a chain of transactions, despite lacking actual knowledge of the fraud. The ruling provides a useful example of how concepts of dishonesty and assistance can apply in a commercial context.

The claimants were a group of UK companies, all in liquidation as a result of their directors' participation in a "carousel fraud". The fraud involved the purchase by the companies of carbon credits from EU Member States (which did not attract VAT), which were sold via an intermediary to UK counterparties (which did attract VAT), including one of the defendants. The directors misappropriated the VAT paid, leaving the companies with huge tax debts.

The defendants were the Royal Bank of Scotland (**RBS**), now NatWest Markets plc, and RBS Sempra Energy Europe Ltd (**RBS SEEL**), a subsidiary of RBS. The claimants alleged that two traders dishonestly assisted in the claimants' directors' breaches of fiduciary duty, and that both RBS and RBS SEEL were vicariously liable as the traders' employers. The "assistance" was said to be the traders' purchases, on behalf of RBS, of carbon credits from the intermediary. The intermediary had purchased the carbon credits from the claimant companies.

The defendants both denied liability, each submitting that the other was solely vicariously liable. They also argued that the trading could not be "assistance" because it was too removed from the ultimate breaches of fiduciary duty by the directors, and that the traders had not acted dishonestly, as they had not known of the directors' fraud.

Knowing participation in fraudulent trading contrary to s213 Insolvency Act was also argued in the alternative by the claimants. On this alternative claim, Snowden J held that where knowing assistance in a fiduciary breach was made out, knowing participation in fraudulent trading would also be made out.

Both RBS SEEL and RBS are liable: dual vicarious liability

Snowden J said this was a "paradigm case for the imposition of dual vicarious liability" because the traders were so much a part of the "work, business or organisation" of both RBS SEEL and RBS that it would be just to make both companies liable for any wrongs that the traders committed against third parties.

RBS SEEL was vicariously liable for the traders as their legal employer and, because it was primarily liable to pay the traders' salaries and benefits, the traders were subject to RBS SEEL's supervision and control, and RBS SEEL had an obligation to ensure that its managers supervised the traders' activities.

RBS was held also to be vicariously liable because the traders were authorised to trade as agents for RBS (and had the power and authority to commit RBS to trades), they were to comply with instructions given by RBS, RBS reimbursed RBS SEEL for their salaries and RBS could direct them not to enter into certain trades.

Broad meaning of "assistance" includes transactions via an intermediary

Dishonest assistance requires proof of three elements: a breach of fiduciary duty, assistance by the defendant in that breach and dishonesty by the defendant.

Regarding the second element, the alleged assistance in this case was of an unusual kind because the traders did

not have any direct interaction with the fraudulent directors. The defendants argued that classing the purchases of carbon credits from an intermediary company as "assisting" a breach of fiduciary duty that they didn't even know of would be an illegitimate extension of the scope of dishonest assistance.

The court rejected this argument, holding that the case of *Alpha Sim v CAZ Distribution Services* [2014] EWHC 207 (Ch) (**Alpha Sim**) provides authority for "assistance" being possible when the defendant's actions are separated from the breach by intermediary transactions.

Snowden J further noted that the same meaning of "assistance" would also apply to liability for knowing participation in fraudulent trading under s213 Insolvency Act. Snowden J reached this conclusion based on an extension of the finding in *Bank of India v Morris* [2005] BCC 739 that "outsiders" (ie not part of the management of the company) who had dealt with the fraudulent company could be liable.

"Dishonesty" includes failure to make enquiries

In *Alpha Sim*, the trader had direct knowledge of the fraud. Here, it was not alleged that the traders had such knowledge. Instead, their "dishonesty" arose from having suspicions about their purchases, but failing to make enquiries.

To decide whether a party has acted honestly, based on *Ivey v Genting*, the court will first determine what that party actually knew or believed at the relevant time. Then the court will determine what an ordinary person, acting honestly, would have done if possessed of that knowledge. If the party did not take that action, they have acted dishonestly.

The traders' initial knowledge of VAT fraud generally in the sector, and their curiosity about where the company they were buying credits from had obtained them, would not have prompted an ordinary person to take action. When the volume of trading increased to a "wholly exceptional" level after a week, however, it was held that an ordinary person would have become suspicious that they were involved in a fraudulent scheme, and made enquiries. The traders therefore acted dishonestly when they failed to make those enquiries, because they "dishonestly turned a blind eye" to the risk that they were participating in fraud. It did not matter that the traders did not have a detailed understanding of the fraud; Snowden J commented: "*I do not think that it matters that they did not understand the detailed mechanics of MTIC fraud, or have an understanding of the particular type of MTIC fraud that was being carried on, or as to the specific role of [the intermediary] in it*".

The court ordered that the two defendants were jointly and severally vicariously liable both for dishonest assistance and fraudulent trading.

Attribution

The judge also considered attribution as an alternative to vicarious liability in relation to RBS only (as it was RBS that had entered into the trades). Snowden J held that the persons whose knowledge would be attributed to RBS in this case would be the traders, because they were given the authority to conduct the relevant trades on behalf of RBS.

Comment

This decision does not make new law but it does provide a good illustration of how the concepts of dishonesty and assistance can impact liability of the participants in a chain of commercial transactions. The judgment illustrates how those involved in trading can become liable in relation to a fraud of an unrelated, and even unknown, party at the far end of a chain of transactions. Companies must encourage employees to flag suspicious activity and make enquiries where they suspect that the transactions they are involved in may be linked, even indirectly, to fraud. There may also, of course, be an obligation to report suspected money laundering.

Loraine MacDonald
Legal Advisor – Not Admitted in the UK
Tel +44 20 3088 1450
loraine.macdonald @allenovery.com

Injunctions

Insurer obtains freezing order against bitcoin exchange operator

AA v (1) Persons Unknown who demanded Bitcoin on 10 and 11 October 2019 (2) Persons Unknown who own/control specified Bitcoin (3) iFINEX (t/a BITFINEX) (4) BFXWW Inc (t/a BITFINEX), 17 January (2020)

An insurer has successfully sought a proprietary freezing order against defendants, including a bitcoin exchange operator, after paying a ransom demand in Bitcoin on behalf of its customer. This decision adds to the growing body of examples of the High Court being willing to treat cryptocurrency as property for the purpose of granting interim injunctions.

In October 2019, the First and Second Defendants (all persons unknown) infiltrated the firewall of a Canadian insurance company and installed malware that encrypted the company's computer systems. The First Defendant demanded Bitcoin in the value of USD1.2m to decrypt the Applicant's systems. The company notified its UK insurance provider (the **Applicant**) who, following negotiations, paid a ransom of Bitcoin worth USD950,000. The money was transferred into a Bitcoin account controlled by persons unknown (the Second Defendant) and linked to a Bitcoin exchange operated by the Third and Fourth Defendants (the **Exchange Defendants**).

Having paid the ransom on behalf of its customer, the Applicant exercised its rights of subrogation to bring proceedings against the Defendants, in connection with which it also brought various ex parte applications. These included applications for orders to require the Exchange Defendants to disclose information about an account controlled by persons unknown (which were adjourned in light of uncertainty over the court's jurisdiction to impose such orders on parties outside of this jurisdiction). The Applicant also sought, and was granted, a proprietary freezing order in respect of the Bitcoin it had paid in ransom.

Cryptocurrencies as property

In order for a proprietary injunction to be granted, the court had to be willing to classify the Bitcoin as a form of property despite it not falling within the traditional legal understanding of property as either physical things capable of being possessed (choses in possession) or legal rights capable of being enforced by action (choses in action).

However, consistent with the court's approach to other recent requests for proprietary orders in respect of cryptocurrency (notably, *Robertson v Others* and *Vorotyntseva v Money-4 Limited*), Bryan J was willing to depart from the traditional definition of property and instead followed the analysis in the UK Jurisdictional Task Force's (**UKJT**) November 2019 Legal Statement on Crypto-Assets and Smart Contracts. This statement concluded that cryptocurrencies are a form of property on the basis that they meet the following criteria: (i) they are definable; (ii) they are identifiable by third parties; (iii) they are capable in their nature of assumption by third parties; and (iv) they have some degree of permanence. In the first example of the High Court expressly endorsing this analysis, which he described as "compelling", Bryan J found that Bitcoin could be the subject of a proprietary injunction and (other tests, including as to serious issue to be tried and risk of dissipation, being met) granted this order against the four defendants in respect of the Bitcoin.

Hearing in private

The court heard the applications in private on the grounds that a public hearing may have encouraged the dissipation of the Bitcoin or encouraged further revenge cyberattacks, and the matter involved information confidential to the Applicant and its customer. The Applicant was also anonymised for the same reasons.

COMMENT

This is not the first decision in the High Court to classify cryptocurrencies as property but this is the first to make a definitive statement endorsing the analysis in the UKJT Legal Statement, which has status only as judicial guidance at present (and with no clear sign of statutory intervention on the horizon). It is notable – and reassuring – that, to date, there has been consistency in the judicial treatment of these applications for proprietary injunctions over cryptocurrency.

We still await the first full trial in which the court will have to confront the substantive legal question of exactly what form of property cryptocurrency takes. In the meantime we can expect further new, or previously unreported, interim decisions to emerge as this area continues to develop.

Georgina Thomson
Associate
Tel +44 20 3088 2426
georgina.thomson @allenovery.com

Sophie Larsen
Trainee
Tel +44 20 3088 1781
sophie.larson @allenovery.com

Privilege

Privilege in regulatory investigation context

Sports Direct International Plc v FRC [2020] EWCA Civ 177, 18 February 2020

Sports Direct has successfully appealed a problematic first instance decision that allowed the Financial Reporting Council (FRC) access to privileged communications. The judgment provides welcome confirmation to companies that, where permitted by statute, communications with their professional advisers will continue to be protected by privilege, even when being sought by regulators.

The FRC, the UK's regulatory body for accountants, auditors and actuaries, has been investigating Grant Thornton in relation to its audit of the financial statements of Sports Direct International (**Sports Direct**), since 2016. The FRC issued several statutory notices to Sports Direct, seeking material relating to the audit that Sports Direct argued was protected by legal privilege.

Arnold J held, at first instance, that the disclosure to the FRC of this material did not infringe Sports Direct's privilege, as it was only being relied on by the FRC in its investigation into Grant Thornton, and not made publicly available or used against Sports Direct. Arnold J went on to state, in the alternative, that even if disclosure to the FRC did infringe this privilege, it was only a "technical" infringement, which was impliedly authorised by the FRC's statutory powers to seek documents. This was a worrying development for companies as it gave the FRC the possibility of obtaining a company's privileged material via an investigation into its adviser.

Privilege protected where statutory disclosure powers are subject to exceptions for privileged material

Lady Justice Rose, giving the leading judgment, disagreed. Rose LJ held that where the statutory powers on the basis of which disclosure is being sought expressly provide an exception for privileged material, then the recipient of a disclosure request is not required

to disclose the privileged material. It is immaterial to whom the privilege belongs.

While this conclusion does not seem altogether surprising given the express wording in the relevant statute provided an exception to disclosure of privileged material, Rose LJ emphasised the importance of simple statutory interpretation. There was nothing in the relevant statute to suggest it meant anything other than that privileged material was exempted from any request for disclosure.

Rose LJ found that the case law was consistent with a finding that privilege should be protected where that is the express intention of Parliament.

Privilege given same level of protection irrespective of whose privilege it is

Arnold J's alternative finding – that disclosure of privileged material to the FRC was allowed as any infringement, if there was one, was only of a technical nature – was also overruled. This was both because there was no support for this in case law, and, perhaps more significantly, because of important policy reasons. It would, if correct (which it was not), involve the application of a lower standard allowing for the statutory exception to be overridden for mere technical infringements.

Rose LJ concluded that the threshold is not any lower, when considering whether privilege is infringed, where the infringement is said to be only technical. That the FRC's investigation in this case was into Grant Thornton, rather than Sports Direct, did not alter the protection that should be afforded to the privilege.

Rose LJ re-affirmed the central importance of privilege from a public policy perspective: that a client must be able to speak freely and securely with its legal adviser. The fact that the client (and only the client) has a choice over whether to waive the resulting privilege, if requested by a regulator, is a satisfactory reason as to why there should only be a single standard applied, meaning it does not matter whose privilege is engaged by the request.

Rose LJ emphasised that privilege is fundamental in all but two circumstances: (i) where the iniquity exception applies; and (ii) where it has been modified or repealed by Parliament through statute (subject only to objection on human rights grounds).

Non-privileged documents attached to privileged communications are disclosable

Sports Direct also appealed the first instance decision that attaching pre-existing, non-privileged documents to privileged communications does not make those documents privileged. As expected, Rose LJ rejected this ground of appeal and confirmed that a non-privileged attachment must be disclosed notwithstanding that it may have been attached to a privileged email. Although this means there is little scope to withhold from disclosure a non-privileged document attached to a privileged communication, in practice, an assessment of an attachment's relevance to a request will still need to be considered in light of the specific wording of the request, as well as within the wider context of its status as an attachment to a separate communication.

This is also clear from the Court of Appeal's recent judgment in *The Civil Aviation Authority v Jet2.Com Ltd* [2020] EWCA Civ 35, which dealt with a similar issue of whether it was necessary to assess privilege as between an email and its attachment separately. In that case, Hickinbottom LJ stated that, when giving disclosure of documents, "separate consideration of substantive documents and attachments" will need to be undertaken.

Comment

This decision reinforces the fundamental protections that should be granted to clients seeking confidential legal advice. It closes down a potential avenue for regulators to obtain privileged material through the back-door, meaning a company can take greater comfort that, when faced with a request for documents from a regulator, it has a right to assert privilege where it has a credible claim to it. A company may therefore be emboldened to refuse to accede to these types of requests, which could serve as useful leverage in any ongoing dialogue with regulators. This will be the case regardless of whether it is the company or a third party that is the focus of a regulator's scrutiny.

As always, a company will need to pay particular attention to the legal basis on which a request for disclosure is made. The same can be said of the disclosure request itself. In both cases, it will be important to carefully consider the specific language used to ensure that the company is aware of, and confident in exercising, its rights.

This ruling is timely given that we are seeing increased scrutiny of auditors and financial reporting generally.

The FRC announced last month reforms of its oversight and supervisory functions to speed up enforcement investigations, as well as broadening its stated purpose to serve the public interest by setting high standards of corporate governance, reporting and audit and by "holding to account those responsible for meeting them".

Robin Marshall
Associate
Tel +44 20 3088 3653
robin.marshall @allenovery.com

Tort

Mining company not liable for unlawful acts of sierra leonean police

Kadie Kalma & ors v (1) African Minerals Ltd (2) African Minerals (SL) Ltd (3) Tonkolili Iron Ore (SL) Ltd [2020] EWCA Civ 144, 17 February 2020

The Court of Appeal of England and Wales has upheld the High Court's verdict in *Kadie Kalma & ors v African Minerals Ltd & ors* [2020] EWCA Civ 144. This is an important case for businesses exposed to human rights risks through their reliance on third parties, particularly state security forces, in relation to their operations abroad. The finding in this appeal confirms the limits on the circumstances in which a company can be held liable for harm caused by such third parties.

Allegations of violence at African Minerals mine in Sierra Leone

The claims were brought by 142 individuals who alleged that they had been harmed by the Sierra Leonean Police (**SLP**) during two major outbreaks of unrest and violence connected to the defendants' iron ore mine. The incidents involved beatings, shootings, robbery, sexual assault and one death. Although the alleged acts took place on Sierra Leonean soil, the English court agreed to hear the case because the actual iron ore producer (the third defendant, Tonkolili Iron Ore Ltd) was previously a subsidiary of African Minerals Ltd (**AML**), which had its head office in London before going into administration in 2015. At first instance, the High Court found that AML and its co-defendants were not liable for the acts of the SLP. In a wide-ranging judgment, the Court of Appeal upheld the High Court's verdict.

High Court: African Minerals not responsible for actions of police

At trial, the claimants sought to argue that AML could be held responsible for the actions of the SLP on the basis that AML: (i) was vicariously liable for those actions; (ii) should be regarded as an accessory in furtherance of a "common design" with the SLP; (iii) procured the SLP to commit the tortious acts; (iv) breached a duty of care in failing to prevent the SLP from committing those acts; and/or (v) breached a non-delegable duty in respect of an "extra-hazardous" activity carried out by the SLP.

All of these claims were rejected by the judge at first instance (Turner J). In particular, he rejected the vicarious liability argument on the basis that, amongst other things, the relationship between AML and the SLP personnel was not akin to a "quasi-employment" relationship. Moreover, it made little sense to find that both AML and the SLP shared "dual vicarious liability" for the acts of the SLP's personnel.

African Minerals criticised for failure to follow Voluntary Principles on Security and Human Rights

However, the judge did find that, had AML owed a duty of care, it would have breached that duty in at least some of the respects alleged by the claimants. In particular, the judge criticised AML for having failed to follow the "recognised minimum standards" set out in the Voluntary Principles on Security and Human Rights (**VPs**) to reduce the risk of human rights abuses in communities located near the mine site. Specifically, as

recommended by the VPs, AML should have carried out a security and human rights risk assessment, had in place a crisis management plan, engaged more with the SLP, and taken further steps to reduce the risk of the SLP using excessive force and mistreating people.

Appeal

The appeal was limited to only two of the original heads of claim in the case, namely:

- whether the respondents were liable as accessories to the torts committed by the SLP, on the basis that they had acted in furtherance of a common tortious design with the police; and
- whether the respondents had negligently breached a duty of care to the appellants in failing to take adequate steps to prevent the SLP from harming the appellants.

African Minerals was not an accessory to the torts committed by the Sierra Leonean police

Accessory liability requires proof that the defendant acted in a way which furthered the commission of a tort by a third party, and did so in pursuance of a common design to do or secure the doing of the acts which constituted the tort (*Fish & Fish v Sea Shepheard* [2015] AC 1229). The appellants' case was that the respondents were accessories to the acts of the SLP (the beatings, shootings, robbery, sexual assault and killing) pursuant to a common design to suppress protests and disruption around the mine through unlawful means.

The judge, at first instance, made a finding of fact that: (i) AML's employees did not instigate, direct, counsel or procure the unlawful actions of the SLP; and (ii) AML's employees did not intend that there should be any such unlawful actions. It followed that there was no common design between the defendants and the SLP that the SLP should use unlawful means to suppress the protests.

On appeal, the appellants argued that it should be inferred from the respondents' provision of resources (money, food, transport, accommodation, etc) to the SLP, and the fact the respondents could foresee that the SLP might use excessive force, that the respondents intended that the police should suppress any protests which arose, if need be, by excessive force. This inferred and conditional intention that the SLP should use excessive force "if need be" was said to be sufficient to demonstrate common design.

The Court of Appeal rejected this position. It noted the first instance judge's findings that it was necessary for AML to provide material and financial support to the local police force in order to enable them to protect mine personnel and property. To the extent that any intention could be inferred, it was "much more likely" that the resources were intended to assist the police in keeping the peace rather than to assist them in using unlawful means to suppress protests.

Further, the fact that it was foreseeable that the SLP might use excessive force did not mean that this was the respondents' intention. Significantly (and helpfully for companies operating in potentially dangerous locations), the court noted that it is a matter of "common sense" that someone who calls on and helps the police to uphold law and order should not be liable for their actions "simply because it is foreseeable that the police might use excessive force to achieve that result": it is precisely in those scenarios where over-reaction is foreseeable that police assistance may be most needed.

The Court drew a distinction between common design and the situation where a party gives assistance to a wrongdoer knowing that the wrongdoer intends to commit the wrong in question. Such "knowing assistance" would be sufficient to impose liability under the criminal law or in equity, but it would not be enough to make the assisting party liable in tort.

African Minerals did not owe the claimants a duty of care

The appellants' challenged several aspects of the High Court's decision that AML did not owe the claimants a duty of care in relation to the actions of the SLP. Specifically, they challenged the (factual) findings: (i) that AML's involvement in events should be characterised as "pure omissions", rather than a combination of omission and positive acts; and (ii) that AML did not create a dangerous situation. Again, the Court of Appeal dismissed these aspects of the appeal.

A case of "pure omissions"

Ordinarily, a party will not be held liable for failing to take steps to prevent criminal acts by a third party as liability will not normally be imposed solely for omissions. The appellants argued that the High Court had been wrong to treat this case as one of "pure omissions". The respondents themselves had also taken actions (such as providing money, vehicles and equipment) which had caused or contributed to the SLP's harmful conduct, according to the appellants.

The Court of Appeal and the judge below rejected this as "an attempt to build a Trojan horse" by which

otherwise bare omissions could be brought within the parameters of a duty of care. They found that the underlying complaint was about an omission – the failure to prevent the appellants from being harmed by the SLP – and the fact that the respondents took some other related actions which in themselves were alleged to be breaches of a duty of care did not change the fundamental nature of the claim. Liability would not attach to omissions, unless an exception to the rule applied.

No creation of the source of danger

An exception to the rule arises where the defendant creates a source of danger that would not otherwise have existed. The appellants alleged that the respondents' provision of resources to the SLP created such a source of danger.

The Court of Appeal disagreed, basing its finding on the same principle discussed above: that a defendant should not become liable for the acts of the police by dint of having called on them to perform their role and provided support for them to do so. The Court quoted with approval the High Court judge's finding that it was the SLP who had created the danger and carried out the violence: "their over-reaction was the result of 'fear, ill-discipline, anger and testosterone' amongst the SLP on the ground". The defendants had not created the danger by providing money, vehicles and accommodation; indeed, "without them, the situation might well have been worse". Thus, the ordinary rule applied and the respondents could not be held liable for the harm that eventuated.

No "free-standing" duty of care

The appellants had argued that, if the case did not fall into the category of "pure omission", then the Court could consider whether the respondents had a "freestanding" duty of care. Having found that the case was one of pure omission, the Court did not need to go on to consider this issue, but did so nonetheless. It applied the so-called "*Caparo* duty of care test" to assess whether the damage was foreseeable, there was a proximate relationship, and the imposition of the duty was fair, just and reasonable in this case. It found that the damage was foreseeable, but that the other two elements of the *Caparo* test had not been established.

First, there was insufficient proximity between the appellants and the respondents, since the appellants were not a clearly-identifiable class or group and most of them had no direct connection with the respondents (representatives of whom, it was noted, were largely absent from events). The fact that the respondents had provided resources to the SLP did not point to proximity between the respondents and the SLP or between the respondents and the appellants: the arrangement was one of necessity, without which the SLP might not have been present at all. Adopting the words of caution that are often used in this context, the Court was reluctant to find a duty which could result in the respondents "owing an indeterminate liability to an indeterminate class of people".

Second, it was not fair, just or reasonable to impose a duty of care on the respondents for the criminal acts of the SLP. They had called on the SLP to protect them, had provided reasonable and proportionate assistance for them to do so and had not been involved in the unlawful acts which followed.

Moreover, contrary to the appellants' suggestion, it was not consistent with the VPs to impose a duty of care on the respondents. The Court found that there was nothing in those principles to suggest that companies operating abroad should be made generally liable for the unlawful acts of the police in their host countries. Indeed, the Court observed, the VPs "are drafted on the basis that, whilst companies operating abroad may properly help to facilitate the law and order expected to be provided by host countries, it is the governments of those countries (and not the companies) who have 'the primary responsibility to promote and protect human rights'".

No interference with findings of fact

The Court of Appeal noted that the judge at first instance, Turner J, had been faced with a vast amount of material on which to found his judgment. This included a 24-day trial (of which seven days were held in Freetown, Sierra Leone) featuring 67 witnesses, and written closing submissions of over 400 pages.

Although the appellants asserted that they were not challenging Turner J's findings of fact, the Court of Appeal remarked that they "repeatedly came close to, and often crossed, the clear boundary as to what can and cannot be argued on an appeal of this sort". The court confirmed that it would only interfere with a finding of fact where that finding is "critical" and "has no basis in the evidence, or is based on a demonstrable misunderstanding of relevant evidence, or a failure to consider such evidence", or where the judge's decision

"cannot reasonably be explained or justified". None of those criteria were met in this case.

Comment

Tortious liability for acts of third parties

This judgment helps to clarify two difficult areas of the law on tortious liability for the acts of third parties.

First, it clarifies the boundaries of the law on common design. It confirms that merely relying on or providing assistance to a party that commits an intentional tort, even where the tort is foreseeable, does not mean that there was a shared intent and a common design with the tortfeasor. In this case, just asking for the assistance of police due to a difficult security situation, and providing assistance where necessary to allow the police to do their job, did not mean that the company intended or had a common design with the SLP to act illegally.

Secondly, the judgment helped to clarify the law on duty of care in relation to (i) what constitutes "pure omissions"; (ii) what qualifies as the "creation of a source of danger"; and (iii) the application of the *Caparo* test to harm caused by third parties. It is notable that, in reaching this conclusion, the judgment took a different approach to that of the UK Supreme Court in *Vedanta Resources PLC & anr v Lungowe & ors* [2019] UKSC 20, which considered the potential liability of English parent companies in relation to the activities of (potentially foreign) subsidiaries. There, the Supreme Court confirmed that whether a parent company had assumed such a duty of care 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 of the subsidiary. It referred to materials published by Vedanta in which "Vedanta might fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control" by its subsidiaries, which, together with the implementation of those standards by training, monitoring and enforcement, suggested to the Court that it was at least arguable that a duty of care was owed.

However, the Supreme Court also commented that the liability of parent companies in relation to the activities of their subsidiaries was "… not, of itself, a distinct category of liability in common law negligence". That comment has led to speculation that the same test for duty of care, based on factors such as level of control and statements in policies, could be applied to determine whether a duty of care was owed in relation to the activities of third parties who were not subsidiaries, including counterparties such as suppliers and potentially even security forces. However, the Court of Appeal in *African Minerals* did not even mention, let alone apply, the Supreme Court's decision in *Vedanta*, instead relying on the separate line of case law confirming that there is generally no duty of care to prevent harm caused by third parties. This may be because the relationship between the company and the SLP was so completely different from that of Vedanta and its subsidiary that there was no basis to even try and argue that there was a similar level of control or supervision.

Push for meaningful corporate responsibility policies and programmes

The *African Minerals* judgment will provide significant comfort to businesses with operations abroad which rely on public security forces to protect their operations. Simply requesting the assistance of such security forces, even if they have used excessive force in the past, should not in itself result in liability for the actions of those forces. Furthermore, these companies now know that a public commitment to the VPs and the adoption of measures recommended by the VPs, such as support for the training of state security forces on human rights, should also not (by themselves) amount to the assumption of a duty of care to prevent harm by those same state security forces.

However, we urge these companies not to read the *African Minerals* judgment as suggesting that they should publically commit to the VPs for an easy public relations win, without needing to do anything to implement them. Such "green-washing" would be the wrong approach for two reasons.

First, while the English Court of Appeal declined to recognise accessory liability or impose a legal duty of care with respect to the actions of state security forces in this case, its inquiry was fact-specific in some respects. The *African Minerals* judgment does not entirely rule out the possibility that, on different facts, a company could share responsibility with public security forces for tortious acts: for example, if a "rogue" employee was directly involved in those acts.

Secondly, even if there is no accessory liability or legal duty of care in tort with respect to the actions of state security forces, a company linked to human rights

violations by security forces can still face serious legal, financial and reputational consequences. Association with human rights violations can make projects unbankable, generate disruptive hostility on the part of communities, and drive away customers, investors and business partners. As the VPs themselves emphasise, "companies have an interest in ensuring that actions taken by governments, particularly the actions of public security providers, are consistent with the protection and promotion of human rights".

The VPs provide a toolkit for companies to develop and implement policies and practices that encourage host state security forces to provide law and order with respect for human rights. The VPs Secretariat plausibly claims that companies that implement the VPs – which call for security and human rights risk assessments, consultations and communications with security forces about human rights, and human rights training for security forces, amongst other things – are more likely to spot warning signs and be prepared to avoid involvement in human rights violations by security forces. They are, therefore, more likely to avoid lawsuits, which is of course the best legal position for companies and the best outcome for communities. If a lawsuit is brought, a company that can demonstrate adherence with the VPs is likely to be in a strong position to prove that it has not breached any legal duties.

The *African Minerals* judgment should encourage more enlightened and risk-averse companies to endorse the VPs or other corporate responsibility standards, and put into place the policies and programmes necessary to implement them in an effective way.

Suzanne Spears
Partner
Tel +44 20 3088 2490
suzanne.spears @allenovery.com

Andrew Denny
Partner
Tel +44 20 3088 1489
andrew.denny @allenovery.com

India Jordan
Associate
Tel +44 20 3088 3146
india.jordan@allenovery.com

Olga Owczarek
Senior Associate
Tel +44 20 3088 1824
olga.owczarek @allenovery.com

Litigation Review consolidated index 2020

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.

Karen Birch
PSL Counsel – London
Tel +44 20 3088 3737
karen.birch@allenovery.com

FOR MORE INFORMATION PLEASE CONTACT

London

Allen & Overy LLP
One Bishops Square
London
E1 6AD
United Kingdom

Tel +44 20 3088 0000
Fax +44 20 3088 0088

GLOBAL PRESENCE

Allen & Overy is an international legal practice with approximately 5,500 people, including some 550 partners, working in more than 40 offices worldwide. Allen & Overy LLP or an affiliated undertaking has an office in each of:

Abu Dhabi	Budapest	Istanbul	New York	Sydney
Amsterdam	Casablanca	Jakarta (associated office)	Paris	Tokyo
Antwerp	Dubai	Johannesburg	Perth	Warsaw
Bangkok	Düsseldorf	London	Prague	Washington, D.C.
Barcelona	Frankfurt	Luxembourg	Rome	Yangon
Beijing	Hamburg	Madrid	São Paulo	
Belfast	Hanoi	Milan	Seoul	
Bratislava	Ho Chi Minh City	Moscow	Shanghai	
Brussels	Hong Kong	Munich	Singapore	