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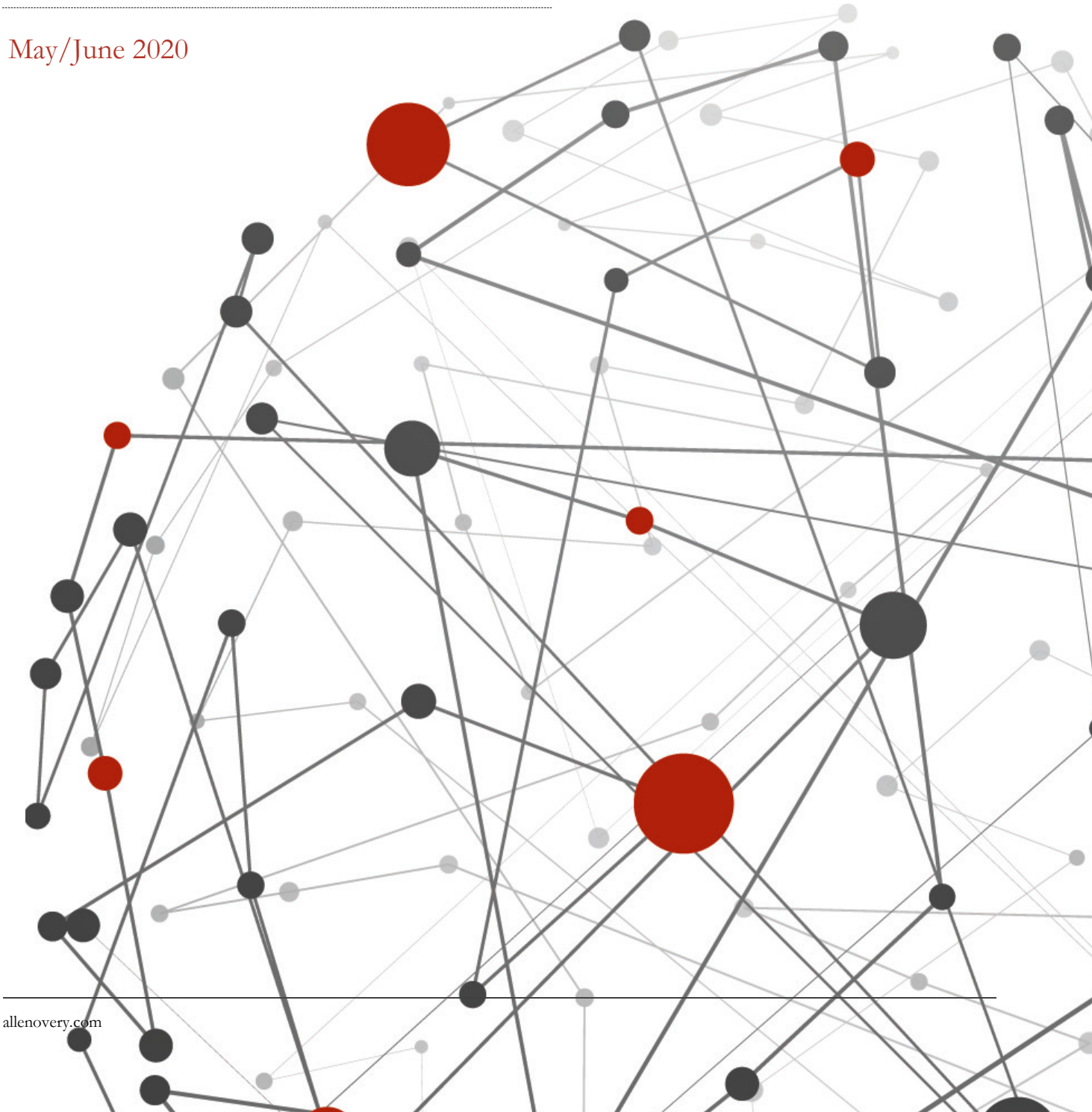

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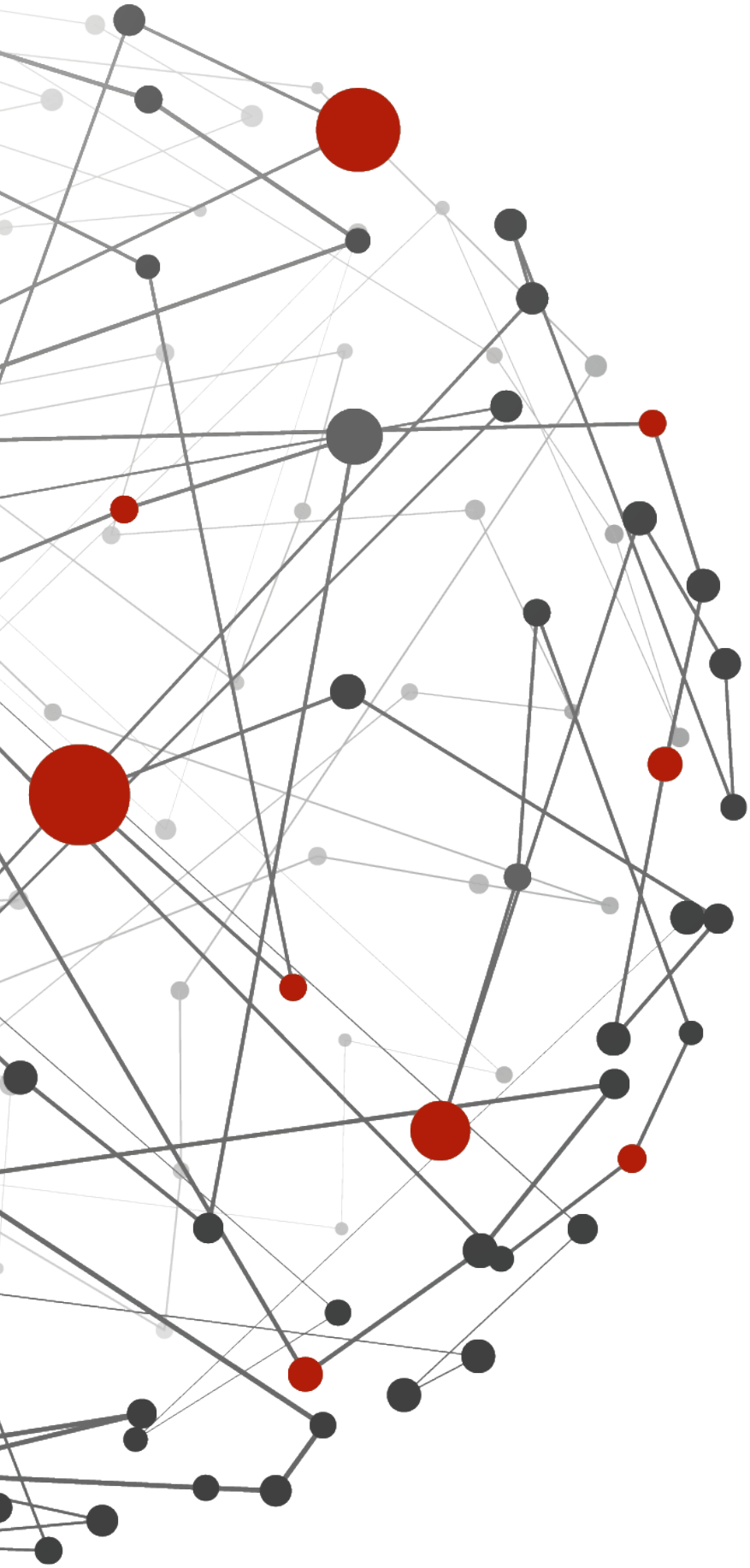

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Arbitration

The governing law of an arbitration agreement and why it matters

Enka Insaat ve Sanayi SA v OOO "Insurance Co Chubb" & ors [2020] EWCA Civ 574, 29 April 2020

The Court of Appeal ruled that, where there is no express choice of law governing the arbitration agreement, there is a strong presumption that the parties have impliedly chosen the law of the seat. That is the case even where the law governing the main contract differs from that of the seat. The governing law of the arbitration agreement determines its interpretation, scope and validity and, as this case illustrates, could have significant practical consequences for the parties.

This was an appeal by Enka Insaat ve Sanayi SA (**Enka**), against the decision of the High Court (Andrew Baker J) refusing to grant an anti-suit injunction against OOO "Insurance Company Chubb" (**Chubb Russia**). Enka was a sub-contractor on a power plant construction project in Russia. A huge fire had occurred at that plant and Chubb Russia, as subrogated insurer of Enka's original contractual counterparty, brought a tort claim in the Russian courts against Enka claiming damages for insurance losses arising out of the fire (the **Russian proceedings**).

It was common ground that there was a valid and binding arbitration agreement in the construction contract that provided for ICC arbitration in London. The construction contract was assumed to be governed by Russian law (although this point was not free from doubt), but the arbitration agreement within it did not have an express governing law. Enka argued that English law governed the arbitration agreement and that the Russian proceedings had been brought in breach of the arbitration agreement. Chubb Russia claimed that it was governed by Russian law and that there had been no breach as the arbitration agreement did not extend to claims in tort if Russian law applied.

The High Court refused Enka's application on the basis that it was not the appropriate forum for deciding the governing law and scope of the arbitration agreement. We reported on the High Court decision **here**. The Court of Appeal, with Popplewell LJ giving the leading judgment, unanimously overturned the judge's decision.

English seat brings with it jurisdiction to issue anti-suit injunction

At first instance, the judge had held that, since the jurisdiction to grant an anti-suit injunction arose under the Senior Courts Act 1981 rather than the Arbitration Act 1996, the English court first had to consider whether it had jurisdiction over the parties. Where, as here, the alternative forum was outside the EU, this approach would require the English court to consider whether it was the appropriate forum. The judge had held in essence that the Russian court was the more appropriate forum to decide whether the Russian proceedings were in breach of the arbitration agreement, based in part on his view that the arbitration clause was governed by Russian law.

The Court of Appeal found that the judge's approach was "wrong in principle". The Court emphasised that the English court, as the court of the seat of the arbitration, was necessarily the appropriate forum to grant assistance in favour of arbitration. This included assistance in the form of an anti-suit injunction under the Senior Courts Act 1981. The choice of London as the seat represented an agreement between the parties to submit to the jurisdiction of the English courts in respect of the exercise of its supervisory powers.

Moreover, no question arose as to whether, if the arbitration agreement was governed by Russian law, the English court should defer to the Russian court as a matter of discretion on whether the Russian proceedings were in breach of the arbitration agreement. The Court held that the task of the English court as the court of the seat was to determine whether there was a breach of the arbitration agreement and, if that required determination

of issues of foreign law, the English court was required to make those determinations. If the court determined there had been a breach, the court then had to decide whether injunctive relief should be granted as a matter of discretion.

Seat of the arbitration provides an implied choice of law

The Court of Appeal then considered what law governed the arbitration agreement. It reaffirmed the three-stage test typically applied by the English courts:

- Is there an express choice of law for the arbitration agreement?
- If not, is there an implied choice of law?
- If not, with what system of law does the arbitration agreement have its closest and most real connection?

Focusing especially on cases like this one where the law of the main contract and the seat were different, the Court held that an express choice of governing law for the main contract could constitute an express choice for the arbitration agreement too. This was a matter of construction but was likely to be the conclusion in only a minority of cases. Otherwise, the general rule should be that the law governing the arbitration agreement is that of the seat as a matter of implied choice, subject only to particular features of the case that demonstrate powerful reasons to the contrary. By way of example, the Court suggested that the general rule might not apply when the arbitration agreement would be invalid under the law of the seat.

Applying these principles to the case at hand, the Court held that English law, being the law of the seat, was the correct governing law of the arbitration agreement. Under English law, the tort claim in the Russian Proceedings fell within the arbitration agreement. The Court went on to consider whether in the exercise of its discretion there was any reason not to grant an anti-suit injunction, concluded that there was not, and duly granted the injunction sought.

Comment

The main interest in this case lies in its analysis of the law governing the arbitration agreement. The other part of the decision – that a choice of an English seat brings with it the powers of the English courts to enforce an arbitration agreement, including through anti-suit injunctions – provides welcome clarification of what should have been clear previously.

It is well established that an arbitration agreement is separable from the rest of the contract and can therefore have a different governing law to the main contract. The governing law of the arbitration agreement determines its interpretation, scope and validity. It can have significant practical consequences for the parties, as this case showed.

However, there has been no consistency in the cases on how to determine the governing law of an arbitration agreement, where the law of the main contract and the seat are different. In this case, the Court of Appeal sought to create some clarity, and some commentators have suggested that it achieved this. There are two reasons to be cautious of this view. First, there are now three Court of Appeal decisions (the other two being *C v D* [2007] EWCA Civ 1282 and the *Sulamerica* case [2012] EWCA Civ 638) which are hard to reconcile. It is no surprise that permission has been given to appeal to the Supreme Court and so the position may yet change. Second, if the Court of Appeal's reasoning is upheld, there will remain room for debate over when exactly the choice of governing law for the main contract will be regarded as an express choice of governing law for the arbitration agreement.

There is a practical way to avoid this uncertainty, which is to specify the governing law of the arbitration agreement where the law governing the main agreement and the law of the seat differ. We generally recommend that the law of the seat is chosen in these circumstances.

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Contract

Failure to notify "as soon as possible" precludes indemnity claim

Towergate Financial (Group) Ltd & ors v Hopkinson & ors [2020] EWHC 984 (Comm), 24 April 2020

An indemnity provision in a share purchase agreement (SPA) was accompanied by a clause containing two time limits for giving notice: "as soon as possible" and "on or before the seventh anniversary" of the SPA. The court held that the time limits operated as a dual condition precedent to an indemnity claim and that, while Towergate had given notice before the seven years was up, it had failed to give notice "as soon as possible". Its indemnity claim failed as a result.

Hopkinson and another sold the entire issued share capital of M2, a company that provided financial advice to retail customers, to Towergate. The SPA contained an indemnity provision under which Hopkinson and others (the **Indemnitors**) were required to indemnify Towergate in full against all losses and liabilities that Towergate might suffer as a result of professional negligence claims. A separate clause in the SPA provided that there was no liability "*in respect of any matter or thing unless notice in writing of the relevant matter or thing*" was given "*as soon as possible and in any event prior to:… in relation to a claim under the indemnity… on or before the seventh anniversary of* [the SPA]".

Shortly before the seventh anniversary of the SPA, Towergate served a notice of possible indemnity claims on the Indemnitors. The claims arose out of FCA reviews of historic advice and promotional activities of M2 concerning certain pension and investment schemes. The reviews resulted in liability for compensation to M2's clients, for which Towergate had only limited insurance coverage. The Indemnitors rejected Towergate's demand for indemnification and Towergate sought a declaration, alternatively damages, that it was entitled to be indemnified under the SPA.

Drafting irregularities

It was common ground that giving notice of an indemnity claim in accordance with the SPA's notice clause was a pre-condition to any liability of the Indemnitors. However, Towergate's case was that by giving notice before the seventh anniversary of the SPA it had complied with the clause. The Indemnitors argued that Towergate had not complied because notice was not given "as soon as possible".

Towergate pointed to "errors" in the clause, including the use of the words "prior to" as well as "on or before" in relation to "the seventh anniversary", and the lack of a specific time from which "as soon as possible" should be counted. It contended that "as soon as possible and in any event prior to" did not form part of the notice provision for indemnity claims, which had a seven-year time limit. It further argued that ambiguity in the clause meant that it must be construed against the Indemnitors who were relying on it to avoid liability, and that there was no commercial justification for "as soon as possible" as a pre-condition to indemnity claims.

"As soon as possible" could not be ignored

As a matter of plain language, the court held that while there were some issues with the clause, these could be resolved by any sensible reader without difficulty. The clause was not ambiguous. It plainly imported a dual condition precedent: as soon as possible and in any event seven years. This was clear, grammatical and workable. Towergate's interpretation, on the other hand, did "striking violence" to the wording of the clause. The court reasoned that there was no logical or practical reason why "as soon as possible and in any event prior to" should not exist in relation to indemnity claims. It could not be said that having a dual condition precedent was unthinkable such that the general must give way to the specific: rather, dual conditions are not infrequently encountered, including in commercial contracts.

Clause had two purposes

As part of its iterative process of interpretation, the court considered whether "as soon as possible" was redundant as a result of the commercial purpose and context of the clause. It held that the clause had two purposes: (i) "as soon as possible" provided early notice to enable defence to be undertaken promptly; and (ii) seven years provided a longstop or limitation period. Similarly, the court was not persuaded that the availability of other remedies to the Indemnitors under the SPA meant that a condition precedent based on "as soon as possible" was redundant. As such, the simple linguistic reading did not need revision.

The court distinguished this case from *AIG Europe (Ireland) Ltd v Faraday Capital Ltd* [2006] EWHC 2707 (Comm), where the court rejected the argument that an apparently similar provision created two conditions precedent (as soon as possible/30 days). Perhaps the most striking of several reasons given by the court for the distinction was that, while 30 days might be confused for "as soon as possible", in the present case – where the second time limit was seven years – any such confusion was plainly absurd. The Indemnitors were therefore not liable unless notice of "any matter or thing" was given to them "as soon as possible".

Notice was given too late

The court had no difficulty in finding that notice was in fact not given "as soon as possible", which it concluded was clear from chronologies produced by the parties. Insurance was limited so there was scope for large losses to exceed it and for successful claims to feed through into the indemnity. The factual investigation was not as complicated as it might have been if there was insurance to a level that meant the indemnity was answerable only to "quasi-catastrophic losses".

An obvious indication that notice was not given "as soon as possible" was the fact that Towergate had given notice to its insurers in the prior year, shortly after the FCA notices were served. This was in circumstances where the insurance notification requirement was less onerous than the SPA requirement because it was predicated on the likelihood of a claim. This indication was backed up by further evidence as to what Towergate knew and when:

- there had been contact with the FCA from three years before the notice to the Indemnitors;
- over two years before the notice, the FCA had flagged "a number of major issues" and failures of risk and compliance functions and Towergate had started to identify potential claims; and
- over a year before the notice, the first FCA notice had been served and an estimated assessment of claims had been produced.

The court concluded that Towergate clearly knew by the time that notice was given to the insurers of a "matter or thing" that might give rise to an indemnity claim. Notice to the Indemnitors was therefore not given "as soon as possible".

In response to Towergate's case that no notification was necessary, until they had "meaningful and useful information", the court found that the level of detail that formed the basis of the earlier notification to insurers was sufficient to meet any such standard. Towergate's argument that it was entitled to wait for 17 months after it had formally notified the insurers was "manifestly unrealistic". Further, Towergate was unable to point to what changed in the sense of having such information to prompt its notification to the Indemnitors – other than the looming seven-year limitation date, which the evidence showed it had diarised.

Comment

This decision is a sharp reminder of the need to pay close attention to notice clauses in relation to warranties and indemnities, both when drafting agreements and at the outset when considering potential enforcement action. A clause that contains two time limits may well give rise to a dual condition precedent, and the court has again demonstrated its reluctance to ignore words drafted into an agreement by commercial parties.

Determining what is "as soon as possible" is clearly highly fact-sensitive. This decision does not offer any real guidance as to the tipping point here, since it was plain to the court that the claimant was far beyond it rather than the position being more finely balanced. What is clear, however, is that once a claimant has begun documenting potential losses and making other notifications, such as to insurers, it is likely to be scrutinised if it then delays in giving notice of an indemnity claim.

The parties have already been to the Court of Appeal where Towergate was unsuccessful in arguing that the notice was not sufficiently detailed. As is often the case for breach of warranty or indemnity claims, the formalities really matter.

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Clauses under scrutiny: force majeure and excluding liability for consequential loss

2 Entertain Video Ltd & ors v Sony [2020] EWHC 972 (TCC), 24 April 2020

Liability for losses stemming from a warehouse fire during the 2011 London Riots could not be excluded by a force majeure clause. The judgment also analyses a clause excluding liability for "any indirect or consequential loss."

Sony provided warehousing and distribution services to the claimant (2 Entertain), a BBC subsidiary selling DVDs. In 2011, during, the London riots, a gang set fire to the warehouse that held 2 Entertain's stock.

Sony's contract with 2 Entertain contained a force majeure provision covering "circumstances beyond the reasonable control of the party affected including…riot [and] civil commotion…" However, the court found, based upon past break-in incidents at the warehouse and industry-standard fire safety guidelines, that the risks of unauthorised entry and arson were reasonably foreseeable. The broader context of civil unrest would not be sufficient to engage the force majeure provision when the underlying cause of loss was within Sony's reasonable control.

Sony pointed to a clause excluding liability for 'any indirect or consequential loss' to exclude liability for loss of profit, submitting that such losses were a consequence of the loss of goods. The court accepted Sony's submission that "indirect or consequential loss" could have a meaning in the contract that runs counter to the common law interpretation of this phrase. In the case law surveyed, the term is typically interpreted by the courts to mean losses that do not arise directly and naturally from the breach of contract (aka the second limb in *Hadley v Baxendale*), and loss of profit often falls outside this interpretation. In this instance, Sony was unsuccessful in establishing that the contract provided an alternate meaning for the phrase in question.

In the current environment, this case is a useful reminder of the court's approach to interpreting force majeure and exemption clauses. Businesses seeking to rely on force majeure will likely need to demonstrate that the purported force majeure event is the cause, and not merely the context, of the claimant's losses. In addition, and perhaps more significantly, by following the *Transocean* case the court has shown than it is possible for "indirect or consequential loss" to mean something other than the second limb in *Hadley v Baxendale.*

This article first appeared on aocompactcontract.com, Allen & Overy's contract law blog.

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Disclosure

Bank ordered to disclose internal compliance review files in mis-selling claim

Fine Care Homes Ltd v Natwest Markets Plc (formerly Royal Bank of Scotland Plc) [2020] EWHC 874 (Ch), 7 April 2020

Following market-wide internal regulatory reviews into the mis-selling of interest rate hedging products, a bank has been ordered to disclose its internal review file and other internal documents to the claimant. The claimant has resurrected mis-selling litigation against the bank after refusing the bank's offer of redress made under a Financial Conduct Authority (FCA) regulatory review scheme.

In one of the first virtual hearings after the UK Government announced the Covid-19 lockdown, the High Court considered an application for specific disclosure and expert evidence. The context was the well-known concerns around mis-sold interest rate hedging products (**IRHPs**).

In July 2007, Fine Care Homes Limited (**Fine Care**) purchased an IRHP sold by the Royal Bank of Scotland (**RBS**, now Natwest Markets). Fine Care issued a mis-selling claim against RBS in 2013 seeking damages of GBP1,400,000.

In 2012, the Financial Services Authority (the predecessor of the Financial Conduct Authority (the **FCA**)) was becoming concerned with the sale of IRHPs to small businesses. It entered into voluntary agreements with a number of banks, which were required under the agreements to consider the regulatory compliance of IRHP sales and offer redress in appropriate cases, with monitoring from KPMG as an independent reviewer. Fine Care and RBS agreed to stay Fine Care's claim so that Fine Care could take part in RBS's review process.

Fine Care was deemed by RBS in its review to fall into the category of a non-sophisticated customer that was sold a complex product. RBS assumed that Fine Care had been mis-sold, and would not have otherwise entered into, that complex product, therefore automatically entitling Fine Care to redress. The quantum of that redress was based on RBS's determination (as approved by KPMG) that Fine Care would have entered into a simpler vanilla product, rather than no product at all. RBS therefore offered Fine Care just under GBP385,000 in redress.

Fine Care disputed the review decision. It argued that it would not have entered into *any* product with RBS and should be offered the full amount of its losses (GBP1,400,000). RBS refused to reconsider its final determination. Fine Care subsequently requested the lifting of the stay on its 2013 claim.

Fine Care seeks bank's internal review file

Fine Care sought three orders in the present application, including disclosure of a copy of RBS's file of documents relating to its review of Fine Care's IRHP. RBS argued that the review file was irrelevant to the issues to be considered at trial, as the review focused on regulatory compliance, whereas Fine Care's claims were in common law negligence and misrepresentation. Further, as RBS deemed Fine Care to be automatically entitled to redress by virtue of its categorisation as a non-sophisticated consumer with a complex product, RBS argued that its review considered only the question of causation (namely whether, but for RBS's mis-selling, Fine Care would have entered into another simpler product or no product at all). In essence, RBS argued, RBS generally asked a different question during the internal review than that which would be considered by the trial judge.

James Pickering QC (sitting as a Deputy High Court Judge) stated that RBS's arguments were "persuasive" but nevertheless ordered disclosure. The documents contained in RBS's review file were likely to be relevant to the issues in Fine Care's claim and it was "artificial" to suggest that the documents would have "no bearing on or relevance" to those issues. Pickering QC stated that this was particularly so given the judgment in *Shore v*

Sedgwick Financial Services[1]: for the common law principles to be considered here, the skill and care to be expected of a reasonably competent financial adviser usually included regulatory compliance, and the relevant regulations afforded "strong evidence as to what is expected of a competent adviser in most situations". In this case, as RBS was considering its own compliance with regulatory requirements in line with its agreement with the FCA, this would "inform – and indeed provide the starting point for –" the trial judge's application of common law principles in the negligence and misrepresentation claim.

Pickering QC also noted one document published by the FCA in relation to this review process, in which the FCA stated that, for any sale of a complex product to a non-sophisticated customer (such as was the case for Fine Care's IRHP), the applicable bank would need to review the underlying sale in order to determine appropriate redress. Therefore, while the review files would not contain direct analysis of liability or compliance, they did contain a review of the IRHP sale, which may be relevant going forward.

No bar to admissibility of evidence adduced during earlier proceedings

RBS also argued that the review file was inadmissible by analogy with the principle in *Hollington v Hewthorn*[2]. In that case, it was held that a decision of an earlier court or tribunal was inadmissible to prove facts in issue in subsequent proceedings between different parties.

Pickering QC deemed that there was no such analogy. He emphasised that *Hollington v Hewthorn* concerned only the admissibility of the outcome of earlier proceedings but not of any particular item of evidence adduced during the course of such proceedings. The rationale was that, unless the later court went into the matter itself, it would not know what weight to place on the outcome of earlier proceedings. This rationale had no effect on the admissibility of evidence previously adduced. Pickering QC therefore saw no bar to the admissibility of any documents contained in the review file, and RBS was ordered to provide copies to Fine Care.

Other documents sought – including internal manuals

The list of disclosure requests included RBS's internal documentation, including manuals and guidance, on sales and compliance relating to IRHPs. These were deemed to be sufficiently defined and likely to be a "powerful indicator of good practice". Pickering QC therefore ordered disclosure, in order for the trial judge to decide their relevance and any weight to be given to the guidance.

However, Pickering QC noted that there seemed to have been little or no discussion between the parties about all other listed documents, which RBS argued were "impossibly wide" in scope. Pickering QC confirmed that the parties should liaise with a view to defining and narrowing issues in disclosure lists and clearly identifying any outstanding issues for the court.

Comment

The ruling here was that material contained in an internal regulatory customer review file may be subject to disclosure in related civil litigation brought by that same customer. Although this decision was in the context of FCA regulatory obligations, there is no reason to think that the same approach could not apply in other regulated industries. Remember, though, that this was a disclosure application. It is not authority for the proposition that a breach of particular regulatory standards equates to tortious liability: as the judgment remarked, it is a starting point and "to inform". Mis-selling cases are highly fact-specific, with the question of reliance being a frequent battleground.

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1 *Shore v Sedgwick Financial Services Ltd* [2007] EWHC 2509.
2 *Hollington v Hewthorn* [1943] KB 587.

Court keen not to second-guess FCA and LSE in market manipulation dispute

Burford Capital v the LSE [2020] EWHC 1183 (Comm), 15 May 2020

The High Court recently rejected an application by Burford Capital Limited (Burford), an AIM-listed litigation funder, for *Norwich Pharmacal* relief. Burford sought to compel London Stock Exchange Group plc (the LSE), AIM's parent, to disclose confidential trading data in connection with alleged market manipulation. This decision highlights the reluctance of the English court to second-guess the Financial Conduct Authority (the FCA) and the LSE, after both organisations concluded that the trading data did not indicate any unlawful market manipulation.

Burford's share price dropped significantly on 6 and 7 August 2019. The dispute with the LSE arose from Burford's allegation that its rapid loss of market capitalisation was, in part, caused by an unlawful form of market manipulation known as "spoofing" or "layering". Burford submitted that this practice "involved very large numbers of sell orders for Burford shares being submitted to and advertised via the LSE's trading platforms, without any genuine intention to trade". Burford's allegation of unlawful market manipulation was independently examined by the FCA and the LSE but neither body concluded that there had been unlawful market manipulation.

Nonetheless, Burford brought an ambitious application to compel the LSE to release confidential trading data, including the identity details of every market participant that made a buy or sell order for Burford ordinary shares on 6 or 7 August 2019. This took the form of an application for *Norwich Pharmacal* relief. Andrew Baker J distilled the requirements for *Norwich Pharmacal* relief as follows:

- whether there is a good arguable case that the respondent was "mixed up in so as to have facilitated" the alleged wrongdoing against the applicant; and
- "[…] whether justice requires that the defendant provide the assistance that the relief sought would compel him to provide, to further the end of righting a facilitated wrong".

A good arguable case for wrongdoing?

Burford's application fell at the first hurdle because it failed to establish a good arguable case that market manipulation had occurred. Mr Justice Baker considered expert evidence on trading relied on by Burford, and concluded that any claim that there was market manipulation was speculative. This was in part because, on the expert's own testimony, it was "impossible to determine with certainty whether an order is manipulative based on the publicly available data that I have reviewed", as the required analysis could only be done "by evaluating the de-anonymised evidence" (ie the information that Burford was looking to obtain through the application).

The interests of justice – the *Rugby Football Union Test* applied

The judgment is perhaps most useful for its analysis of the public policy factors that underpin the second limb of the test – whether it was in the interests of justice to grant the relief.

The court considered the list of factors set out by Lord Kerr in *Rugby Football Union v Consolidated Information Ltd* [1] (**Rugby Football Union**), including the merits of the case, the public interest in allowing the claimant to vindicate its legal rights, the deterrent effect of granting the application, and the availability of alternative sources for the information sought. Mr Justice Baker also identified two additional factors under the second limb, which are of particular relevance to financial services litigation: (i) whether granting relief at common law would cut across an existing statutory regime; and (ii) the impact of granting relief on public confidence in the UK's equity capital markets or in the FCA as a regulator.

Public interest

While the "public interest" is listed as a discrete factor in *Rugby Football Union*, the court has scope to return to the merits of the case when considering this issue. In the

[1] *Rugby Football Union v Consolidated Information Ltd* [2012] UKSC 55, [2012] 1 WLR 3333.

words of Mr Justice Baker, "The stronger the merits (beyond having passed the good arguable case threshold), the weightier that public interest".

The bulk of the court's discussion regarding public interest concerned a technical argument about whether Burford could have a private cause of action against the alleged wrongdoers. Ultimately, the court concluded that even if the evidence had established a good arguable case for wrongdoing, Burford still failed to make a good arguable case that it had an actionable civil claim. It was the court's view that the FCA has the exclusive statutory function of investigating and deciding whether to prosecute market abuse. No private prosecution may be brought. In any case, justice did not require the LSE to disclose confidential information to Burford in order for Burford to bring a private prosecution. If Burford was unhappy with the FCA's decision not to bring action, its proper remedy was a judicial review.

Mr Justice Baker noted that other *Rugby Football Union* factors such as the potential deterrent effect on wrongdoers, any fault on the part of the defendant, and a lack of alternative sources for the information in question could weigh in favour of granting relief. However, Burford's submissions on these points either were not persuasive or did not add material weight in favour of granting relief.

Damage to public confidence

The court was particularly wary of the "risk of damage to public confidence in the FCA as regulator". The judgment took note of the balancing exercise "between legitimate concern that it is not in the public interest to be (perceived to be) undermining the FCA and proper concern that the court be fearless to act [...]". Ultimately, granting the application would "interfere in the normal workings of a regulated market", an undesirable consequence that would need to be adequately counterbalanced by factors such as those discussed above.

Closely related to this point was the potential for collateral damage to innocent third parties, as granting an application would entail a "serious invasion into [their] confidential and commercially sensitive trading activities and strategies", which could in turn undermine public confidence in the UK's capital markets.

It should be noted that the court was open to the possibility that "ongoing confidentiality concerns might be satisfactorily minimised and managed", through the re-anonymisation of data or proceedings being held in private. However, the burden would rest with the applicant to establish the practical workability of these options.

Statute ousting common law relief?

Although it did not make a difference to the outcome, the LSE did not persuade the court that the statutory regime regulating market abuse ousted the common law jurisdiction to grant *Norwich Pharmacal* relief. The facts of *Burford* were distinguished *from R (Omar) v Secretary of State for Foreign and Commonwealth Affairs*[2], where the court held that the differences between the statutory scheme in question, concerned with obtaining evidence for use in foreign criminal proceedings, and the common law jurisdiction under *Norwich Pharmacal* "were so substantial that Parliament was to be taken […] to have created an exclusive procedure, not a parallel one; that, therefore, where the statutory regime was in play, the Norwich Pharmacal remedy did not run". Mr Justice Baker left the possibility open for future courts to decide, in a case with stronger evidence of market abuse, to grant *Norwich Pharmacal* relief, notwithstanding the FCA's decision not to bring proceedings under the Market Abuse Regulation (**MAR**).

COMMENT

Burford faced some difficult hurdles in this application.

First, it was in something of a Catch-22 situation in that, without the de-anonymised data that it was seeking in the application, it was impossible for Burford to show that there was a good arguable case that there had been wrongdoing on which a *Norwich Pharmacal* order could be founded.

Second, the context was that the FCA and the LSE had already investigated and concluded that it was not something that merited taking further action. Even though the existence of MAR was not an absolute impediment to the relief sought, it was clear that the court did not want to give a decision that risked undermining confidence in the relevant regulatory bodies, nor was it a promising starting point for Burford persuading the court of the underlying merits of its case.

Finally, these difficulties were compounded by the emphasis placed on the merits of the case throughout the criteria for granting *Norwich Pharmacal* relief. Unlike

[2] *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 118, [2014] QB 112.

an application for freezing or prohibitive injunctions, where the "good arguable case" and "serious issue to be tried" tests are simply an initial threshold that must be cleared, Mr Justice Baker emphasised that the underlying merits would also have an important bearing upon the second limb of the test – whether it was in the interests of justice to grant relief.

Burford therefore serves as a useful reminder of the inherent difficulty facing *Norwich Pharmacal* applicants from both an evidential and policy standpoint. It is important to remember that a *Norwich Pharmacal* order is draconian relief in that, at a minimum, it inconveniences innocent third parties, and here would have risked prejudicing the third parties whose data Burford sought. If the merits of the underlying case appear relatively weak, this may well fatally undermine the application from the start.

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Risk of prosecution by foreign regulator no excuse for defendant's failure to disclose in English litigation

Byers v Samba Financial Group [2020] EWHC 853 (Ch), 8 April 2020

The High Court rejected a defendant's application to vary an order for standard disclosure, notwithstanding that such disclosure would have exposed the defendant to a breach of its regulator's requirements, and a risk of prosecution, in Saudi Arabia. As a result of the defendant's failure to comply with the court's disclosure order, its defence was struck out save for issues on which the claimants were not disadvantaged by the defendant's lack of disclosure. This judgment highlights some of the challenges which face litigants when caught between English disclosure rules and foreign regulatory requirements.

The claimants started breach of trust proceedings in England against the defendant bank (**Bank**) in 2017. The court originally ordered standard disclosure. The Bank later sought to vary the court's order for standard disclosure, to discharge the Bank from its outstanding disclosure obligations. The Bank argued that it was unable to comply fully with the order as it did not have the consent of its regulator (the Saudi Arabian Monetary Authority – **SAMA**) to comply. The Bank asserted that SAMA had refused to give consent to any further disclosure and that non-compliance with SAMA's decision would create a real and substantial risk of prosecution in Saudi Arabia with severe penalties. It was, the Bank argued, having to choose between "defying the express requirements of its regulator, SAMA (breach of whose rulings is a criminal offence), and acting contrary to the orders of the English court". The claimants applied for the defence to be struck out on the basis of the defendant's failure to complete disclosure.

The court granted the claimants' application to strike out the defence (apart from selected issues which were not affected by the disclosure breach) and rejected each of the Bank's applications, which included requests for the court's assistance in petitioning the Saudi Arabian Government and for a split trial.

No material change in circumstances

Assessing whether to exercise its jurisdiction to vary the disclosure order, the court considered whether there had been a material change in circumstances since the standard disclosure order was originally made.

The court found that there was no evidence of a material change in circumstances, merely evidence that the Bank did not comply with SAMA's requirements and did not adequately communicate with SAMA. The Bank did not

appear to have produced a complete list of disclosure documents for SAMA to consider (as SAMA had requested in deciding whether to provide its consent to disclosure). It had also not received a decisive refusal of consent from SAMA. The Bank was instead relying on an undisclosed letter from SAMA stating that the court must petition Saudi Arabia's Ministry of Foreign Affairs for consent and a further letter from SAMA, prepared at the Bank's request, setting out the legal consequences of making disclosure before obtaining consent.

The Bank was criticised for not having done more to ensure that a complete (or at least fuller) picture of its interaction with SAMA was placed before the court. There was no convincing reason why the Bank's correspondence with SAMA could not have been disclosed (as was previously ordered by the court) as a confidential exhibit.

A balancing act: *Bank Mellat* applied

The Bank argued that the consequences of complying with the standard disclosure order would be so serious for the Bank that the court should relieve it from the dilemma of having to act contrary to Saudi Arabian law. The court considered *Bank Mellat v HM Treasury*[1], which is the leading authority on the extent to which the risk of prosecution of a foreign litigant in its home state is a material consideration when the English court is making or enforcing an order for disclosure or inspection of documents. *Bank Mellat* states, inter alia, that the court should balance the actual risk of prosecution in the foreign state triggered by compliance with an English disclosure order against the importance of the disclosure to conducting a fair trial.

Fancourt J was "unable to conclude that there is a strong likelihood of prosecution" but did accept that there would be a risk, if the Bank were to give standard disclosure. The Bank's witnesses, the court found, had overstated the risk. Despite this risk, Fancourt J found the balancing exercise still favoured ordering disclosure. The claimants would be significantly disadvantaged by a lack of disclosure, and the Bank had gained a considerable advantage through the claimants' full disclosure. The Bank had also sought the variation of the order very late.

Striking out the defence

The court deemed the Bank's breach of the standard disclosure order to be both serious and deliberate. Although the breach of the order was not "wholly inexcusable" due to the Bank's genuine concern about prosecution in Saudi Arabia, the breach was inexcusable to the extent that "the Bank has wrongly failed to do what it should have done to persuade SAMA to relent so that it could comply".

The court granted the claimants' application for striking out the defence, except the issues where the claimants were not disadvantaged by the lack of disclosure. At the time of writing, the Bank is seeking permission to appeal.

Comment

The strike-out order in *Byers* highlights the potential ramifications of failing to comply with English disclosure obligations. The case confronts the dilemma faced by a litigant whose disclosure obligations under English law conflict with the laws of a foreign jurisdiction. Fancourt J's opinion signals that the balancing test in *Bank Mellat* will continue to be influential and that a court will not be quick to vary a disclosure order. The applicant will need to demonstrate a real risk of prosecution by a foreign government but even that will not guarantee a variation – it is a question of balancing the risk of prosecution against the requirements for a fair trial. As Fancourt J said, "the outcome for the Bank will not serve to encourage other litigants to advance colourable claims of inability to comply with the Court's orders. The Court will, as ever, be astute to detect and prevent any such abuse".

The decision in *Byers* comes after a pair of high-profile cases which highlight the English courts' robust attitude to enforcing English court disclosure rules in the face of competing foreign law considerations. The court ruled against the collateral use of documents disclosed in English proceedings to obtain foreign legal advice[2] and to comply with a U.S. subpoena[3].

1 *Bank Mellat v HM Treasury* [2019] EWCA Civ 449.
2 *The ECU Group v Plc v HSBC Bank Plc* [2018] EWHC 3045 (Comm).
3 *ACL Netherlands BV (as successor to Autonomy Corporation Ltd) & ors* [2019] EWHC 249 (Ch).

The court's observation that the Bank may not have been presenting the "full picture" also provides practical case management guidance for litigants facing similar circumstances. The litigant should be able to demonstrate proactive steps, taken expeditiously, to obtain the appropriate consents, together with evidence that it has done what has been asked of it in order to obtain consent. The court here was plainly not impressed with the Bank's efforts to obtain SAMA's consent, and the amount of time that had elapsed between the original disclosure order and the application for a variation.

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Privilege

The limits of without prejudice protection

Motorola Solutions, Inc. & ors v Hytera Communications Corporation Ltd. & ors [2020] EWHC 980 (Comm), 24 April 2020

Berkeley Square Holdings & ors v Lancer Property Asset Management Ltd & ors [2020] EWHC 1015 (Ch), 1 May 2020

The High Court has allowed disclosure of "without prejudice" (WP) communications in two recent cases: one involving threats to remove assets from the jurisdiction in order to frustrate enforcement of a judgment; and the other involving an attempt to uphold a settlement agreement that was challenged on the grounds of fraud and breach of fiduciary duty. These decisions are interesting because the limited exceptions to the WP rule rarely outweigh the strong public interest in protecting open and frank settlement discussions.

Motorola v Hytera: a threat to move assets in order to frustrate enforcement of a judgment

Pending execution of a substantial U.S. judgment in its favour, the claimant applied to the English courts for a freezing order over the defendant's assets in England and Wales. The claimant sought to prove a risk of dissipation of assets by referring to oral statements, made by the defendant at two settlement meetings, that were privileged by virtue of the WP rule. The claimant alleged that, at these meetings, the defendant had threatened to prevent enforcement of an "unacceptable" U.S. judgment by, among others, moving assets and changing the entities due to receive payments from customers. In support, the claimant submitted: (i) two witness statements from a senior in-house counsel; and (ii) a photograph of the defendant's flip chart presentation showing that the consequence of an "unacceptable" U.S. judgment was "retreat". The claimant argued that, while the evidence contained WP communications, it was admissible under the "unambiguous impropriety" exception to the WP rule. The defendant denied that the exception applied and that it had made any threats.

The "unambiguous impropriety" exception applied

Under the "unambiguous impropriety" exception, WP communications are admissible if their exclusion would act as a cloak for perjury, blackmail or other unambiguous impropriety.

The court applied the "unambiguous impropriety" exception and allowed the claimant's evidence. The court held that:

- In a threat case such as this, the requirement is that the threat "unambiguously exceeded what was proper" or "permissible in settlement of hard fought commercial litigation".
- A threat to move assets in order to frustrate enforcement of a judgment fulfils this requirement at least if the clear implication of the threat is that the removal will be accomplished by "improper means".
- While some of the defendant's threatened actions might fall short of constituting "improper means", they must be looked at as a whole:
  - "So viewed, they amounted to a threat to move assets away from jurisdictions where enforcement could be accomplished without undue difficulty into countries which were 'murky', and to do so with a view to frustrating enforcement."
  - The judge could not see, for example, how it could be proper for the defendant to change the entities due to receive payments from customers in order to frustrate collection.
- In the absence of a record of the WP communications, the claimant only has to prove there is a "good arguable case" or a "plausible evidential basis" that the defendant made the alleged statements. The evidence met this threshold.

The claimant was thus able to rely on the defendant's WP statements in order to prove a risk of dissipation of assets and obtain a freezing order over the defendant's assets in England and Wales.

Berkeley v Lancer: WP exceptions used to uphold settlement agreement

Lancer demanded a number of outstanding payments from Berkeley pursuant to an asset management agreement. During mediation, Lancer mentioned in its written statements that it used some of the money received from Berkeley to make payments to a company owned by Berkeley's attorney (ie the person appointed by Berkeley under a power of attorney to represent Berkeley's interests in all matters relating to the asset management agreement). Mediation discussions failed, but the parties entered into a settlement agreement shortly thereafter. A few years later, Berkeley sought to recover its payments to Lancer and set aside the settlement agreement on the basis of fraud and breach of fiduciary duty caused by Lancer's allegedly undisclosed payments to the company owned by Berkeley's attorney. In its defence, Lancer argued that the written statements from the mediation proved Berkeley's knowledge of the side payments and, thus, Berkeley's claims had no merit. While Lancer agreed that the written statements were WP communications, it submitted that they should be allowed in evidence under one or more of the exceptions to the WP rule.

The misrepresentation or fraud exception applies as a shield, not just as a sword

Under the misrepresentation or fraud exception, WP communications are admissible if they prove that a settlement agreement should be set aside on the grounds of misrepresentation, fraud or undue influence.

Berkeley argued that the exception did not apply because Lancer sought to uphold the settlement agreement rather than set it aside. The court disagreed and held that Berkeley's interpretation is contrary to principle: if a party can use WP communications to prove misrepresentation and rescind a settlement agreement, it would be illogical to say that the other party cannot use WP communications to disprove misrepresentation and uphold the settlement agreement. The court allowed the WP communications either under the "properly interpreted" misrepresentation or fraud exception or under a "small and principled" extension to serve the interests of justice.

The matter was only "fairly justiciable" if WP communications admitted

As derived from *Muller v Linsley*[1], WP communications are admissible if the matter is not "fairly justiciable" otherwise (the **Muller exception**).

Given that Berkeley relied strongly on its lack of knowledge of Lancer's side payments, the matter was only "fairly justiciable" if Lancer could put forward the only evidence that proved Berkeley's knowledge: the WP communications. Therefore, the court allowed the WP communications under the Muller exception too.

Notably, the court distinguished *Fincken*[2], a Court of Appeal decision in which WP communications were not allowed even though they proved that a party had lied in

1 [1994] EWCA Civ 39, 30 November 1994.
2 [2003] EWCA Civ 1630, 14 November 2003.

a sworn document. First, the parties in *Fincken* argued for the "unambiguous impropriety" exception, not the Muller exception. Second, the WP communications in *Fincken* were an admission of fact relevant to the settlement agreement which, as a matter of public policy, should be protected in order to encourage open and frank settlement discussions. Unlike *Fincken*, the WP communications in this case: (i) were Lancer's own statements rather than an admission by Berkeley; and (ii) were background information and largely irrelevant to the settlement agreement.

The estoppel exception did not apply

Under the estoppel exception, WP communications are admissible if they consist of clear and unambiguous statements made by a party with the intention that the other party should rely on them and the other party does rely on them to its detriment.

Lancer argued that the WP communications should be allowed as part of its defence of estoppel by silence or convention because: (i) during the mediation, Berkeley was made aware of the side payments and did not dispute them in any way; (ii) consequently, Lancer assumed that the side payments were in order; and (iii) as Lancer had reasonably relied on Berkeley's silence to its detriment, Berkeley was estopped from claiming that the side payments were not actually in order. Berkeley disagreed and contended that the estoppel exception only covers promissory estoppel. The court acknowledged that the law is unclear as to the type of estoppel covered by the exception, but concluded that the point need not be decided. The exception did not apply because Berkeley's silence was a "very far cry" from the required clear and unambiguous statement.

A new "independent fact" exception?

Reviewing comments from a number of cases, the court suggested a new exception allowing WP communications which contain "independent fact[s]" in no way connected with the merits of the settlement discussions.

As Lancer had not advanced its case on the basis of an "independent fact" exception and Berkeley denied the existence of such an exception, the court left the point open. However, it noted that at least some of Lancer's WP communications would be admissible under an "independent fact" exception (if one existed) because they were background information and largely irrelevant to the settlement agreement.

COMMENT

These two High Court decisions are rare examples of WP communications being admissible in evidence.

Motorola v Hytera confirms that a threat to remove assets from the jurisdiction through "improper means" in order to frustrate enforcement of a judgment falls under the "unambiguous impropriety" exception. However, it is still unclear what constitutes "improper means" and whether a removal through proper means might still fall under the "unambiguous impropriety" exception because of the reprehensible intention to frustrate enforcement of a judgment. As the court put it:

> "The court's jurisdiction to grant freezing orders, which have been equated in the litigation context to nuclear weapons, reflects the seriousness with which the court views the unjustified removal of assets in order to frustrate judgments. It would therefore be surprising if the court were to regard threats to do so as falling within the bounds of what is permissible, even in hard-fought commercial litigation." (emphasis added)

Other examples of threats that crossed the fine line between hard-fought litigation tactics and impropriety are the threats of criminal action, not limited to contempt proceedings, and immediate publicity of extremely serious allegations in *Ferster v Ferster*[3] and the threats of terrorist charges in *Boreh v Djibouti*[4].

Additionally, *Motorola v Hytera* confirms that, in the absence of a record of the WP communications, the party seeking to lift privilege only needs a "good arguable case" or a "plausible evidential basis" for its version of events. In this case, the evidence from a senior in-house counsel and a copy of a presentation were sufficient.

The court in *Berkeley v Lancer* remarked that this seems to be the first reported English case that applied the misrepresentation or fraud exception. In fact, the court appears to go even further and expand the exception to circumstances in which the settlement agreement is sought to be upheld rather than set aside. This approach is consistent with two other exceptions to the

[3] [2016] EWCA Civ 717, 12 July 2016.
[4] [2015] EWHC 769 (Comm), 23 March 2015.

WP rule: (i) the rectification exception, which allows WP communications in order to establish the true settlement terms agreed between the parties; and (ii) the interpretation exception, which allows WP communications in order to determine what facts the parties were aware of at the time of the settlement agreement.

The decision also clarifies that, despite its problematic history, the Muller exception applies only when a matter is not "fairly justiciable" without allowing the WP communications and such WP communications do not contain admissions relevant to the settlement agreement. This is a high threshold and, if an argument can be reasonably supported by other evidence, the court is unlikely to lift privilege.

Finally, *Berkeley v Lancer* leaves open the question as to the type of estoppel covered by the estoppel exception as well as the possibility of a new "independent fact" exception, similar to the one developed in Scotland. Regarding the latter, courts should heed the observation of the House of Lords in *Ofulue v Bossert*[5]: an exception that allows cherry-picking certain sentences from WP communications could cause confusion and uncertainty, potentially hindering open and frank settlement discussions.

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[5] [2009] UKHL 16, 11 March 2009.

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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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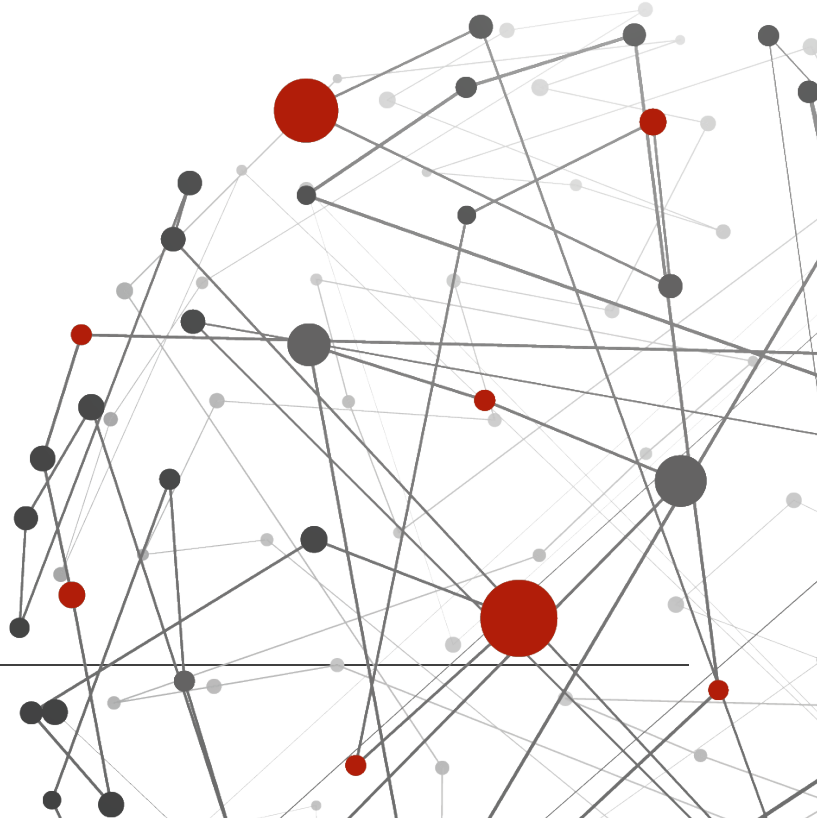

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