ALLEN & OVERY

Litigation and Dispute Resolution Review

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Contract

Recital to intercreditor agreement means creditor is contractually estopped from challenging security

Arboretum Devon (RLH) Ltd [2021] EWHC 1047 (Ch), 28 April 2021

An intercreditor agreement provided that neither creditor would challenge the "validity" of the other's security. The term "validity" was interpreted broadly to prevent a challenge to the general effectiveness of the security. In any event, the relevant security was effective as a matter of construction, and even if the judge's interpretation was wrong, contractual estoppel based on the recitals of the intercreditor agreement would prevent one of the creditors from challenging the security.

Arboretum Devon (RHL) Ltd (**Arboretum**) obtained loans from various lenders through a peer-to-peer lending platform operated by Lendy Ltd (**Lendy**), for the purchase and development of land. Arboretum granted a debenture to a security trustee (the **Security Trustee**) creating fixed and floating charges over all of Arboretum's assets.

Arboretum borrowed more money from Shoby Investments Ltd (**Shoby**) which was also secured. All the parties later entered into an Intercreditor agreement (the **Intercreditor Deed**) under which they agreed that the security in favour of the Security Trustee would rank in priority to that held by Shoby up to a value of GBP7.845 million. Clause 2.9 relevantly provided that neither creditor would "challenge or question…the validity or enforceability of any Security constituted by a Security Document".

Following Arboretum's subsequent insolvency, the company was sold, realising approximately GBP900,000, entirely payable, subject to the challenges in issue, to the Security Trustee according to the priority agreed in the Intercreditor Deed.

Challenge to security

Shoby sought to challenge the Security Trustee's security. It argued that, as a result of alleged misrepresentation and breach of warranty by Lendy, Arboretum bore no liability under the Lendy loan agreements but was instead only liable to Lendy on the basis of either a restitutionary claim or an implied loan, neither of which gave rise to obligations secured by the debenture.

Did Clause 2.9 of the Intercreditor Deed prevent Shoby's challenge? This was determined as a preliminary issue.

Definition of "Secured Liabilities"

Under the debenture, "Secured Liabilities" were defined as:

> "*all present and future monies obligations and liabilities of the Borrower to the Beneficiaries…. pursuant to any Finance Document*".

The judge agreed with Shoby that, on its proper construction, the term "Secured Liabilities" was limited to obligations and liabilities "pursuant to any Finance Document". However, the judge concluded that, even if Shoby succeeded in showing that the lenders only had claims on a restitutionary basis or under an implied loan, those claims would still be Secured Liabilities under the debenture. The objective observer would not have understood the parties' intention to be limited to creating security only for claims in contract under the Finance Documents, but instead that the parties had agreed to create security for contractual and non-contractual obligations arising more generally pursuant to the transactions provided for in the Finance Documents.

Construction of "validity" in the Intercreditor Deed

The dispute primarily concerned the meaning of the word "validity" in Clause 2.9. Shoby argued that the term should be construed narrowly to refer to matters such as whether the formalities of the security had been complied with. Shoby submitted that its challenges went instead to the value of the security, which did not fall within Clause 2.9 and therefore Clause 2.9 did not prevent it from challenging the security.

The judge held that the dispute between the parties was not over the amount lent by the lenders (the value of the security), but instead whether the obligation to repay the amounts advanced by the lenders was effectively secured or not. The judge concluded that it was unlikely that the parties had intended to limit the meaning of "validity…of any Security" to matters of formal validity, preferring a wider interpretation under which the phrase was "more generally to include the effectiveness of the security as a security for the acknowledged secured obligations". Clause 2.9 would therefore preclude Shoby from bringing its intended challenge in any case.

Contractual estoppel

Even if the conclusions on the construction of the debenture and the Intercreditor Deed were wrong, a contractual estoppel would arise to prevent Shoby's challenge. Recital A to the Intercreditor Deed provided that "[Lendy] has agreed to provide, or has provided, the Senior Debt to the Borrower on behalf of the [Lenders] secured by way of the Senior Security".

The judge found that Recital A amounted to a statement of fact agreed between the parties to the Intercreditor Deed from which neither of them could depart. Given that the definition of "Senior Debt" referred to "[l]iabilities…under the Senior Debt Documents", which were in turn included under the definition of "Finance Documents", the agreed statement of facts was clearly inconsistent with Shoby's position that Arboretum's obligations to the lenders were not "pursuant to any Finance Document". Shoby was therefore estopped from advancing that claim.

Comment

The judge adopted a broad approach to contractual interpretation as to the meaning of 'Secured Liabilities'. In doing so, weight appears to have been given to the context (ie the parties' overall transaction) when determining the objective intention behind the parties' drafting of particular clauses.

The case is also an instructive reminder that a party may find itself estopped from advancing a claim where it has agreed to a certain state of affairs, even if that state of affairs does not reflect reality. In this case, the contractual estoppel arose by virtue of the recitals to the Intercreditor Deed; parties should ensure that recitals to contracts are drafted with care.

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Notice of SPA claim sufficient in light of recipient's knowledge

Dodika Ltd v United Luck Group Holdings Ltd [2021] EWCA Civ 638, 7 May 2021

Based on the actual knowledge of the recipients and the commercial purposes of the notice provision, the Court of Appeal found adequate notice had been given of a tax indemnity claim.

A buyer gave notice of its claim under a tax indemnity by solicitors' letter. The letter (sent shortly before the relevant deadline) made reference to an ongoing "investigation by the Slovene Tax Authority ... into the transfer pricing practices" of a subsidiary of Outfit7 (the company sold, and best known for

the popular Talking Tom and Friends app and media franchise).

At first instance, the judge held that the notice was inadequate on the basis that it did not provide "reasonable detail" of "the matter which gives rise to" the claim (as required by the contract). However, the Court of Appeal disagreed, concluding that reasonable detail had been provided by the buyer's letter.

In the court's view, what constituted "reasonable detail" must depend on all the circumstances, and those circumstances include what is already known to the recipient. In this regard, the court found that the knowledge of a notice recipient can be relevant to the question of whether the notice complied with the applicable contractual requirements, not just to the construction of the notice (as the sellers had argued).

On the facts of this case, it had been assumed (for the purposes of the proceedings) that the recipients had knowledge of the further detail which the sellers argued should have been included, namely information about the subsidiary's transfer pricing practices and the tax authority's position. In addition, the only further detail available was of a generic and limited nature. As a result, provision of that information would not have advanced any of the commercial purposes of the notice provision.

Ultimately, the court took a commercial approach to the interpretation of the relevant notice provisions. It was reluctant to find that the notice was deficient on the basis that the buyer had not gone through the "ritual" of spelling out certain information, in circumstances where the sellers accepted that the "missing" information would not have advanced the commercial purposes of the notice, and indeed was assumed to have been known to the sellers. The court's view was that a reasonable recipient of the notice, with the assumed knowledge of both parties, would have known which general facts the claim was based on.

Nonetheless, this case is also a reminder of the importance of careful compliance with contractual notice provisions, demonstrating that they may be subject to close scrutiny before the courts. Indeed, the court observed that where a contract prescribes that certain specific information must be included in a notice (by contrast with the requirement in the present case that "reasonable detail" simply be provided), and that specific information is omitted, it will be no excuse to argue that the information was already known to the recipient.

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Damages for fraudulent misrepresentation in business assets sale

Glossop Cartons and Print Ltd v Contact (Print and Packaging) Ltd [2021] EWCA Civ 639, 7 May 2021

When considering direct losses suffered as a result of fraudulent misrepresentations made in the course of a business assets sale, a court should determine the difference between the market value of the assets at the appropriate date, and the purchase price. The Court of Appeal held that the judge had erred in awarding damages for fraudulent misrepresentation based on what the buyers had "factored in" to their calculation of the purchase price.

The transaction concerned a purchase by **Glossop** from **Contact**. The agreement specified that the purchase price of GBP1.2m comprised GBP900,000 worth of assets (plant, machinery, stock and WIP) and a sum of GBP300,000 representing goodwill. Goodwill was included notwithstanding the fact that all parties to the agreement knew that the business had been loss-making for a number of years and that the sold assets included the loss-making contracts. The buyers were willing to pay a premium over the value of the assets in the expectation that they

could achieve synergies with their existing business. It subsequently turned out that they had made a bad bargain.

Following the transaction, Glossop and the other purchasers brought misrepresentation claims against the sellers. During the course of the proceedings, it was admitted that Contact and its owner made a number of fraudulent misrepresentations to secure the transaction. In his decision on quantum, the judge calculated direct losses flowing from the misrepresentations by deducting from the purchase price the 'value' of each flaw or defect that, in his view: (i) Glossop and the other purchasers had considered when agreeing to the final purchase price; or (ii) were the product of their commercial mistakes. The appropriateness of this approach, sometimes called the "deduction" method, was the main issue on appeal.

The deduction method was not appropriate

The measure of damages for direct loss caused by fraudulent misrepresentations is the purchase price paid, less the market value of the assets at the valuation date, as established by the House of Lords in *Smith New Court Securities Ltd v Citibank NA*.[1] This objective standard applies even in circumstances where assessing the business assets' market value can be difficult. The deduction method is incorrect in principle because it accounts for subjective factors that the claimant "may or may not have 'factored in' to their calculation of the purchase price". These subjective elements are irrelevant for the purposes of a court's direct loss damages assessment.

After reviewing the expert evidence, the Court of Appeal was satisfied that the parties' contractual assessment of the value of assets (at GBP900,000) was correct. The amount paid for goodwill (GBP300,000) was the difference between the value of the assets comprised in the sale and the price paid, and thus constituted the recoverable amount for direct loss.

Compensation for making a bad bargain

Another point on appeal was the judge's opinion that the assets' market value could not reflect the appellants' commercial misjudgements and mistakes. This was held to be incorrect. Litigants asserting claims of fraud may recover damages despite their prior knowledge of faults affecting the purchased assets.[2] A claimant is entitled to the difference between the price paid and the assessed market value, "whatever miscalculations it may have made in entering into the transaction".

Comment

As a point of practice, this ruling highlights the need for lawyers to work closely with experts to ensure that valuations are performed within the correct damages framework. A claim for fraudulent misrepresentation will require the parties' experts to engage in an objective valuation of the entire transaction. In this case, this exercise could be performed with relative ease. However, in a larger transaction the actual market value can be much more difficult to ascertain given that – in the words of the Court of Appeal – "valuation is never a precise science".

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[1] [1997] AC 254. The decision on this point was reaffirmed in Butler-*Creagh v Hersham* [2011] EWHC 2525 (QB).

[2] In reliance upon *Standard Chartered Bank v. Pakistan National Shipping Corporation (Nos. 2 & 4)* [2003] 1 AC 959 and the decision in *OMV Petrom SA v. Glencore International AG* [2016] EWCA Civ 778; [2017] 3 All ER 157, where Clarke LJ held that market value is to be determined objectively and without regard to "what the claimant might or might not have thought about what it was buying at the time".

Guarantee unenforceable due to amendments to an underlying agreement: a "trap for the unwary"

Brown-Forman Beverages Europe Ltd v Bacardi UK Ltd [2021] EWHC 1259 (Comm), 19 May 2021

The judgment provides a helpful reminder of the distinction between guarantees and indemnities, and how they interact with a defence of equitable set-off. The court also held that pure guarantee obligations had been discharged as a result of amendments to the underlying agreement, in the absence of consent or immateriality.

The claimant, the defendant and the defendant's subsidiary entered into a cost-sharing agreement relating to the provision of certain services (the **Agreement**). The claimant, the subsidiary and the claimant's parent company later entered into an addendum which varied the Agreement (the **Addendum**).The subsidiary failed to pay sums to the claimant under the Agreement, raising the defence of equitable set-off, on the basis that the sums owed by the claimant to the subsidiary were equal to or exceeded those owed by the subsidiary to the claimant. Those claims were referred to arbitration. The court here determined preliminary issues regarding whether the defendant was liable to the claimant under certain surety obligations in the Agreement. The relevant extracts of the provisions provided (emphasis added):

> "*[The defendant] agrees to indemnify and hold [the claimant and its parent company] harmless from and against and in respect of any and all losses, liabilities, claims, judgments, expenses, costs (including attorneys' fees) and settlements incurred in connection with any failure by [the defendant's subsidiary] to timely fulfil its payment obligations… under this Agreement".* (**Clause 6.2**)

> "*As a separate and independent stipulation, [the defendant] agrees that any obligation, commitment or undertaking expressed to be undertaken by [its subsidiary] (including, without limitation, any moneys expressed to be payable under the Agreement) which may not be enforceable against or recoverable from [its subsidiary] by reason of any legal disability or incapacity on or of [its subsidiary] or any fact or circumstance (other than any limitation imposed by the Agreement) shall nevertheless be enforceable against and recoverable from [the defendant] as though the same had been incurred by [the defendant] and [the defendant] were the sole or principal obligor in respect thereof and shall be performed or paid by [the defendant] on demand".* (**Schedule 6.2**)

Guarantee or indemnity

The claimant sought to characterise Clause 6.2 as an indemnity, providing a primary obligation for the defendant to pay when triggered. It argued that the primary obligation had been triggered by the subsidiary's refusal to pay, regardless of its defence of equitable set-off. The defendant relied on the set-off defence to claim that none of the surety obligations had been triggered.

The court reiterated the difference between a guarantee and an indemnity. A guarantee is a contractual obligation to either discharge a debt owed by the principal debtor or to procure the principal debtor's compliance with its guaranteed obligation: the liability of the surety is ancillary, or secondary, to the primary liability of the creditor. In contrast, an indemnity imposes a primary obligation on the surety that is wholly independent of the liability (if any) arising between the principal debtor and the creditor.

In interpreting the provision, neither party relied on the factual context, but rather "commercial common sense" and the words used. The court held that the provision was an indemnity, relying on the presence

of express guarantees elsewhere in the Agreement and the type of loss covered (arising from a failure to timely fulfil payment obligations, which extended beyond the losses and costs of the claimant as principal creditor).

No "no set-off" clause

The key question, regardless of whether Clause 6.2 was an indemnity or a guarantee, was whether the surety obligations in the Agreement had been triggered despite the subsidiary's set-off defence. They had not.

The court held that, although a defence of equitable set-off does not extinguish liability until such point that it is agreed (or otherwise determined) that the relevant claims should be netted off, the defence is substantive and prevents the claimant from enforcing or relying on its claim. No demand for payment can be made until the party no longer relies, or is no longer entitled to rely, on the defence. Clear wording would be needed to demonstrate that the parties intended for the surety obligation to nevertheless be triggered (such as a "no set-off" clause). That wording was missing and the provisions had not been triggered:

- Clause 6.2 did not capture any sum contractually due to the claimant which was unpaid by the subsidiary, but instead only those losses "incurred in connection with any failure… to timely fulfil its payment obligations". That loss was distinct from the sum claimed by the defendant and Clause 6.2 was not therefore triggered. Even if that was wrong, the surety language required a breach of an obligation to pay by the subsidiary, which had not occurred given the validly asserted defence of set-off. The claimant was not entitled to assert otherwise.
- Schedule 6.2 did not capture circumstances in which a party relied on a set-off defence. Instead, it required circumstances where the obligation was not enforceable or recoverable "by reason of any legal disability or incapacity", neither of which applied.

The court placed particular emphasis on the absence of a "no set-off" provision in the Agreement, noting that such provisions are commonplace in commercial agreements and straightforward to draft. The absence of such wording supported the interpretation that the parties did not intend to allow a party to enforce a claim in circumstances where the other party had validly asserted a defence of set-off.

Guarantees discharged by amendments to the Agreement

Under the rule in *Holme v Brunskill*, a guarantor's liability is discharged where amendments are made to the primary underlying agreement after giving of the guarantee, unless either: (i) the guarantor consented to the variation; or (ii) the variation was patently insubstantial or incapable of adversely affecting the guarantor. The defendant argued that its surety obligations had been discharged by the Addendum.

The court considered the rule "unduly favours guarantors", a "trap for the unwary" and "merits reconsideration". However, the rule was clearly not a fundamental right of a guarantor as parties are permitted to contract out of it and "all well-advised creditors therefore do so". The court held that the rule remained restricted to its current parameters (ie not extending to indemnities) and considered it in relation to the pure guarantee obligations in the Agreement (which neither Clause 6.2 nor Schedule 6.2 qualified for).

In relation to consent, there was no evidence that the signatories to the Addendum had actual (nor implied or ostensible) authority to consent to the variation on the defendant's behalf. In relation to materiality, the onus on the claimant to show that the amendments were immaterial was a strict one. It was not clear on the facts that the amendments were self-evidently to benefit or not prejudice the surety, and immateriality could not therefore be demonstrated.

The court found in the defendant's favour: its guarantee obligations under the Agreement had been discharged.

Comment

The ruling is an important reminder of the utility of two commonly included clauses within commercial agreements. The substantive impact of the set-off defence, which prevented the surety obligations from being triggered, demonstrates why “no set-off” clauses are included in so many commercial contracts. The “trap for the unwary” created by the rule in *Holme v Brunskill*, which allows a creditor to unwittingly release a guarantor from its obligations by amending an underlying agreement, demonstrates why the rule is commonly excluded by waiver of defences clauses and guarantor consent is routinely sought when amending finance documents. The burden on a creditor to prove immateriality, in the absence of consent, is a strict one: it must positively demonstrate that the amendments were immaterial, which may be a high bar. It is therefore welcome confirmation that the rule does not extend to indemnities.

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Privilege

"Without prejudice" mediation materials admissible to uphold settlement agreement

Berkeley Square Holdings & ors v Lancer Property Asset Management Ltd & ors [2021] EWCA Civ 551, 15 April 2021

This Court of Appeal ruling considers the ambit of existing exceptions to the 'without prejudice' rule. The defendant was successful in getting statements made in 'without prejudice' mediation position papers admitted in evidence to uphold a settlement agreement which the claimant sought to set aside.

Lancer entered into the following agreements with Berkeley (the latter acting through an individual appointed under a power of attorney (the **Attorney**)):

- an asset management agreement to manage Berkeley's properties; and
- a side letter increasing Lancer's fees under the asset management agreement. At the Attorney's direction, Lancer paid on to the Attorney's companies a number of the fees received pursuant to the side letter.

A dispute arose between Berkeley and Lancer in relation to the amounts due to Lancer under the side letter. During mediation, in written position papers marked 'without prejudice', Lancer referred to the payments to the Attorney's companies. These papers were shared with Berkeley's solicitors and the Attorney. Shortly after the mediation, the Attorney (acting on Berkeley's behalf) and Lancer concluded a settlement agreement.

A few years later, Berkeley terminated the Attorney's and Lancer's respective appointments. It then started proceedings against Lancer seeking to, inter alia, set aside the settlement agreement. Berkeley alleged that:

- it had only discovered the payments to the Attorney's companies after termination;
- the payments were made pursuant to the side letter and the settlement agreement and, thus, these agreements were means by which, in breach of his fiduciary duty, the Attorney defrauded Berkeley. Therefore, the Attorney did not have actual authority to, inter alia, conclude the settlement agreement on Berkeley's behalf; and
- Lancer knew about or suspected that the Attorney was acting in breach of duty by, inter alia, committing Berkeley to the settlement agreement. Therefore, the Attorney did not even have ostensible authority to, inter alia, conclude the settlement agreement on Berkeley's behalf.

In its defence, Lancer sought to rely on the mediation position papers to show that Berkeley had known about the payments to the Attorney's companies before the settlement agreement. While Lancer accepted that the statements in the position papers were made "without prejudice" (**WP**), it argued that they should be allowed in evidence under one or more of the exceptions to the WP rule.

At first instance, the High Court allowed the WP statements under two exceptions to the WP rule. The Court of Appeal only allowed the WP statements under one of those exceptions.

Misrepresentation or fraud exception applies as a shield, not just as a sword

The conventional description of the misrepresentation or fraud exception to the WP rule is that WP communications are admissible if they show that a settlement agreement should be set aside on the grounds of misrepresentation, fraud or undue influence. Berkeley argued that this exception did not apply because Lancer sought to uphold the settlement agreement, not to set it aside.

Agreeing with the first instance decision, the Court of Appeal ruled that the WP statements were admissible under this exception. The court held that the purpose of the exception is to help determine whether a settlement agreement is binding. Therefore, WP communications are admissible if pertinent to issues proving or disproving the binding nature of a settlement agreement.

Muller exception is only about waiver of WP privilege in three-party cases

At first instance, the High Court held that the exception derived from *Muller v Linsley*[1] (the **Muller exception**) applies if the matter is not 'fairly justiciable' otherwise and the WP communications do not contain admissions relevant to the settlement agreement. Given that Berkeley relied strongly on its lack of knowledge of the payments to the Attorney's companies and Lancer's WP communications were the only evidence to the contrary, the court lifted the WP protection.

The Court of Appeal, *obiter*, disagreed with the High Court's interpretation of this exception. It noted that, although the decision in Muller has not been overruled, its reasoning can no longer stand.

It questioned whether the *Muller* exception could apply to so-called "two-party" cases (ie where the parties to the litigation and the WP settlement discussions are the same).

- First, *Muller* was a "three-party" case (ie a party to the WP settlement discussions was not also a party to the litigation) and, therefore, applying it to two-party cases would extend the exception beyond the facts of *Muller*.
- Second, *Muller* dealt with the difficulty of waiver in a three-party situation, which is not necessarily an issue in two-party cases. This is because, if a party to WP settlement discussions puts that material in issue in litigation, the other party to those discussions (who is also a party to the litigation) can simply choose to accept that waiver. By contrast, in the three-party scenario, the absence of a corresponding waiver from the third party might need to be overridden by the court.
- As this is a two-party case, the relevant question on the admissibility of the WP statements is whether Berkeley's reliance on a lack of knowledge of the payments disclosed thereby amounts to a waiver of its right to WP privilege, which Lancer (as the other party to the WP settlement discussions) can simply accept. The issue was not decided because Lancer had made it clear that it did not rely on waiver.

The Court of Appeal observed that the High Court's ruling developed a potentially new exception to the WP rule, which applies where a matter raised by the party resisting disclosure is not 'fairly justiciable' without recourse to WP communications. As the existence of this potentially new exception was not determinative of the appeal, the Court of Appeal declined to consider it further.

No extension of the estoppel exception

Lancer alleged that the WP communications should be allowed as part of its defence of estoppel by silence: despite being informed of the payments to the Attorney's companies during the mediation, Berkeley never raised any concerns.

The conventional description of the estoppel exception is that 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

exception should extend to any form of estoppel (including silence).

The Court of Appeal held that any such extension raises difficult issues which need not be determined in a case that does not turn on them.

No new "'independent fact" exception

At first instance, the High Court suggested there might be another exception to the WP rule where WP material contains "independent fact[s]" in no way connected with the merits of the settlement discussions. The independent facts in this case would have been Lancer's payments to the Attorney's companies, because they were disclosed in the context of settlement discussions about the amounts due to Lancer. However, as Lancer had not advanced its case on this basis, the High Court left the point open and simply noted that such an exception might have applied. The Court of Appeal agreed that the issue need not be decided, but expressed doubts that it would have applied anyway.

Comment

The Court of Appeal decision in *Berkeley v Lancer* is a rare example of WP communications being admissible in evidence. Cases applying any of the limited exceptions to the WP rule are few and far in-between due to the courts' regard for the strong public interest in protecting open and frank settlement discussions.

The Court of Appeal looked at the purpose rather than the formal wording of the misrepresentation or fraud exception and applied it to circumstances in which a settlement agreement is sought to be upheld rather than set aside. The court's *obiter* remarks on the Muller exception suggest that it is limited to the question of waiver in three-party situations and, thus, not applicable in a two-party case such as this one.

The Court of Appeal declined to definitively rule on further potential exceptions to the WP rule, such as: (i) any form of estoppel (including silence); (ii) if matters are not "fairly justiciable" without recourse to WP communications; or (iii) for 'independent fact[s]' in no way connected with the merits of the settlement discussions. Instead, the court commented that such issues should only be decided in cases that turn on them.

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[1] [1994] EWCA Civ 39, 30 November 1994.

Procedure

Court allows journalist access to historic accountant's report held by company's solicitors

Goodley v Hut Group Ltd [2021] EWHC 1193 (Comm), 6 May 2021

An English Court has relied on the principle of open justice to order that an accountant's report, referred to in a six-year-old English court judgment, should be disclosed to a journalist as the document was relevant to a proper journalistic endeavour (how a company seeking a public flotation had previously dealt with an issue of fraud within its corporate governance systems) and the document's release was unlikely to do serious harm.

Applying for documents referred to in court

This case concerns an application by a journalist working for the Guardian newspaper, Simon Goodley, for a PWC report referred to in a 2014 judgment in *The Hut Group Ltd v Nobahar-Cookson and Barclays Private Bank and Trust Ltd* [2014] EWHC 3842.

The 2014 judgment concerned, inter alia, whether there had been fraud at The Hut Group (**THG**), and suggested that the discovery of fraud had played a part in THG withdrawing from a proposed listing on the London Stock Exchange in 2012. The judgment relied in part on a report written by PWC into the fraud.

In August 2020 THG announced its intention to attempt to float on the London Stock Exchange. Mr Goodley requested a copy of the PWC report as it related to alleged historic fraud. The Court confirmed that it no longer held a copy of the report; however, THG's external lawyers confirmed that they did. THG's lawyers refused to provide a copy.

When will the court allow access to documents?

The court has a broad power to order documents to be provided to non-parties to litigation. Lady Hale **explained in 2019** that, other than where it is limited by statute, the court has inherent jurisdiction to determine what public access is required to documents or other information placed before the court in order to satisfy the principle of open justice.[1] This relates to all documents placed before the court, not just to statements of case and judgments (the provision of which is provided for under the Civil Procedure Rules).

It was this inherent jurisdiction that Mr Goodley relied upon to request the provision of the PWC report.

Requesting access to court documents – a balancing act

There is a limit to this inherent jurisdiction. The court must carry out a balancing act each time it makes a decision. On the one hand there is the purpose of the open justice principle and the potential value of the information in advancing that purpose, and on the other hand any risk of harm which its disclosure may cause.

It is for the person applying for the document to show how granting access will advance the open justice principle. In turn, it is for the respondent to show that this is not the case or, in the alternative, that the production of the document could cause serious harm.

In this case, Mr Goodley argued that the report was relevant to THG's current application for a listing on the London Stock Exchange. He argued that the report concerned THG's earlier plans to list and how the company dealt with the findings of fraud referred to in the 2014 judgment. Mr Goodley also argued that he wanted to understand the basis for the findings in the original judgment.

THG's lawyers primarily argued that Mr Goodley did not require the documents to further the purposes of the open justice principle, but rather for his own purposes in respect of an old and stale case.[2]

Court orders disclosure of accountant's report

The court ordered that the report be produced.

The court found that the principle of open justice will be advanced by disclosure of documents to journalists in pursuit of serious journalistic endeavours. Here, the story was plainly a serious journalistic pursuit: it concerned how a company seeking a public flotation recently dealt with an issue of fraud within its corporate governance systems. THG had failed to demonstrate that it would suffer serious harm by the disclosure and that the disclosure would therefore be unjust.

Comment

We have seen a few recent cases in which non-parties have sought access to documents referred to in court. However this was slightly different in that it concerned a journalist trying to obtain, from a litigant's lawyers, an accountant's report referred to in a judgment delivered six years earlier, for the purpose of reporting on a proposed flotation, not on the proceedings in which the report was referenced.

Businesses which enter into litigation in the English courts need to be aware that documents submitted and used as part of litigation have the potential to find their way into the public domain.

This judgment may embolden journalists and the media to make more attempts to get hold of documents referred to in court.

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1 See *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38, [34] and [41].

2 See Blair Judgment, [24].

Litigation Review consolidated index 2021

Top finance litigation and contract law developments in 2020 (Jan/Feb)

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UK Supreme Court clarifies English law on arbitrators' duties of impartiality, disclosure and confidentiality: *Halliburton Company v Chubb Bermuda Insurance Ltd* (Jan/Feb)

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Contract

Recital to intercreditor agreement means creditor is contractually estopped from challenging security: *Arboretum Devon (RLH) Ltd* (July)

Notice of SPA claim sufficient in light of recipient's knowledge: *Dodika Ltd v United Luck Group Holdings Ltd* (July)

Damages for fraudulent misrepresentation in business assets sale: *Glossop Cartons and Print Ltd v Contact (Print and Packaging) Ltd* (July)

Guarantee unenforceable due to amendments to an underlying agreement: a "trap for the unwary": *Brown-Forman Beverages Europe Ltd v Bacardi UK Ltd* (July)

No intimidation and economic duress in loan restructuring: *Oliver Dean Morley (t/a Morley Estates) v Royal Bank of Scotland Plc* (March/May)

Liquidated damages clause in aircraft purchase agreement not an unenforceable penalty: *De Havilland Aircraft of Canada Ltd v SpiceJet Ltd* (March/May)

Termination of Bitcoin trading account: *Ramona Ang v Reliantco Investments Ltd* (Jan/Feb)

Crime

SFO rebuked for overreaching: no power to seek overseas documents from non-UK companies: *The Queen on the application of KBR Inc v The Director of the Serious Fraud Office* (Jan/Feb)

Evidence

Reforms to witness statements: sense, finally, after a century of psychological research; or, a triumph of form over substance? (March/May)

Expert

Global expert services firm breaches conflicts undertaking by appointments in related arbitrations: *Secretariat Consulting Pte Ltd & Ors v A Company* (Jan/Feb)

Insurance

Court of Appeal restates the legal principles applicable to the sanction of Part VII transfers of insurance businesses: *The Prudential Assurance Company Ltd and Rothesay Life Plc* (Jan/Feb)

Privilege

"Without prejudice" mediation materials admissible to uphold settlement agreement: *Berkeley Square Holdings & ors v Lancer Property Asset Management Ltd & ors* (July)

Asserting what you did not discuss with your solicitor may waive privilege over what you did discuss: *Guest Supplies Intl v South Place Hotel Ltd* and *PJSC Tatneft v Bogolyubov & ors* (Jan/Feb)

Surveillance reports may not be privileged: *Gerrard & Gerrard v Eurasian Natural Resources Corporation Ltd & Diligence International LLC* (Jan/Feb)

Procedure

Court allows journalist access to historic accountants' report held by the Company's solicitors: *Goodley v The Hut Group Ltd* (July)

Sanctions

The Office of Financial Sanctions Implementation issues updated guidance relating to monetary penalties for breaches of financial sanctions (March/May)

Tort

Claim against parent company in tort for inducing breach of contract by subsidiary has no real prospect of success: *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* (March/May)

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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