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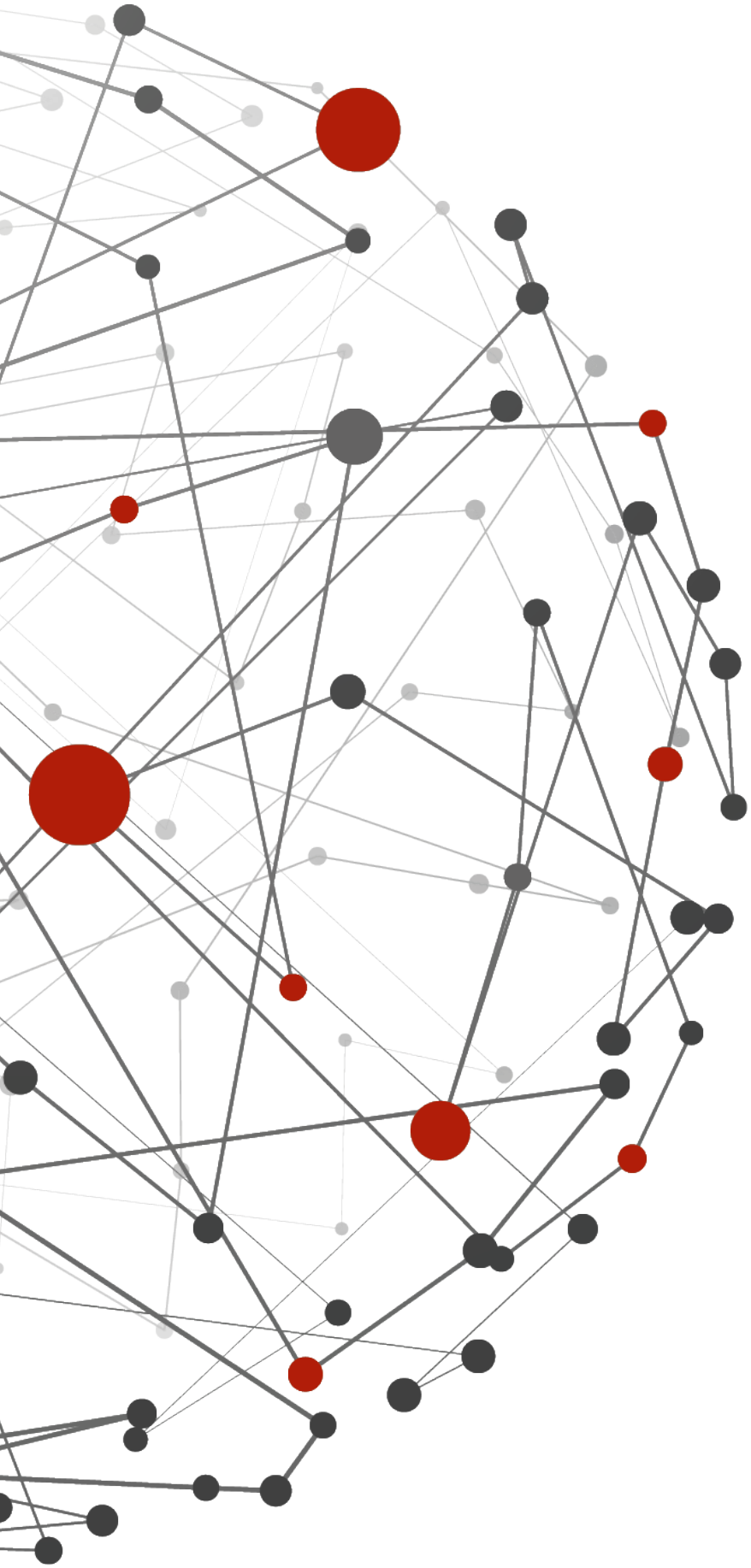

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Arbitration

Agreement on "non binding arbitration" not an arbitration agreement

IS Prime Ltd v (1) TF Global Markets (UK) Ltd (2) TF Global Markets (AUST) PTY LTD (3) Think Capital Ltd (2020) [2020] EWHC 3375 (Comm), 9 December 2020

An agreement to submit to non-binding arbitration is not an enforceable arbitration agreement under the English Arbitration Act 1996. The court dismissed an application for stay of English court proceedings under s9, citing absence of a valid arbitration agreement between the parties. The court held that an arbitration agreement must provide for a binding determination of disputes.

The claimant, an English financial services company, and the defendants, a group of associated companies, were parties to an exclusivity agreement. This agreement was part of a suite of documents relating to a sale agreement between third parties. Clause 7.7 of the sale agreement provided that any dispute relating to the sale agreement "shall first be submitted to non-binding arbitration" in Florida under the Commercial Arbitration Rules of the American Arbitration Association (**AAA**).

The parties to the sale agreement commenced arbitration under the AAA rules for issues arising out of the sale agreement as well as breach of the exclusivity agreement, on the basis that the claims were interrelated. The claimant and defendants were joined as parties to this arbitration. The claimant then subsequently brought a damages claim in the English courts on the basis that the exclusivity agreement was governed by English law and provided for the non-exclusive jurisdiction of the English courts.

The defendants applied for a stay of the English litigation under s9 Arbitration Act 1996 (the **Act**) in favour of the AAA arbitration. Baker J dismissed the application on the basis that clause 7.7 did not constitute an arbitration agreement under the Act.

Arbitration must provide for a binding determination

Though the Act does not define the term "arbitration", there is good authority under English law that an arbitration must provide for a binding determination of disputes. The claimant and the defendants agreed that an award under the AAA process would not be binding on the parties. This meant, Baker J held, that there was no arbitration agreement between the parties.

The court noted that if it had been the case that the AAA arbitrators were, in fact, required to make a binding determination, clause 7.7 would have constituted an arbitration agreement, notwithstanding the term "non-binding".

Section 58(1) of the Act does not allow for non-binding arbitrations

The defendants argued that s58(1) supports the validity of non-binding arbitrations as it allows parties to agree that an award would not be binding until any process of appeal was exhausted. Rejecting this proposition, without going into much detail, Baker J held that the clause could not be interpreted to support the proposition that parties could agree that an award would never be binding. This is consistent with the finding in *Berkeley Burke* [2017] EWHC 2396 (Comm) where Teare J held that s58(1) presupposes the existence of a valid arbitration agreement and applies to those cases that provide for a tiered arbitration panel.

Clause 7.7 did not evidence an agreement to engage in pre-litigation process

The defendants also argued that clause 7.7 evidenced an agreement between the parties not to commence litigation until conclusion of the AAA process. They argued that there is authority under English law that requires courts to honour parties' decisions to engage in pre-litigation processes. On this basis, the defendants sought a stay of proceedings pursuant to the court's inherent jurisdiction under s49(3) Senior Courts Act 1981.

Rejecting the defendants' argument, the court held that clause 7.7 did not evidence an explicit promise between the claimant and the defendant (neither of whom were a party to the sale agreement) to participate in the AAA

process prior to litigating in the English court for breach of the exclusivity agreement. Another factor that weighed against the defendants was that they had made, and the claimant had accepted, an offer to stay the AAA proceedings in favour of the English litigation in the letter before action.

Comment

It is clear from this decision that an agreement to submit to "non-binding" arbitration is not an enforceable arbitration agreement under the Act. If parties intend to resolve their dispute through arbitration, the clause must provide for binding determination in order to receive the protection offered to the arbitration process under the Act.

In some cases, an agreement to submit to non-binding arbitration may encourage parties to assess their case early and possibly reach a settlement. However, it is important to weigh both the time and costs implications of engaging in any such pre-litigation process. A time-bound negotiation or mediation clause could serve a more efficient purpose in guiding the parties towards settlement.

This case is a useful reminder of the need to: (i) properly ascertain the preferred method for resolving disputes while the contract is being negotiated; and (ii) draft dispute resolution provisions, in particular arbitration agreements, with care.

Practitioners must also carefully assess the need to provide for similar dispute resolution provisions across a suite of transactional documents, to avoid conflicting proceedings. Similar dispute resolution provisions are also helpful in cases where a need for joinder and/or consolidation may arise.

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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 [2020] UKSC 48, 27 November 2020

The Supreme Court recognised for the first time that there is an ongoing, statutory duty in English law, which requires arbitrators to disclose facts or circumstances which would, or might reasonably, give rise to justifiable doubts as to their impartiality. That duty is, however, subject to an arbitrator's duty of confidentiality in English-seated arbitral proceedings.

The Court unanimously confirmed that, when considering whether justifiable doubts actually exist as to an arbitrator's impartiality, the appropriate test to apply is whether the fair-minded and informed observer would conclude that there was a real possibility that the arbitrator was biased. The application of this test will be highly fact-specific, however, and must take account of the distinctive features of international arbitration, including any customs and practices specific to the relevant field of arbitration.

Background

This was an appeal by Halliburton against a decision of the Court of Appeal rejecting Halliburton's application to remove Mr Kenneth Rokison QC as chair of the tribunal in a London-seated 'Bermuda Form' arbitration between it and its insurer, Chubb, arising from the 2010 explosion on the Deepwater Horizon oil rig (the **Halliburton Arbitration**). Mr Rokison was appointed by the High Court, having been Chubb's preferred candidate for chair. Following his appointment as chairman in the Halliburton Arbitration, Mr Rokison accepted an appointment by Chubb, and a joint party appointment, in two other insurance arbitrations commenced by another claimant, Transocean, also in connection with the Deepwater Horizon incident (the **Transocean Arbitrations**). Halliburton sought Mr Rokison's removal on the basis that there were justifiable doubts as to his impartiality, essentially because:

– Mr Rokison failed to disclose to Halliburton his appointments in the Transocean Arbitrations; and

– there was a common issue in the three arbitrations as to whether fines and penalties paid by the policyholders in connection with the Deepwater Horizon incident were recoverable under the policies, and Chubb could benefit from learning in the Transocean Arbitrations what arguments might work in front of Mr Rokison without Halliburton even being aware that it had had that opportunity.

Halliburton's application was rejected by both the High Court and the Court of Appeal. The two key issues that came before the Supreme Court were whether, and to what extent: (i) an arbitrator may accept appointments in multiple arbitrations concerning the same or overlapping subject matter, with only one common party, without giving rise to an appearance of bias (the **First Issue**); and (ii) the arbitrator may do so without making a disclosure (the **Second Issue**). Given the general importance of these questions, the Supreme Court permitted interventions from the LCIA, ICC and the Chartered Institute of Arbitrators, as well as trade-specific arbitration associations, with the LMAA representing maritime arbitration, and GAFTA representing commodities arbitration.

The First Issue: impartiality

Pursuant to s24(1)(a) of the Arbitration Act 1996 (the **Act**), the court may remove an arbitrator in an arbitration seated in London where justifiable doubts exist as to their impartiality. It was not in dispute that the standard of impartiality in the Act reflects the common law test for the appearance of bias, ie whether the fair-minded and informed observer would conclude that there was a real possibility that the tribunal was biased. While in this sense the test is the same for arbitrators as it is for judges, Lord Hodge, giving the leading judgment, said that,

"*in applying the test to arbitrators it is important to bear in mind the differences in nature and circumstances between judicial determination of disputes and arbitral determination of disputes*".

These differences include the duty of confidentiality in English arbitrations, the limited review by the courts of arbitral decisions and the fact that arbitrators are paid, and often appointed, by the parties. The Court did not explain further how these differences should be taken into account when applying the apparent bias test to arbitrators rather than judges.

Lord Hodge held that the same standard of impartiality applies to party-appointed arbitrators and the presiding arbitrator, and that no account is to be taken of the characteristics of the parties (for example, the familiarity of foreign parties with arbitrator appointment practices). The assessment is, however, a nuanced one, which must reflect "*the customs and practices of the relevant field of arbitration*."

This qualification was made because it became apparent in the case that some fields of arbitration, notably maritime and commodities arbitration, were more tolerant of repeat related appointments of the same arbitrator than 'mainstream' commercial arbitration. As the LMAA and GAFTA explained to the court, in their fields disputes often arise from the same incidents and chain or string supply contracts.

On the specific question in this case, Lord Hodge held that the acceptance by an arbitrator of repeat appointments in related arbitrations with the same or overlapping subject matter and only one common party was capable of giving an appearance of bias.

This would be dependent on the facts of the case and, especially, on the customs and practices in the relevant field of arbitration. He suggested that, where this practice was more acceptable, thought should be given to making this clear in the relevant arbitration rules.

The Second Issue: disclosure

It is widely recognised in arbitration rules, including those of the LCIA and ICC, as well as soft law instruments such as the IBA Guidelines on Conflicts of Interest in International Arbitration (the **IBA Guidelines**), that a prospective arbitrator must disclose any circumstances which could call their impartiality into question, and that this duty continues through the arbitration. Now, for the first time, the Supreme Court has recognised that such a duty exists in English law.

The duty requires arbitrators to disclose facts or circumstances known to them that would, or might reasonably, give rise to justifiable doubts as to their impartiality. The test for disclosure is, therefore, wider than the test for apparent bias, as might be expected. Although it did not decide the point, the Supreme Court suggested that there might be situations that would require an arbitrator to make reasonable enquiries to ascertain whether any disclosure needed to be made (as the IBA Guidelines contemplate). The Court also noted that, since the same facts could lead to different views on whether there was an appearance of bias, it followed that the same facts could require disclosure for one type of arbitration but not another.

The Supreme Court's confirmation that a duty of disclosure exists under English law gave rise to two further questions:

- whether the failure to disclose relevant facts itself indicates partiality; and
- how the duty to disclose interacts with the long-recognised duty of confidentiality, which is considered to be a key feature and attraction of arbitration in London.

On the first point, the Court held that a failure to disclose may itself justify the removal of an arbitrator in a case that was "*close to the margin*" – that is, a case where "*one would readily conclude that there is apparent bias in the absence of further explanation*". A non-disclosure may also result in the arbitrator facing costs consequences from a challenge, even where the challenge is ultimately unsuccessful. These points were the Court's answer to the concern that a breach of the duty of disclosure might not have any adverse consequences for the arbitrator.

On the second point, the Supreme Court held that the arbitrator's duty of confidentiality took precedence over their duty of disclosure. Unless the parties to the arbitration to which the disclosure relates consent to the disclosure, only facts that are not confidential may be disclosed. The Supreme Court observed that the parties' consent to a disclosure may be inferred, for example through their choice of institutional rules. If the arbitrator's obligation of confidentiality means they cannot comply with their disclosure obligation, they must decline the new appointment. On the facts in *Halliburton*, Lord Hodge held that it would not breach confidentiality to disclose: the identity of the common party (Chubb); how, and by whom, the arbitrator was appointed; whether the other arbitration arose out of the same or a related incident; and, at a high level, whether similar issues were likely to arise in the other arbitration. He also suggested that the same details are likely to be disclosable without consent in other cases, absent some express provision in the arbitral rules to the contrary.

Decision

Applying these tests to the facts, the Supreme Court held that Mr Rokison's failure to disclose his appointment in the first Transocean Arbitration to Halliburton amounted to a breach of his legal duty of disclosure, as the overlapping appointments, where only Chubb was a common party, were capable of giving an appearance of bias. According to the court, there was no established practice in Bermuda Form arbitrations that it was acceptable for an arbitrator to take multiple related appointments with only one common party and, absent party agreement to the contrary, disclosure was required.

The Court went on to conclude that, nevertheless, there were no doubts about the impartiality of Mr Rokison that would justify removing him. The key factor seems to have been the timing of the three arbitrations, in that the Halliburton Arbitration started six months before either of the Transocean Arbitrations, meaning that, if any party was expected to be at a disadvantage, it was Transocean and not Halliburton. Among other things, the Supreme Court also: (1) did not regard his non-disclosure as an indicator of partiality given that there was a lack of clarity in English law at the time as to the nature and scope of the duty of disclosure; and (2) considered that his response to Halliburton's challenge, which the Court regarded as measured and fair, showed that there was no subconscious ill will towards Halliburton. Consequently, the Supreme Court dismissed Halliburton's appeal.

Comment

The Supreme Court's decision will no doubt be the leading case on the standard of impartiality for an arbitrator. It took a somewhat more robust line than the Court of Appeal in holding that overlapping appointments with a single common party were capable of amounting to an appearance of bias. In doing so, the Court largely followed the international consensus on arbitrator conflicts. Equally, the Supreme Court's rejection of the challenge in this case – which must have been quite close to the line – suggests that the bar for a successful challenge remains high.

The case is also notable for recognising an arbitrator's legal duty of disclosure for the first time under English law. However, the standards defined by the Court on impartiality and disclosure may not always be easy in practice.

It was already clear that challenges to arbitrators turn on the facts – as exemplified by Halliburton's challenge in this case. The Supreme Court has added further nuance by giving judicial recognition to the varying practices of different fields of arbitration, and by recognising that an assessment of the apparent bias test must take into account the characteristics of arbitration, without providing much explanation on how this should be done. There are sensible reasons

for the various distinctions made by the Court but, as Lord Hodge himself recognised,

"*how far this ruling on consent, which relates to Bermuda Form arbitrations, can be applied by analogy to other arbitrations will depend on their particular characteristics and circumstances and custom and practice in their field*".

It may be that the effect of *Halliburton* is to make it harder for parties and arbitrators to reach clear views on potential conflicts.

The judgment establishes the principle that an arbitrator's duty of disclosure must yield to their duty of confidentiality. Time will tell how easy this will be to apply in practice. The Court helpfully recognised that the necessary party consent to a disclosure may be inferred from the choice of arbitral rules. However, it is unclear how easy it will be to determine whether a particular set of rules meets this threshold in a particular case. If disclosure of relevant information is precluded by confidentiality, it may be that a further effect is that arbitral institutions could lack full information to rule on challenges to arbitrators. Arbitrators may sometimes find that they have to decline appointments if they are unable to disclose enough information to explain themselves fully.

The *Halliburton* decision is the second from the Supreme Court in as many months dealing with arbitration and involving Chubb. Like the Enka case, which addressed the governing law of an arbitration agreement, *Halliburton* brings welcome clarity to the principles of English arbitration law but may lead to difficulties in practical application.

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Conflict of laws

Asymmetric jurisdiction agreements – are they effective against "torpedo" actions in another court?

Etihad Airways PJSC v Flother [2020] EWCA Civ 1707, 18 December 2020

An asymmetric jurisdiction agreement is an exclusive jurisdiction agreement for the purposes of the "anti torpedo" provisions of the Brussels Recast Regulation. This means that the court given exclusive jurisdiction for the benefit of one party only can continue to hear a dispute even if it is second-seised (while the first-seised court should stay its proceedings). The Court of Appeal's (*obiter*) views on the application of the 2005 Hague Convention on Choice of Court Agreements to asymmetric jurisdiction agreements may be of more long-term interest following the end of the Brexit transition period. Allen & Overy is representing Etihad Airways PJSC.

What is an asymmetric jurisdiction agreement?

An asymmetric jurisdiction agreement is a common type of jurisdiction agreement. It allows one party (normally a lender) to bring proceedings anywhere, while the other party (normally a borrower) is restricted to bringing proceedings in one jurisdiction only.

Competing claims in Germany and England

Flother (the insolvency administrator of Air Berlin) started proceedings in Germany despite the asymmetric jurisdiction agreement, in a loan agreement between Air Berlin and Etihad, providing that the English court had exclusive jurisdiction over the related claim made against

Etihad. Etihad then started proceedings in England, and Flother applied for the English proceedings to be stayed on the basis that the German court was first seised under the "first in time" provisions of the Brussels Recast (the **Brussels Recast**).[1]

Etihad relied on Article 31(2) Brussels Recast which allows a court second-seised (such as the English court in this case) to proceed to hear a claim where it is the court specified in an exclusive choice-of-court agreement (and provides that the first-seised court shall: (i) stay its proceedings until such time as the second-seised court determines that it has no jurisdiction; and (ii) decline jurisdiction if the second-seised court establishes it). Etihad's position was that an asymmetric jurisdiction agreement is "exclusive" for the purposes of Article 31(2).

Asymmetric jurisdiction agreement is an exclusive jurisdiction agreement that trumps first-in-time provisions of Brussels Recast

The Court of Appeal noted that there is nothing in the wording of Article 31(2) Brussels Recast to suggest that asymmetric agreements fall outside the scope of an exclusive jurisdiction agreement. The Court of Appeal also referenced the policy objective behind the introduction of Article 31(2), noting that failing to view asymmetric agreements as being in the ambit of Article 31(2) would mean "the path remain[*ed*] wide open for the kind of abusive litigation tactics [this Article] was admittedly designed to counter".

The Court of Appeal found Article 31(2) was engaged and accordingly the English High Court had been correct in dismissing Flother's jurisdictional challenge and the English proceedings should continue.

Asymmetric jurisdiction agreements and the Hague Convention

The Court of Appeal also made some *obiter* comments about whether asymmetric jurisdiction agreements fall within the scope of the Hague Convention.

Until the UK is allowed to accede to the Lugano Convention post-Brexit, the only applicable multilateral regime on jurisdiction and judgments between the UK and the EU for new disputes is the Hague Convention. The Hague Convention requires Contracting State courts to respect exclusive jurisdiction agreements in favour of other Contracting State courts and to enforce related judgments, but it is more limited in scope than the Brussels Recast regime or the Lugano Convention. It applies only where parties have (after the date on which the Hague Convention came into force) chosen an exclusive jurisdiction agreement – whereas Brussels and Lugano recognise both exclusive and other jurisdiction agreements.

Although asymmetric agreements have traditionally been considered by commentators to be outside the scope of the Hague Convention, Cranston J's *obiter* comments in *Commerzbank v Liquimar*[2]as well as Jacobs J's remarks at first instance in this case,[3] had suggested a different view. While emphasising that it was not deciding the point, the Court of Appeal said that it was prepared to proceed on the basis that the Hague 2005 Convention should probably be interpreted as not applying to asymmetric jurisdiction agreements. The court cited Hartley and Dogauchi's explanatory report[4] as "a strong indication" that asymmetric agreements fall outside the Hague Convention. The Court of Appeal also observed that in the Diplomatic Minutes of the Meeting between delegates a proposed amendment to define an exclusive choice-of-court agreement as being "for some or all of the parties" was debated but withdrawn after receiving no support.

Comment

A familiar complaint among commercial parties about the operation of the Brussels Regulation (the predecessor of the Brussels Recast) was about the rigid "first-in-time" rule, which required Member State courts to give priority to the courts "first seised", even where those courts had been seised in breach of a jurisdiction agreement (the tactic became known as a "torpedo").

The "torpedo busting" Article 31(2) of the Brussels Recast is an exception to the first-in-time rule where the court second seised has been chosen in an exclusive jurisdiction agreement. Given the extensive use of asymmetric jurisdiction agreements in finance contracts, this decision clarifies that as far as the English courts are concerned, this exception for

1 Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
2 *Commerzbank Aktiengesellshcaft v Liquimar Tankers Management and another* [2017] EWHC 161 (Comm).
3 allenovery.com/en-gb/global/news-and-insights/publications/asymmetric-jurisdiction-agreements-and-multiple-related-agreements
4 Hartley and Dogauchi write in their report: "It was agreed by the Diplomatic Session that, in order to be covered by the Convention, the agreement must be exclusive irrespective of the party bringing the proceedings. So agreements of the kind referred to in the previous paragraph [ie asymmetric agreements] are not exclusive choice of court agreements for the purposes of the Convention".

exclusive agreements includes asymmetric agreements too.

Following the end of the transition period at 11pm on 31 December 2020, the Brussels Recast is no longer applied in the English courts, save for legacy cases. There is therefore unlikely to be much, if any, further litigation before the English courts concerning Article 31(2).[5] The Court of Appeal's decision will, though, be of interest to commercial parties litigating in Member State courts; its ruling is in line with previous decisions from other Member State courts on this exact same question. Etihad was successful in obtaining a stay of the German proceedings at both first instance and on appeal but a further appeal has been allowed and it is possible the issue of asymmetric jurisdiction agreements and Article 31(2) may be the subject of a reference to the CJEU.

The Court of Appeal's *obiter* comments on asymmetric agreements and the Hague Convention are arguably of greater interest to commercial parties litigating before the English courts going forward than the findings on the Brussels Recast. We have already detected some parties moving from using asymmetric agreements to exclusive jurisdiction agreements to leave no room for doubt as to whether they fall within the Hague regime. This decision may encourage that trend.

One final Brexit-related point: the UK Government has applied to re-accede to the Lugano Convention and awaits the EU's consideration of its membership. The Lugano Convention does not contain a torpedo exemption where there is an exclusive jurisdiction agreement, instead providing the unreformed "first-in-time" rules found in the Brussels Regulation. While we await news of the UK's application, it may be said in this context that re-accession may turn out to be a case of two steps forward, one step back.

Read more about the impact of Brexit on jurisdiction and enforcement of judgments.

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Contract

Termination of Bitcoin trading account

Ramona Ang v Reliantco Investments Ltd [2020] EWHC 3242 (Comm), 27 November 2020

The High Court has ruled against an online trading platform in a dispute arising from its termination of the claimant's Bitcoin futures trading account and the subsequent cancellation of the claimant's open trades and withholding of the sums on account. The decision highlights the risks faced by financial institutions when terminating customer relationships, in particular that claims in these scenarios can be significant and are not limited to the sum held on account by the customer.

The dispute relates to an account used to trade Bitcoin futures, but this ruling will be of broader interest to account-providing financial institutions generally, given the potential application to other trading accounts.

In early 2017 the claimant (**Ms Ang**) opened an account with an online trading platform (**UFX**), owned by the defendant investment firm (**Reliantco**), to trade Bitcoin futures. Ms Ang made substantial profits, which she

5 An application for permission to appeal to the Supreme Court has been made in this case.

subsequently withdrew from the UFX account. Ms Ang then deposited further sums into the account in late 2017, following which Reliantco: (i) terminated Ms Ang's account; (ii) cancelled (as opposed to closed-out) all related open transactions; and (iii) set-off the credit balance in Ms Ang's account against trading profits previously made and withdrawn (thereby offering to return to her USD8,972 rather than the USD400,000 she had deposited into the account in late 2017).

Ms Ang alleged that Reliantco was not entitled to terminate her account and sought to recover: (i) the funds in the account; (ii) the gain from her open positions; and (iii) the sums she would have made from her proposed reinvestment of the funds under (i) and (ii) above had they been repaid to her.

Breach gave Reliantco the right to terminate

Reliantco resisted the claim primarily on the basis that: (i) the account had been operated by Ms Ang's husband (Dr Wright) rather than Ms Ang (in breach of the Customer Agreement between Ms Ang and Reliantco); and (ii) Ms Ang had provided inaccurate "Source of Wealth" documentation. The court noted that Dr Wright is a specialist computer scientist with cybersecurity and block-chain expertise, who claims to be the, or a, principal inventor of Bitcoin, and who had in late 2016 and early 2017 twice been refused an account with Reliantco due to allegations of fraud made against him in 2015.

On (i), the court held that, while Ms Ang had played the principal role in setting up the account and the subsequent trading, Dr Wright had accessed the account on a number of occasions and there had therefore been a breach of the Customer Agreement. The breach entitled Reliantco to terminate Ms Ang's account. On (ii), the court found that the information which Ms Ang provided in her Source of Wealth form was not untrue or inaccurate.

Terminating in line with contractual obligations

A: Return of funds on account

The court held that there was the equivalent of a Quistclose trust[1] in respect of the funds on account, and, in any case, Reliantco was obliged to return this amount (ie USD400,000) under the Customer Agreement as it was not suggested that any amount needed to be withheld in respect of future liabilities.

B: Closing out open transactions

For Ms Ang's open transactions, the Customer Agreement obliged Reliantco to close out, rather than cancel, the open positions and therefore realise the unrealised gain on the Bitcoin futures and pay the balance to Ms Ang. The circumstances set out in the Customer Agreement, which would have enabled Reliantco to cancel the open positions, had not occurred: the information which Ms Ang had provided in the Source of Wealth form was not untrue or inaccurate and while Dr Wright had accessed Ms Ang's account on a number of occasions, the court concluded that it was Ms Ang who had played the principal role in setting up the account and the subsequent trading and the account was used only on her behalf. In any event, the court noted that even if Dr Wright's access went beyond that, under the Customer Agreement it would have only given rise to a right for Reliantco to terminate the agreement, not cancel Ms Ang's open positions.

The court further noted that even if this contractual analysis was inaccurate, and Ms Ang's breach of the Customer Agreement was a circumstance in which Reliantco's right to cancel the open positions was engaged, this would be an unfair term under the Consumer Rights Act 2015 (the **CRA 2015**) as it would permit Reliantco, for what might be trivial breaches, to deprive the consumer of what might be very significant gains. By way of reminder, an earlier High Court ruling in *Ramona ANG v Reliantco Investments Ltd*[2] had established that Ms Ang was a consumer under EU law: speculative investment by private individuals is not, generally speaking, a business activity, and Ms Ang's contract with Reliantco was outside of any business of Ms Ang's. Therefore, Ms Ang's contract with Reliantco was subject to the CRA 2015.

C: Loss of future investment returns

As a result of Reliantco breaching the Customer Agreement by failing to return the funds Ms Ang had deposited, and further failing to close-out her open positions, realise the gain and pay forward the balance, the court held that Ms Ang was entitled to the sums she would have earned had the monies to which she was entitled been paid to her upon termination of her account. The court emphasised that remoteness of damage was not an issue as it was plainly within the reasonable contemplation of the parties when they

1 Per *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.
2 [2019] EWHC 879 (Comm).

contracted that if Reliantco failed to pay sums to Ms Ang to which she was entitled, she might lose the amount she could have gained had she used such sums to invest in other products.

As a result of their rulings on points (A), (B) and (C) above, the court ordered Reliantco to pay Ms Ang USD1,017,562.47, plus an additional GBP700,000 in costs, plus an additional GBP37,500 for Reliantco rejecting the claimant's Part 36 offer to settle (which was at least as advantageous to the defendant as the court's monetary award).

COMMENT

This case provides a good example of how not to handle the termination of client accounts. It illustrates the importance of terminating client accounts, closing out open positions, and returning funds in accordance with contractual obligations. Contractual obligations must be considered when determining how to treat client funds upon termination of accounts, even in instances where the customer has breached the underlying agreement. So too must contractual obligations be considered even if there are money laundering concerns, although in these circumstances there will be additional obligations stemming from money laundering laws (eg the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2017) and regulatory expectations.

The decision also highlights the importance of the decision-making process around the termination of client accounts and the treatment of client funds being proportionate and documented, so that these decisions are defensible should they later be challenged.

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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 [2021] UKSC 2, 5 February 2021.

The Serious Fraud Office does not have the power to issue a section 2 notice to a non-UK company with extraterritorial application. It can, however, continue to compel production of documents held extraterritorially by UK companies.

The SFO can issue a notice requiring a person or entity under investigation or any other person to produce documents which appear to the SFO to relate to any matter relevant to the investigation[1]. These are commonly called "section 2 notices". Failure to comply with a section 2 notice without reasonable excuse is a criminal offence.

The territorial scope of this power has been unclear: does it extend to documents held by UK companies overseas (including on an overseas server)? Does the SFO have power to issue a section 2 notice to a foreign corporation that has no business presence in the UK?

Both questions were answered by the Supreme Court in this case dealing with the validity of section 2 notices issued to:

– **an English company**: Kellogg Brown & Root Ltd (**KBR UK**) which carried out business in the UK

1 Section 2 Criminal Justice Act 1987.

and was the subject of a criminal investigation run by the SFO.

– **its U.S. parent company**: KBR Inc (**KBR US**): the ultimate parent of a multinational group, including KBR UK, providing professional services and technologies. KBR US had no fixed place of business in the UK and did not independently carry on business in the UK; it only did so through its UK subsidiaries.

SFO seeks documents held by U.S. parent and UK subsidiary

The SFO initially issued a section 2 notice to KBR UK compelling it to provide its documents. KBR UK told the SFO that it did not have certain material sought by the SFO, but that if and to the extent that the material existed, it would be held by KBR US.

The SFO then handed a new section 2 notice to an officer of KBR US, who (at the SFO's insistence) was attending a meeting in the UK with the SFO to discuss the investigation. KBR US's application to quash this notice was initially rejected by the Court. That decision has been reversed by the Supreme Court.

SFO does not have the power to compel documents from extra-territorial parent company

The Supreme Court unanimously held that the SFO's statutory power to issue compelled production notices was not intended to have extra-territorial effect and therefore the notice could not validly be issued to the U.S. parent.

There is a presumption that legislation is not generally intended to have extra-territorial effect: ie, it is restricted in operation to the UK. This reflects the principle that states should not infringe each other's sovereignty and the concept of international comity.

The Court could not find any clear indication either for or against the extra-territorial effect of the legislation granting the SFO the power to issue compelled notices. The fact that the SFO had broad ranging powers to conduct its investigations, and the public interest in the effective investigation of serious fraud were not sufficient. As such, the presumption was not rebutted and applied to limit the SFO's extra-territorial power.

The passage of multiple statutory schemes for international reciprocal cooperation with multiple foreign authorities, in particular through the use of Mutual Legal Assistance (**MLA**) treaties provided strong support for the fact that Parliament did not intend to the SFO's powers to operate as a unilateral extra-territorial power. This would have the undesirable and unintentional effect of removing the statutory safeguards and protections surrounding use and return of documents built into the MLAs and similar statutory schemes. This was not parliament's intention with the SFO's section 2 powers, and there had been no basis for the court at first instance to judicially develop an alternative "sufficient connection" test in an attempt to justify reading the power more widely.

Section 2 notice capable of extending to documents held overseas by UK companies

On the other hand, for UK companies, the state does have a legitimate interest in its legislative power extending to the conduct of its own nationals and companies abroad. As such, a section 2 notice issued to a British-registered company would authorise the service of a notice to produce documents held overseas by that British company, and the British company would be required to bring the document into the UK in order to produce it. This point was accepted by the parties, rather than argued in full, but the Court appeared to support this position.

It was also suggested (but not decided) that a foreign company which has a registered office, a fixed place of business, or which carries on business in the UK would also be a valid recipient of a section 2 notice. However, the mere presence of an officer of the company in the UK was certainly not sufficient.

Comment

The decision is a blow to the SFO with the unanimous rejection by the Supreme Court of the attempted expansion of the statutory powers to compel documents from foreign parent companies. It will have similar ramifications for other agencies seeking to compel production of material from parent companies without any domestic presence. It will reassure foreign companies that they will continue to benefit from the protections built into the MLA regimes when information is being required of them in the UK. Although this may slow the pace of UK investigations, the Supreme Court has preferred to recognise the parliamentary intention and safeguards built in to the evidence gathering process as not easily discarded.

However, UK based companies will need to take note that documents in their possession or control, but held overseas, may fall in scope of section 2 notices and, subject to contrary statutory intent, production powers of other authorities. This construction of the SFO's powers was not challenged by the parties in this case and therefore not decided by the Supreme Court, although the commentary did appear to favour this view.

A&O partner Billy Jacobson represented KBR Inc. in the U.S. with regard to the investigation which is the subject of the Supreme Court's decision. The U.S. DOJ and SEC closed their investigations, taking no action against the company.

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Experts

Global expert services firm breaches conflicts undertaking by appointments in related arbitrations

Secretariat Consulting Pte Ltd & ors v A Company [2021] EWCA Civ 6, 11 January 2021

The obligations of an expert services provider to avoid a conflict with its client's interests should be assessed by reference to the expert's retainer and not (as was held at first instance) by reference to a freestanding fiduciary duty of loyalty. This case provides clarity for the first time on the English court's approach to conflicts of interest where a multi-jurisdictional expert services firm seeks to provide expert services on both sides of active, related dispute proceedings. Where two experts from different entities within the same global organisation were engaged to testify in related arbitrations that involved overlapping facts and issues, but for clients pursuing conflicting claims, a conflict of interest was found to exist.

Two related arbitrations regarding a petrochemical plant

The developer of a petrochemical plant (the **Developer**) was the respondent in two London-based arbitrations. The first concerned a claim by a sub-contractor (**Arbitration 1**). The second concerned a claim by the Developer's project manager (the **Project Manager**) (**Arbitration 2**).

There was a clear overlap in the issues and claims arising in these arbitrations. In Arbitration 1, the sub-contractor claimed costs arising from delays to its work, which it alleged were caused by the late release of certain construction drawings by the Project Manager. In Arbitration 2, the Project Manager claimed and the Developer counterclaimed for sums related to the consequences of the Project Manager's delay in issuing the construction drawings.

Different parts of global expert services group engaged as experts in both arbitrations

The Developer engaged Secretariat Consulting Pte Ltd (**SCL**) to provide expert services in Arbitration 1. Under SCL's terms of engagement, SCL confirmed that it had no conflict of interest in acting for the Developer and would "maintain this position for the duration of [its] engagement". From June 2019, the testifying expert ("**K**") and his team began work, with a particular focus on the delay issues in the project.

In March 2020, the Project Manager engaged Secretariat International UK Ltd (**SIUL**), of the same corporate group as SCL, to provide expert services in support of its claims against the Developer regarding quantum in Arbitration 2. "**M**" was engaged as the testifying expert. The Developer's objection that the Project Manager's engagement of SIUL would give rise to a conflict of

interest was ignored by the Project Manager and the Secretariat Group.

The Developer obtained an urgent interim injunction from the English court restraining the Secretariat Group from providing expert services to the Project Manager in Arbitration 2. The injunction was continued by Mrs Justice O'Farrell in April 2020. The Secretariat Group appealed and on 11 January 2021 the Court of Appeal handed down its judgment dismissing the appeal of the Secretariat Group, although for different reasons to the positon taken by the court at first instance.

No fiduciary duty owed by expert witness

The first instance judgment focussed on the Developer's argument that the Secretariat Group owed a fiduciary duty of loyalty to it, akin to the fiduciary duty of a lawyer to their client. The Developer argued that this duty was breached due to the existence of a conflict, or potential conflict, of interest for the Secretariat Group by the engagement of SIUL by the Project Manager. O'Farrell J determined that in circumstances where SCL was engaged to provide advice/support to the Developer and to prepare an expert report, there was the necessary relationship of trust and confidence to give rise to a fiduciary duty of loyalty, which extended to the rest of the Secretariat Group. It was the first time that an English court had determined that an expert in arbitration or litigation proceedings owed a fiduciary duty of loyalty to its client.

The Court of Appeal disagreed. Lord Justice Coulson, giving the lead judgment, said that he would be "reluctant" to conclude that a fiduciary duty of loyalty is owed by an expert to his client in circumstances where this was not a necessary finding to dispose of the appeal. Lord Justice Males was more definitive in his concurring judgment, stating that "*an expert witness is not a fiduciary and does not owe fiduciary duties to his client*", save in circumstances far removed from the present case. Although the relationship between a client and an expert witness may have some characteristics of a fiduciary relationship, the court determined that it is not the most accurate way of describing what an expert does when instructed in litigation or arbitration proceedings.

Contractual duty to avoid a conflict of interest bound entire group

The Court of Appeal preferred instead to analyse the expert's obligations based on the terms of the expert's retainer. The terms of SCL's retainer dealt expressly with conflicts of interest and required SCL to avoid conflicts for the duration of the retainer. Males LJ noted that it would be unusual nowadays in any substantial litigation or arbitration for an expert to be retained without a retainer that addresses conflicts.

The court held that SCL's contractual undertaking to avoid a conflict of interest bound all of the companies in the group, including SIUL. Similarly, the first instance judge had found that a fiduciary duty of loyalty extended to the broader group.

On the specific facts in this case, the wide scope of the conflict check that had been carried out by Singapore-based SCL suggested that SCL was giving the undertaking in the retainer on behalf of all Secretariat entities. This was supported by the fact that the Secretariat Group was marketed and managed as one global group of companies and that its clients and SCL's testifying expert did not distinguish the individual entity in the Secretariat structure that was retained.

Coulson LJ rejected the Project Manager's argument that this finding had the effect of piercing the corporate veil; this was a question of commercial construction of the engagement terms that was informed by the factual background and the commercial reality of the parties' positions.

Expert's conflict of interest existed

The Secretariat Group argued that the appointment of SIUL and M did not give rise to a conflict, as M was to be instructed in a separate arbitration, M was an expert in a different discipline from K, and M was employed by a different company to SCL. The Court of Appeal, like the first instance judge, rejected these arguments, finding that a conflict of interest, which is a matter of degree, did exist.

The court stated that the overlaps in this case were "all pervasive", as there was an overlap of parties, role, project and subject matter. For example, while SCL was giving advice to support the Developer, SIUL would be giving advice on the same or similar disputes and issues opposing the Developer. The court noted the breadth of the roles of SCL and SIUL, who were engaged to be more than simply "testifying experts", which exacerbated the risk of a conflict of interest. It was also relevant that the Developer considered that there was a conflict and that the Secretariat Group appeared to accept that there was, or might be, a conflict.

COMMENT

The facts of this case are distinctive, involving two live arbitrations and an expert services provider that was seeking to act for and against its client's interests in relation to disputes concerning the same project and the same or a similar subject matter. However, the case is noteworthy for the guidance that it provides to experts and their clients in litigation and arbitration matters on the court's approach to assessing a potential conflict of interest in a time when multi-jurisdictional expert services firms now regularly operate and market themselves as one firm.

The case clarifies that the obligation of loyalty owed by an expert to its client will be determined by the expert's terms of engagement rather than the designation of the relationship as a fiduciary one. The decision to overturn the first instance judgment on this issue will be welcomed by experts, who will have feared the legal ramifications of the attachment of the "fiduciary" designation. They may, however, be less welcoming of the court's decision to extend the duty to avoid conflicts to the whole of the Secretariat Group; this may trigger a rethink over how cross-jurisdictional expert groups market themselves and present their terms of engagement.

The court's emphasis on the contractual position as the basis for assessing the scope of an expert's duty to avoid conflicts of interest suggests that careful attention must be paid to the precise words proposed by an expert in its retainer. The users of expert services should be alert to expert groups seeking to limit the representations and undertakings that they offer in relation to conflicts of interest to the specific entity involved. While a party will need to accept that an expert that it has previously engaged may appear on the other side of a dispute in relation to a different project, it will wish to ensure that the expert and the expert's group cannot be retained against its interests where the proceedings relate to the same or a related project.

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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

The Court of Appeal upheld the joint appeals by The Prudential Assurance Company Limited (**PAC**) and Rothesay Life Plc (**Rothesay**) against Snowden J's refusal to sanction the transfer of a portfolio of annuities from PAC to Rothesay under the provisions of Part VII of the Financial Services and Markets Act 2000 (**FSMA**) for insurance business transfer schemes. This is the first occasion in the 150 years since the Life Assurance Companies Act 1870 first introduced court approval for insurance transfers that the law governing such transfers has been considered by the appellate courts. Allen & Overy LLP acts for PAC, one of the successful Appellants.

The Court of Appeal (Vos C, David Richards LJ, and Patten LJ) has upheld PAC and Rothesay's appeals that Snowden J made a number of errors in the exercise of his discretion under Part VII of FSMA in refusing to sanction the transfer of a portfolio of annuities from PAC to Rothesay. This is the first occasion on which the law governing such transfers has been considered by the appellate courts, and the Court of Appeal took the opportunity to review the existing case law and restate the principles applicable to the exercise of the court's discretion to sanction such transfers. In particular the Court emphasised that for transfers of long-term insurance business that do not vest a discretion in the insurer, the court's paramount concern should be to

assess whether the transfer will have a material adverse effect on the receipt by policyholders of their benefits. The judgment is likely to become the definitive statement of the law in this area.

The Court of Appeal's restatement of the law emphasises the importance of the Independent Expert and the regulators' reports in the exercise of the court's statutory discretion, and confirms that subjective factors should play little or no role in the court's decision making. The judgment should promote certainty as to how the scrutiny of future transfers will be approached by the courts, reinforcing the utility of the Part VII process for insurance companies.

Recap – Part VII and Solvency II Regimes

Part VII of FSMA sets out the statutory mechanism for enabling transfers of insurance business. It permits insurers and reinsurers to transfer general and long-term insurance business between different legal entities, subject to the court's sanction. Under section 111(3) of FSMA, the court must consider that "in all the circumstances of the case, it is appropriate to sanction the scheme". Section 109 of FSMA requires that an application in respect of an insurance business transfer scheme must be accompanied by a "scheme report" which may be made only by a person (the Independent Expert) who: (i) appears to the PRA to have the skills necessary to enable a proper report to be made; and (ii) is nominated or approved for the purpose by the PRA. The PRA and FCA also have an important role in advising the court on whether an insurance business transfer scheme should be sanctioned, and such advice is typically provided to the court through written reports.

The financial strength of the transferor and transferee required under Solvency II forms an important part of the Independent Expert's consideration of any insurance business transfer scheme. Solvency II requires insurers to hold a minimum amount of capital in addition to the assets backing the liabilities to policyholders. Insurers must also be able to demonstrate that they can satisfy their regulatory requirements under Solvency II and pay policyholder claims in adverse scenarios. These solvency requirements reflect specific risks faced by each insurer and form an integral part of the Independent Expert's consideration of an insurance business transfer scheme.

Background and High Court judgment

In March 2018, Prudential plc announced its intention to demerge M&G Prudential, its UK and European savings and investments business, and to list it as an independent company on the London Stock Exchange. In support of this demerger, Prudential proposed that approximately 370,000 annuity policies would be transferred from PAC to Rothesay under Part VII of FSMA (the **Scheme**).

PAC and Rothesay applied to the High Court for sanction of the Scheme. The application was heard in June 2019, and judgment was handed down in August 2019. Snowden J exercised his discretion not to sanction the Scheme. In doing so he concluded that, contrary to the opinions of the Independent Expert and the regulators on the basis of PAC and Rothesay's Solvency II metrics, there was a material disparity between the external future support likely to be available to PAC and Rothesay, and that the risk of either company requiring such support could not be said to be remote. He also took into account the comparative age and venerability of PAC and Rothesay, which had been emphasised by a number of affected policyholders who objected to the Scheme.

Snowden J granted PAC and Rothesay permission to appeal his judgment and both companies appealed to the Court of Appeal on the same grounds. These appeals were the first time a Part VII transfer has been appealed to the appellate courts in the 150 years since the Life Assurance Companies Act 1870 first legislated for court approval of insurance business transfers. There were a number of significant procedural issues to be addressed, including the participation of objecting policyholders as interested parties and whether, if the appeal was successful, the Court of Appeal should then re-exercise the discretion to sanction the scheme. At a directions hearing on 18 June 2020, Lord Justice Patten directed that the appeal should be a two-step process: the Court of Appeal would first consider whether to uphold the appeal and, if it did so, the question of sanction would be remitted back to the High Court. The Association of British Insurers was also granted permission to intervene in the appeals.

The Court of Appeal's judgment

The Court of Appeal emphasised that the range of businesses that may be transferred under Part VII, and the range of circumstances that might occasion a transfer, mean that the application of the court's discretion under section 111(3) FSMA cannot be reduced to a single test or list of factors to be applied in all cases. The court drew two key distinctions relevant to the approach to exercising its discretion: (1) between general insurance business and long-term business; and

(2) between polices that vest a discretion in the insurer (in particular with-profits policies) and those that do not. It confirmed that the discretion under section 111(3) of FSMA is not "a rubber stamp", but emphasised that the court must only take into account and give weight to matters that ought properly to be considered.

As a result, the Court of Appeal emphasised that the existing case law – which had been considered authoritative as to the approach to be taken by the court in exercising its discretion – had to be evaluated in light of the particular insurance business being transferred in each case.

The Court of Appeal specifically addressed the leading decisions of *Hoffman J in* Re *London Life*,[1] Evans-Lombe J in Re *Axa*,[2] David Richards J in Re *Royal Sun Alliance*,[3] and Warren J in Re *Scottish Equitable*,[4] and the related decision of Vos C in Re *Barclays Bank plc*[5] (which considered the transfer of a ring-fenced banking business under a comparable provision for the transfer of such schemes in Part VII of FSMA). It explained that Re London Life and Re Axa should not be treated "as if they were a comprehensive statements of the factors that should be applied by the court in all insurance business transfers", but viewed as cases primarily relevant to the transfer of with-profits business. For transfers of long-term insurance business that do not vest a discretion in the insurer – such as the annuities in this case – the court's "paramount concern" should be to:

"*assess whether the transfer will have a material adverse effect on the receipt by the annuitants of their annuities, and on whether the transfer may have any such effect on payments that are or may become due to the other annuitants, policyholders and creditors of the transferor and transferee companies*".

An adverse effect will only be material if it is:

a) a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case;
b) a consequence of the scheme; and
c) material in the sense that there is the prospect of real or significant, as opposed to fanciful or insignificant, risk to the position of the stakeholder concerned.

The Court of Appeal explained that the court should conduct this assessment by scrutinising the reports of the Independent Expert and the regulators, and the evidence of any other person with a right to be heard, including transferring policyholders. However, it should accord full weight to the opinions of the Independent Expert and the regulators, in the absence of errors or defects in their reports, and should not depart from their recommendations "without significant and appropriate reasons for doing so". The Court of Appeal emphasised that judges should not substitute their own opinions on actuarial and specialist issues for the expert opinions required by FSMA. The court will also be concerned to assess whether there will be any material adverse effect on service standards, and whether the circumstances of the case require consideration of any other factors.

Applying this approach to the Scheme, the Court of Appeal held that Snowden J had been wrong to conclude that there was a material disparity between the external future support available to PAC and Rothesay and to regard such a disparity as a material factor in the exercise of its discretion. In so concluding, it held that Snowden J had failed to accord adequate weight to the conclusions of the Independent Expert that the risk of either company requiring such support was remote, and the regulators' non-objection to the scheme. Snowden J had correctly accepted the Independent Expert's conclusions that, applying the Solvency II metrics, the relative financial strengths of PAC and Rothesay were comparable, but incorrectly held that those metrics were only informative of the current position and not of future solvency risks. It held that Snowden J then incorrectly substituted his own speculation as to future solvency risks for the views of the Independent Expert and the regulators. It also held that relative likelihood of non-contractual parental support being available in the future was not a relevant factor to take into account, and full weight should have been given to the fact that the PRA had considered the scheme in light of its statutory objective, which includes its forwards-looking approach to regulation.

1 Re London Life Association Ltd (21 February 1989, unreported).
2 Re *Axa Equity & Law Life Assurance Society plc and Axa Sun Life plc* [2001] 1 All ER (Comm) 1010.
3 Re *Royal Sun Alliance Insurance plc* [2008] EWHC 3436 (Ch).
4 Re *Scottish Equitable plc and Rothesay Life plc* [2017] EWHC 1439 (Ch).
5 Re *Barclays Bank plc* [2018] EWHC 472 (Ch).

The Court of Appeal held that Snowden J accorded too much weight to factors such as the relative age, venerability, and reputation of PAC and Rothesay, and their role in policyholder choice of PAC as annuity provider. The court acknowledged that these subjective factors may be a sensible basis for consumers to make decisions, but are not relevant factors for a court with the benefit of detailed financial information, Solvency II metrics, and the opinions of experts and regulators to take into account. It expressly approved Warren J's statement in Scottish Equitable that age and reputation were irrelevant factors, and disapproved Snowden J's departure from Scottish Equitable on that point.

The Scheme will now be remitted back to the High Court for a different Chancery Division judge to consider whether it is appropriate to sanction it, in light of the law as restated by the Court of Appeal.

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Privilege

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 [2020] EWHC 3307 and *PJSC Tatneft v Bogolyubov & ors* [2020] EWHC 3225 (Comm), 24 November 2020

A party may waive privilege not just by making positive assertions about its privileged communications but also negative assertions (ie what was not said in privileged communications). For there to be a waiver, the party has to have made sufficient reference to those negative assertions and to be voluntarily relying on them to put forward a positive case on an issue the court has to decide.

What the solicitors were not told

In *Guest Supplies v South Place Hotel Ltd* a director of the claimant said in a witness statement that an agreement, which was central to the dispute, no longer existed in its original form. He also said that ("without waiving privilege") he had never told his solicitors that the version of the agreement he had sent them was the original version. The defendant argued that this negative assertion (ie on what he had not said to his solicitors) constituted a waiver of privilege in relation to everything the claimant did in fact say to its solicitors about the "creation, provenance and/or authenticity" of the agreement.

Test for waiver in *PCP Capital Partners v Barclays Bank*

The court approached the question in much the same way it would have done for a positive assertion. It followed the pragmatic approach taken in *PCP Capital Partners v Barclays Bank Plc* [2020] EWHC 1393 (Comm):

- There must be sufficient reference to the privileged communication.
- That communication must be relied on to support the party's case.
- If a waiver is established, it will encompass all privileged documents falling within the scope of the relevant "transaction". The identification of that transaction should be approached realistically, guided by the principle of fairness and avoiding artificially narrow or wide outcomes.

Effect of "without waiving privilege" wording

Whether the claimant had waived privilege was to be assessed objectively. Therefore the words "without waiving privilege" did not prevent privilege being waived.

Privilege waived over communications between client and solicitor

The court held that the director's negative assertion resulted in privilege being waived over all communications between the claimant and its solicitors relating to the "creation, provenance and/or authenticity" of the agreement.

The reference to the communications (including non-communications) was more than a mere "narrative reference". The director was clearly relying on the communications to demonstrate that he never suggested that the agreement was the original version. The authenticity and terms of the original agreement went to the very heart of the case. Fairness therefore required that the scope of the "transaction" must encompass all communications between the claimant and its former solicitors on the provenance of the agreement.

Privilege reference must be voluntary in order to waive privilege

Similarly in *PJSC Tatneft v Bogolyubov*, the second defendant argued (among other things) that the claimant had waived privilege as a result of a negative assertion that certain matters regarding an arbitration were not discussed by its lawyers. The claimant's denial was made in response to an assertion by the defendant that these matters were in fact discussed.

The court again draw heavily on *PCP Capital Partners v Barclays Bank Plc*, with particular focus on the reason why the assertion was made. The court was clear that waiver can only occur where a party voluntarily makes sufficient reference to a privileged communication (including a negative assertion) so as to advance an issue in its case. Waiver does not occur where a party is merely responding to an assertion that a matter was discussed and denying it. The requisite voluntary disclosure does not exist.

On the facts of this case, the claimant had made its negative assertion in response to an assertion by the defendant that a matter was discussed. The claimant was not seeking to advance a positive case and there was therefore no waiver.

COMMENT

The court's continued pragmatic approach to waiver is to be welcomed. *PCP Capital Partners v Barclays Bank Plc* cut through the difficulties of the content/effect distinction and these latest authorities apply the same practical approach to negative assertions. If a party is seeking to advance its case by making assertions as to privileged communications (including negative propositions) that party does so at the risk that privilege is likely to be waived.

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Surveillance reports may not be privileged

Gerrard & Gerrard v Eurasian Natural Resources Corporation Ltd & Diligence International LLC [2020] EWHC 3241 (QB), 27 November 2020

A dispute about the use of private investigators highlights some attendant risks, in particular the possibility that the report generated may not be privileged.

Mrs and Mrs Gerrard brought claims for breaches of data protection law, misuse of private information, harassment and trespass arising from surveillance carried out on behalf of ENRC by Diligence International, an investigations company specialising in complex cross-border inquiries. The Gerrards sought to injunct ENRC from making any use of the information obtained by surveillance. The merits of the substantive claims are not considered here, but it is important to note that the attempt to strike out the harassment claim failed.

Of interest for the present purposes is that in its defence ENRC claimed the instructions provided to Diligence and the ensuing documents produced were for the dominant purpose of litigation and so subject to litigation privilege. The Gerrards challenged this, arguing that: the documents were generated as a result of iniquitous conduct, so that the iniquity exception to privilege applied; the documents generated by the surveillance could not be confidential in relation to them; and the documents were not generated for the dominant purpose of litigation. ENRC applied to strike out these claims.

The court decided that the time to answer these questions was after, not before, disclosure. The strikeout application was dismissed. However, it went on to make some interesting, non-binding, observations on whether the Gerrards' arguments had no prospect of success.

- The allegations of harassment were clearly more than mere civil wrongdoing, since, if proved, they also amounted to a criminal offence, so could engage the iniquity principle. Diligence were also accused of lying to immigration authorities and using prohibited military-grade night-vision binoculars. Nonetheless the court also endorsed the case law pointing to "trickery, dishonesty, sharp practice, underhand or contrary to public policy" shy of criminal conduct being sufficient.

- On the question of confidentiality, although feeling that the statement from a leading textbook that "no privilege will attach to attendance notes or recordings or transcripts of conversations between the parties, or to video and audio tapes made by one party of the other party" may well be too sweeping, this was not sufficient to strike out the claim. So the argument that there is a lack of confidentiality between a person carrying out surveillance and the person they are following, where the surveillance operative is discovered, may work.

Comment

The iniquity principle stems from privilege being a form of confidence and it being a long-standing principle that there is no confidence in iniquity. Often the principle is raised where assets are hidden to put them beyond judgment. Lawyers have to think extremely carefully before advising in this context and may want to decline to do so, for fear of their advice not being privileged.

The court's observations in this case are a warning to proceed with caution when (thinking about) conducting or instructing others to conduct covert surveillance in the context of civil litigation.

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Top UK finance litigation and contract law developments from 2020

This is a round-up of the most interesting finance litigation and contractual developments in 2020. The selection is necessarily subjective and draws from a wide range of cases and developments that are of direct relevance to finance parties.

Contract and Covid-19

Business interruption insurance policies cover pandemic

The High Court held that losses caused by the Covid-19 disruption are recoverable under business interruption insurance policies pursuant to most disease clauses (ie the business interruption is due to a notifiable disease within a specified radius of the premises), and certain denial of access clauses (ie prevention or hindrance of access to or use of the premises due to Government or other authority action or restrictions) for certain types of policyholder. On the latter, relevant considerations include the detailed wording of the clause and how the business was affected by the Government response to Covid-19.

The court also held that the Covid-19 pandemic and the Government response are a single cause of loss and are not part of the "but for" scenario for the purpose of reducing quantum.

The Supreme Court dismissed the insurers' appeals (albeit accepting some of their arguments) and allowed the Financial Conduct Authority (**FCA**) and Hiscox Action Group appeals either fully or on a qualified basis. However in doing so the Supreme Court disapproved the High Court's single cause of loss approach. It instead held that, whilst the other consequences of the Covid-19 pandemic beyond the insured peril were part of the "but for" scenario, they constitute a concurrent proximate cause with the insured peril. The Supreme Court extended existing case law on concurrent proximate causes to find that quantum was not to be reduced by the effects of the uninsured concurrent proximate cause(s).

FCA Business Interruption Test Case [2020] EWHC 2448, 15 September 2020 and *FCA Business Interruption Test Case* [2021] UKSC 1, 15 January 2021.

Material Adverse Effect clauses

The importance of a textual analysis of the contractual language in ascertaining the meaning and effect of Material Adverse Effect (**MAE**) clauses was emphasised in *Travelport Ltd & ors v WEX Inc* [2020] EWHC 2670 (Comm), 12 October 2020.

WEX entered into a share purchase agreement with Travelport to acquire two companies that provided virtual credit and payment services to the travel payments market. Under the MAE clause, conditions resulting from a pandemic could only be taken into account if they had a disproportionate effect on the target companies as compared to other participants in the industries in which the target companies operated.

Travelport sought to avoid the transaction by invoking the MAE clause and argued that the relevant industry for comparison was the "travel payments industry". The court disagreed, holding that the word "industry" suggested a broad pool of participants. It also found that the "travel payments industry" was not a term in established use, but rather referred to informally and with varying meaning. Instead, the relevant industry was the "B2B payments industry".

The parties have since settled. This litigation shows the tension between greater specificity, which, with the benefit of hindsight, may have worked in Travelport's favour, and ambiguity, which can help provide fuel for renegotiation if the unexpected happens between signing and completion.

Competition

The most significant decision to date as regards the enforcement of EU and UK competition laws relating to anti-competitive agreements and practices between independent businesses, *Sainsbury's & ors v Mastercard & ors* [2020] UKSC 24, 17 June 2020, held that the multilateral interchange fees (**MIFs**) that retailers, such as Sainsbury's, paid on Mastercard and Visa card payments restricted competition.

On the competition law issues, the Supreme Court confirmed that it was bound by the 2014 decision of the Court of Justice of the European Union[1] (**CJEU**). The MIFs in this case were materially indistinguishable from the MIFs charged by Mastercard in the European Economic Area (**EEA**) that breached EU competition law (Article 101(1) TFEU).

The ruling also clarified that the exemption in Article 101(3) TFEU only applies if supported by "robust analysis and cogent empirical evidence". However, this cannot take into account benefits obtained by different consumer groups in a "two-sided market". For example, benefits obtained by Mastercard cardholders as a result of the MIFs could not be used to make up for the harm suffered by Mastercard retailers as a result of the same MIFs.

In relation to pass-on, the Supreme Court decided three points which are favourable from the perspective of defendants: First, that pass-on arises not only where a claimant passes on an overcharge in the form of higher prices charged to customers, but also where it responds to an overcharge by reducing fees and costs paid to suppliers. Second, that whilst the legal burden in relation to pass-on lies with the defendant, once the defendant has raised the issue of pass-on there is a 'heavy evidential burden' on the claimant to provide evidence as to how it recovered costs in its business. Third, that the "broad axe" approach to the quantification of damages applies equally to claimants and defendants. Therefore a defendant can achieve a reduction in the amount of damages to account for pass-on (or other forms of mitigation) even if it is unable to prove precisely the quantum of pass-on.

Data privacy

Data transfers from the EU to third countries: data controller obligations

There have been two attempts to set up a streamlined basis on which personal data could be transferred between the EU and the U.S. The first, the Safe Harbour framework, was declared invalid by the CJEU five years ago in *Schrems I* (Case C-362/14, 6 October 2015). The second, the EU-U.S. Privacy Shield, was declared invalid this year in *Schrems II* (Case C-311/18, 16 July 2020).

Both *Schrems* decisions form part of retained EU case law and so continue to bind the English High Court, at least.

The CJEU reasoned in *Schrems II* that the EU-U.S. Privacy Shield did not protect the personal data of EU residents from U.S. surveillance, and it failed to ensure that EU individuals had effective and enforceable remedies through the courts or an Ombudsman in relation to certain U.S. mass surveillance laws.

The ruling means that, from a UK and EU perspective, transfers of personal data from the EU to the U.S. can no longer be made in sole reliance on the U.S. recipient being certified under the EU-U.S. Privacy Shield.

The CJEU held that data controllers may continue to use the European Commission (**EC**) standard contractual clauses for cross-border data transfers to third countries, subject to: (i) an assessment of whether the laws in the third country affect the protection provided by the standard clauses; and (ii) any notification by the data recipient of issues affecting compliance with the standard clauses. Should either of these conditions apply, data controllers must implement additional protective measures and consider whether to inform their national supervisory authority.

The form of the standard clauses is being updated by the EC and draft guidance on additional protective measures has been produced by the European Data Protection Board.

The derogation for international transfers of personal data necessary for the establishment, exercise or defence of legal claims is unaffected by the *Schrems II* decision. In addition, by a provision hidden in the EU-UK Trade & Co-operation Agreement, data transfers from the EU and EEA to the UK are not to be treated as made to a third country. This lasts until an adequacy decision is granted by the EC, or (if earlier) until 1 May 2021. If no adequacy decision is issued by that date, there is a further automatic extension until 1 July 2021, unless either party objects to that.

Vicarious liability for data breach and class actions

In *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12, 1 April 2020, the Supreme Court found that the supermarket was not vicariously liable for breach of data privacy committed by one of its employees.

A disgruntled employee leaked online and to newspapers the payroll data of about 100,000 of the supermarket's employees. Over 9,000 of them brought proceedings under a group litigation order for breach of statutory

[1] *MasterCard Inc v European Commission* (Case C-382/12 P) [2014] 5 CMLR 23, 11 September 2014.

duty under the Data Protection Act 1998 (the **DPA**). The court found no vicarious liability on the specific facts of the case, as the unlawful disclosure was not sufficiently closely connected with the acts that the disgruntled employee was authorised to do. In other words, it was not within his "field of activities".

The decision is generally seen as good news for employers, but the court noted that vicarious liability is not automatically excluded simply because an employer is compliant with the DPA. The court specifically rejected the argument that because the DPA contemplates fault-based liability, common law should not impose additional no-fault strict liability on employers. This analysis is likely to apply under the General Data Protection Regulation as it forms part of retained EU law.

It is worth looking out for this year's Supreme Court decision in the appeal from *Lloyd v Google LLC* [2019] EWCA Civ 1599, 2 October 2019, which is being heard this spring. The lawsuit, brought as a representative action on behalf of an estimated 4.4 million iPhone users, is in respect of Google's use of the "Safari Workaround", which allegedly permitted Google to bypass Safari's blocking of third-party cookies. This, it is alleged, allowed Google to collect users' data without their knowledge or consent and use it for advertising. The decision will likely set the tone for whether this type of mass, opt-out, class action claim is feasible in the UK for data breaches.

Disclosure and privilege

Internal regulatory compliance files may be disclosable in misselling claims

The court ordered disclosure of the bank's internal regulatory compliance review file concerning the sale of interest rate hedging products (**IRHPs**) in a misselling dispute (*Fine Care Homes Ltd v Natwest Markets Plc (formerly Royal Bank of Scotland Plc)* [2020] EWHC 874 (Ch), 7 April 2020).

The reasoning was that the file was likely to be relevant to claims for negligence and misrepresentation because the skill and care to be expected of a reasonably competent financial adviser usually include regulatory compliance, and the relevant regulations afford "strong evidence as to what is expected of a competent adviser in most situations". The court also ordered disclosure of the bank's internal IRHP manuals and guidance.

The court eventually dismissed the misselling claim on the merits (*Fine Care Homes Ltd v Natwest Markets Plc (formerly Royal Bank of Scotland Plc)* [2020] EWHC 3233 (Ch), 27 November 2020). The bank was entitled to rely on the "no-advice" contractual clause. Under the doctrine of contractual estoppel, no advisory duty of care arose. The court emphasised the clear distinction between: (i) "no-advice" clauses (ie clauses that simply define the primary rights and obligations) such as the one in this case; and (ii) "non-reliance" clauses (ie clauses stating that there has been no reliance on a representation) such as the one in *First Tower Trustees v CDS*.[2] Only the latter are subject to the requirement for reasonableness under the Unfair Contract Terms Act 1977.

Conflicting foreign regulatory requirement not always a sufficient excuse for non-disclosure

The decision in *Byers & ors v Samba Financial Group* [2020] EWHC 853 (Ch), 8 April 2020 highlights some of the challenges faced by litigants caught between English disclosure rules and foreign regulatory requirements.

The defendant bank tried, and failed, to vary an order for standard disclosure on the basis that it did not have the consent of its regulator in Saudi Arabia and, thus, any further disclosure would create a real and substantial risk of prosecution in Saudi Arabia with severe penalties.

The court considered whether this risk outweighed the importance of the disclosure to conducting a fair trial. Relevant factors in refusing the bank's application included: (i) the late submission of the variation request, after the bank had benefitted from the other side's full disclosure; (ii) the bank's failure to comply with the regulator's requirements; (iii) the bank's refusal to disclose its correspondence with the regulator (even as a confidential exhibit); (iv) the lack of a decisive refusal of consent from the regulator; and (v) the fact that the bank's witnesses had overstated the risk of prosecution in Saudi Arabia.

Finding that the bank's breach of disclosure was serious and deliberate, the court also struck out the bank's defence submissions, except for the issues where the claimants were not disadvantaged by the bank's lack of disclosure.

2 *First Tower Trustees Ltd & anr v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, 19 June 2018.

Court reluctant to second-guess FCA and LSE in market manipulation claim

In *Burford Capital Ltd v London Stock Exchange Group plc* [2020] EWHC 1183 (Comm), Burford claimed that a significant drop in the price of its AIM-listed shares was the result of unlawful market manipulation. The allegation was examined and dismissed by both the London Stock Exchange (the **LSE**), AIM's parent company, and the FCA.

Burford applied for a *Norwich Pharmacal* order to compel the LSE, a third party, to release confidential trading data, including identity details for market participants. Keen not to second-guess the FCA and the LSE, the court rejected Burford's application. Burford had failed to make a good arguable case for market manipulation and to satisfy the interests of justice test. On the latter, the court identified two additional factors 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.

Dominant purpose test in legal advice privilege

In *The Civil Aviation Authority v Jet2.Com Ltd, R. (on the Application of)* [2020] EWCA Civ 35, 28 January 2020 the court confirmed that legal advice privilege is subject to a dominant purpose test, thus bringing English law in line with the law in Australia, Hong Kong and Singapore.

The case involved internal multi-party email communications between Jet2 in-house lawyers and non-lawyer employees. The court doubted the decision in *Three Rivers No. 5*,[3] which held that communications between an employee of a company and the company's lawyers could not attract legal advice privilege unless that employee was tasked with seeking and receiving that advice on behalf of the client. It therefore seems that *Three Rivers No. 5* is ripe for overturning if the subject matter gets to the Supreme Court.

Accounting regulator not able to force disclosure of privileged documents from client

Reversing a problematic first-instance decision, the court in *Sports Direct International Plc v Financial Reporting Council* [2020] EWCA Civ 177, 18 February 2020 provided welcome confirmation that, where permitted by statute, privileged material belonging to a company does not have to be disclosed to a regulator (in this case, it was the company's accountants' regulator). As part of its regulatory investigation into Grant Thornton's audit of Sports Direct, the Financial Reporting Council (the **FRC**) issued a number of statutory notices of disclosure to Sports Direct, including for documents protected by legal privilege. The court held that the privileged documents did not have to be disclosed because the FRC's statutory powers had an express exception for privileged material.

Disclosure Pilot Scheme

This round-up would not be complete without a brief mention of the Disclosure Pilot Scheme (the **DPS**) operating in the Business and Property Courts until 31 December 2021. Two key takeaways from decisions so far are that the DPS: (i) applies to both existing and new proceedings, including proceedings where a disclosure order was made before the start of the DPS; and (ii) seeks to introduce an important culture change to the disclosure exercise, replacing the parties' "no stone unturned" approach with a collaborative approach underpinned by principles of reasonableness and proportionality.

Fraudulent trading

Broad definition of "dishonest assistance" leads to dual vicarious liability

Bilta (UK) Ltd (in liquidation) & ors v Natwest Markets plc & anr co [2020] EWHC 546 (Ch), 10 March 2020 was an interesting case on the dual vicarious liability of a parent bank and its indirect subsidiary for the actions of two of their traders involved in trading carbon credits, via an intermediary, related to carousel fraud.

The decision provides a good illustration of how those involved in trading can become liable in relation to a fraud of an unrelated, and even unknown, party at the far end of a chain of transactions. "Dishonesty" includes failure to make enquiries when an ordinary person would have become suspicious and "assistance" includes transactions via an intermediary.

The two traders had purchased a significant number of carbon credits from an intermediary despite: (i) their general knowledge of carousel fraud in the sector; and (ii) the sudden and significant increase in trading volume with the intermediary. Dishonest assistance was therefore made out and, as a result, so was knowing participation in fraudulent trading (s213 Insolvency Act).

[3] *Three Rivers Council v The Governor and Company of the Bank of England (No. 5)* [2003] EWCA Civ 474, 3 April 2003.

Given that the traders had acted in their capacity as agents for the parent bank and employees of the indirect subsidiary, dual vicarious liability was imposed.

Creditor claims

Reflective loss rule does not limit creditors' claims

Finally, in a seminal decision, the majority in *Marex Financial Ltd v Sevilleja* [2020] UKSC 31, 15 July 2020 clarified that the rule against reflective loss only bars claims by a shareholder in respect of losses suffered as a shareholder because of an actionable wrong committed against both the company and the shareholder. The rule does not bar other types of losses suffered by a shareholder, any claims by a non-shareholder (eg creditors) or situations where the company has no cause of action.

The newly narrowed scope of the rule was confirmed in *BIG, Burgess & ors v Smith & ors* [2020] EWHC 2501 (Ch), 21 September 2020, where an indirect shareholder was allowed to recover its loss.

For fuller coverage of these cases and more, please see our monthly Litigation and Dispute Resolution Review.

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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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