C L I F F O R D
C H A N C E

Newsletter June 2012

Contentious Commentary

Contract

Best buys

An obligation to use best endeavours may be enforceable, but it remains a difficult concept.

What does an obligation on an airport to use its "best endeavours to promote [C's] low cost services" require? The obvious answer is "depends", and that was what the majority of Court of Appeal really said in *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417 in holding that D was obliged to allow flights outside the airport's normal opening even though doing so was loss-making for the airport.

The first issue was whether the obligation was legally enforceable at all. Moore-Bick LJ thought it was, distinguishing between a clause whose content was so uncertain as to be incapable of creating a binding obligation and an obligation the precise limits of which were difficult to define in advance but which can nevertheless be given practical content. He did not explain how you distinguish the two.

Longmore LJ considered that an obligation to use best endeavours should be held to be enforceable unless the intended object to be procured by the endeavours is too vague or the parties have provided no criteria on the basis of which it is possible to assess whether best endeavours have been, or can be, used (isn't the criteria best, not second-best, endeavours?). Which comes back to the point, "depends".

Lewison LJ, dissenting, considered that the obligation in this case was too vague to be enforceable. The agreement was silent on opening hours, so the natural position was that opening hours were not covered. Relying on a vague obligation to promote the airline's business involved making a contract for the parties rather than interpreting the one they had already made. The parties had to reach a further agreement on opening hours rather than expecting the court to come to the rescue.

The second issue was the extent to which D could take into account its own financial interests. Again, depends. In this case, it was obvious that low cost airlines would need to operate outside the airport's somewhat limited normal opening hours in order to get sufficient use from their aircraft, and so the fact that the airport suffered a loss by doing so was not a fundamental objection. But the Court of Appeal recognised that this was not an absolute obligation, and there could be circumstances in which the airport was not obliged to subsidise the airline in this way.

The bottom line may be that the airport had opened outside its normal hours for a number of years but, under new ownership, declined to do so further. The Court of Appeal rejected unanimously estoppel by convention, but going back on previous behaviour never looks attractive. All is fact specific.

No obligation to oblige

A contract breaker cannot require acceptance of a repudiatory breach.

White & Carter (Councils) Ltd v McGregor [1962] AC 413 is controversial. The House of Lords (by majority) concluded that a party is not obliged to accept a repudiatory breach of contract by the other party but could, provided that it did not need the assistance of the contract-breaker, leave the contract in place, complete its obligations and in due course claim the contract price rather than merely damages. People have railed against how unreasonable this is, raised theories of efficient breach,

Contents

quasi-mitigation (pure mitigation is only relevant to a damages claim) and so on, but the House of Lords' decision reflects the fundamentalist English proposition that contracts are to be honoured; a party can't complain if it is held to its freely undertaken obligations (unless specific performance is required).

The House of Lords accepted that there may be limitations on this talibanite position. Lord Reid contemplated a different outcome if the innocent party had "no legitimate interest" in continuing the contract or if the innocent party's conduct was "wholly unreasonable". The practical issue has been how unreasonable the innocent party's conduct must be in order to lose the right to continue with the contract. In *Isabella Shipowners SA v Shagang Shipping Co Ltd* [2012] EWHC 1077 (Comm), Cooke J nailed his colours firmly to the mast marked extraordinarily unreasonable.

The case concerned a time charter. The charterer sought to return the vessel a few months before the end of the charter, saying that it had no further use of the vessel. Clear repudiatory breach. The owner declined to take redelivery of the vessel, and sued for the hire due to the end of the contract term.

The first question was whether the charterer's cooperation was necessary to complete the charter. If so, *White & Carter* had no application. Cooke J said that cooperation was not required. A time charterer is entitled to give instructions as to what the vessel should do but, absent instructions, the vessel simply sits wherever it happens to be awaiting instructions (cf a demise charter, where the charterer provides the crew).

Cooke J went on that an innocent party will have no legitimate interest in maintaining the contract if damages are an adequate remedy and its insistence on maintaining the contract is "wholly unreasonable", "extremely unreasonable" or "perverse". But Cooke J could see nothing unreasonable in the owners' conduct in this case. Why should the charterer be able to compel the owners to trade the vessel in an uncertain market, leaving the charterer to argue about mitigation?

So it will require genuinely extreme circumstances to prevent an innocent party declining to accept a repudiatory breach and suing for the contract price. But it is only in rare circumstances that a party can continue the contract without any cooperation from the contract-breaker. A nice academic argument, but perhaps of less day to day relevance.

Conclusive misproof

An aircraft lessor is estopped from denying the accuracy of its acceptance certificate.

If an aircraft for lease is delivered by the lessor in a state that is not in accordance with the contractual requirements, can the lessee complain? Of course. But not if it is estopped from doing so, and in *ACG Acquisition XX LLC v Olympic Airlines* [2012] EWHC 1070 (Comm), the lessee was estopped.

The case is interesting for the limited and fact specific protection given to the lessor. The lessor failed on the conclusive proof provision in the lease because the relevant clause was not wide enough: it waived the lessee's right to reject the aircraft but not to claim damages. The drafting may need improvement.

But the lessor won on genuine estoppel because the lessee signed an acceptance certificate stating that the aircraft was in the condition required by the lease. The lessor had to prove all the usual requirements for estoppel, including detrimental reliance. It will be difficult in many cases to show detrimental reliance on a piece of boilerplate but, in this case, the judge decided that the reliance came in the form of the lessor's giving up its right to reject redelivery from the previous lessee. The lessor got home on the facts, but it wasn't as clear legally as lessors in general might have liked.

Faith in the City

An agreement to agree cannot be rescued by good faith.

English law will not enforce an agreement to agree. The parties have either agreed or they haven't. To say that they will agree is merely to confirm that they haven't agreed; if so, there is nothing the court can enforce. The court will not decide what the parties would or should have agreed because the courts have no criteria upon which to make that determination.

The courts have confirmed in two recent cases that adding an obligation of good faith to an agreement to agree will not rescue the obligation from oblivion. One of the cases is pretty orthodox application of the English law position, but the other is a more questionable extension of the courts' approach.

In *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548, C sold his cable business to D but, as part of that deal, signed a side letter providing that C would have the opportunity to invest in the continuing business, and that C and D would negotiate in good faith over the terms of the investment agreement. The Court of Appeal decided that the parties intended to create legal relations but failed in law to do so because all they did was establish a basis for future negotiations.

Shaker v Vistajet Group Holdings SA [2012] EWHC 1329 (Comm) was different because the parties knew that their obligation in a letter of intent to "proceed in good faith and to use reasonable endeavours" to agree documents for the sale of an aircraft was not legally binding even though C had paid a deposit. As a result, they went on that, if "despite the exercise of their good faith and reasonable endeavours", the parties failed to agree on the documents, C was to be refunded the deposit. The LOI recognised that the obligation to agree the final documents could not be binding, but expressly said that the provisions about the return of the deposit were binding.

The documents were not signed, but D objected that C had not used good faith and was therefore not entitled to the return of his deposit. C argued that this condition precedent to the return of the deposit was unenforceable. Teare J agreed with C. However, the court wasn't being asked to decide what the parties would have agreed or what the damages might be (eg even if good faith had been exercised, might the parties still not have agreed?). The court was only being asked to decide whether one party acted in good faith: if it had done so, it recovered its deposit; if it had not done so, its deposit was forfeit.

The courts generally have no difficulty in deciding issues of good faith (eg for the purposes of the change of position defence in restitution and in relation to the exercise of contractual discretions). Could the court really not do so in this case? The courts can decide whether a party has used best and reasonable endeavours (see *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417 above). Is that really so different?

The close-out blues

A party can look after its own interests when closing out.

West LB AG v Nomura Bank International Ltd [2012] EWCA Civ 495 is a counterpart of *Euroption Strategic Fund Ltd v Skandinviska Enskilda Banken AB* [2012] EWHC 584 (Comm) on the latitude typical contracts give parties doing a valuation under a contract. In *West LB*, the valuer did not contest the first instance decision that its valuation was invalid, even though the valuer had sole and absolute discretion. But the Court of Appeal emphasised that in deciding on the correct value, the court must put itself in the valuer's position and reach the decision that the valuer would have reached. In doing that, the valuer would have had regard to the dangers to itself of valuing too optimistically, taking into account its own interests. The outcome was that the valuer had improperly valued the assets at zero, but the court then properly gave the assets that same absence of value.

Shooting down

The subsequent discovery of a serious breach of contract does not discharge a party from a debt.

A contract of employment is terminated under an express provision, obliging the company to pay six months' salary in lieu of notice. The company subsequently discovers misconduct that would have justified immediate dismissal. Is the company still obliged to pay the six months' salary? According to *Cavenagh v William Evans Ltd* [2012] EWCA Civ 697, yes, but the court also hinted at better points not taken in the case.

The company relied on *Boston Deep Sea Fishing v Ansell* (1888) LR 39 Ch D 339, which establishes that an employer facing a claim for wrongful dismissal (ie repudiatory breach of contract) can rely on breaches of contract of which it was not aware at the time it terminated the contract in order retrospectively to justify its termination of the contract. But in *Cavenagh*, the employer was not faced with a claim for wrongful dismissal. The employer had terminated the employment contract under an express clause, which led to a debt becoming due to the employee.

But the Court of Appeal hinted at what the company should have done. The company did not counterclaim for damages (thought the damages would have been significantly less than the debt due). The company did not rely on the employee's fiduciary obligation to reveal his own misconduct, and claim that its termination was voidable by reason of its unilateral mistake (can the exercise of a contractual power be avoided for mistake?). The irony is that if the company had wrongly sacked the employee, it could have relied on the *Boston Deep Sea Fishing* rule. Since it did the right thing - and the employee did the wrong thing by not confessing to his misdemeanours - it couldn't. A curious lesson for all contracting parties, not just employers.

Jurisdiction/arbitration

The fight goes on

An arbitral tribunal can award damages for bringing court proceedings in breach of an arbitration agreement.

West Tankers Inc v Allianz SpA shows no sign of coming to an end.

The parties continue to fight tooth and nail before courts in London, Syracuse and Trieste, not to mention before the arbitral tribunal, all following the ECJ's decision that the English courts cannot grant an anti-suit injunction preventing pursuit of the Syracuse proceedings because bringing those proceedings is in breach of the arbitration agreement. And the Syracuse court hasn't even decided whether it has jurisdiction yet, a mere nine years into the proceedings.

The most recent instalment ([2012] EWHC 854 (Comm)) involved C's appeal against the arbitrators' majority decision that the arbitrators could not award damages against D for breach of the arbitration agreement by bringing the proceedings in Italy. The damages claimed comprised the costs of the Italian proceedings, together with any award made by the Italian court in a manner inconsistent with the arbitrators' prior decisions that C has no liability to D.

Flaux J disagreed with the arbitrators. He recognised that D had a right under the Brussels I Regulation to bring proceedings in Italy and that the Italian courts had a right to decide their own jurisdiction unhindered by anti-suit injunctions from the English courts. But arbitration falls outside the scope of Brussels I. Arbitrators are free to reach decisions inconsistent with those of the courts, including a decision undoing what a court might have done. As a result, arbitrators can conclude that the court proceedings are a breach of contract and award damages accordingly (described as equitable damages for some unexplained reason).

Surely another visit to the CJEU will be required. Failing that, it will be a battle for recognition between an arbitral award and a contrary Italian court judgment, if such is forthcoming. There would, indeed, be a cruel sense of futility if the Italian courts were now to decide that they do not have jurisdiction.

Vampires all

The Brussels I Regulation should be given reflexive effect.

Owusu v Jackson (Case C-281/02) says that if a court in the EU has jurisdiction under article 2 of the Brussels I Regulation (domicile of the defendant), the court must exercise that jurisdiction, whether or not it is an appropriate court to hear the case. The courts have, however, been fighting the full force of that conclusion at every turn. It doesn't apply if there is a jurisdiction agreement (*Konkola Copper Mines plc v Coromin Ltd* [2005] EWHC 898 (Comm)). And now it doesn't apply to shareholder disputes or where a non-EU court is first seised.

Ferrexpo AG v Gilson Investments Ltd [2012] EWHC 721 (Comm) concerned a dispute about the shareholding in a Ukrainian company. The defendant was an English company, and the dispute was already before the Ukraine courts. Having rejected the argument that the Ukraine courts were untrustworthy, Andrew Smith J decided that he should give reflexive effect to either or both of articles 22(5) or 27 of the Brussels I Regulation. He stayed English proceedings in favour of the Ukraine even though D was domiciled in England.

Article 22(5) gives exclusive jurisdiction to the courts of the place of incorporation in proceedings relating to decisions by a company's organs; article 27 requires a court second seised of a dispute to decline jurisdiction. Both, however, relate only to proceedings within the EU, not outside. The Regulation says nothing about the situation of proceedings within the EU that would be better determined outside the EU. Hence the need to give "reflexive" effect to the Regulation, ie invented effect to get round this problem. The judge concluded that this reflexive effect gave him a discretion whether to give effect to articles of the Regulation in extra-EU situations, and, in the circumstances, he would do so. This looks rather like forum non conveniens, something traditionally decried by the civil lawyers.

Whether and, if so, what reflexive effect should be given to the Regulation as far as proceedings outside the EU are concerned will remain a problem (eg in deciding as he did, Andrew Smith J declined to follow a contrary decision in *Catalyst Investment Group v Lewinsohn* [2009] EWHC 1964 (Ch)) until the CJEU sorts it out or the Regulation is amended. And amendment could be in the offing, and it might even provide a somewhat stunted jurisdictional discretion.

Surreal America

The law governing an arbitration agreement is probably that of the seat of the arbitration.

Three laws can be relevant to an arbitration: (i) the law governing the contract in which the arbitration agreement is to be found; (ii) the law governing the distinct arbitration agreement in that contract (see section 7 of the Arbitration Act 1996); and (iii) the curial law, ie the law of the seat, whose courts exercise supervisory jurisdiction over the arbitration.

Parties commonly choose the law governing the contract as a whole and select the seat of the arbitration, but seldom go on to choose a law to govern the arbitration agreement - reasonably, they think that putting one governing law provision in an agreement ought to be enough. If the governing law of the contract is English law and the seat of the arbitration is London, no problem. But if, as in *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, the law governing the contract is Brazilian law, but the arbitration is to be in London, what law governs the arbitration agreement and therefore determines its validity?

Arbitration agreements fall outside the Rome I Regulation, so their governing law is determined under common law rules. This requires consideration of: (a) have the parties made an express choice? (b) if not, have the parties made an implied choice? (c) if there is no express or implied choice, with what law does the arbitration agreement have the closest and most real connection?

The recent trend (eg *Sulamerica* at first instance) has been, absent express choice, to treat the seat of the arbitration as key. However, in the Court of Appeal in *Sulamerica*, Moore-Bick LJ disinterred older cases that indicated that the governing law of the agreement as a whole should be given greater, possibly decisive, weight. It looked as if the recent trend would be reversed. But it wasn't.

On the facts, Moore-Bick LJ rejected the argument that there was an implied choice resulting from the choice of law governing the agreement as a whole. The reason he offered was that the evidence indicated that Brazilian law might have significantly undermined the effectiveness of the agreement, and the parties cannot impliedly have intended that. One might debate the sequencing of the horse and the cart in this argument. One party contended that, under Brazilian law, there could be no arbitration without its consent, which might have been a reason for using Brazilian law (in addition to the power station in question being built in Brazil) rather than for rejecting it. And what would the outcome have been if Brazilian law had been the same as English law? Does Moore-Bick LJ's approach really amount to saying that parties cannot impliedly have intended to apply any law that is not as arbitration-friendly as English law if the arbitration is in London?

Having decided that there was no implied choice of law, Moore-Bick LJ then concluded that the arbitration agreement had the closest and most real connection with the seat of the arbitration rather than with the rest of the contract. He appeared to lay this down as almost a rule of law. It is, however, the line taken by the recent cases, but not by the older cases to which Moore-Bick LJ referred at length. Having cited the older cases, he failed to explain why he was not following them. The only connection to England was the seat of the arbitration. Having set-off resolutely down an ancient path, Moore-Bick LJ reached his desired destination by turning on to the more recent one.

Lord Neuberger MR recognised the need for certainty in this area and that there was an "unsatisfactory tension" between the older and the newer cases (ie they are contradictory). The MR then declined to offer a solution because he considered that, in this case, both approaches led to the same conclusion, namely English law. He also failed to explain how that could be.

So we are left in a position of uncertainty. The outcome of *Sulamerica* suggests that the recent status quo has been maintained, but the wording of the judgments is less clear. The only certainty is that there will have to be more litigation.

Pro-anti-suit

Anti-suit injunctions can be granted against persons not a party to the arbitration agreement.

In *Ingosstrakh-Investments v BNP Paribas SA* [2012] EWCA Civ 644 (aka *Russian Machines*; Clifford Chance acted for the bank), the Court of Appeal upheld an anti-suit injunction restraining the pursuit of proceedings before the Russian courts in breach of an arbitration agreement in a guarantee. The different feature about the case is that the injunction was granted against persons who were not parties to the arbitration agreement (the guarantor accepted the injunction).

The proceedings in Russia were brought by shareholders in the guarantor alleging breach of Russian company law in failing, inter alia, to obtain shareholder approval for the guarantee. The guarantor and the shareholders were all ultimately controlled by Oleg Deripaska. C alleged collusion between the various companies. The Court of Appeal accepted that if the decisions in relation to the arbitration and the Russian proceedings were co-ordinated decisions made by the same person or persons, that would render the pursuit of the Russian proceedings unconscionable and vexatious since the companies sought to obtain a decision from the Russian courts on issues relating to the effect of the arbitration agreement, which issues had been submitted to arbitration. The Court of Appeal accepted that C had made out a sufficiently arguable case to obtain an interim injunction.

The Court of Appeal also agreed with the judge that the shareholders could be joined to the English proceedings as necessary and proper parties (the Court of Appeal declined to decide whether joinder could also be effected under CPR 62.5), that there were no reasons in comity or delay for overturning the injunction and that England was the appropriate forum in which to try the application for an anti-suit injunction.

In contrast to *Russian Machines*, in *Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd* [2012] EWHC 1331 (Comm), Andrew Smith J rejected an attempt by C to pre-empt, through declarations of non-liability, proceedings brought against an affiliate of C under a US regulatory arbitration scheme. C had contracts with some of the Ds, but the Ds and others started the arbitration in the US alleging that C's affiliate was responsible for the woes the Ds had suffered as a result of the contracts with C and their reliance on C. The judge, rather limply, decided that C had insufficient interest in obtaining the declarations and, in any event, he should not interfere with the US arbitration scheme, even though the Ds had committed to C that they had not relied on anyone in C's group. A bit more judicial cynicism might have helped.

Financial services

Reviewed decisions committee

The FSA's Regulatory Decisions Committee must give proper reasons.

The FSA suffered an embarrassing defeat in *R (C) v Financial Services Authority* [2012] EWHC 1417 (Admin). The judge quashed the RDC's decision, forcing the RDC to revisit the case.

The judgment, which was redacted to preserve C's anonymity, relates to an alleged failure by a senior executive at a bank to deal adequately with certain information over a two week period during the financial crisis, which resulted in the issue of an incorrect public statement. This failure did not negatively affect the bank's performance, but it was, the FSA said, still a failure to exercise due skill, care and diligence in managing the business of the bank, in breach of Principle 6.

The RDC is obliged by section 388(1) of FSMA to give reasons. Silber J concluded that the RDC had failed in this obligation. The reasons must deal with the substantial points made by the unsuccessful party so that he knows why he lost and, in general terms, why his submissions were not accepted. In this case, the RDC had regurgitated the FSA's Preliminary Investigation Report, adding only a summary of C's arguments but not explaining why it rejected those arguments or reflecting concessions made by the FSA. In other words, Silber J considered the RDC's decisions must look like court judgments following an inter partes adjudicatory hearing. This is not remotely how the FSA sees the RDC process.

Silber J went on that C was substantially prejudiced by the RDC's failure because C could not form a view as to whether to accept the RDC's decision or to appeal to the Upper Tribunal. On appeal, the matter would be approached de novo, with the result that the FSA could raise new points and the penalty could be increased.

In the light of this, the judge accepted that judicial review was the appropriate course rather than leaving the matter to appeal. The Upper Tribunal could not cure the RDC's failure to give reasons and, as such, an appeal did not provide an alternative or a suitable remedy.

The FSA's final throw of the dice was to argue that granting JR would undermine the appeal process, that the courts would be swamped with JR applications and that civilisation would be undermined. Silber J rejected this. If the RDC gave proper reasons, there would be no problem. The solution was in the FSA's hands.

Farther afield

Judicial criticism can have wider ramifications.

The FSA has prohibited Mr Anthony Verrier from performing any regulated activity in the financial services industry as a result of criticism by Jack J in a case about seducing employees from another company (*Tullett Prebon plc v BGC Brokers LP* [2010] EWHC 484 (QB), affirmed at [2011] EWCA Civ 131). Mr Verrier was held to have taken part in an unlawful means conspiracy to induce the employees to leave and, perhaps more significantly, was found by the judge to have "stuck to the truth where he was able to, but departed from it with equanimity and adroitness where the truth was inconvenient." The FSA did not investigate whether or not the judge's findings were correct, but relied on FIT 2.1.3G(2) and (10) to conclude that the fact of judicial criticism was in itself enough for the FSA to act severely. Any revisiting of the issues would have been a waste of the FSA's resources, it thought.

The FSA's decision therefore exposes a risk, beyond the obvious, arising from court proceedings. If it goes wrong, the individuals concerned could face personal problems.

Who's a naughty boy, then?

The FSA's use of privileged material yields no consequences.

Privilege is more than a rule of evidence but a fundamental condition upon which the administration of justice rests. So any improper use of privileged material will necessarily bring salutary remedies in order to uphold the purity of the fountain of justice. Except that it doesn't, as Burnett J decided in *Ford v Financial Services Authority* [2012] EWHC 997 (Admin).

In *Ford*, the judge had previously decided ([2011] EWHC 2583 (Admin)) that the FSA had improperly used two of C's privileged documents (C had argued that many more were privileged), including quoting from them in Warning Notices. This new hearing was to decide what the consequences of the FSA's malefaction should be. The answer was next to nothing.

C asked for the Warning Notice to be quashed. However, the judge decided that the privileged material formed a very modest part of the overall picture, and was peripheral but not irrelevant. It was essentially parasitic on other material. As a result, Burnett J considered it sufficient for the references to the privileged material to be removed, which still left "a coherent, seamless and powerful document". Quashing the Warning Notice was unnecessary.

Next, C asked that any FSA employees who had seen the privileged material should have nothing more to do with the matter. Again the judge refused. The investigation was almost at an end. Removing from the scene of their crime those who had inspected the privileged information would substantially interfere with the final stages of the process, and would be disproportionate and contrary to the public interest. Since the FSA agreed that the RDC should not include anyone who had seen the material, the judge considered that there would be no real prejudice to C.

The only point on which C won was destruction of the material. The FSA argued that it would be enough if the FSA simply undertook not to use the material, without going to the hassle of finding and destroying copies. The judge considered that that would not be enough. The FSA should use its best endeavours to extract hard copies held by employees and search databases for electronic copies, and destroy them all. That might not find all the copies, but it would reduce the risk to C.

The adverse consequences of the FSA's use of privileged material are, therefore, pretty non-existent. The FSA can proceed untroubled. If it's right that the material was peripheral, you can see where the judge was coming from, particularly as underlying the case appears to be a major financial scandal (Keydata, which has already cost the FSCS a lot of money), and he acquitted the FSA of high-handed behaviour. But if privilege is that important, shouldn't the remedies be such as to ensure that people don't think they can get away with ignoring it?

Implied criminal property

A bank is entitled to refuse to transfer monies if it suspects money laundering.

Mr Shah is mightily aggrieved with his bank, which he has blamed for wrongly making a money laundering report in the UK and, as a result, wrongly refusing to make transfers from his account. This, he says, led the Zimbabwean authorities to be suspicious of him and to confiscate his assets in Zimbabwe. In *Shah v HSBC Private Bank (UK) Ltd* [2012] EWHC 1283 (QB), Supperstone J rejected Mr S's claim to recover from the bank the value of his Zimbabwean assets, placing the risks arising from money laundering reporting on the reported rather than the reporter.

The judge concluded that there is an implied term in the contract between banker and customer to the effect that the banker is entitled to refuse to honour its customer's instructions in the absence of consent from the Serious Organised Crime Agency under section 335 of the Proceeds of Crime Act 2002 if the bank or its agent suspects money laundering. This implication presumably arises as a matter of law rather than from the parties' intention.

The judge also followed the authorities to the effect that suspicion only requires the bank to consider that there is a possibility, more than fanciful, that the relevant facts to establish money laundering exist. The suspicion does not have to be reasonable, but it does have to be of a settled nature, nor need the suspicions ultimately be proved to be justified. In this case, the relevant person at the bank - the MLRO - did have a suspicion, and so the implied term kicked in, exonerating the bank.

In short, the judge considered that the legislation had balanced the public interest of catching money launderers with those of the reported and the reporters, and had put the reported at the bottom of the pile. Banks can rest easier.

CLIFFORD CHANCE

Negligence

Caped crusaders

A parent company owes a duty of care to a subsidiary's employees for their health and safety.

Man contracts asbestosis because of 18 months employment at an asbestos factory over 50 years ago. His employer no longer exists, and it had no insurance cover. But its parent company is still around. Can he claim damages from the parent company because the parent owed a direct duty of care to the subsidiary's employees? The answer will generally lie more in feelings of sympathy and in policy considerations than in legal analysis. That was certainly the case in *Chandler v Cape plc* [2012] EWCA Civ 525.

The evidence available to the court was, in its words, "mainly circumstantial", and involved a historical analysis of meagre information in order to reconstruct who might have done what or said what in the late 1950s and early 1960s. It looks, however, as if the parent did no more than most parent companies do for their groups. The parent company laid down policy; it directed the group's business; it provided centralised services. That, according to the Court of Appeal, was enough to assume a duty of care - at least, in the context of asbestosis.

More specifically, the Court of Appeal considered that the parent had assumed a duty of care to the subsidiary's employees because both parent and subsidiary carried on the same business, the parent had superior knowledge of relevant aspects of health and safety in that industry, the parent ought to have known that the subsidiary's system of work was unsafe, and the parent ought to have known that the subsidiary's employees would rely on its using its superior knowledge for their protection. On the last point, it wasn't even necessary for the parent to intervene in the subsidiary's health and safety matters; if the parent intervened on production and funding issues that would be enough (ie it is enough if it is the parent of a group run as such).

The Court of Appeal's analysis of what is required to create a duty of care was fragile to the point of non-existence. There just was a duty. The Court of Appeal also denied emphatically that the case had anything to do with corporate veils; the imposition of a direct duty may be thought, however, to apply serious secateurs to that veil. Whether it matters or not elsewhere is less clear. The Court of Appeal might have been trying to limit its decision to health and safety issues in ancient hazardous industries. But how the decision will be used is a different matter.

Contentious Commentary is a review of legal developments for litigators

Contacts

Simon James
E: simon.james
@cliffordchance.com

Susan Poffley
E: susan.poffley
@cliffordchance.com