CLIFFORD CHANCE

CONTENTIOUS COMMENTARY

A REVIEW FOR LITIGATORS

NOVEMBER 2018

CLIFFORD

CHANCE

CONTENTIOUS COMMENTARY – NOVEMBER 2018

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Contentious Commentary is a review of recent developments in the English courts

TORT

CRIME AND DOUBLE PUNISHMENT

An employer is vicariously liable for its employees' data breaches.

It is easy to understand Morrisons' annoyance that it should be held vicariously liable for the criminal data disclosure by a disgruntled employee whose motive was to get at his employer. The ex-employee might now be in gaol, but he can still draw some comfort from the fact that his scheme achieved its aim of creating an expensive nuisance for Morrisons. The message from the Court of Appeal in *Wm Morrison Supermarkets plc v Various Claimants* [2018] EWCA Civ 2330 is that if you entrust an employee with a task and he abuses that trust, you've got to pay for it.

The employee (S) was disgruntled with D as a result of unrelated disciplinary procedures, which resulted in his being given a warning. There was nothing to suggest that this incident made S a security risk.

Part of S's job was to liaise with D's external auditors. The auditors asked for a copy of D's payroll records, including the names of about 100k employees together with their dates of birth, bank details etc. S duly obtained these, passed them to the auditors as required, but kept a copy himself. A couple of months later, S posted the details on a website and, when that attracted little attention, informed local newspapers of the data breach. This did attract attention, as well as leading to S's conviction and being sentencing to eight years in prison.

None of the employees whose details were disclosed has lost any money. Nevertheless, litigation was commenced against D for breach of the Data Protection Act 1998, breach of confidence and infringement of privacy, and a Group Litigation Order was made in respect of claims by 5518 employees.

D was a data controller for the purposes of the DPA but was not in breach of its obligation to have in place adequate and appropriate controls over the data (save in one respect, but that had no causative effect). In stealing the data, S made himself a data controller, and it was as such that he placed the data on the internet (and committed his numerous crimes and civil wrongs). Since the breach was not by D as data controller, liability depended upon D's being vicariously responsible for S's crimes.

D argued that the DPA had by necessary implication excluded vicarious liability in these circumstances. The DPA balanced the risks arising from the right to privacy against the need for data transfers by concepts such as appropriateness and reasonableness. For example, it only allows data subjects to obtain compensation where D has failed to take reasonable care to comply with the Act's requirements. Vicarious liability on D would impose strict a liability that was, D argued, inconsistent with the scheme of the DPA.

The Court of Appeal suggested that it might been more sympathetic to this argument (though probably not sympathetic enough) if D had pushed it to its logical conclusion, namely that the DPA had swept away all claims for breach of confidence and privacy in respect of matters within the scope of the DPA (and, more particularly, the underlying EU directive). D fought shy of going that far, and the Court felt unable to conclude that vicarious liability alone had impliedly gone. If Parliament intended that result, it should have said so more clearly.

That led to whether D was vicariously liable for the civil consequences of S's criminal conduct. The test for vicarious liability required the court to consider the nature of S's job and then whether there was sufficient connection between that job and his wrongful conduct to make it right for the employer to be held liable (*Mohamud v WM Morrison Supermarkets plc* [2016] AC 667).

Concepts such as "sufficient" and "right" suggest that the courts haven't entirely moved much beyond the length of the Lord Chancellor's foot, but the Court of Appeal found the answer easy in this case. D's delinquencies might have been done from home and there might have been a temporal gap, but there was still, it thought, an unbroken thread in S's conduct from his job to the improper disclosure. The fact that the target of S's conduct was D, rather than his fellow employees, was not relevant. Nor was the Court concerned that D might face a large number of claims; it should get insurance.

S continues to rot in gaol, but the Court of Appeal has offered him the satisfaction that his criminal conduct has achieved its aim of making life expensive for his former employer.

CONFIDENCE IN THE COURTS

Confidentiality provisions in a settlement agreement will be enforced.

Is *ABC v Telegraph Media Group Ltd* [2018] EWCA Civ 2329 yet another case of a Non-Disclosure Agreement being imposed by the rich and powerful to gag five people who had complained about sexual harassment and racial abuse?

Or is it a case not of oppression of the poor and the maimed and the halt and the blind by the rich and the powerful but rather of a settlement agreement voluntarily reached, which the courts should enforce? After all, each of the complainants agreed voluntarily to settle his or her employment claim, each was paid a substantial sum, each had independent legal advice, and each could still, without breaching the NDA, go to the police or regulatory authorities if he or she wished.

The press was firmly in the former camp; but the Court of Appeal was equally firmly in the latter.

When considering whether to grant an interim injunction to restrain publication by the press, the courts must consider whether C is "likely" to succeed at trial (s12 of the Human Rights Act 1998, though "likely" is a somewhat flexible concept: *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253), as well as the public interest in disclosure. But where disclosure is in breach of an express term of an agreement settling litigation, the courts consider that the public interest against disclosure is strong. Courts encourage settlement; confidentiality is often an important aspect of the settlement; courts cannot therefore allow the confidentiality provisions in a settlement agreement to be ignored at will. As a result, where all parties have had legal advice, it takes a "strong case" for the court to refuse to enforce the settlement agreement on ordinary contractual or equitable principles.

In this case, the Court of Appeal decided that C was likely to succeed at trial, the public interest in upholding the settlement agreement remained strong, the damage caused by disclosure would be severe (including to C and employees of the companies concerned), and an injunction should therefore be granted. Pacta sunt servanda.

Until, of course, Lord Hain, under legal protection but in defiance of constitutional propriety, stated in the House of Lords that ABC is Sir Philip Green. Despite this, the interim injunction remains in place preventing the newspaper revealing details of the allegations against Sir Philip and the identities of those who had settled their claims.

DATA LOSS

A representative action cannot be brought against Google.

Lloyd v Google LLC [2018] EWHC 2599 (QB) involved an attempt to bring a US-like class action, under the guise of representative proceedings, against Google for improperly harvesting in 2011-12 information about the browsing habits of iPhone users. The claim failed on all counts. The judiciary is not yet ready to take England down, or even to edge towards, the US route. Enforcement of the law is a matter for regulators, not civil litigation.

The basis of the claim was breach of the Data Protection Act 1998 (now replaced by the GDPR and the Data Protection Act 2018). Google was, sufficiently arguably, in breach of the Act. Section 13 of the Act (now article 82 of the GDPR) allows the court to award compensation to "an individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act". The compensation sought was for infringement of users' data protection rights, for commission of the wrong and for loss of control over personal data. The quantum of loss pleaded was the sum it would have cost Google to buy the rights in question at a fixed tariff per iPhone user (aka *Wrotham Park* damages), which at, say, £750 per head would have run into the low billions. No distress or other loss arising from the breach was pleaded.

Warby J did not consider that the heads of damage pleaded constituted "damage" within the meaning of section 13. He concluded that the damage suffered had to be separate from the breach and causally linked to the breach. In contrast, the damage pleaded was, he thought, merely a reassertion that the breach had occurred. English tort law provides compensation for loss; it does not award damages merely to censure breach.

Further, the judge considered that the case failed to meet the specifications for a representative action in CPR 19.6. These require all those represented to have the same interest in the claim, which was not the case here. Google might have a defence to some of the individual claims, and not all those represented would have suffered the same damage. The effect of the breach was not necessarily the same on all members of the class, and so there could be no representative action. Warby J also doubted whether the class could be defined satisfactorily.

Just for good measure, the judge would also have refused to sanction the representative action as a matter of discretion.

The putative representative claimant was a former executive director of Which?, he had behind him an advisory committee led by a former Lord Justice of Appeal, he had £15.5m in litigation funding from Therium, and he had £12m in after the event insurance. In short, he had all his ducks in a row. They quack no more (though an appeal seems likely).

THE SUBSIDIARY TRAP

A parent does not owe a duty of care for its subsidiary's acts.

Vedanta Resources plc v Lungowe [2017] EWCA Civ 1528 is going to the Supreme Court on the question of a parent company's responsibility to those wronged by its subsidiaries, but there are also other runners in the field. *Okpabi v Royal Dutch Shell* [2018] EWCA Civ 191 and, more recently, *AAA v Unilever plc* [2018] EWCA Civ 1532 are trogging their way through the courts, both with a conspicuous lack of success so far for the claimants. It remains to be seen whether the Supreme Court will treat all three cases as a package on appeal.

Unilever involved tribal rioting following Kenya's 2007 general election, which affected a tea plantation run by Unilever's local subsidiary and led to the death or injury of a number of plantation workers. C brought proceedings in the English courts against the subsidiary and, in order to secure jurisdiction over the subsidiary, against the parent company on the basis that the parent owed its own independent duty of care to the subsidiary's employees.

The Court of Appeal said that there were no special rules in the law of tort on the legal responsibility of a parent for the activities of its subsidiaries. It is simply the application of the normal rules on a duty of care (though it may be hard to read *Chandler v Cape plc* [2012] EWCA Civ 525 in that way).

On the facts of *Unilever*, the Court of Appeal (even Sales LJ, who dissented in *Okpabi*) considered the case hopeless. All knowledge within the Unilever group about the risks of tribal violence in Kenya lay with the local subsidiary. The parent might have enquired whether the subsidiary had in place plans to protect its employees, but that was as far as it went. It got nowhere near to establishing sufficient proximity for a duty of care to be imposed on the parent.

DOUBLE TROUBLE

A fraud claim can be brought after a failed negligence claim.

In *Banca Nazionale del Lavoro SpA v Playboy Club London Ltd* [2018] UKSC 43, the Supreme Court decided that a bank did not owe a duty of care to a casino for a credit reference because the request for the reference was made by a different company in order to hide the fact that the request was gambling-related.

Playboy Club London Ltd v Banca Nazionale del Lavoro SpA [2018] EWCA Civ 2025 involved the casino's subsequent pursuit of a fraud claim against the bank over the same reference (ie on the basis that the bank knew that the reference was false). The bank applied to strike out the claim as an abuse of process (*Johnson v Gore-Wood* [2002] 1 AC 1). The casino accepted that it could have brought the fraud claim with its negligence claim – it would not have been improper for lawyers to plead the claim – but not that it should have brought the claims together.

The Court of Appeal, perhaps a trifle benevolently, allowed the fraud claim to go ahead. It was influenced by the bank's havering as to the nature of its defence in the negligence claim, the fact that the second claim was a fraud claim, the fact that information came out in cross-examination at the trial that enhanced the fraud claim, and by information that emerged later still. But above all, it did look like a case in which the bank had not behaved well.

PRIVATE PASSIONS

A skilled person's decisions under the banks' swaps misselling review are not open to judicial review.

The FCA's requirement that banks carry out a swaps misselling review has resulted in banks paying out a lot of money to their customers but, inevitably, some customers remain unhappy.

In *R (oao Holmcroft Properties Ltd) v KPMG* [2018] EWCA Civ 2093 the bank offered C £441k following its review, but C wanted a further £5.2m in consequential losses. Banks' offers under the misselling review required the approval of a skilled person appointed by the bank for that purpose and also by the FCA under s166 of FSMA (in Barclays' case the skilled person was KPMG). C's disruntlement did not lead it to ignore the review and sue in the usual way, or even to claim that a duty of care was owed by the bank in its conduct of the misselling review (a claim now blocked by *CGL Group Ltd v RBS* [2017] EWCA Civ 1073); rather, C sought judicial review of KPMG's decision to approve the bank's offer.

The Court of Appeal decided that KPMG's decisions were not amenable to judicial review. This was not because KPMG was appointed by the bank under the terms of a contract – the skilled person was still "part of the wider regulatory context", and the idea that the appointment was entirely voluntary was stretching reality. But the bank's internal review of its swaps' sales, its offer of settlement, and the skilled person's review of that offer were all concerned with the pursuit of private rights. The regulator's scheme offered an alternative means of recourse for a private law claim, not the conferral of additional public law rights (though that is a rather conclusory argument).

Disgruntled customers could reject the offer of settlement and go to the courts in the normal way. The scheme was ancillary to the private law claim.

The Court of Appeal added that even if the skilled person's decisions had been judicially reviewable, the Court would not have allowed the JR to proceed. The non-disclosure alleged on the part of the bank was inconsequential. The Court of Appeal was also puzzled as to why C had allowed the limitation period on its underlying claims to expire, rejecting a standstill agreement offered by the bank and not bothering to issue a precautionary claim form to protect its position. Foregoing private law rights in the hope that public law would ride to the rescue was not a sensible course.

CONTRACT

RANGING FAR AND WIDE

An injunction requires breach of another contract.

SDI Retail Services Ltd v The Rangers Football Club Ltd [2018] 2772 (Comm) involved replica football kit. Teare J decided that, by failing to offer C the chance to match an offer by a third party (E), D was in breach of contract. By entering into a contract with E, D had done something that it agreed not to do. This was a negative obligation, and a final injunction (whether to restrain or cure the breach) will be granted in respect of a negative obligation unless it would be unjust or unconscionable. The adequacy of damages does not come into the equation. So Teare J granted an injunction that required D not to perform its agreement with E and to inform E that it would not do so (ie to repudiate the agreement with E). D had entered into the agreement with E in the knowledge that this might be a breach of the agreement with C, and had to pay the consequences.

E was aware of the dispute between C and D but did not participate in the action, regarding it as a matter of concern to C and D only. E didn't apparently appreciate the effect the outcome could have on its contractual rights. But, having seen the injunction granted, E rushed into court two days later, asking the court not to seal the order because it should have been joined as a party and would be prejudiced.

Too late, said the Judge. E knew what was going on between C and D, and E must (or should) have been aware of the risk that C would secure an injunction. The agreement between D and E also provided various indemnities for E on events such as this happening. If E had wanted to be heard, it should have applied to be joined.

There was no discussion as to whether E could be liable to C for inducing breach of contract or the effect that might have on the validity of the contract between D and E. The thrust of the judgment was that the first contract in time won, even if that meant breach of the second. E should have put up but, having failed to do so, it had to shut up.

FRAUD UNRAVELS PART

Rescission takes the parties back to their previous contract.

Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc [2018] EWHC 1857 (Comm) involved parties who had an existing contract but were negotiating to revise the price in the light of changing market conditions. The seller put its demands for a higher price on the increased costs it was suffering, placing a figure on those costs. The judge rejected the argument that this was normal commercial jousting over price, and concluded that the figures for costs constituted a representation that the figures were genuine estimates of the increased costs. In fact, the figures included profit and were, on any view, high. Since C knew that its figures were not genuine, C was fraudulent. Beware. Egg on face.

D also proved that it had relied on the representation, ie but for the misrepresentation, D might not have entered into the contract. This is a lower test than for non-fraudulent misrepresentation, which is that but for the misrepresentation, D would not have entered into the contract.

Having proved its case in misrepresentation, D claimed rescission of the new contract (ie return of the purchase price). But if the parties cannot be put back in the position they were in before the contract, rescission is not possible. C pointed out that the goods involved were eggs, which could no longer be returned to C; the deal could not be unscrambled. D argued that it was enough if the value of the eggs could be returned even though the eggs themselves had long since been poached by someone else.

But the judge decided that rescission in this case didn't require the eggs or their value to be returned. Rescinding a contract that amends an earlier contract puts the parties back into the earlier contract, ie the eggs were still validly supplied, but at the lower price payable under the earlier hard-boiled contract. All that D was entitled to was the difference between the price under the earlier contract and the amended contract.

THE SPECIAL ONE

A modern deed is a specialty.

The limitation period for ordinary contract claims is six years. The limitation period for claims on a specialty is twelve years. A specialty is usually treated as synonymous with a deed, but in *Liberty Partnership Ltd v Tancred* [2018] EWHC 2702 (Comm), D argued that a deed was only a specialty if it was executed under seal rather than executed as a deed but without a seal as allowed by Law of Property (Miscellaneous Provisions) Act 1989.

The judge rejected D's argument. As long as a document is executed in a manner allowed by the law for a deed, it is a specialty within section 8 of the Limitation Act 1980, and the longer limitation period applies.

PRIVATE INTERNATIONAL LAW

THE SOUND OF MONEY

The CJEU takes a multi-factorial approach to jurisdiction in tort.

The Court of Justice of the European Union insists that rules on jurisdiction must be predictable and founded on the principle that defendants should be sued at home save in certain well-defined situations. But in *Löber v Barclays Bank plc* (Case C-304/17) the CJEU took a more flexible approach to the difficult question of where financial damage is suffered in tort (echoing *Kolassa v Barclays Bank plc* (Case 375/13) and arising from the same underlying fraud).

The case is difficult to follow because of the lack of explanation by the court of the underlying structure. But it was said that bearer bonds were issued (in Germany?), bought by Austrian banks and, the prospectus being registered in Austria, sold to Austrian consumers on the secondary markets. Return was to be based on a portfolio managed by a third party in Germany, which appears to have run off with the money. An Austrian bought some of the bonds with money from her Austrian bank account which she transferred to another Austrian bank account by way of payment. The Austrian sued the UK issuer in tort in Austria on the basis that the information in the prospectus was misleading. The Austrian courts only had jurisdiction if the harmful event occurred in Austria.

The CJEU said that just because the claimant suffered loss at a bank account at home was not enough to give jurisdiction: there must be circumstances contributing to the attribution of jurisdiction to the claimant's home courts. Those circumstances were present: the money came from a bank account in Austria and was paid to an account in Austria; the claimant only had dealings with Austrian banks; and the prospectus was registered in Austria. It was all pretty Austrian really; if you allow things to be sold in Austria, expect to be sued in Austria, even in tort (and, likely, under Austrian law). But the lack of any serious legal or factual analysis as to what actually happened is not reassuring.

A PHONEY WAR

Whether Ukraine took a loan from Russia as a result of duress will be investigated by the English courts.

The conventional view is that one sovereign cannot sit in judgment over another (hence, eg, state immunity). But it goes further. One sovereign, through its courts, cannot determine the legality or otherwise of acts between sovereigns on the plane of public international law since that conduct is non-justiciable in domestic courts.

But in *The Law Debenture Corporation plc v Ukraine* [2018] EWCA Civ 2026, the Court of Appeal has set itself the awkward task of determining whether Russia exercised improper duress over Ukraine in persuading Ukraine not to sign an association agreement with the EU and to accept a loan from Russia (plus other goodies) instead.

The reasons this scene might be visited upon London date back to November 2013, when Ukraine was scheduled to sign the association agreement with the EU. Russia objected strenuously to Ukraine's plan to move out of Russia's sphere of influence and towards the EU's, and brought economic and other pressure to bear on Ukraine not to sign the agreement. Ukraine's President Yanukovych eventually succumbed to that pressure in return for a promise of cheap loans and gas from Russia. One of these loans was structured as a two year $3bn Eurobond, the documents for which were executed on 24 December 2013. The bond was in the usual form, was subject to English law and jurisdiction, and was listed on the Irish stock exchange. Russia was the only subscriber and remains the sole holder (as was, it seems, always expected to be the case).

Ukraine's withdrawal from the proposed association agreement with the EU led to mass protest in Kyiv. In February 2014, President Yanukovych fled (to Russia), Russia invaded Crimea, and military interventions took place in eastern Ukraine, causing considerable dislocation and destruction.

Ukraine initially paid the interest falling due on the bond but, shortly before its maturity in December 2015, imposed a moratorium on repayment. Russia caused the trustee to bring proceedings in the English courts for the sums due. In *The Law Debenture Trust Corporation plc v Ukraine*, the trustee/Russia applied for summary judgment. While Russia succeeded in defeating most of Ukraine's defences, the Court of Appeal decided that one defence, duress, required a full trial, thereby preventing judgment being entered against Ukraine.

Duress allows a contract to be avoided if illegitimate pressure was applied to bring about a contract.

The pressure does not have to involve illegal acts but must involve acts that are morally and socially unacceptable. There are very few cases in which a commercial contract has been avoided on grounds of duress. The pressure relied on by Ukraine involved Russian threats, eventually brought to fruition in the insurrection in eastern Ukraine and the annexation of Crimea.

The Court of Appeal considered that it could enter upon the events between Russia and Ukraine because there was a sufficient "domestic foothold". The contract was governed by English law, gave jurisdiction to the English courts, and the trustee's/Russia's claim was a simple claim in debt under that contract. Ukraine was entitled to raise all defences available in domestic law even if their determination required the court to look into matters of public international law and the standards expected of a sovereign state. The Court saw no difficulty in its considering these matters, not least because the allegations involved the use of force contrary to jus cogens and article 2(4) of the Charter of the United Nations.

The Court of Appeal considered that Ukraine had raised an arguable defence of duress on the facts sufficient to defeat the summary judgment application. It observed that if Russia did not want an English court to decide the issue, Russia could accept Ukraine's suggestion that the issue be referred to the International Court of Justice, with the English proceedings put on hold until the ICJ reached a conclusion. The chances of Russian agreeing to this are probably somewhere between nought and zero, but the point was, in any event, largely rhetorical rather than real – the issues of public international law are not necessarily the same as would arise in the English law of duress.

The Court of Appeal also said that, if it had decided that the issues raised by Ukraine's defence of duress were not ones that an English court could or should decide, the remedy would not be to strike out the defence and give the trustee/Russia judgment but rather to stay the claim. It would be unfair to allow the trustee/Russia to proceed with its claim while at the same time depriving Ukraine of a defence otherwise available in English law.

More prosaically, the Court of Appeal rejected Ukraine's other defences. In particular, it concluded that, as a matter of English law, a foreign sovereign state has unlimited capacity; the ultra vires rule does not apply to states. Similarly, the Minister of Finance had ostensible authority to sign the loan documents for Ukraine even if the loan resulted in Ukraine's quantitative limits on borrowing being exceeded because the trustee had no reason to suspect that to be the case. And no term should be implied that Russia would not subsequently make it harder for Ukraine to perform its obligations because Russia was not a party to the contracts, and terms could only be implied into a tradeable bond if they arose from the wording of the bonds, not from surrounding circumstances that would be unknown to subsequent purchasers.

Russia now has a choice (though it will presumably appeal): allow an English court to look into Ukraine's allegations; or drop the claim.

CRIME

OUT OF SIGHT BUT NOT OUT OF MIND

The SFO can require documents from overseas companies.

For the Serious Fraud Office to demand the presence of a representative of an overseas company at a meeting in London and then to slap into the hands of said representative a pre-prepared section 2(3) notice might be thought a bit devious. Especially as the SFO does not contend that it can serve section 2(3) notices outside the UK. But in *R (KBR Inc) v The Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin), the Court thought it all fine, and rejected the overseas company's challenge to the notice.

Section 2(3) of the Criminal Justice Act 1987 allows the SFO to give a notice requiring (under threat of imprisonment) the production of documents relating to a matter under investigation. The question in *KBR* was whether notice could be given to an overseas company demanding the delivery of documents held overseas. This is a matter of construction of the statute. The starting point may be that statutes do not have extraterritorial effect, but the court considered it inconceivable that section 2(3) was intended to be entirely domestic. The fact that documents were on a server outside the UK could not, the Court thought, have been intended to forestall an SFO investigation (though the 1987 Parliamentary mind might not even have known what a server was).

The Court considered, however, that the matter had to have "sufficient connection" with the UK (words of its own invention, not appearing in the statute – if there isn't a sufficient connection, why is the SFO investigating?). In *KBR*, this was manifestly met. The (US) company did not itself carry on business in the UK, but its UK subsidiaries did and those subsidiaries were under investigation by the SFO for corruption. The potentially corrupt payments identified by the SFO had, under group procedures, required the approval of the legal and compliance functions at the parent in the US. This was, according to the Court, sufficient connection with the UK to justify the notice.

The Court dismissed the argument that the SFO should instead have used the mutual cooperation procedures available between the US and UK. These offer additional means to obtain information, but do not constrain the SFO's ability to use section 2(3).

The Court also rejected the argument that the notice was not properly served. Service in the court proceedings sense was not required – section 2(3) only requires the notice to be given ("the Director may by notice in writing require…") – and it was manifestly given by being handed to an officer of the US company when on official business in the UK.

Moral: think carefully before attending meetings in person with the SFO.

INDECENT EXPOSURE

Exposure to sanction means doing something prohibited.

Mamancochet Mining Ltd v Aegis Managing Agency Ltd [2018] EWHC 2634 (Comm) is a sorry, not to say strange, saga of shifting sanctions, supplemented by a signal slowness. The events in question occurred in 2012, but the case was heard on an expedited basis almost exactly six years later.

The basic facts were that a cargo shipped from Russia to Iran was insured against theft. The cargo was stolen. At the time of the insurance contract and the theft, the insurance contract infringed neither US nor EU sanctions on Iran. By the time the claim was made, payment by the insurers would have offended both US and EU sanctions. A couple of years later, sanctions on Iran were loosened by the EU and the US such that payment would have been permitted. No payment was made.

Move on three years or so, and President Trump re-imposed sanctions on Iran with effect from 27 June 2018 or, if payment fell within certain "wind-down" activities, from 4 November 2018. Payment would breach US sanctions after whichever of those dates was applicable (the rapid approach of the latter causing the urgency). The EU responded by expanding the application of its Blocking Regulation (2271/1996/EC), making it (in the UK) a crime to comply with the revived US sanctions on Iran.

The core of the dispute related to the terms of the insurance policy. These said that the insurers did not have to pay if doing so "would expose [the insurers] to any sanction, prohibition or restriction" under US or EU sanctions law. Rejecting the insurers' argument, Teare J decided that being exposed to a sanction meant that payment would actually infringe the legislation, not merely that there was a risk that it would do so. If the insurers wanted exemption because they feared being penalised, even if wrongly, they needed to say so more clearly.

Teare J therefore had to decide the US law issue of whether the US sanctions prohibited payment on or after 27 June or only from 4 November. He decided the latter, the clause therefore did not apply, and judgment could therefore be entered against the insurers (UK subsidiaries of US parents).

The insurers argued that a failure by the UK sanctions agency to respond to a request for confirmation that payment would not infringe EU sanctions meant that there was a risk of sanction under EU law. The judge thought this argument hopeless.

Teare J also decided that the clause, when applicable, suspended, rather than extinguished, the insurers' payment obligation. The first imposition of sanctions did not absolve the insurers from payment for all time; liability revived when the sanctions were lifted.

All this meant, unfortunately, that the judge did not have to decide the true meaning of the EU's Blocking Regulation. The Blocking Regulation is an horrendously ambiguous piece of legislation. The UK has complicated matters by making breach a crime, with all the inchoate offences that go with criminal conduct; in most EU member states, non-compliance is a civil matter.

The Regulation makes it an offence "to comply… actively or by deliberate omission, with any requirement or prohibition… based on or resulting, directly or indirectly, from" the US sanctions. The insurers argued that their non-payment would not be complying with US sanctions but with the terms of the insurance contract: there was no liability that the insurers were refusing to discharge in prohibited compliance with US sanctions because the contract did not require payment.

The judge did not decide the point, but said that he could see "considerable force" in the insurers' argument. If that were so, it would be highly convenient. EU-based entities could, for example, include clauses in their agreements allowing them, in effect, to comply with US sanctions, and doing so would not expose them to penalties under the Blocking Regulation.

But it is not entirely obvious that this is the right interpretation. The obligation imposed by the Blocking Regulation is not not to comply with US sanctions but not to comply with any requirement or prohibition based on or resulting from US sanctions. Does a contract clause that excuses an insurer from liability if payment would infringe US sanctions impose a requirement or prohibition that is based on or results from US sanctions? Does the Blocking Regulation allow parties in effect to contract out of the Blocking Regulation? And, of course, a mildly purposive interpretation might be expected of an EU regulation. This may not be the end of the courts' engagement with the Blocking Regulation.

COURTS

SUNNY INTERVALS

Litigation can be in reasonable contemplation on receiving a whistle-blower's disclosure.

The Court of Appeal gave Andrews J a bit of a pasting in *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006. Not only did she get the law on privilege wrong, but she got the facts wrong too – and the Court of Appeal doesn't usually like overturning first instance judges on the facts. So gone is the idea that documents aimed at avoiding litigation or which are to be shown to the other side can't be subject to litigation privilege. Likewise, gone is the idea that criminal litigation can only be in contemplation once facts are known that would lead a prosecutor to prosecute; the need to investigate doesn't mean that litigation can't be reasonably in contemplation.

But it's not all clarity and light. In *ENRC*, the risk of investigation and prosecution by the SFO was pretty obvious following (and even apart from) a whistle-blower's disclosure of corruption and despite it taking a couple of years and 184 witness interviews to investigate the facts. If litigation privilege hadn't applied in *ENRC*, it wouldn't apply until a very late stage in any corporate criminal matter.

But the Court of Appeal didn't lay down any firm guidelines, still less bright lines, as to when litigation will be reasonably in contemplation and therefore when litigation privilege can kick in ("This aspect of the appeal is, in our judgment, primarily factual"). The Court nodded in the right direction in deciding that activity against the background of a threat of prosecution if the SFO couldn't be persuaded to take lesser action was covered by litigation privilege. Nevertheless, "we are not sure that every SFO manifestation of concern would properly be regarded as adversarial litigation", nor is it the case that "once an SFO criminal investigation is reasonably in contemplation, so too is a criminal prosecution". It all depends on the facts. But if the allegations are obviously serious, and the entity responds to them as such, then it may well be that litigation is reasonably in contemplation.

Likewise, the corporate client problem in legal advice privilege has not been resolved, ie is the client with whom a lawyer's communications are privileged only those tasked with obtaining legal advice or does the client include anyone within the organisation with relevant information. The Court of Appeal could have distinguished *Three Rivers (No 5)* [2003] QB 1556, from which this issue arises, but it didn't. It rightly accepted that *Three Rivers (No 5)* is wrong but decided that this aspect of the decision was part of the ratio and thus binding. Only the Supreme Court can sort it out.

This potentially shuffles the client point into a twilight zone. In the shadow of *ENRC*, all courts below the Supreme Court are bound to hold that a lawyer's client only encompasses those within a corporation charged with obtaining legal advice. Discussions with employees outside this charmed circle are not privileged (unless litigation is reasonably in contemplation). But a strong Court of Appeal has told us that this is wrong, in the light of which it is to be expected – at least, hoped - that the Supreme Court will correct the law if given the chance. But when will the Supreme Court get a chance? It will require two parties to fight the point all the way to the Supreme Court (with the possibility of leapfrogging the Court of Appeal). Who will think it worthwhile to incur the costs? A party with seriously adverse interview notes might want to do so, but will its opponent feel that the chances of success in the Supreme Court make it worth the fight? We wait and see, but in the meantime we still have the problem of whether, and if so how, to define the client.

Despite the above carping, *ENRC* is undoubtedly a good decision: the Court of Appeal accepted the importance of privilege and the need to place it in a modern corporate context. This is a huge improvement on the restrictive attitude to privilege displayed in *ENRC* at first instance and in *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch). But the issues haven't gone away - yet.

REGULATORS' PRIVILEGE

Privilege cannot be claimed against a regulator.

Less high profile, but of equal (if not greater) concern, regarding privilege is *The Financial Reporting Council Ltd v Sports Direct International plc* [2018] EWHC 2284 (Ch), in which SDI's claim to privilege against its auditor's regulator was refused.

The FRC is investigating Grant Thornton's audit of SDI and, in particular, SDI's use in its VAT structure of a company owned by a relative of the principal shareholder of SDI. SDI is in dispute over VAT with the French and Irish authorities. The FRC served a statutory notice on SDI demanding documents held by SDI showing what GT knew about the establishment of this VAT structure and the advice about it given to SDI by Deloittes. SDI resisted disclosure of certain documents on the basis of legal advice privilege. The FRC's rules say that a notice does not require a person to provide documents if they would be entitled to resist disclosure in High Court proceedings on grounds of legal professional privilege.

But, said the FRC, disclosure by SDI to the FRC in an investigation of GT would not infringe SDI's privilege because the documents in question would remain confidential in the FRC's hands and could only be used for the purposes of the investigation of GT (and not against SDI).

This argument was based on some unsatisfactory, and much criticised (on this point), cases, starting with *Parry-Jones v The Law Society* [1969] 1 Ch 1 and continuing through, eg, *R (Morgan Grenfell) v Special Commissioners* [2003] 1 AC 563 and *Simms v The Law Society* [2005] EWHC 408 (Admin). *Parry-Jones* stems from a time before the current proliferation of regulators and before the current appreciation of the status and importance of privilege. It also involves the regulation of solicitors, which raises special problems because most documents held by solicitors will be privileged; if the regulator can't get at them, its task is that much harder.

The bottom line was that Arnold J felt obliged by these cases to hold that SDI's privilege would not be infringed by the disclosure of privileged documents to the FRC. The regulated, ie GT, can assert privilege over legal advice it has received, but third parties cannot assert their privilege against the regulator, at least as long as the regulator holds the privileged material in confidence and will not use the documents against the third party. But the courts have said privilege is based on the right to bare all to a lawyer in complete confidence; this surely shatters that confidence. Cats cannot be put back into bags. Another one for the Supreme Court to sort out.

More conventionally, Arnold J also decided that the fact that pre-existing unprivileged documents were sent to a lawyer did not bestow privilege on those documents. He also decided that SDI's disclosure to GT, under limited waiver, of its legal advice did not constitute a waiver against the FRC of privilege in the advice. The audit of SDI and the regulatory process regarding GT were not part of a single process (eg *Belhaj v Director of Public Prosecutions* [2018] EWHC 513 (Admin)).

RECORDS REJECTED

The court has limited powers to allow access to documents used in court.

Cape Intermediate Holdings Ltd v Dring [2018] EWCA Civ 1795 concerned attempts by a lobby group to obtain the papers used at a trial about asbestosis but which settled before judgment. The attempt was made under CPR 5.4C, which governs non-party access to court records, and the court's inherent jurisdiction.

CPR 5.4C allows a non-party to see "court records" in certain circumstances, but the Court of Appeal took a limited view as to what constitute "court records". Basically, court records are confined to documents that must be filed under the rules and which are kept by the court office as a record of the proceedings. More particularly, very few trial documents are court records for these purposes: none of trial bundles, witness statements, experts' reports, skeletons, closings, or transcripts is a court record for these purposes. The court was particularly mindful of the risk that the trial judge might have scribbled on his or her version of the court bundle, and the Court did not want those scribblings to enter the public domain.

But the Court of Appeal took a more expansive view of the ever-vexed subject of the court's inherent jurisdiction (which, unlike powers given to other administrative bodies, seldom seems to diminish in the face of express rules). The driving principle, it thought, was open justice. Things are now read by the judge that would once have been read to him (as he would invariably have been), and third parties should be put in the position as if the hearing had been entirely oral. As a result, the Court of Appeal considered that there was no inherent jurisdiction to allow non-parties to inspect trial bundles or documents referred to in skeletons, witness statements etc simply on the basis that they were so referred to. The judge must have actually have read them.

The result is that there is inherent jurisdiction to allow non-parties to inspect: witness statements (including experts' reports) which stand as evidence in chief and which would be available for inspection during the trial under CPR 32.12 (CPR 32.12 does not act to limit or exclude the court's inherent jurisdiction); documents read in open court and those which the judge is invited to read, whether in open court or outside court, and which it is clear that the judge has read; skeletons, provided that there has been a public hearing in which the skeleton was deployed; and, as a catch-all, any specific documents which it is necessary for a non-party to inspect in order to meet the principle of open justice. If there is a right to inspect, the court may require a party to provide copies on payment of an appropriate fee.

But the court still has a discretion to allow, or not, inspection of documents. This involved considering the extent to which principles of open justice are engaged, the legitimate interests of the person seeking the documents, the reasons for preserving confidentiality etc. But it is clear that the Court of Appeal considered that open justice trumps most, if not all, other considerations. The fact of the case settling before judgment counted for nothing. The applicant in *Cape Intermediate Holdings* was a lobby group with no direct interest of its own; it wanted to make the documents publicly available for others. This, the Court thought, was a sufficiently legitimate public interest for it to access the documents. On this basis, the requirement for a legitimate interest adds little.

NEW DISCLOSURE RULES

The disclosure rules applicable in business cases will change on 1 January 2019.

With effect from 1 January 2019, new disclosure rules will apply in the Business and Property Courts of England and Wales. The rules aim to make disclosure less costly and complex.

The new rules (like the current ones) place an obligation on parties to preserve potentially relevant documents when litigation is in sight (though with rather more formality around the process), but make considerable changes thereafter.

First, the parties must attach to their pleadings the "key" documents upon which they rely or which are necessary to enable the other parties to understand the claim or defence. This is called Initial Disclosure. There is no obligation to search for documents, and the obligation evaporates if, for example, it would require a party to disclose more than 1000 pages or 200 documents (counting only documents in "page form" and documents which the recipient does not already have).

Secondly, if a party wants disclosure beyond Initial Disclosure, it is first necessary for the parties to agree a list of issues for disclosure, ie those issues that require reference to contemporaneous documents to resolve fairly. The court will then apply one of five disclosure models to those issues. This is called Extended Disclosure.

The five disclosure models are:

- Model A: no further documents;
- Model B: documents required for Initial Disclosure;
- Model C: documents or narrow classes of documents by reference to specific requests from the other party;
- Model D: documents likely to support or adversely affect a claim or defence following a reasonable and proportionate search;
- Model E: documents likely to support or adversely affect a claim or which may lead to a train of enquiry that may result in the identification of further documents.

Extended Disclosure will only be ordered if it is "appropriate" to do so in order fairly to resolve one or more of the issues, and the order itself must be reasonable and proportionate.

Thirdly, whether or not the court orders Extended Disclosure, there is a continuing obligation on the parties to disclose "known adverse documents", namely adverse documents of which a party is "actually aware" without undertaking any search. A document is adverse if "it or any information it contains contradicts or materially damages the disclosing party's" case.

For these purposes, a corporate party is aware of documents "if any person with accountability or responsibility within the company… for the events or circumstances which are the subject of the case, or for the conduct of the proceedings, is aware." As a result, although there is no obligation to search for known adverse documents, it is necessary to ask those involved in the underlying matters whether they recall any adverse documents.

The new rules are formally a pilot that is scheduled to last two years, but pilots of this sort have a history of rolling into permanence.

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