CLIFFORD

CHANCE

CONTENTIOUS COMMENTARY

A REVIEW FOR LITIGATORS

APRIL 2019

CLIFFORD
CHANCE

CONTENTIOUS COMMENTARY – APRIL 2019

CONTENTS

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

CONTRACT

RELATIONSHIP COUNSELLING

Relational contracts have an implied duty of good faith.

"I find that these were relational contracts. I find that this means that the contracts included an implied duty of good faith." So said Fraser J in his monumental judgment in *Bates v Post Office Ltd* [2019] EWHC 606 (QB). But perhaps Fraser J has got it the wrong way round: a contract may be called relational because there is an implied (even express) duty of good faith according to normal principles; but categorising it as relational surely cannot determine what duties are to be implied.

Bates concerned the accounting system that the Post Office required its sub-postmasters to use. When this showed a shortfall, the Post Office failed to provide information that explained the shortfall, required sub-postmasters to pay the shortfall, sometimes terminated the sub-postmastership, and even prosecuted some for fraud (the Criminal Cases Review Commission is looking into convictions). The sub-postmasters contend that the system was flawed, and generated incorrect shortfalls for no reason. Whether the system in fact did so will be determined at a later trial, but Fraser J, while not overjoyed with the conduct of the litigation by either side, reserved his most excoriating criticism for the Post Office and its witnesses. He regarded the Post Office as fighting the case tooth and nail in an inappropriate way - even threatening the court - for fear of damage to its reputation if it were to be concluded that the system was not flawless.

A core issue at this stage was whether the contracts between the Post Office and its sub-postmasters were relational contracts and, as such, were subject to an obligation of good faith. Fraser J accepted that there is no general duty of good faith in commercial contracts, but that the contracts in question were relational and, as such, had an implied duty of good faith (or vice versa). This meant that both parties were obliged to refrain from acting in a manner that would be regarded as commercially unreasonable by reasonable and honest people. Good faith also, he thought, brings with it requirements of transparency, co-operation, and trust and confidence.

So what is a relational contract? Fraser J considered that the starting point is that there is no term that prevents the implication of a duty of good faith. Assuming no contrary indications: the contract would be long-term; the parties must intend their roles to be performed with integrity and fidelity to the bargain; collaboration is required; the spirit and objective of the venture may not be capable of being expressed exhaustively in a written contract; each must repose trust and confidence in the other (but of a different kind to that involved in fiduciary relationships); the contract requires a high degree of a communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty; there may be significant investment by one party; and it may be an exclusive relationship.

Some of these elements assume the answer (eg integrity, fidelity, trust etc) and some are a bit weak (eg objectives not capable of being written down) but Fraser J said, inevitably, said that the list was not exhaustive and that no single point was determinative.

What *Bates* reflects is a desire by some members of the judiciary (notably Leggatt LJ and, now, Fraser J) to develop a new category of contracts that don't involve fiduciary relationships in the usual way but on to which similar, but lesser, obligations should be imposed. Whether the higher courts will be convinced by the need for this or by the analysis is a different matter.

One result of the implied term (and Fraser J thought the same would be implied even if the contracts were not relational) was the termination provision. This allowed termination on not less than three months' notice. Fraser J considered that this required the Post Office to give proper consideration to the appropriate notice period, and that the decision to terminate had to be taken in good faith, not perversely, taking into account relevant factors and ignoring irrelevant ones. As a general rule, exercising a right to terminate is not constrained in this way, but the strange circumstances of being a sub-postmaster (which usually involves buying an existing sub-postmastership) might justify it on the facts.

IMPLICATIONS TRASHED

Whether a representation is to be implied is a matter of fact in each case.

In *PAG v RBS* [2018] EWCA Civ 355, the Court of Appeal concluded that "we are satisfied that RBS did make some representations to the effect that RBS itself was not manipulating and did not intend to manipulate LIBOR. Such a comparatively elementary representation would probably be inferred from a mere

proposal of the swap transaction" based on LIBOR, ie any IBOR rate-setter proposing a contract based on the IBOR may make that implied representation. Potentially that makes any IBOR-based contract with a rate-setter vulnerable to rescission if the IBOR rate-setter has been found to have manipulated the IBOR.

In *Marme Inversiones 2007 SL v Natwest Markets plc* [2019] EWHC 366 (Comm), Picken J was quietly sceptical about the Court of Appeal's approach. He was bound by the decision but, since the implied representations claimed in *Marme* were not exactly in the *PAG* form, he was able to emphasise that every case depended on its own facts and to conclude that the representations alleged before him were not made. He focused far more than the Court of Appeal on the principle that a representation cannot be implied from silence and on caveat emptor. Indeed, the Court of Appeal's approach to the implication of a representation (based on what a reasonable person would assume to be the case) perhaps confuses the question of the proper interpretation of a representation that has been made with that of whether a representation has been made at all – the rejected conflation of the tests for the interpretation of contractual terms and the implication of terms.

Picken J also reached conclusions that will make it hard for others to succeed on IBOR-based implied representations. He held that for a representation, actual or implied, to induce entry into a contract, the representation must act on the mind of the representee. Since the representee gave no thought to the manner in which EURIBOR (in that case) was set – few did until the scandals emerged – it cannot have relied on the supposed representations. An unconscious assumption is not enough.

Picken J went on to conclude that even if he was wrong about everything else, rescission of the swap was not possible. Partial rescission of a transaction is not allowed because it would create a different bargain for the parties. Although the swaps were standalone transactions, they were entered into as a result of a requirement in a loan agreement to hedge the interest rate risk. The swap and the loan were all part of the same overall transaction. Rescinding the swap therefore required rescission of the loan. Paying off the loan in accordance with its terms was not enough since that was not the same as rescission.

And just to rub it in, the judge decided that the borrower had affirmed the swaps after having knowledge of its supposed right to rescind.

PAG may therefore have offered succour to those pursuing IBOR-based claims (even though the bank in fact won that case), but *Marme* has snatched it away.

FUTILE SUBMISSIONS

There is no principle of futility in contractual interpretation.

In *Astor Management AG v Atalaya Management plc* [2018] EWCA Civ 2407, C became entitled to increased consideration under a sale and purchase agreement if two conditions were met: first, a local authority gave permission for mining to restart at a copper mine in Spain; and, secondly, the mining company (D) obtained a "Senior Debt Facility" sufficient to enable it to restart mining. The first condition was unquestionably met, but D obtained funds by means of loans from group companies, not from external lenders. So, said D, it didn't have to pay the increased consideration because the two conditions were not met. Up to a point, said the Court of Appeal.

C argued that there was a "principle of futility", namely that if a pre-condition to accrual of a contractual right became futile or unnecessary, it did not have to be performed. D did not need a senior debt facility to start mining, so that condition to payment no longer had to be met.

The Court of Appeal did not agree that there is such a principle. There is a principle of construction that recognises that a pre-condition may, in the light of subsequent events, cease to apply. So, for example, if Spanish law no longer required a permit from the local authority to mine the copper, that condition would no longer be relevant. But there is no general principle that allows the court to disregard a contractual pre-condition because the court considers that the condition no longer serves a useful purpose.

In order to disregard a condition as a matter of interpretation, the court must be satisfied that an event that the parties had not contemplated has occurred and also as to what the parties would have intended; if so, the court could, as a matter of interpretation, give effect to that intention. But here neither requirement was met. There were sufficient indications in the SPA that the parties knew that other forms of financing might be used, and the court was not clear what the parties would have intended.

Having failed on that aspect of interpretation, C argued that the inter-group loans were Senior Debt Facilities. The Court of Appeal did not agree. A Senior Debt Facility referred to external lenders – not the case here – and had to rank ahead of other obligations in the event of insolvency – not the case here either.

At this point, it didn't look good for C. But the SPA also said that until the increased consideration was paid in full, D could not pay anything to other group companies and, further, that if D had surplus cash available, it was obliged to pay the additional consideration early. D argued that the increased consideration only became due and payable to C if the two conditions were met. Since they were not met, there was nothing to be paid to C at all, whether early or not, and the cash sweep provision did not apply.

The Court of Appeal rejected D's arguments. It decided that the increased consideration became due and owing when the SPA was entered into, but was only payable when the two conditions were met. Since the cash sweep provision referred to the consideration being paid early if funds were available, that contemplated payment even if the two conditions were not met. The effect of the pre-conditions to payment was therefore circumvented by the cash sweep.

FOREIGN LEGIONS

A foreign scheme of arrangement does not affect English law rights.

English law determines what discharges or varies obligations under an English law contract. A foreign insolvency, foreign legislation or a foreign restructuring will not be effective to vary rights and obligations under an English law contract (at least as long as the creditor does not submit to the foreign process and there is no legislation to the contrary).

In *Bakhshiyeva v Sberbank* [2018] EWCA Civ 2802, a company with English law indebtedness was subject to an Azeri restructuring process (looking something like an administration and a scheme of arrangement), which successfully restructured the company's debts allowing it to come out the other end and continue in business. The company tried to get round the basic principles of English law (ie that Azeri law has no effect on English law debt) by seeking a permanent stay under the Cross-Border Insolvency Regulations 2006 of English proceedings against it. The CBIR allow (and sometimes require) English courts to confer the benefits of UK insolvency law on foreign insolvencies.

The Court of Appeal was satisfied that, for all the virtues of "modified universalism" in insolvency law, this was a step too far. The CBIR, which gives effect to the UNCITRAL model law, was procedural only. It did not purport to change substantive rights, and a procedural device should not be allowed to have that effect.

As a result, despite the restructuring having been approved by almost all the company's creditors, those creditors whose rights were governed by English law and who had not participated in the restructuring process (a Russian bank and some funds) were able to obtain judgment and enforce their rights against any assets they could find in England despite the restructuring process being complete in Azerbaijan.

FRUSTRATED BY BREXIT?

Brexit will not frustrate the lease of an EU body.

The European Medicines Agency took a 25 year lease of its London HQ in 2014, but in 2018 an EU regulation required the EMA to move to Amsterdam in the light of Brexit. So what about the lease? The obvious step would be to sell it, but as an alternative the EMA has been trying to escape its long-term obligations by contending that when the UK leaves the EU, the lease will be frustrated.

In *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch), Marcus Smith J had minimal difficulty in dismissing all the EMA's arguments as to why the lease would be frustrated by Brexit. The case was largely specific to the position of the EMA, but it is interesting not least as an illustration of how hard it is to invoke frustration in English law.

The EMA's principal argument was based on supervening illegality. It argued that Brexit would render performance of its obligations under the lease ultra vires because the EMA's HQ must be in an EU member state and, on Brexit, the UK will cease to be a member state. Paying rent for an HQ outside the EU would be beyond its powers.

The judge rejected the EMA's argument. It was politically and legally expedient for the EMA to be headquartered in an EU member state, but there was no legal requirement for this. But even if that had been the case, he decided that it would not frustrate the lease as a matter of English law. The capacity of an entity incorporated under a foreign law is relevant when entering into a contract but not when its capacity is reduced by a later change of that foreign law. But even if that was wrong, any frustration argument failed because it was self-induced – the EU could have avoided the consequences it relied on rather than simply passing a regulation in 2018 that required the EMA to move.

The EMA's back-up argument relied on frustration of the parties' supposed common purpose. The judge accepted that Brexit was not relevantly foreseeable when the agreement for lease was signed in 2011, but rejected the argument that the EMA's obligations under the lease were rendered radically different by Brexit. Further, the provisions regarding assignment in

the lease meant that the underlying problem – the EMA no longer wanting headquarters in London – was specifically addressed by the lease. If a contract covers a point, there can be no frustration.

The EMA lost hands down. Perhaps its hope may have been for a reference to the CJEU regarding its power to have headquarters outside the EU, but Marcus Smith J did not consider that to be necessary for his decision.

Clifford Chance acted for Canary Wharf.

PAYMENT ABUSE

Exclusion of a bank's duty of care requires express words.

Barclays Bank plc v Quincecare Ltd [1994] 4 All ER 363 established that banks owe their customers, whether as an implied contractual term or in tort, a duty not to pay sums from a bank account if the bank has information that puts it on enquiry, in the sense of having reasonable grounds for believing, that the payment is an attempt to misappropriate funds from the customer.

The Federal Republic of Nigeria v JP Morgan Chase NA [2019] EWHC 347 (Comm) concerned not a general bank account but something akin to an escrow account, the terms of which stated expressly that the bank was under no duty to investigate the validity of its instructions. This, argued the bank, excluded the *Quincecare* duty.

The judge (Andrew Burrows QC, Professor of the Law of England at Oxford University) rejected the bank's claim. He considered that the modern approach to interpretation, effectively replacing the contra proferentem rule, is that if the general law conferred a right, the more valuable that right is, the clearer any words excluding it need to be. He thought the *Quincecare* duty was of great value to C and, therefore, that very clear words were needed to exclude it. The words in question were, he thought, not sufficiently clear because he characterised the *Quincecare* duty as primarily a negative duty not to pay rather than a positive duty to investigate (even though he recognised that if a bank was on notice such that it did not pay, it couldn't just sit on its hands (and the money) but would then have to investigate). Perhaps a rather formalistically academic approach.

The judge also decided, on similar grounds, that a term that said that the bank's obligations would be "determined solely by the express terms of this Agreement" was not enough, in the round, to exclude the implied term.

This was only an application for reverse summary judgment, so the bank will continue to a substantial claim arising from allegedly fraudulent payments from the account involving members of the Nigerian Government, right up to its then President. The judge also decided that he could not give summary judgment to the bank on the basis that, whatever enquiries the bank had made, the outcome would have been the same - the bank had obtained a certificate from the Nigerian Attorney General, and even if it had asked the President, what would he have said? But, the judge concluded, this was too factual for summary judgment.

TORT

VICARIOUS FRAUDS

Vicarious liability for reliance-based torts depends upon authority.

Vicarious liability has been in the courts a lot recently. *Winter v Hockley Mint Ltd* [2018] EWCA Civ 2480 didn't involve Morrisons for a change, and, indeed, raised a new point on vicarious liability for reliance-based torts – deceit in *Winter* – even if only to conclude that such liability didn't really exist.

The Court of Appeal decided that the test for vicarious liability in deceit is not the rather woolly test applied to other torts (consider the nature of the tortfeasor's job and whether there is sufficient connection between that job and his wrongful conduct to make it right for the employer to be liable: *Mohamud v WM Morrison Supermarkets plc* [2016] AC 667). Instead, it depends upon the authority, actual or apparent, of the tortfeasor (*Armagas Ltd v Mundogas SA* [1986] 1 AC 717). Indeed, it's probably fair to say that there is no vicarious liability for this kind of tort; the issue is whether the principal is liable for the wrongs of its agent, which depends on the authority of the agent.

The reason for this difference in approach is that where liability depends upon reliance, if the wronged party has relied solely on the agent, there is no basis for making the principal liable. It is only if the wronged party has relied on the principal that the principal can be liable, and that depends upon the agent having authority to make the representation on behalf of the principal. Vicarious liability and agency principles merge into one.

INFORMED ADVICE

Cases are either information cases or advice cases.

Building society enters into long-term swaps following negligent advice from its auditors that it need not include the mark to market value in its accounts. On finding this to be wrong, restating its accounts, and closing out the swaps, it sues its auditors for the close-out costs. In *Manchester Building Society v Grant Thornton LLP* [2019] EWCA Civ 40, it lost. Negligent misrepresentation claims are either advice cases, where someone is responsible for the decision, or information cases, where someone is responsible for one piece of information relevant to the decision. This was an information case, with the result that D was only responsible for the consequences of the information being wrong, not all the consequences of entering into the swaps.

CHANCEY LITIGATION

Loss of chance analysis only applies to third party conduct.

In *Perry v Raleys Solicitors* [2019] UKSC 5, the Supreme Court looked at when damages will be assessed on a loss of chance basis in counter-factual situations. The Court's clear conclusion was if the question is what the party to the litigation (invariably the claimant) would have done, it depends upon the party proving this on a balance of probabilities; but if the question is what a third party would have done, it depends upon a loss of chance evaluation.

Perry itself concerned an ex-miner who put in a claim under the Government's compensation scheme for white finger vibration. He recovered general damages but did not claim for special damages arising from an inability to carry out certain domestic tasks for which he had to employ others. He later claimed from his solicitors for their failure to advise him to make a claim for special damages. The solicitors admitted negligence but denied that this had caused the ex-miner any loss. Loss depended upon his showing that, if properly advised, he would have made a claim for special damages and that he would then have recovered something.

The Supreme Court decided that the question of whether the miner would have claimed special damages had to be proved on a balance of probabilities, not as a loss of chance. Further, it was not merely whether he would have claimed but whether he could honestly have claimed. The trial judge decided that he could not honestly have done so because the evidence showed that he was not suffering from any real loss of relevant amenity. Even if he might have claimed in the hope of slipping through unnoticed or for nuisance value, the courts would not help such improper conduct.

The Supreme Court concluded that it was proper to hold a full trial on the question of whether the miner would have claimed and, if so, honestly, but if the issue is third party conduct and loss of chance, a full trial is not appropriate.

PRIVATE INTERNATIONAL LAW

TRUMP-BASHING

The PTIA prevents enforcement of a judgment.

The Protection of Trading Interests Act 1980 is an interesting, if little used, piece of legislation. One aspect of it, sections 5 and 6, was passed to protect UK entities from multiple damages awarded in, then, largely anti-trust actions in the US. In *SAS Institute Inc v World Programming Ltd* [2018] EWHC 3452 (Comm), the Act caused serious injury to a US party, C, which was seeking to enforce the non-multiple part of a US judgment.

C obtained a judgment for breach of contract and fraud from a US District Court in North Carolina. Under the North Carolina Unfair and Deceptive Trade Practices Act, C was entitled to triple damages, though (at its request) judgment was entered for two sums – the compensatory amount ($26m) and the multiple ($52m). C managed to recover only $4.3m in the US, so came to D's home, England, to enforce the balance of the compensatory judgment.

C failed. Section 5 says that a judgment for multiple damages is not enforceable in the UK. Cockerill J decided that splitting the US judgment made no difference. The the whole judgment, including the compensatory element, is unenforceable.

And it got worse. Section 6 allows someone who has paid multiple damages to recover the amount that exceeds compensation. D had not paid the compensatory judgment in full, but Cockerill J decided that the sum recovered by C should be pro-rated between the compensation and the multiple. Accordingly, she entered judgment for D for ⅔ of the sum recovered, ie for $2.88m. C's attempt to enforce its North Carolina judgment therefore resulted only in an English judgment being entered against it.

(C's claim failed for a number of other reasons too, including public policy in that the US judgment enforced parts of the contract between C and D that were void under the EU's Software Directive (given effect in the Copyright, Designs and Patents Act 1988), as well as issue estoppel and abuse of process.)

RELATIVITY

Deciding whether the courts have jurisdiction depends upon weighing the arguments.

The courts have not shown a sure hand in deciding on the correct approach to an application challenging the jurisdiction of the court - in particular, the threshold for showing that one of the "gateways", giving the court jurisdiction, is passed (eg that a contract governed by English law has been entered into). The problem is that jurisdiction is decided at an interim stage on witness statements alone, but it might involve significant questions of fact (eg is there a contract between C and D?) and, what is more, facts that could affect the outcome of the case at trial. The courts can't reach a final decision on these points - they will seldom have the material to do so and, in any event, they shouldn't prejudice the trial - but they can't avoid making a decision on the jurisdiction issue at an early stage given the English courts' justified refusal to follow the approach of some other courts by deciding jurisdiction at the same time as the substantive dispute.

The test used to be that the claimant had to show a good arguable case on the facts that one of the gateways for jurisdiction was met (a threshold higher than that required to resist summary judgment but lower than a balance of probabilities). Waller LJ then set the hares running in *Canada Trust v Stolzenberg* [1998] 1 WLR 547 with the throw-away remark that this involved deciding which of the parties had "much the better of the argument" (referred to as the *Canada Trust* gloss). This moved from a relatively absolute test (has the claimant passed the threshold) to an absolutely relative test (whose argument is better). It certainly raised the bar.

In *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, Lord Sumption re-wrote the test as being

> "(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory state may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."

The question in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10 was whether the Sumptionised test removed the relativism introduced by *Canada Trust*, reverting to absolutism, or whether it had cemented relativity in place.

The Court of Appeal decided that relativity continues to hold sway. If the Supreme Court had intended to abolish the *Canada Trust* gloss, the Court of Appeal thought that it should have said so more clearly (it did say that "much" should be removed from the gloss). The court rejected the argument that Lord Sumption was merely being polite in his rejection of Waller LJ's approach. So the court must weigh the evidence and the argument, applying common sense, and decide who has the better of the argument.

This will not achieve the courts' oft-stated aim that jurisdictional challenges should be short and sweet. If the claimant has only to clear an absolute hurdle, then evidence might be more limited. But if the issue is who has the better of the argument and evidence, both parties are bound to throw everything at the interim hearing in order to persuade the court that they are on the right side of the relative boundary. Courts won't like that. Is that really what Lord Sumption meant?

SOVEREIGN GAMES

A claim form must be served on a sovereign.

General Dynamics United Kingdom Ltd v State of Libya [2019] EWHC 64 (Comm) explored two issues on the requirements for service of a claim form (or equivalent) on a state and, in particular, the effect of section 12(1) of the State Immunity Act 1978. Section 12 provides that, absent an agreement as to service,

> "Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign & Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or other document is received by the Ministry."

The first point taken in *General Dynamics* was the ambitious one that no document instituting proceedings is required to be served on the state when the proceedings are for the enforcement of an arbitral award under the New York Convention. An application to enforce an arbitral award is started by the issue of an arbitration claim form, but the claim form is, oddly, not required to be served on the defendant (absent contrary order); it is the order permitting enforcement that must be served, but that is not the document instituting proceedings.

Males LJ was not impressed by this subtlety. He considered that section 12 requires there always to be a document initiating proceedings that is served on the State – the convoluted timescale in the Act for acknowledging service etc doesn't work otherwise. Whatever the first document that the claimant must serve on the State is the document initiating proceedings for the purposes of section 12.

The second question was whether the court could dispense with service on a state. Despite recent cases holding that service on a state could be dispensed with - if this is done, there was nothing to which section 12 applies (*Havlish v Islamic Republic of Iran* [2018] 1478 (Comm)) - Males LJ considered that section 12 prohibited the court from dispensing with service. Section 12 provides that the document initiating proceedings "shall be served" in the manner set out. Neither court nor CPR can circumvent this legislative requirement.

What this means for service on states that decline to accept service of proceedings they dislike (eg, Iran) will doubtless be litigated later. In *Havlish*, evidence from the Foreign & Commonwealth Office said:

> "several previous attempts at service of legal claims on the Government of Iran under the State Immunity Act, via the Ministry of Foreign Affairs (MFA) in Iran have been unsuccessful, despite the best efforts of the British Embassy in Tehran… repeated attempts to effect service caused the Iranian Ministry of Foreign Affairs to inform the British Embassy that further attempts, or attempts by other means, to serve the documents would not only be refused, but would also be detrimental to bilateral relations. That position has not changed, and senior colleagues at the British Embassy continue to hold the view that any further attempts at Service on the Government of Iran under the State Immunity Act would be unsuccessful and counterproductive."

It may be questionable whether the FCO is in a position to judge whether or not service has been successful but if, as in that case, the FCO won't even try to serve the papers, there is not much that can be done – if Males LJ is right. This emphasises the need for contracts with states to include a means of serving process on them to avoid a state being able to frustrate the legal process.

REGULATION

PROTECTED SPECIES

Regulators should rarely be liable in costs when they lose.

In *British Telecommunications Ltd v The Office of Communications* [2018] EWCA Civ 2542, BT succeeded in overturning before the Competition Appeal Tribunal a regulatory decision by Ofcom because Ofcom got the law and the facts wrong. The CAT duly awarded BT its costs (though only 50%), having started from the proposition that, in the CAT, costs should follow the event. The Court of Appeal considered this to be the wrong starting point. Even though the rules give the CAT a wide discretion on costs, the Court of Appeal concluded, after leafing through a series of inconsistent authorities, that where a public body has taken a decision honestly, reasonably and properly, the key driver is the need not to discourage the public body from standing by its decision for fear of the financial consequences (the "chilling effect" of a potential costs order). Essentially, something bordering on the improper is required before costs should be ordered against a public authority such as Ofcom.

COURTS

FREEZING OVER

The scope of a freezing injunction is ambiguous.

The standard form of freezing injunction states that it applies to "any asset which [the defendant] has power, directly or indirectly, to dispose of, or deal with as if it were his own". It goes on that the defendant is to be regarded as having such power "if a third party (which shall include a body corporate) holds or controls the asset in accordance with his direct or indirect instructions." That's pretty wide.

The Court of Appeal's decision in *Lakatamia Shipping Co Ltd v Su* [2014] EWCA Civ 636 established that this standard wording does not extend to assets of a company wholly-owned by the frozen person but only to assets legally or beneficially owned by the frozen one. That is orthodox company law. The company's assets are the company's assets, not those of its shareholders. But if the frozen one exercises his power as a director etc of the company to reduce the value of his shareholding in the company (his shareholding is caught by the freezing injunction), then that could offend the freezing injunction.

In *JSC BTA Bank v Ablyazov* [2015] UKSC 64, the Supreme Court decided that the standard form of freezing injunction does, as a matter of interpretation, apply to assets over which the frozen party has control, even if not legally or beneficially owned by him and even though no enforcement measures could be taken against those assets (the right to draw down a corporate loan in that case).

In *FM Capital Partners Ltd v Marino* [2018] EWHC 2889 (Comm), the judge decided that *Ablyazov* had impliedly overruled *Lakatamia Shipping* on the proper interpretation of the standard freezing injunction but not on the underlying law that the assets of a wholly-owned company are not within the control of the frozen one because, in exercising power over the company's assets, the frozen party is acting as a director of the company or organ, not in his own right.

What this really means is that the wording of the standard form injunction is confusing. It applies to assets controlled by the frozen party even if he has no sufficient interest in those assets such that enforcement measures could be taken against them; it shouldn't do. But not if those assets are held by a wholly-owned company, at least unless the object is to reduce the value of his shares in the company.

WITNESSING THE DECLINE

More judicial complaints about witnesses.

It's almost a truism, trotted out time after time, that "the best approach for a judge in the trial of a commercial case is… to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts" (eg *Gestmin SGPS S.A. v Credit Suisse (UK) Limited, Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (Comm), Leggatt J).

In *Recovery Partners GP Ltd v Rukhadze* [2018] EWHC 2918 (Comm), Cockerill J went further, complaining that the witnesses before her were intelligent, and had worked extensively with their legal teams on the preparation of their witness statements and then on the documents in preparation for cross-examination. This, she said, was not a virtue but a vice because she could have little confidence that the evidence was the witnesses' "unclouded recollection rather than an overwritten version based on their reconstruction of events in the light of their microscopic review of the documents – and their own view of their own case."

What would the judge have said if the witnesses had not done their homework?

DISHONEST EVIDENCE

Evidence of market practice is not admissible on questions of dishonesty.

Dishonesty is an objective, not a subjective, matter: *Ivey v Genting Casinos (UK) Ltd* [2018] AC 389. This means that the relevant person's knowledge at the material time must be established; but whether, in the light of what he knew, he was dishonest is a matter for the court to decide by reference to the standards of ordinary decent people. In *Carr v Formation Group plc* [2018] EWHC 3116 (Ch) (a case about football agents and commission), Morgan J therefore rejected an application for permission to adduce expert evidence on market practice on commission amongst football agents. The evidence was inadmissible in relation to the standards of ordinary decent people, not least because markets can adopt practices that are dishonest by those standards. The court had to decide for itself.

But the case also involved unlawful means conspiracy. The judge decided that this could be defended on the basis that the conspirators acted in their own interests and in the belief that their conduct was lawful. Evidence of market practice is admissible on whether they believed that their conduct was lawful. So the evidence that was ejected by the front door sneaked back in through the rear entrance.

UNOPPOSED FAILURE

Declarations are always a matter for the court's discretion.

If you turn up to a trial, your silken advocate to the fore, and the opposition does not show, you might reasonably expect to win. But in *The Bank of New York Mellon v Essar Steel India Ltd* [2018] EWHC 3177 (Ch), C still contrived to lose despite both these favourable features.

The case concerned sums due on a bond. The judge accepted that the trustee of the bond had standing to sue and that D had been validly served despite having terminated the authority of its London process agent, on whom service had been effected.

C's problem was that it did not seek judgment for the sums due but only a declaration that they were due. The reason for this limited relief was, it might be inferred, connected with the fact that D was in an insolvency process in India and there were some (unexplained) issues in that process regarding C's claim. But this background made Marcus Smith J nervous. Either his declarations would be irrelevant to events in India, in which case why bother? Or they would have an effect on those events, but he didn't know what effect, and the insolvency practitioner wasn't before him to argue the issues. The judge also wasn't clear that there was really any dispute over D's obligation to pay – the problem was that it couldn't pay. So the judge refused as a matter of discretion to grant the declarations sought.

COLLATERAL DISADVANTAGES

The implied undertaking on the use of disclosed documents must be strictly observed.

In *ECU Group plc v HSBC Bank plc* [2018] EWHC 3045 (Comm), Andrew Baker J got seriously irritated with a firm of solicitors for failing to understand the nature of, and for breaching, the (so-called) implied undertaking (now in CPR 31.22(1)) applicable to the use of documents provided on disclosure (in *ECU Group*, pre-action disclosure).

CPR 31.22 states that documents provided on disclosure must only be used for the purposes of the proceedings in which they were disclosed – in *ECU Group*, prospective proceedings in England. The solicitors used the content of the documents to seek advice from US lawyers as to potential proceedings against the Ds and others in the US. The judge considered that using the content of the documents for this improper purpose was as much a breach of the implied undertaking as if the documents themselves had been sent to the US lawyers. To deprive C of any advantage, the judge required that the US lawyers' retainer be terminated, that the US lawyers not be instructed again on this matter without the court's permission, and that their advice not be shared with anyone else.

Andrew Baker J was even more annoyed that an industry journalist had been tipped off that she would be interested in a forthcoming court application alleging that D had not complied fully with the order for pre-action disclosure because the application would reveal the contents of many disclosed documents. The judge thought that this tipping off might itself have been a breach of the implied undertaking. Initially, the journalist was told to get a copy of the supporting witness statement from the court but, eventually, the solicitors gave her a copy, which included detailed descriptions of some of the disclosed documents. This was a serious breach of the implied undertaking ("I do not think that a solicitor with a competent, basic knowledge of the rule against collateral use, or who took a cursory glance at the White Book commentary on CPR 31.22, could reasonably have advised otherwise").

There was no chance that the court would ever have granted permission for this journalistic adventure in advance, and it certainly would not do so retrospectively. Indeed, the judge thought that the standard practice in such an application should be for the court expressly to order that no collateral use be made of the documents even though they were referred to in open court. The judge did not think that an application in open court should circumvent the undertaking, notwithstanding CPR 31.22(b).

USE AND ABUSE

Documents and witness statements in English proceedings should not be given to US authorities.

ECU Group (above) emphasised the breadth and seriousness of the "implied undertaking", now in CPR 31.22 and 32.12 with regard to documents and witness statements respectively, disclosed in English court proceedings. *ACL Netherlands BV v Lynch* [2019] EWHC 249 (Ch) went on to stress that the court will not lightly give permission for collateral use, even if the proposed disclosure is to foreign law enforcement bodies.

In *ACL Netherlands*, Hildyard J recognised the strong public interest in the rule against collateral use. Disclosure infringes litigants' rights to confidentiality by compelling them to reveal documents; the concomitant protection is that the documents must not be used for purposes other than the litigation, at least until a public trial takes place. The test for the court to allow collateral use is, accordingly, strict: the applicant must show (a) that there are special circumstances constituting "cogent and persuasive reasons" for permitting collateral use and (b) there will be no injustice to the person who has given disclosure. Hildyard J considered that the test was, if anything, stricter with regard to witness statements than to documents.

ACL Netherlands itself concerned an application in the English litigation brought by Hewlett Packard arising from HP's purchase of Autonomy. A US Grand Jury (in reality, the US law enforcement agency) had issued a subpoena against a parent company in the HP group demanding the delivery up of all documents and witness statement disclosed in the English proceedings. HP contended that it would be in contempt of the Grand Jury and would face grievous penalties if it failed to comply.

Hildyard J was sceptical as to whether such dire, or any, consequences would in fact flow, but in any event he considered that he was entitled to look at how important the documents were for US law enforcement. He concluded that they were not at all important. It was a wide-ranging trawl, and there had already been one criminal trial and conviction in the US, and others had been separately charged, so the documents could not be said to be necessary for the US process. There were no cogent or persuasive reasons for departing from the normal rule.

The judge also considered that there would be prejudice to the parties that had given the disclosure in the English proceedings if the documents were passed to the US authorities. In particular, it would give the US authorities information about the defence to the charges that the authorities would not otherwise have been able to obtain.

Ultimately, Hildyard J was robust in his defence of the English public interest in the face of foreign laws. English interests are not necessarily to be overridden by foreign laws enforcement, even criminal laws.

Clifford Chance acted for the First Defendant in *ACL Netherlands*.

ADMIT ONE

A defendant is not obliged to investigate with third parties the truth of an allegation.

CPR 16.5 requires a defendant to state in his defence which allegations he admits, which he denies and which he is unable to admit or deny. The last option – colloquially called non-admission – is not a free choice. The rules say that a defendant can only not admit an allegation if he is "unable" to admit or deny it. If the allegation is something that is within the defendant's knowledge, the defendant is able to nail its colours to the mast rather than merely sit back and require the claimant to prove the allegation. So much for the burden of proof.

In *SPI North Ltd v Swiss Post International (UK) Ltd* [2019] EWCA Civ 7, the Court of Appeal accepted that CPR 16.5 obliges a corporate defendant to make enquiries of employees who should know whether a pleaded allegation is true or false before the defendant pleads to that allegation (at least, if the employee's knowledge would be attributed to the company). The question in *SPI North* was whether a corporate defendant is obliged to go one step further and, if reasonable to do so, ask ex-employees about allegations in order to plead to them.

The Court of Appeal's response was no. The timetable for the defence was, it thought, too tight for a defendant to be obliged to investigate the truth of an allegation with ex-employees or other third parties. Also, a defence requires a statement of truth, and a defendant might need to undertake considerable analysis in order to decide whether it actually believes what it has been told by its former troops (the same might be said of its current troops). The Court of Appeal also considered that what might constitute reasonable enquiries was too fraught for it to be a useful test. The Court of Appeal didn't want endless applications about what a defendant should or shouldn't have done.

But just because a defendant would rather not plead to an allegation does not allow it sit on the fence.

PRIVILEGE

VEXATIOUS LITIGANTS

Purely commercial discussions about litigation are not privileged.

WH Holding Ltd v E20 Stadium LLP [2018] EWCA Civ 2652 is another of those decisions about privilege that the judiciary lob over the barricades from time to time to vex us. The hope is that the distinctions it seeks to draw are so fine as to fade from view on closer inspection, leaving us where we were.

WH Holding concerned six emails passing between board members of D (which owns the London, ex-Olympic, Stadium) and between board members and "stakeholders" concerning the "commercial settlement" of a dispute with C (West Ham United) over seating at the Stadium. The question was whether the emails attracted litigation privilege.

The Court of Appeal started by rejecting the argument that the conduct of litigation does not include avoiding or settling litigation. The Court of Appeal acknowledged that this heresy had been resoundingly squashed in *SFO v ENRC* [2018] EWCA Civ 2006. So far so good.

But then the Court of Appeal took an unfortunate path by treating a run of the mill statement of litigation privilege given by Lord Carswell in *Three Rivers (No 6)* [2005] 1 AC 610, [102], as if it were a statute. Lord Carswell said that litigation privilege applies to

> "communications between parties or their solicitors and third parties for the purpose of obtaining information and advice in connection with existing or contemplated litigation… but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole of dominant purpose of conducting the litigation; (c) the litigation must be adversarial, not investigative or inquisitorial."

Based on this, the Court of Appeal decided that the overriding requirement for litigation privilege is that the communication must be for the purpose of obtaining information or advice regarding the litigation. The reference to the dominant purpose of conducting litigation was a limitation on the overriding requirement, not an extension (even though conducting litigation is clearly wider than obtaining information or advice about the litigation). A purely commercial discussion about settlement between board members would not, the Court of Appeal considered, involve obtaining information or advice about the litigation. The claim to litigation privilege therefore failed at the first hurdle.

Prima facie, therefore, a discussion between businessmen about settlement using neither information obtained from third parties for the purpose of the litigation nor legal advice is not privileged. Likewise, a discussion that explores the reputational damage litigation might cause. And what about a tactical debate or any discussion that doesn't actually involve legal advice or looking for evidence? Communications involving lawyers will still be safe in the main, but parties can expect a quizzing on whether internal communications were really for the purpose of obtaining information or advice about the litigation.

A glimmer of light in this gloom is that the Court of Appeal accepted that a document in which information or advice obtained for the litigation can't be disentangled from the commercial discussion, or which revealed such information or advice or matters subject to legal advice privilege, will remain privileged. The chances of an internal debate about settlement not revealing this kind of information and advice may be slight. There is, perhaps, a hint that D's claim to privilege in *WH Holding* was put on too narrow a basis.

But if there are any such documents, it results in absurdity, as Norris J at first instance had pointed out. For example, the courts encourage settlement – indeed, courts are desperate for parties to settle. *WH Holding* will not make settlement easier given the risk that a frank discussion about settlement might have to be revealed, potentially undermining a party's position in the litigation. Then, a settlement offer will, itself, be without prejudice, and so will not be shown to the court. But a party's internal discussions about settlement must, apparently, be disclosed and, presumably, can be put in evidence (at least, there was no suggestion otherwise).

The Court of Appeal also touched upon the circumstances in which a court could inspect documents in order to check a party's claim to privilege. The customary position has been that a judge should only inspect documents if it really does look as if there is something wrong with the claim ("reasonably certain"). The Court of Appeal rejected this. They considered that the courts have a free discretion (though to be exercised "cautiously"), taking into account the overriding objective. The

Court of Appeal's first instance brethren will doubtless be thrilled with this approach given that they now risk facing endless requests that they inspect documents. Still, it might make them feel the pain that is disclosure and begin to understand how hard privilege decisions can be.

WHO'S LAUGHING NOW?

A second, equal, purpose bars litigation privilege.

A contract requires a party to take a decision (whether a painting attributed to Frans Hals was in fact by Hals) for which the party needs expert advice. But the party knows that if its conclusion is that the painting is a fake, it is very likely to face litigation from a third party. Is the party's correspondence with the expert privileged?

No, according to Teare J in *Sotheby's v Mark Weiss Ltd* [2018] EWHC 3179 (Comm). For litigation privilege to apply, the dominant purpose of the communications with the expert must be the conduct of the litigation. The judge decided that the two purposes - contractual decision and subsequent litigation - for commissioning the expert's work were at least equal. Litigation could not, therefore, be the dominant purpose.

The judge rejected a somewhat half-hearted argument that *SFO v ENRC* [2018] EWCA Civ 2006 had loosened this requirement by allowing what might otherwise be two purposes (in *ENRC*, preserving reputation and dealing with a criminal investigation) to be merged as if they were the same. Teare J considered that it was all very fact specific and that the older authorities (notably *Waugh v BRB* [1980] AC 520) remained firmly in place.

DOMINANT DEALINGS

Legal advice privilege also has a dominant purpose test.

In *R (oao Jet2.com Ltd) v Civil Aviation Authority* [2018] EWHC 3364 (Admin), Morris J considered whether emails copied to lawyers were subject to legal advice privilege. He took a relatively orthodox approach except that he decided that, as with litigation privilege, legal advice privilege only applies if the dominant purpose of the communication is to seek or to give legal advice. His narrative suggested that, if a communication was with an outside lawyer, it would be hard to see the communication as having any other purpose, but he displayed the customary judicial reservations as to whether inhouse lawyers were always consulted for the purposes of legal advice.

Where an email or other communication is sent to lawyers and to others, the judge considered that the whole email, to everyone, would be privileged if its dominant purpose was to obtain legal advice, but if the dominant purpose was commercial, the copies sent to the lawyers might be privileged, but the copies sent to others would not.

In another decision in the same case ([2019] EWHC 336 (Admin)), Morris J had to decide whether disclosure of one privileged document waived privilege in others. He took the approach that it was necessary to identify the "transaction" or issue in respect disclosure had been made, and then to decide whether fairness required disclosure of the other documents.

In this case, he decided that the transaction/issue was the context in which another email had been sent (referred to as the "attack dogs" email). The email disclosed was part of the discussion about that other communication, and, the judge concluded, waived privilege in all other emails discussing that same communication.

LAWYERS ALONE

Instructions in relation to an escrow account are privileged.

The overall moral of *Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd* [2019] EWHC 3 (Comm) is that acting as an escrow agent is not a free lunch. What can go wrong often will go wrong (see, for example, *Nigeria v JP Morgan Chase* above).

Asia Coal Energy Ventures involved a share sale, along with the sale of associated loans. The shares were sold, but solicitors were paid the purchase price of the loans by their client (the person financing the deal) to hold pending the appointment of an escrow agent or, failing that, to hold until an alternative arrangement was agreed. Needless to say, problems arose in the sale of the loans, the escrow agent wasn't appointed, no other arrangement was agreed, and there is litigation in various fora across the world.

The solicitors have been sued along with the buyer (but not the solicitors' client). The specific application related to attempts to extract documents. In the escrow agreement, the solicitors confirmed that they had received $85m and that they had irrevocable instructions from their client to transfer or hold the funds as above. C sought disclosure of any documents providing those instructions.

Moulder J agreed with the solicitors that the documents were privileged. C argued that the instructions could not be confidential because the client had authorised the solicitors to say that they had these instructions. Moulder J rejected this. The solicitors had not been instructed by their client to tell C what their

instructions were. The reference to the instructions was merely confirmation that the solicitors were able to enter into an independent obligation as principal. The reference was not enough to waive confidentiality in the underlying instructions.

Then C argued that there was no sufficient legal context to provide privilege in the instructions – the solicitors were in effect acting as a bank. Again, Moulder J rejected this. She considered that the instructions were all part of a piece with the solicitors' delivery of legal advice to their client, including how best to protect the client's interests. The different elements could not be separated out, and were privileged.

C's final throw was that the instructions had, it seemed, been revealed to the buyer, and had thus ceased to be confidential. The Judge saw no reason why two parties with a common interest – buyer and financier – could not share privileged instructions on a confidential basis without losing privilege.

Moulder J did order the solicitors to reveal the content of its client account, but otherwise privilege prevailed.

CLIFFORD
CHANCE

CONTACTS

Simon James
Partner

T +44 20 7006 8405
E simon.james
@cliffordchance.com

Susan Poffley
Knowledge Director

T +44 20 7006 2758
E susan.poffley
@cliffordchance.com

Ben Barrat
Senior Associate PSL

T +44 20 7006 1696
E benjamin.barrat
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance LLP, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2019

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Bangkok • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • Jakarta* • London • Luxembourg • Madrid • Milan • Moscow • Munich • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

35245-5-89