CLIFFORD

CHANCE

CONTENTIOUS COMMENTARY

A REVIEW FOR LITIGATORS

MARCH 2020

C L I F F O R D

C H A N C E

CONTENTIOUS COMMENTARY – MARCH 2020

CONTENTS

Contract 2

Checking authority – Authority msut be checked upfront 2

A fund of knowledge – An agreement ot provide funds is not a guarantee 2

Unsettled law - Judicial change in law does not allow a contract to be set aside 2

The end of term – Termination of a contract does not require good faith 3

Computer mistakes – Algorithmic contracts hard to escape 3

Private international law 5

A symmetry respected – Asymmetric jurisdiction is exclusive 5

Companies 7

Standing in the shadows – Shadow directors owe limited responsibilities 7

Good try, but… - Directors not negligent in financial crisis takeover 7

Courts 9

Pilot docked – Disclosure Pilot explained 9

Laying down the law – Disclosure Pilot explained some more 9

The rich pay late – Freezing injunction living expenses not to be trimmed 10

Very interesting – Part 36 offers can't exclude interest 10

Funders fund losers too – *Arkin* cap doffed 10

Privilege 12

From a land down under – Dominant purpose applies to legal advice privilege 12

Regulators regulated – No special privilege rules for regulators 12

Scheduled prejudice – Exhibiting without prejudice note to agreement is a waiver 13

Property 15

A bit of common sense – Cryptocurrencies are property 15

Contacts 16

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

CONTRACT

CHECKING AUTHORITY

Apparent authority is only available if reasonable checks have been made.

One point to emerge (really to be confirmed) from *East Asia Company Ltd v PT Satria Tirtatama Energindo* [2019] UKPC 30 is that a party cannot rely in advance of entering into a contract on the representative of the other having apparent authority to do so. At the time of entering into the contract, a party must believe that the representative of the other has actual authority. If that turns out to be wrong, the party can fall back on apparent authority, which is a species of estoppel by representation, but an absence of that initial belief will cause the contract to fail.

Further, a party can't rely on apparent authority if it failed to make the enquiries that a reasonable person would have made in the circumstances, and doubts about the authority of the other's representative do require enquiries. Authority is not, therefore, something that can be glossed over or ignored in the hope that all will be well. It matters, and without proper diligence, the contract may fail.

A FUND OF KNOWLEDGE

A funding agreement is not a guarantee.

The difference between a guarantee, to which the Statute of Frauds 1677 applies, and another obligation, to which it doesn't, can be slight, not to say obscure. The consequences are, however, far from slight and anything but obscure. The Statute of Frauds applies to a "speciall promise to answere for the debt default or miscarriages of another person", and requires the promise to be in writing or evidenced in writing – no writing, no claim.

One form of guarantee is an obligation to "see to it" that the principal debtor performs his obligations. If the principal debtor doesn't perform, the guarantor is liable for damages. But how does that differ from an obligation to put another in funds so that the other can pay his debts?

This was the question in *Abbhi v Slade* [2019] EWCA Civ 2175. A son-in-law asked a solicitor to act for his father-in-law in litigation against the f-i-l's son. The s-i-l knew, and told the solicitor, that his f-i-l couldn't pay the solicitor's fees. The s-i-l said that he didn't want to pay the solicitor directly because he thought that doing so would increase his risk of third party costs liability under s51 of the Senior Courts Act 1981, so the s-i-l agreed with the solicitor that s-i-l would provide money to his f-i-l so the f-i-l could then pay the solicitor directly. Is that a "see to it" obligation or an independent primary obligation?

The Court of Appeal considered that it was an independent primary obligation outside the scope of the Statute of Frauds. The s-i-l was agreeing to pay for the litigation by putting his f-i-l in funds before the due date on the solicitor's bills. The obligation to do so was not dependent on any prior default by the f-i-l but was an absolute primary obligation to put his f-i-l in funds in time. So the s-i-l, who 7stopped paying the solicitor's bills after the case was lost and whose f-i-l had died insolvent, was obliged to meet the solicitor's fees. Relief, doubtless, for the solicitor, who had £¼m in counsel's fees to pay.

UNSETTLED LAW

Overturning a settlement agreement for common mistake of law is hard.

A common mistake of fact or law can lead to a contract being set aside; a common misprediction as to the future does not have that result. But English common law operates under a declaratory theory, ie the courts declare the law as it has always been (even if no one knew). So is a failure to appreciate that the courts might in future change the law a mistake or a misprediction? It is a mistake as to the current state of the law because of a failure to predict the future reversal.

Since *Great Peace Shipping Ltd v Tsavliris Salvage (Internatiional) Ltd* [2002] EWCA Civ 1407, a case of common mistake of fact which laid down the law on setting aside an agreement for common mistake, it has been recognised that there are problems in applying that law to cases of mistake of law, particularly judicial changes in the law (eg *Brennan v Bolt Burden* [2004] EWCA Civ 1017).

Marcus Smith J grappled with these problems in *Elston v King* [2020] EWHC 55 (Ch). A bankrupt entered into an income payments agreement under threat of his trustee seeking an income payments order to the same effect. A first instance decision indicated that pension payments that a bankrupt could elect to take but had not yet taken could be included in an agreement/order. So the bankrupt agreed to pay over certain pension assets on that basis. A month later, another first instance decision doubted the initial one, and a little later the Court of Appeal confirmed the latter decision. The bankrupt had

CLIFFORD

CHANCE

therefore agreed to hand over to his trustee more than he was obliged to have done.

Could the income payments agreement (categorised by the judge as a settlement agreement since it compromised the trustee's right to apply for an income payments order) be set aside for common mistake?

Marcus Smith J decided that the correct approach was first to construe the settlement agreement to see, whether, as a matter of construction, anyone was taking the risk of a change in the law. If one party had accepted the risk, end of story.

If neither party was taking the risk, the judge thought that there would not be a common mistake if the law assumed by the parties was only as laid down at first instance, a fortiori a controversial first instance decision. In those circumstances, the parties would be predicting whether the higher courts would follow or overturn the first instance decision. But if the law was well-established and unquestioned, before being "dramatically" overturned, then there would be common mistake. Needless to say, the real world seldom fits into such tidy categories – what about a controversial, but binding, CA decision (*Three Rivers (No 5)* springs to mind)?

On the facts*, Elston* fell into the former rather than the latter category. The parties appreciated, or should have appreciated, that the decision they relied was only first instance and was controversial. Their mistake was to think that the decision would stand the test of time; that was, legally, a misprediction rather than a mistake and, as such, was incapable of vitiating a contract.

THE END OF TERM

A termination right is not a discretion.

The ability to end a contract in accordance with its terms is a right, not a discretion to be exercised by balancing different interests. So decided the judge in *Taqa Bratani Ltd v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm), a case about an operator of a North Sea oil field under a joint venture agreement.

The operator could be removed by a unanimous vote of the other joint venturers (the contract wasn't strictly terminated, but the judge thought that the same applied). The other joint venturers so voted, and the judge decided that they were entitled to do so whatever their reasons. As a matter of interpretation, there was no fetter on the right, and no term was to be implied that the operator could only be removed in good faith and not in a capricious, perverse or arbitrary manner.

Commercial players can't expect the court to rescue them with a benevolent interpretation or an implied term that they didn't think to write down.

COMPUTER MISTAKES

A computerised contract is not vitiated by a mistake.

Computers, at least without real AI, do what they are programmed to do, no more and no less. If two computers are told to enter into a contract on certain terms, they do so. But can that contract be set aside if, when humans look at the contract after the event, they consider it absurd? No according to the Singapore Court of Appeal in *Quoine Ltd v B2C2 Ltd* [2020] SGCA(I) 02.

D was a trading platform for cryptocurrencies operated entirely be algorithm. The algorithm decided that the positions of two traders need to be closed out, so it went into its digital market place to find what bids there were from market participants. The computer went down the list of bids on the system, matching enough to effect the close out. All very normal.

Unfortunately, D had introduced a glitch into its algorithm a couple of days earlier which no one had spotted. This meant that there was very little liquidity in the market. This resulted in some of the close-out contracts being made on bids from C that were 250 above times the market rate (10 BTC to 1 ETH rather an 0.04 BTC to 1 ETH). Like D, C's trading operation operated entirely by algorithm.

The reason C's off-market bids were in the D's system was that C's trading algorithm needed always to have some bids there to avoid the algorithm falling over, and so the programmer included prices that were way off the market but at which C would be happy to trade because it could not fail to make money. Equally, the programmer knew that it was thoroughly unlikely that anyone would in fact wish to trade at that those prices.

After the trades were executed and the cryptocurrencies transferred between the relevant accounts, people at D found out about the trades and purported to undo the contracts, including reversing the transfers between the accounts. The Singapore Court of Appeal agreed with the first instance judge that D had no contractual right, express or implied, to reverse transactions in this way.

D's main argument to justify its conduct was that the contracts were void or voidable for mutual or unilateral mistake. D argued that C knew or must have known that no

one would enter into contracts at the prices posted, and so there had been insufficient meeting of (digital) minds to form a contract.

The majority of the Court disagreed. There was no relevant mistake since, at common law, the mistake must be as to a term or the subject matter of the contract. There was no mistake as to either; any mistake was as to underlying assumptions as to the prices at which deals would be done.

Insofar as there is a doctrine of equitable mistake (not clear, in English law at least) and there was a relevant mistake, there must be constructive knowledge of the mistake by the counterparty and unconscionability on its part. That had to be judged by reference to the knowledge of the person who programmed the computer, plus anything else he might know up to the time of the contract. Here again the court saw no mistake, nor any unacceptable conduct. The contract therefore stood.

Lord Mance, recently retired from the UK's Supreme Court, was freelancing in Singapore (along with a retired Chief Justice from the High Court of Australia) and dissented in *Quoine*. He took the view that, for equitable purposes, the issue was not what the programmers knew, nor was the investigation limited by the date of the contract. He considered that the test was the objective (and retrospective) one of what would reasonable humans have known or believed had they known of the circumstances that actually occurred. He considered that a reasonable person would, on this basis, have known of the computer error by D and, as a result, should not be able to enforce the contract (ie equity can step in after the event and do the right thing).

The case might be thought to arise from the inadequacy of the terms and conditions governing transactions on the exchange. The terms could have allowed the reversal of trades when problems occurred. But they didn't. The (Singapore) courts declined to step in to rescue a party that failed to help itself.

(The Singapore Court did not need to decide whether cryptocurrencies are property: cf *AA v Persons Unknown* [2019] EWHC 3556 (Comm) below.)

PRIVATE INTERNATIONAL LAW

A SYMMETRY RESPECTED

An asymmetric jurisdiction clause is exclusive under Brussels I.

In a world of competition between different courts, it is not surprising that judges should defend the jurisdiction of (and therefore work coming to) their forum. Jacobs J certainly did so in *Etihad Airways PJSC v Flöther* [2019] EWHC 3107 (Comm) in taking a wide view of a jurisdiction clause and a purposive view of the Brussels I Regulation.

Air Berlin is, despite its name and home, an English company that did its transactions under English law, including those entered into when it was flying nervously towards the runway of insolvency. Its main hope of avoiding the deadly descent was a shareholder, E, which entered into a package of agreements in attempted salvation, including a loan agreement for €350m. E would not, however, agree to lend the higher sums accountants considered were required to save AB. That led AB's auditors to question whether they could sign off AB's accounts on a going concern basis. So the package eventually signed between AB and E also included a comfort letter in which E expressed an intention to provide the necessary support to AB. This satisfied AB's directors and auditors, and the accounts were signed off.

AB still went bust, not least because E refused a drawdown under the loan agreement because, it said, the conditions precedent to the drawdown were not then met.

AB's German insolvency administrator started proceedings in Berlin against E for breach of the comfort letter or, if the comfort letter was not legally binding, for culpa in contrahendo (ie pre-contractual liability) on the basis that E had used its negotiating power to avoid providing a binding obligation while at the same time inspiring in AB trust that E would adhere to its commitment in the comfort letter (ie the act of refusing to enter into a binding contractual obligation created a binding non-contractual obligation).

The loan agreement was governed by English law and included an asymmetric exclusive English jurisdiction clause applying, in the usual way, to all claims brought by AB arising out of or in connection with the loan agreement. The comfort letter was silent as to law and jurisdiction (doubtless for the usual reason that including either could make a comfort letter look more legally binding). In *Etihad Airways*, E sought various declarations from the English court designed to stymie the German proceedings. AB (through its insolvency administrator) applied to stay the English proceedings.

AB's stay application turned on three issues: the width of the jurisdiction clause in the loan agreement; the scope of article 25 of the Brussels I Regulation; and whether an asymmetric jurisdiction clause is an exclusive jurisdiction clause for the purposes of article 31(2) of Brussels I6.

Jacobs J decided that, as a matter of English law, E had a sufficiently arguable case that the jurisdiction clause in the loan agreement extended to AB's claims on the comfort letter. The jurisdiction clause was very wide, and the comfort letter and the loan agreement were closely related as part of a single package governed by English law. There were no conflicting jurisdiction clauses.

It was reasonably foreseeable that disputes about the comfort letter would involve the loan agreement. Even without assuming that sane businessmen wouldn't want disputes arising from the same relationship to be decided by different courts, Jacobs J was satisfied as a matter of interpretation that the tentacles of the loan agreement's jurisdiction clause adhered to the comfort letter.

But to work, a jurisdiction clause must apply to "disputes… which may arise in connection with a particular legal relationship" (article 25(1) of the Brussels I Regulation) – you can't slip into a contract a jurisdiction clause that applies to unknown disputes about extraneous matters. AB argued, essentially, that the "legal relationship" in question was that of lender and borrower under the loan agreement, and the comfort letter claims arose from a different relationship. Jacobs J was satisfied that the relationship referred to in the jurisdiction clause was wider than just the loan, and that the requirements of article 25 were met.

Despite all this, the English court, as the court second seised, would still have been obliged to stay its proceedings unless the asymmetric clause in the loan agreement was an "exclusive" jurisdiction clause within the meaning of article 31(2) of the Brussels I Regulation. Jacob J agreed with Cranston J in *Commerzbank AG v Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm) that asymmetry isn't inconsistent with exclusivity. The purpose of article 31(2) was to

prevent a party from ignoring its obligations under a jurisdiction clause. The clause gave the English courts exclusive proceedings over any claims started by AB; by starting proceedings in Germany, AB was in breach of its obligations under the clause. That was what article 31(2) intended to prevent.

E's triumph in London therefore moves the focus back to Berlin, where the court has been deliberating on a stay application by E for eleven months. Prima facie, the Berlin court must recognise the Jacob J's judgment and decline jurisdiction (article 31(3)). But that may not necessarily be the end of the story.

COMPANIES

STANDING IN THE SHADOWS

Shadow directors owe limited duties.

A shadow director is someone in accordance with whose directions or instructions the directors of a company are accustomed to act (section 251 of the Companies Act 2006). A person can become a shadow director even if his or her instructions do not extend over all, or even most, of the company's activities or affairs. But in those circumstances, the fiduciary duties owed by the shadow director reflect the nature and extent of the instructions given, not necessarily extending to the full gamut of obligations owed by real directors – the duties of a shadow director only apply to the instructions he or she gives.

This gave the Cs a problem in *Standish v The Royal Bank of Scotland plc* [2019] EWHC 3116 (Ch). They complained that a representative of the Bank's global restructuring group (for whom the Bank was vicariously liable) had become a shadow director, pleading his insistence on the company appointing a "turnaround consultant" of his choosing as chairman, and then instructing the consultant to sack the managing director. But the Cs' claim to financial loss arose from the company's entering into two restructurings, which gave the Bank a substantial shareholding in the business. There was no causal link between the matters giving rise to the shadow directorship and the alleged wrongs or losses. The claim was therefore bound to fail, and was struck out.

GOOD TRY, BUT…

Directors' duties to shareholders are limited.

Parts of *Sharp v Blank* [2019] EWHC 3078 (Ch) have an avuncular, even condescending, air to them. It was all very difficult way back then in 2008 - who really knows what was happening anyway? - but people who were doing their best shouldn't be condemned just because things arguably didn't turn out as well as hoped. That's just the way it goes sometimes. That's not quite how the recently retired Norris J put it – his judgment would have been far shorter had he done so – but that's one distinct flavour.

Another flavour that emerges from the judgment is that Lloyds Bank had been looking acquisitively at the declining HBOS for some time, but knew that competition issues would likely prevent any takeover. Come the financial crisis, with HBOS in real danger of joining its compatriot RBS in the government's hands, the authorities were keen to usher HBOS into apparently safer hands, even to the extent to brushing aside those competition concerns. The opportunity for a takeover was there, and those then in charge of Lloyds were keen to seize what was likely to be their only chance to upsize considerably rather than be boring, cautious old Lloyds Bank as usual. But, as it transpired, opportunities can be poisoned chalices, and a (relatively) sound bank plus a failing bank does not necessarily equal a sound bank.

Sharp v Blank concerned Lloyds Bank's takeover of HBOS in September to November 2008, at the very height (or in the depths) of the global financial crisis. The state of HBOS was such that the combined entity required governmental recapitalisation, which seriously diluted existing Lloyds' shareholders. A group of shareholders made the basic complaint that, if the takeover had not happened, they would have been a lot better off. The directors breached their duties, the Bank was vicariously liable for the directors' conduct, so the Bank should pay – ie part of the value in the Bank now should be transferred from all shareholders to a few of them.

Directors owe their duties to the company, not directly to shareholders. But Lloyds' takeover of HBOS required shareholder approval, and the circular soliciting that approval included a statement that the directors accepted individual responsibility for its contents. The directors therefore owed a standard duty of care to shareholders for the contents of the circular. The judge decided, however, that this duty did not extend to stock exchange announcements or analysts' calls about the takeover (the judge was, indeed, puzzled as to why the shareholders bothered to argue about these other items given the position on the circular).

But, the judge thought, the test for liability on the circular was whether no reasonable director could have come to the conclusion that the directors came to. The judge was satisfied that, in the strained circumstances of the time and on the basis of the information available to them (they aren't obliged to second-guess everything their advisers say), the directors' recommendation of the takeover to the shareholders (96% of whom voted in favour) was within the

bounds of the reasonable. The basic claim therefore failed.

It was also accepted that the directors owed an equitable duty to include sufficient information in the circular to enable shareholders to make an informed decision about the takeover. Directors must be "fair, candid and reasonable", but don't have to include absolutely everything. Norris (ex-)J decided that the directors had omitted from the circular two things that they should have mentioned. The first was that Lloyds had extended an "extraordinary" repo facility to HBOS in order to help keep HBOS alive (the directors convinced themselves that this was in the ordinary course of business); the second was that HBOS was using a lender of last resort facility from the Bank of England, which had been structured to ensure that it did not need to be disclosed to the market (its sensitivity was such that the lawyers advising Lloyds on the deal weren't told about it).

But, critically, the judge decided that these matters would not have been plastered in large red print across the front of the circular, in effect announcing to the world that HBOS was on the verge of failure. Rather, these matters would have been set out in a nuanced way to avoid scaring the markets too much. This might still have led to HBOS's share price going down 10-15%, but it wouldn't have changed the shareholders' vote. The takeover would still have been approved; the failures in the circular did not cause the shareholders any loss.

There were doubtless other issues (reflexive loss?) but the judge considered his judgment already "overlong" at 280 pages, and did not extend it further by trespassing on areas not necessary for his decision.

The judgment can be seen as a sensible recognition that the director's lot is tough, especially when the financial world is in chaos, and judges (who lack commercial experience) shouldn't second-guess retrospectively business decisions. Some shareholders may, however, see it differently.

COURTS

PILOT DOCKED

Vos C lays down the law on the Disclosure Pilot.

It widely accepted that the explosion in the number of documents caused by digitalisation requires something to be done about disclosure. The Disclosure Pilot now taking place in the Business & Property Courts is something, but it is not universally popular (is there any evidence or reasonable expectation that initial disclosure with pleadings and an additional list of issues will really save money later in the litigation?).

In *McParlane & Partners Ltd v Whitehead* [2020] EWHC 298 (Ch), Sir Geoffrey Vos sought, perhaps, to rescue the Disclosure Pilot. He said that Extended Disclosure (ie court ordered disclosure after initial disclosure and lists of issues) must be fair, disproportionate and reasonable, and that it should not become a disproportionately costly exercise. Lofty sentiments but, in practical application, not easy. Views can diverge as to what proportionality and reasonableness require.

Vos C emphasised that the list of issues for disclosure should be big picture, not unduly granular or complex, and limited to those issues upon which one or more of the parties is likely to have undisclosed documentation (ie documentation not already included in initial disclosure). What documents the parties might have is therefore the starting point in drafting the list of issues for disclosure, and should trim its scope.

LAYING DOWN THE LAW

Missing documents are not necessarily an objection to disclosure.

On 19 February 2019, Marcus Smith J joined a new party to an action, allowed amendment to the pleadings, and ordered disclosure. He ordered disclosure by reference to the old rules, neither he nor the parties appreciating that this should have been done by reference to rules of the Disclosure Pilot, in PD51U. Later, C whinged about D's disclosure and demanded more, again by reference to the old rules.

By the time the matter got to court, everyone realised that the application had to be reframed under the new rules, but the judge obviously couldn't get too cross since everyone was at fault. But do bear in mind that almost everything about disclosure in the B&PCs now falls under the new rules no matter when the action started.

In *Agents' Mutual Ltd v Gascoigne Halman Ltd* [2019] EWHC 3104 (Ch), the disclosure whinge concerned a universe of over 2 million documents reduced by word searches to 30,000, which were manually inspected, leading to the disclosure of 95 documents. C complained that this was too few. Marcus Smith J rejected that argument. Unless it was obvious that documents must exist that had not been disclosed, a small number was not on its own a ground for objection.

C also complained that the search terms used were too narrow. An example of a hypothetical relevant document that the search terms would have missed was given. Marcus Smith J said that the fact that documents may have been missed was irrelevant. The question was whether a reasonable and proportionate search had been made, not whether some stones remained undisturbed: "keywords are intended as a first trawl, to produce a manageable corpus of potentially relevant documents: they are not intended to capture every relevant or potentially relevant document". Likewise, the fact that different search terms may have produced a different outcome was irrelevant, at least unless it could be shown that it was a better outcome.

The judge pointed out the differences between applications under PD51U, §17, and PD51U, §18. The former applies where an extended disclosure order has not, or not adequately, been complied with. There, the court can make another order if it is "appropriate" and making the order would be "reasonable and proportionate". The latter deals with an application in effect to vary a prior order, for which it is necessary to show that the order is "necessary for the just disposal of the proceedings" as well as "reasonable and proportionate". In order words, you've generally got to get the disclosure order right first time because any subsequent adjustment will be difficult (a point also made by Hildyard J in *SL Claimants v Tesco plc* [2019] EWHC 3315 (Ch), below).

Marcus Smith J stressed that word searches on the universe of documents collected from relevant custodians should not be conducted unilaterally (though, again, he couldn't complain too much since his order said nothing about cooperation). Parties must try to agree search terms.

The Judge accepted that defining search terms was not necessarily easy, and it was only possible to tell if the terms produced a manageable universe of documents after a search was done (he didn't say what a "manageable universe" was – not necessarily an easy concept). This meant that the use of search terms was an iterative process and, he thought, an iterative process that should also be a co-operative process. Agreement must be reached before a manual review of the product of the search is undertaken since that is where, he thought, the expense comes.

THE RICH PAY LATE

Living expenses under a freezing injunction must reflect prior expenditure, however high.

£80,000 per month in living expenses would be enough for most people. But not if you have to keep up (rented) homes in Monaco and on Park Lane, not to mention employ private security, pay school fees etc etc. All while subject to a freezing injunction. And you are running out of money.

The question for the Court of Appeal in *Vneshprombank v Bedzhamov* [2019] EWCA Civ 1992 was whether in considering the living expenses that should be allowed under a freezing injunction, the court should look only to what D had actually been spending by way of living expenses before the freezing injunction or whether it should also take a view as to what D could afford as the case went along.

The Court of Appeal was firmly of the former view, ie the only question is what was D spending before the freezing injunction. The purpose of a freezing injunction is not to provide security to C, nor to prevent D from spending available funds on living expenses in the way he did before, nor to allow C to oppress D. If, therefore, D could prove that he spent vast sums on living prior to the injunction, he must be allowed to do so afterwards. The court will not reduce the amounts to what it considers reasonable or take a view as to what D can afford going forward, even if this might mean that there will be nothing left to meet an eventual judgment.

But the Court also recognised that defendants may exaggerate their expenditure, thereby dissipating assets (to grant a freezing injunction in the first place it must be shown that the defendant will dissipate assets). As a result, courts are entitled to exercise a "healthy scepticism" regarding defendants' assertions as to their pre-injunction expenditure.

But if a defendant can prove that he spent outlandish sums, then he must be allowed to continue to do so even if it looks as if the defendant will run out of money in the near future. It's not for courts to take decisions of this sort for defendants, or even to police that defendants are actually continuing to spend the amounts they previously spent. A freezing injunction is there to retain the status quo and to prevent dissipations outside the ordinary course.

(If there is a proprietary claim, it might be different.)

VERY INTERESTING

A Part 36 offer cannot exclude interest.

Part 36 is a "self-contained procedural code about offers to settle" (CPR §36.1(1)), it is "carefully structured and highly prescriptive" (*Gibson v Manchester City Council* [2010] EWCA Civ 726, [4]), and an offer not made in accordance with CPR 36.5 will not have the near automatic consequences of Part 36. CPR §36.5(4) says that an offer to pay money will be treated as including interest.

Faced with this, it is somewhat curious that C in *King v City of London Corporation* [2019] EWCA Civ 2266 should make an offer to settle (which C then beat) expressed to be under Part 36 but which stated that it did not include interest. Either the offer was outside the rigid confines of Part 36 or it included interest (and was therefore more generous than C intended).

In *King*, the Court of Appeal decided that a Part 36 offer cannot exclude interest, that it was inconceivable that an offer that excluded interest could be converted by the rules into one that included interest, and so the offer fell outside Part 36. The Court also rejected C's ingenious argument that an offer that excluded interest was an offer to settle part of the claim, which is permitted.

So despite having beaten his purported Part 36 offer, C could not then lay claim as of right to the usury and other goodies that Part 36 allows. The City won on a technicality.

FUNDERS FUND LOSERS TOO

The *Arkin* cap no longer fits.

In 2005, the judiciary was deeply concerned about access to justice. Legal aid had disappeared in civil cases, conditional fee agreements were still novel, and litigation funders were a rare and exotic breed.

As a result, in *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655, the Court of Appeal succumbed to the argument put forward by this exotic breed that if courts imposed potentially limitless costs on funders, the funders would all close down their businesses, leaving to the rich alone the ability to enter the halls of justice.

To avoid this threat, the Court of Appeal invented the *Arkin* cap, ie a funder funding a losing case should only be ordered to pay in costs an amount equal to its funding (ie if a funder put up £2.5m, its maximum exposure would be £5m). This, the Court of Appeal considered at the time, would allow litigation funders to sleep more comfortably in their beds and thus preserve access to justice.

But times are now more cynical. Funders have pots of cash chasing money-making litigation. Will they really shut up shop just because their costs' risk is somewhat elevated? No, according to the Court of Appeal in *ChapelGate Credit Opportunity Master Fund Ltd v Money* [2020] EWCA Civ 246. But does *Arkin* oblige courts (below the Supreme Court) to don the eponymous headgear? No, again. Courts have a wide discretion on costs under section 51 of the Senior Courts Act 1981, and *Arkin* merely offers a pointer, not a rule. Indeed, the Court in *ChapelGate* thought it was a pointer confined to cases on facts similar to those in *Arkin*, ie where a funder had only funded a particular aspect of the costs (experts' fees and bundles in *Arkin*).

A funder's potential return is, the Court thought in *ChapelGate*, a significant factor in the exercise of discretion under section 51 – the more the funder stands to gain, the more it should be treated as the real defendant for costs purposes. And virtually all funding agreements put funders at the head of the queue for any recoveries from the litigation (even though funders assiduously deny controlling the litigation they fund).

The *Arkin* cap hasn't gone entirely. But it will no longer fit many, possibly most, cases. Funders have often used the argument that their presence strengthens a case because it shows that the claimant can fund the litigation through to the end, so defendants should settle. Now, perhaps, the response will be that funding provides someone who is good for the costs of the successful defendant, who therefore doesn't need to settle.

PRIVILEGE

FROM A LAND DOWN UNDER

All categories of privilege require a dominant purpose.

In *Waugh v British Railways Board* [1980] AC 521, the House of Lords decided that litigation privilege only applies to documents created for the dominant purpose of the conduct of litigation. But there has been doubt ever since as to whether a dominant purpose test also applies to legal advice privilege, ie the dominant purpose, not merely a purpose, of the creation of a communication must be to seek or give legal advice.

In *SFO v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006, the Court of Appeal said, *obiter*, that it did not think that a dominant purpose test added anything of value to legal advice privilege, but in *R (Jet2.com) v The Civil Aviation Authority* [2020] EWCA Civ 35, the Court of Appeal decided, *ratio*, that there is very definitely a dominant purpose test for legal advice privilege.

Jet2.com involved a spat between the CAA and the airline over the latter's failure to join a "voluntary" mediation scheme dealing with passenger complaints. The CAA tried to shame the airline into joining by critical press releases and a leak of correspondence to the Daily Mail, which duly published a story adverse to the airline.

The overall issue was whether the CAA had acted within its powers, while the immediate question was whether internal CAA emails sent to various people, including inhouse lawyers, were privileged. The answer was no.

The Court of Appeal started by agreeing with comments in *ENRC* that the decision in *Three Rivers (No 5)* [2003] EWCA 474, regarding the identity for privilege purposes of the lawyer's client within a corporate entity, was wrong. Unfortunately, they also agreed that it is binding in its errant ways, and so must await the Supreme Court for correction.

Then the Court of Appeal went on to dominant purpose. They noted that the dominant purpose test had been imported from Australia, where it applies both to litigation privilege and legal advice privilege, that other common law jurisdictions take the same approach, and that the (obiter) direction of English law was to apply it to both limbs (the noble exception being *ENRC*). So the Court decided that dominant purpose is a requirement of both limbs of legal professional privilege as a matter of English law.

What does this mean in practice? Perhaps not that much. If correspondence is to or from a lawyer only, it is likely to be privileged (as long as the lawyer is acting in a legal capacity) – why, other than for the dominant purpose of seeking legal advice, does anyone incur the expense of communicating with lawyers, at least external lawyers?

If the correspondence is to lawyers and non-lawyers, the dominant purpose test comes more to the fore. If the dominant purpose of the communication overall is legal advice, it is privileged in its entirety; if not, it is not privileged. But if the lawyer then replies, that reply is likely to be privileged even though the replies of others are not. It gets more difficult if a non-lawyer then responds to the lawyer's privileged reply or uses the same email chain. If the response reveals any legal advice, it might be privileged, but if not, the lawyer's part of the chain can be redacted. As ever with privilege, this may involve some fine judgements.

Jet2.com also raised a question of waiver, ie whether revealing one email the recipients of which included lawyers waived all parts in the chain, including from lawyers, and other communications on the same subject matter. The Court of Appeal decided that it did not.

The test is what is the "transaction" for which the document has been disclosed, ie what is the party that has disclosed it trying to prove and, in the light of that, does fairness require that all other related documents be revealed? The Court took a narrow approach to the "transaction", holding that all the CAA's disclosure had been intended to show was that there were different views within the CAA, and that the content of any legal advice was not relevant to this.

The bottom line is that privilege needs a case to go to the Supreme Court to sort out some serious issues. But only a case where privilege really, really matters will go that far up the judicial hierarchy.

REGULATORS REGULATED

There is no privilege exception for regulators.

Regulators have wide-ranging powers to extract documents from third (ie non-regulated) parties. In *Sports Direct International plc v The Financial Reporting Council* [2020] EWCA Civ 177, the FRC argued that these documents included privileged documents as long as the FRC was bound by an obligation of

confidentiality and the documents could not be used against the party that provided them (always the case for documents held by a non-regulated party). This amounted to an argument that third parties could not raise privilege as a reason for failing to supply documents to regulators.

This argument succeeded at first instance. This success derived from Lord Hoffmann's interpretation in *R (Morgan Grenfell & Co Ltd) v Special Commissioner* [2003] 1 AC 563 of *Parry-Jones v The Law Society* [1969] Ch 1.

In *Parry-Jones*, the House of Lords decided that the Law Society could obtain privileged documents from a solicitor it regulated where the privilege belonged to the solicitor's client. If that were not so, how was the Law Society supposed to regulate solicitors since most documents held by solicitors are subject to privilege? In *Morgan Grenfell*, Lord Hoffmann suggested that the reason behind this decision was either that disclosure to the Law Society, which was bound by an obligation of confidentiality, was not an infringement of the solicitor's client's privilege or that, if it was, it was a technical breach that was impliedly authorised by the Law Society's statutory rules. In *Sports Direct* at first instance, the judge felt obliged to echo this approach.

In *Sports Direct* in the Court of Appeal, Rose LJ felt no such compunction. SDI withheld documents on the grounds of privilege and was, she said, entitled to do so absent statutory rules to the contrary. It was obvious nonsense to say that disclosure to a third party's regulator did not infringe privilege. For a statute to override privilege, it had to be express or a necessary implication; there was no lesser test for regulators. The FRC's rules, unlike the Law Society's, did not come close.

CRIMINAL RELEASES

Reading a document in a criminal trial does not destroy the document's confidentiality.

You might think that reading out parts of a document during a criminal trial, and inviting the judge then to read the first three (out of nine) of its pages, would put paid to any confidentiality in that document. But not according to Hildyard J in *SL Claimants v Tesco plc* [2019] EWHC 3315 (Ch).

The document concerned was the note of an interview between an inhouse lawyer at Tesco and Tesco's external lawyers setting out what the inhouse lawyer knew about Tesco's overstatement of its commercial income prior to the overstatement becoming public, Tesco's shares crashing and Tesco being sued by its shareholders (Tesco itself agreed a fine of £129m under a deferred prosecution agreement, but the three executives charged with personal offences were all acquitted). The note was originally privileged, but the Cs contended that the use of the note at the criminal trial resulted in its losing its confidentiality and, therefore, ceasing to be privileged.

Hildyard J considered that there is a difference between the information in a document and the document itself. Whether references to the information in a document are sufficient to cause a loss of confidentiality in the document as a whole is a matter of degree. In this case, he decided that the references were insufficient to destroy confidentiality, nor was the criminal judge's reading of the document sufficient to require the document's disclosure to the public following the criminal case. Nevertheless, generally, if you don't want to lose privilege in a document, don't mention its contents.

(Cf *BGC Brokers LP v Tradition (UK) Ltd* [2019] EWCA Civ 1937 below.)

SCHEDULED PREJUDICE

Including confessions of wrongdoing in a settlement agreement removes without prejudice protection.

BGC Brokers LP v Tradition (UK) Ltd [2019] EWCA Civ 1937 is a somewhat eccentric case, but it nevertheless contains a warning for those drafting settlement agreements.

The case concerned employees of C who were found to have been leaking confidential information to employees of D. C settled with one of its employees (S), the settlement agreement including in a schedule notes of a without prejudice meeting between C, S and their respective lawyers in which S confessed to his crimes and misdemeanours.

The purpose of including the note in the schedule was so that S could warrant that what he said at the meeting was the whole truth and nothing but the truth. The agreement asserted that the notes were without prejudice and that neither party was waiving that "privilege". C then sued D. In disclosure, C supplied D with a copy of the settlement agreement, but redacted the schedule. D demanded an unredacted copy of the settlement agreement.

In *BGC Brokers*, the parties agreed that the meeting between C and S was without prejudice. The notes were not therefore disclosable. But they also agreed that the settlement agreement was disclosable. The issue was whether the inclusion of the notes in the settlement agreement was enough to render

them part of the agreement, and therefore disclosable, or whether they retained their underlying protected status despite being included in the settlement agreement.

The Court of Appeal was clear, though without much, if any, reasoning, that D was entitled to see the full, unredacted, settlement agreement. By exhibiting the notes to the agreement, without prejudice protection was lost.

C also asserted litigation privilege on the basis that the notes reflected evidence gathered for the purposes of its claim against D. The Court accepted, for the purposes of argument, that the notes were made for the dominant purpose of collecting evidence, but decided that their subsequent inclusion in the settlement agreement was not for that purpose. It was for the purpose of extracting representations and warranties from S. Litigation privilege could not therefore attach to that use of the notes.

BGC Brokers is eccentric on its facts, and somewhat unsatisfactory on multiple levels (is a settlement agreement always outwith without prejudice? *Gnitrow Ltd v Cape plc* [2000] 1 WLR 2327, 2332C? Limited waiver?). But it is nevertheless a cautionary tale about what you can safely include in a settlement agreement.

PROPERTY

A BIT OF COMMON SENSE

Cryptocurrencies are property.

AA v Persons Unknown [2019] EWHC 3556 (Comm) is an everyday story of contemporary fraud/blackmail. A Canadian insurance company was hacked, its data encrypted, and it was told that it could have the key to unencrypt the data on payment of (after negotiation) US$950k in bitcoin. The Canadian insurer's UK insurer paid, the key was given and the data unlocked, and the Canadian insurer proceeded with its business (in, presumably, a state of some embarrassment).

But the insurer's insurer wanted its money back. It traced most of the bitcoin to an exchange operated by BVI companies which, it said, should be able to identify the account holders/fraudsters from the exchange's KYC procedures. Step one to retrieving the bitcoin was some sort of interim relief to stop the bitcoin moving on.

Teare J accepted that bitcoin is property, reciting with little comment the recently published semi-official legal statement to that effect – basically, the concept of "property" is not historically frozen in choses in possession or in action (bitcoin being neither) but extends to the inventions of modern computer science that look property-like. And since bitcoin is property, an injunction could be granted on the (easier) proprietary basis to prevent its dissipation rather on the (harder) freezing injunction basis.

But there was a jurisdictional problem, though it wasn't ventilated in any detail, doubtless because of the absence from the hearing of the exchanges or the fraudsters. The insurer aside, there was no connection to the jurisdiction (the location of the fraudsters was unknown). The case being one of obvious fraud, the judge was in a benevolent mood. He decided that this was a case of tortious damage being suffered within the jurisdiction since the insurer is here and paid money from an account here. This met the jurisdictional "gateway" in PD6B, §3.1(9).

He also thought that section 25 of the Civil Jurisdiction and Judgments Act 1982 was available (interim injunction in support of substantive foreign proceedings, even though there was no suggestion of any proceedings elsewhere). Teare J allowed service on all parties by email.

Teare J ordered that the application be in private. That is obviously right as far as the immediate consequences are concerned – if the fraudsters were alerted, the bitcoins would presumably migrate elsewhere in a crypto-instant. But the judge also thought that identifying the parties might lead to revenge attacks, though the persons likely to do that are the fraudsters, and they will have to be told about the injunction at some point. The judge also pointed to the risk of potential copycat attacks on the Canadian insurer or its insurer.

The fraudsters are unlikely to turn up in court, whether in England, the BVI or anywhere else, to fight the case. So the real question will be whether the BVI exchange complies with the English injunction or whether it feels it is able, or obliged, to ignore it, either as to retaining the bitcoin or disclosing the names on the account holding the bitcoin.

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 2020

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.

35245-5-91