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December 2021

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Court of Appeal confirms that a conditional application for summary judgment is not a step in proceedings; Court of Appeal retrospectively imposes financial conditions on permission to appeal; principle of arbitral confidentiality held to be "significant and worthy of protection".

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PH*lit* is our London litigation know-how blog, where you will find the latest developments on commercial litigation topics delivered in a monthly round-up of the most important topics addressed by the Courts of England and Wales, as well as key regulatory and legislative updates. You can subscribe to this site if you would like our updates sent to you by email as soon as they are posted.

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In this edition…

- We consider a case involving alleged fraud and money laundering where the High Court ruled that a defendant had not taken a "*step in the proceedings*" when applying to have its application for summary judgment heard before its application to stay the court proceedings in favour of arbitration.
- We review a Court of Appeal ruling where financial conditions were retrospectively imposed on the defendants' right to appeal.
- We reflect on a High Court decision to grant the claimants relief from sanctions for failing to comply with an unless order, despite rejecting the claimants' application to amend an application notice for an extension of time.
- We consider a High Court decision concerning an application for disclosure of specific documents pursuant to paragraph 18 of CPR Practice Direction 51U.
- We discuss a Court of Appeal ruling concerning arbitral confidentiality, where the Court observed that English law deems the principle of arbitral confidentiality to be "*significant and worthy of protection*".
- We consider a Court of Appeal decision regarding the jurisdictional tests contained in section 9 of the Defamation Act 2013 and the General Data Protection Regulation, in the

context of an appeal against an order granting permission for the claimant to serve proceedings out of the jurisdiction.

- Finally, we review a High Court decision allowing certain claims brought by the claimants for the purposes of enforcing an unsatisfied judgment which held that the former Chief Executive Officer of the claimants' corporate group had perpetrated a very large and sophisticated fraud.

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High Court declines to hear summary judgment application ahead of application to stay proceedings in favour of arbitration

Deposit Guarantee Fund for Individuals v Bank Frick & Co AG [2021] EWHC 3226 (Ch) (judgment available here)

1 December 2021

- In a case relating to alleged fraud and money laundering, the High Court has ruled that a defendant had not taken a "*step in the proceedings*" when applying to have its application for summary judgment heard before its application to stay court proceedings in favour of arbitration. However, the Court declined to order - "*as a matter of logic*" - that the summary judgment application be heard first.

- In 2013, PJSC National Credit Bank (the "**Bank**") pledged funds as security for various loans made by the first defendant, Frick & Co A.G. ("**Frick**"), to three UK incorporated entities (the "**Debtors**"). Each of the six relevant pledge agreements (the "**Pledges**") provided for any disputes to be subject to arbitration. The Debtors defaulted on the loans. Upon enforcing the Pledges, Frick received $25.8 million, which had the effect of putting the Bank into insolvency proceedings in Ukraine. The claimant in these proceedings, Deposit Guarantee Fund for Individuals ("**DGFI**") , was then appointed as liquidator for the Bank.

- DGFI brought proceedings in England against Frick and one of the Debtors on the basis that the Debtors were sham companies carrying on no legitimate business and therefore the Pledges had been entered into fraudulently, at the instigation of two senior managers from within the Bank. This was allegedly done for the purpose of extracting assets from, and putting them beyond the reach of, the Bank's creditors. The claim was brought under sections 423-425 of the Insolvency Act 1986 (Transactions defrauding creditors).

- In acknowledging service, Frick stated its intention to contest jurisdiction on the basis of the arbitration clauses in the Pledges (as well as there being an insufficient connection to England). Subsequently, on 26 July 2021, Frick applied:

    - to stay the English court proceedings in favour of arbitration in accordance with section 9 of the Arbitration Act 1998 (the "**Act**") (the "**Stay Application**"); and

    - alternatively, and "*only in the event that the Stay Application is unsuccessful*", Frick applied for strike out and/or summary judgment, on the basis of the claim lacking any reasonable grounds (the "**SJ Application**"). Frick made clear in its application notice that the SJ Application was conditional on the Stay Application not succeeding.

First Issue

- Under section 9(3) of the Act, the Stay Application could not be brought "*after [Frick] has taken any step in [the Court] proceedings to answer the substantive claim*". Frick sought DGFI's agreement that the SJ Application did not constitute a "*step in the proceedings*" and

therefore could be heard first without Frick, consequently, submitting to the jurisdiction of the English courts. DGFI refused, resulting in Frick issuing a second application seeking:

- a declaration that by applying to have the SJ Application heard first, Frick was not prejudicing its right to pursue the Stay Application; and
- if that declaration were granted, an order for the SJ Application to be heard first.

- In light of the judgment in *Capital Trust Investments Ltd v Radio Design* TJ AB [2002] EWCA Civ 135, it was common ground between the parties that an application made expressly conditional on a stay application being unsuccessful did not constitute the defendant's submission to the jurisdiction. However, on DGFI's case, Frick's position that the SJ Application should be heard first was a step in proceedings that obviated the right to pursue the Stay Application, in accordance with section 9(3) of the Act.

- The Court concluded that provided the SJ Application had been made expressly conditional on the Stay Application, as was the case, then it mattered not in what order Frick sought for those applications to be heard.

Second Issue

- At the centre of the case management dispute as to the order of the applications was the question of costs, which itself was a chicken and egg dilemma with unnecessary costs a possible consequence, no matter what order was made. Whilst Frick argued that the SJ Application would be less costly, the Court could not be satisfied that this was the case without examining the merits of the Stay Application. The Court further commented that the SJ Application would necessitate expert evidence in respect of Ukrainian law, which could be a "*substantial undertaking*".

- As: (i) the Court was not persuaded either way on which route would incur less cost; (ii) the SJ Application was "*expressly predicated on the outcome of the Stay Application*"; and (iii) there were no "*countervailing case management considerations*", the Court declined to order that the SJ Application be heard first, which would not have been the logical order of events.

PH*lit* comment:

This judgment reminds practitioners that where your client wants to contest jurisdiction, it is also possible to make an application for summary judgment without compromising any jurisdictional challenge under section 9 of the Act, provided that the application is made expressly conditional to that challenge. Moreover, an application for case management directions to hear the summary judgment first should not constitute an inadvertent submission to the jurisdiction. However, a court is unlikely to make such a case management order unless there are clear benefits in departing from the logical order of events.

In all instances, the defendant should at all times make clear that any proposed action is without prejudice to, and conditional upon, the stay application. The claimant's representatives will inevitably be eagle-eyed for any inadvertent waiver.

Court of Appeal imposes financial conditions on defendant's right to appeal

*SpiceJet Ltd v De Havilland Aircraft of Canada Ltd [2021] EWCA Civ 1834 (judgment available **here**)*

7 December 2021

- Despite the successful claimant's presence at the hearing in which permission to appeal was granted, and despite not having proposed any conditions to the defendant's right to appeal (which would ordinarily preclude a subsequent application to impose conditions under CPR 52.18(1)(c)), the Court of Appeal has exercised its own inherent jurisdiction to impose such conditions.

- On 23 February 2021, the High Court awarded summary judgment to the claimant, De Havilland Aircraft of Canada Ltd ("**De Havilland**"), ordering that the defendant, SpiceJet Ltd ("**SpiceJet**") pay US$42,950,000 in liquidated damages arising under an aircraft purchase agreement (the "**LD Amount**").

- At that February hearing (the "**23 February Hearing**"), SpiceJet was granted permission by the High Court judge to appeal on the basis of "*just a squeaker of an argument*" of contractual construction. Importantly, the Court did not grant permission on the separate ground that the liquidated damages amounted to a penalty and SpiceJet did not renew its application for permission on that ground. At the 23 February Hearing, De Havilland did not invite the Court to make its grant of permission conditional in any way.

- Subsequently, on 23 March 2021, De Havilland applied to the Court of Appeal for an order: (i) striking out SpiceJet's appeal unless SpiceJet paid the LD Amount into court pursuant to CPR 52.18(1)(a); and/or (ii) security for its costs incurred in responding to the appeal.

- Separately (but crucial to this judgment), on 3 June 2021, De Havilland issued a petition to enforce the English Court judgment in the High Court of Delhi. SpiceJet opposed that petition, including on the basis that the LD Amount constituted an unlawful penalty and therefore the judgment was unenforceable.

- It is worth citing CPR 52.18 (*Striking out appeal notices and setting aside or imposing conditions on permission to appeal*) in full, with relevant emphases added:

  > "*(1) The appeal court may –*
  >
  > *a)* ***strike out the whole or part of an appeal notice****;*
  >
  > *b) set aside permission to appeal in whole or in part;*
  >
  > *c)* ***impose or vary conditions*** *upon which an appeal may be brought.*
  >
  > *(2) The court will only exercise its powers under paragraph (1)* ***where there is a compelling reason for doing so****.*
  >
  > *(3)* ***Where a party was present at the hearing*** *at which permission was given, that party may not subsequently apply for an order that the court exercise its powers under subparagraphs (1)(b) or (1)(c).*"

- By virtue of CPR 58.18(3), as De Havilland had attended the 23 February Hearing where permission to appeal was granted, it was precluded from applying under CPR 52.18(1)(c). Therefore it made its application under CPR 52.18(1)(a).

- The Court of Appeal considered that seeking strike out of SpiceJet's appeal unless it paid the LD Amount into court was "*plainly asking for the imposition of a condition by another route*". Nonetheless, the Court noted that its inherent jurisdiction to dispose of matters fairly and expeditiously permitted it to make the order sought. The key question, however, was whether there existed a compelling reason to exercise its discretion to grant the order sought by De Havilland under CPR 52.18(1)(a).

- The Court identified that its discretion must be exercised with some degree of care. In most cases, where the applicant was present at the hearing where permission to appeal was granted, a court would require a material change in circumstances so as to justify the exercise of its discretion.

- The Court considered SpiceJet's attempt to re-litigate in India the issue of whether the LD Amount was a penalty to be - even in foreign proceedings - "*abusive*" and something that

could not "*be countenanced*". This was a "*significant change of circumstances*" and a compelling reason to make an order under CPR 52.18(a).

- The Court of Appeal then considered whether the granting of an order might stifle an otherwise arguable appeal, given SpiceJet's precarious financial position. The Court was satisfied that SpiceJet's majority shareholder, Mr Ajay Singh, being of significant personal wealth, would be able to inject sufficient funds into SpiceJet so as to meet any unless order. The Court remarked that it had to consider the slim prospects of the appeal, and the amount that Mr Singh would be willing - as a competent businessman - to invest in such a venture given the likelihood of the appeal's success. With that in mind, the Court ordered that SpiceJet pay £5,000,000 into court, failing which its appeal would be struck out.

- On the matter of security for costs, the Court commented that the purpose of such an order is to protect an applicant from the potentially "*substantial obstacles to or a substantial extra burden (of cost or delay) in enforcing an English judgment*" where the respondent is ordinarily resident abroad. As De Havilland had already pursued enforcement proceedings in India, the Court did not consider that there was a significant extra burden to adding the relatively modest costs of the present appeal to that enforcement application, and SpiceJet committed not to oppose an application to add such costs to the Indian petition. Security for costs was therefore refused.

PH*lit* comment:

The judgment offers useful guidance on CPR 52.18. Above all, it highlights that successful parties to litigation should be prepared (where appropriate) to propose conditions to any permission to appeal at the relevant permission hearing. Had SpiceJet not taken an "abusive" position in opposition to the Indian petition, it is most likely that the Court would not have imposed any conditions on SpiceJet's permission to appeal.

However, this judgement also demonstrates that if a party has failed to propose conditions at the permission hearing, the court nevertheless has the inherent jurisdiction to impose conditions where there are compelling reasons to do so, and which have arisen since the date of permission hearing.

High Court refuses an application to amend an application notice seeking additional time but grants relief from sanction

(1) Cavadore Limited and (2) Magenta Black Trading Limited v (1) Mohammed Jawa and (2) Modern Food Company Limited [2021] EWHC 3382 (Ch) (judgment available here)

13 December 2021

- Whilst declining the claimants' application to amend its application notice seeking further time to comply with an unless order, the High Court has nevertheless determined that, in all the circumstances, the claimants should be granted relief from sanction in failing to so comply.

- The first claimant, Cavadore Limited ("**Cavadore**"), is stated to be the ultimate beneficial owner of the Japanese restaurant Nozomi in Knightsbridge. The second claimant, Magenta Black ("**Magenta**" and together with Cavadore, the "**Claimants**") is entitled to exploit certain Nozomi intellectual property rights pursuant to the terms of a licence. Magenta entered into five franchise agreements with the defendants, Mohammed Jawa and Modern Food Company Limited (the "**Defendants**"), for the purposes of establishing Nozomi restaurants in the Middle East. Both the Defendants are based in the Kingdom of Saudi Arabia ("**KSA**").

- Those agreements have since terminated, but the Claimants assert claims in the value of at least £23 million. The substance of the claims is not relevant for the purpose of this judgment, save to note that there was nothing before the Court to suggest that they were not properly arguable.

- The present proceedings are the Claimants' third attempt at prosecuting their claims. The first claim failed due to service deficiencies in the KSA, which led to the claim being struck out on the basis that the time for service of claim form had expired. This resulted in an adverse costs order against the Claimants in the amount of £210,036.61 (the "**Adverse Costs**"). The second claim was never served because the Defendants' solicitors refused to accept service, and thereafter simply fell away.

- The third claim was issued on 11 February 2021, and on 10 March 2021 the Claimants applied without notice for: (i) permission to serve the claim out of the jurisdiction in the KSA; and (ii) an order permitting alternative service by way of email to the Defendants' solicitors. On 27 April 2021, after some back and forth between the Claimants and the Court, the Court gave an order granting the application (the "**27 April Order**"). The Defendants subsequently applied to set the 27 April Order aside.

- At a hearing on 26 August 2021, Deputy Master Arkush set aside the 27 April Order (noting in part that the prospective delay in effecting service through official channels in KSA was an inadequate reason to justify alternative service), and ordered that permission to serve through official channels in KSA be granted, together with an extension of time to make service possible. Moreover, the Deputy Master gave an order (the "**Unless Order**") that unless the Claimants paid the Adverse Costs from the first proceedings by 25 September 2021, this third claim would be struck out 14 days thereafter (i.e. on 9 October 2021) (the "**Strike Out Date**")

- On 24 September 2021, the Claimants applied to extend the time for payment of the Adverse Costs until 27 September "*due to logistical banking delays*" (the "**First Application**"). On 27 September 2021, the Claimants issued an amended application requesting a further extension of time for payment until 8 October 2021, on the basis of delays in relation to a loan (and associated security) being used to settle the Adverse Costs, which it was said would be "*resolved imminently*" (the "**Second Application**"). On 28 September 2021, the Defendants' solicitors wrote to the Court expressing concern with the Claimants' conduct and adequacy of their explanations, and requested an in-person hearing, which was subsequently listed for 29 November 2021. In the interim, the Strike Out Date, to which the Claimants were seeking an extension, elapsed.

- On 23 November 2021, the Claimants issued a third application notice seeking to extend the date for payment of the Adverse Costs until 22 December 2021 by way of amendment to the First and/or Second Application or, alternatively, relief from sanctions for failure to comply with the Unless Order (the "**Third Application**"). A witness statement accompanied the Third Application, which gave more detail explaining the reasons for the delay in making payment, which details were far more complex than mere logistical issues.

- At the hearing on 29 November 2021 (the "**29 November Hearing**"), the Court considered the First Application to be "*wrong and misleading*", and it was clear that at the time of Second Application, the Claimants knew that any financing issues could not have been "*resolved imminently*" as had been suggested.

- The Court was therefore required to determine the following issues:

- Given that the Strike Out Date had passed by the time of the 29 November Hearing, were the First and Second Applications moribund and of no effect?

- If the First and Second Applications were not moribund and of no effect, should the Court permit their amendment by way of the Third Application, such that the Strike Out Date would be extended until 22 December 2021 (and not the original extension until 8 October 2021 sought in the Second Application)?

- If such amendments were not permissible, should the Claimants be granted relief from sanctions for failure to make payment in accordance with the Unless Order?

First Issue

- Dealing with the first issue quickly, the Court confirmed that the effect of bringing an in-time application for an extension of time (as the First and Second Applications were) was to suspend the sanction that would otherwise have taken effect, pending determination of the application.

Second Issue

- In relation to the second issue, the Court noted that an application notice is not a statement of case, and there is little authority on making amendments to them. The Court arrived at the "*clear conclusion*" that, in furtherance of the Overriding Objective, permission should not be granted to amend the First and Second Applications as sought in the Third Application, on the following bases:

  - first, all of the applications should have been brought much earlier, as soon as the Claimants were aware that there would be a delay in making payment;

  - second, the First and Second Applications were misleading and the information provided in them inadequate;

  - third, the proposed amendments would have significantly altered the nature and substance of the original applications; and

  - fourth, permission to make the amendments should be determined in accordance with the more rigorous *Denton* test (discussed below) for relief from sanction.

Third Issue

- The *Denton* test requires the court to consider the following three criteria: (i) the seriousness and significance of the breach; (ii) whether there was any good reason for the breach; and (iii) whether, in all circumstances of the case, it would be just to grant relief. As accepted by the Claimants, the breach was serious and significant, and there were realistically no good reasons for it. The Court therefore had to "*anxiously*" weigh up all the circumstances of the case, and in so doing concluded that, for the following reasons, relief should be granted:

  - if relief were refused, the Claimants would lose a very valuable claim;

  - if the Claimants were forced to issue a new (fourth) claim in the event that relief were refused, this might constitute an abuse of process;

  - the interest on the Adverse Costs mitigated the delay in the Defendants receiving payment of them; and

- despite the misleading nature of the Claimants' applications, concerted efforts had been made to obtain financing so as to settle the Adverse Costs.

PH*lit* comment:

The Court made abundantly clear its dissatisfaction with the Claimants' conduct in progressing its three applications. Had the Claimants been open and transparent about their funding arrangements at the outset, they would have been in a significantly better position, which might have even avoided the need for making an application at all. The Court specifically noted its surprise that the Claimants' solicitors had offered no explanation or apology in respect of the misleading information presented in the First and Second Applications.

It should go unsaid that practitioners never want to be in a position to have to apply from relief if at all possible, and this case offers stark guidance as to the fundamental importance of being transparent both with the Court and the other side. On another day, the Court may well have weighed up the circumstances of this case against the Claimants.

High Court gives guidance on disclosure of specific documents under PD 51U

SDI Retail Services Ltd v Rangers Football Club Ltd *[2021] EWHC 3364 (Comm)* (*judgment available here*)

13 December 2021

- The High Court has considered an application for disclosure of specific documents pursuant to paragraph 18 of the CPR Practice Direction 51U ("**PD 51U**"). The Court clarified that to decide whether an order should be made under paragraph 18 of PD 51U, the matters for consideration were either the issues in the action as crystallised by the parties' statements of case (where an order to vary Extended Disclosure is sought) or the List of Issues for Disclosure set out in the parties' Disclosure Review Document (where an order for specific disclosure is sought).

- The underlying dispute relates to an agreement dated 21 June 2017 pursuant to which the defendant football club, Rangers, granted the claimant certain rights, including the exclusive right to manage the retail sale of certain branded products (the "**SDIR Agreement**"). The SDIR Agreement contained a "matching" right, by which the claimant was granted the right to match any offer made by third parties for the right to, amongst other things, operate and manage certain retail operations and sell other branded products. Rangers subsequently entered into a separate agreement with two other retail companies, pursuant to which those companies were granted the rights to manufacture and supply official and replica home, away and third playing kits for the 2018-2019, 2019-2020 and 2020-2021 Scottish football seasons (the "**Elite/Hummel Agreement**"). The claimant argues that Rangers breached the matching right contained in the SDIR Agreement by failing to give it the opportunity to match the Elite/Hummels Agreement. The claimant argues that, were it not for the Elite/Hummels Agreement, it would have acquired the rights and been the football club's official retailer during the 2018- 2019 and 2019-2020 seasons, and is therefore suing for various forms of loss and damages, including loss of profits from the sale of replica kits and other branded products.

- The Elite/Hummel Agreement was terminated in around February 2020 and the present application concerned documents relating to a third agreement between the defendant football club and another retail company, Castore, which acquired the rights granted under the Elite/Hummel Agreement from March 2020 (the "**Castore Agreement**"). The parties had agreed a List of Issues and an order for Extended Disclosure was made, when the claimant applied under paragraph 18 of PD 51U for an order seeking disclosure of the Castor Agreement and of Castore's quarterly financial statements that were produced pursuant to the Castore Agreement (together, the "**Castor Documents**").

- Paragraph 18 of PD51U which states:

  - ***18.1*** *The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.*

  - ***18.2*** *The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4).*

- The Court noted that while paragraph 18.1 of PD 51U is expressed as a power to vary an order for Extended Disclosure, varying an existing order for Extended Disclosure is not the only way in which the Court may provide for a specific document or classes of documents to be disclosed. In this regard, insofar as an existing order for Extended Disclosure does not provide for the disclosure of a particular document or class of documents, the court may make a further order for disclosure which encompasses such document or class of documents by an express variation of the List of Issues for Disclosure, the applicable Extended Disclosure Model, the search parameters or, where relevant, the applicable requests for Model C Disclosure. However, alternatively the court does not have to undertake such a process and it could instead simply make an order for specific disclosure of a document or class of documents, provided that: (i) the disclosure ordered must be for a specific document (that is, an identified or identifiable or describable document) or a specific class of documents, but that class must be of a "*narrow*" ambit; and (ii) the document must relate to a particular Issue for Disclosure. Accordingly, the Court observed that the specific disclosure contemplated by the second sentence of paragraph 18.1 is not as wide as the Court's power under CPR rule 31.12, but any possible limitations could be circumvented by expressly varying an existing order for Extended Disclosure.

- In determining the an application for disclosure of specific documents under paragraph 18.1 of PD 51U, the Court noted that the principal considerations are:

  - whether the documents in question are relevant to the issues of determination in the action;

  - whether the document exists or existed and is or was within the control of the other party;

  - whether the order would be necessary for the just disposal of the proceedings; and

  - whether such an order would be reasonable and proportionate having regard to the overriding objective.

- In addition, where the disclosure of further documents requires there to be a variation to an existing order for Extended Disclosure, the factors set out in paragraph 6.4 of PD 51U must be taken into account. Pursuant to paragraph 6.4 of PD 51U, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective, including the following: (i) the nature and complexity of the issues in the proceedings; (ii) the importance of the case; (iii) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence; (iv) the number of documents involved; (v) the ease and expense of searching for and retrieving any particular document; (vi) the financial position of each party; and (vii) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

- In all the circumstances, the Court observed that the principal issue between the parties was whether the Castor Documents were relevant.

- In considering this question, the Court noted that it had to consider the List of Issues for Disclosure, but that the Issues of Disclosure were not determinative when seeking to vary an order for Extended Disclosure. In the Court's judgment, the Castor Documents were relevant to the issue of quantum – although they concerned the 2020 – 2021 season, they served as a useful comparator to the sales and revenue which could have been generated by the claimant had it obtained the rights granted under the Elite/Hummel Agreement. The Court also noted that the Castor Documents related to specific Issues of Disclosure, albeit that they fell out of the date range ordered under the order for Extended Disclosure.

- The Court held that an order for specific disclosure, within the meaning of the second sentence of paragraph 18.1 of PD51U, was justified given that the Castor Documents were specifically identified and related to Issues for Disclosure, even if they did not fall within the date range of the Court's order for Extended Disclosure. Accordingly, it was not necessary for the Court to vary the existing order for Extended Disclosure, however it confirmed that would have been prepared to do so if necessary.

PH*lit* comment:

Following the Court's judgment in Eurasian Natural Resources Corp Ltd v Qajygeldin *[2021] EWHC 462 (Ch) earlier in the year, this judgment provides further helpful clarification of the provisions contained in PD 51U. The judgment confirms that where a particular document, or class of documents, is not covered by an existing order for Extended Disclosure, the Court can either vary the order for Extended Disclosure or it can simply order for the particular document or class of documents to be disclosed provided that the document or class of documents is sufficiently specific and identifiable and relate to a particular Issue for Disclosure.*

The judgment also confirms the particular considerations that the Court will take into account when deciding whether an order should be made under paragraph 18.1 of PD 51U, and confirms that where the Court is required to vary an existing order for Extended Disclosure, the factors set out in paragraph 6.4 of PD 51U will also be relevant.

Court of Appeal weighs up arbitral confidentiality against principles of open justice

CDE v NOP [2021] EWCA Civ 1908 (judgment available here)

14 December 2021

- The Court of Appeal has been asked to consider whether an arbitral award made against a company behind a high-profile fraud should be made public, in circumstances where an action relating to the same facts has been brought before the High Court against individuals connected to the company, namely the defendants in this case. The task for the Court of Appeal, therefore, was to weigh the tension between the principles of open justice and arbitral confidentiality. On this occasion, the Court weighed in favour of arbitral confidentiality, noting that English law deems the principle of arbitral confidentiality to be "*significant and worthy of protection*".

- The defendants in the action were accused of orchestrating a high-profile fraud. These same allegations were also the subject of an arbitration brought by the claimants against a company connected to the defendants ("**Company X**"), in which the tribunal found (in a lengthy award) that the claimants' allegations were well-founded and that the defendants had given false evidence (the "**Award**").

- The claimants sought to rely on the Award in the present proceedings, brought against the defendants directly, arguing that it would be an abuse of process for the defendants to insist on litigating the same issues again. The defendants submitted that, as they were not parties to the arbitral proceedings, the Award was not binding on them and is therefore not admissible as

evidence against them. These issues are to be determined in the claimants' application for summary judgment, due to be heard in February 2022 (the "**Privity Application**").

- In addition, the claimants argued that the Award should be made public as there is a public interest in the arbitrators' principal findings; the defendants had previously publically stated that they would be vindicated in the arbitration and, now they have not been so vindicated, this should be publically known. The defendants and Company X submitted that the Award should remain private, at least until the Privity Application has been determined, because if the Privity Application fails the Award will have no further relevance to the present proceedings and there would, accordingly, be no justification for making the Award public.

- On the defendants' case, the Privity Application would need to be heard in private, in order that the claimants can rely on the content of the Award before the judge hearing the application but, in the event that the judge finds in favour of the defendants, the Award will not have become public by virtue of having been discussed in open court. At a Case Management Conference ("**CMC**") (heard in private), the High Court seemed to indicate that it was in agreement that the Privity Application should be heard in private for this reason. However, when the Court provided its order (the "**Order**"), it made no decision as to whether the Privity Application (or any other application in the proceedings) should be heard in public or private, but instead simply provided that the claimants would need to seek a determination from the Court in relation to each application as to whether it should be heard in private.

- The claimants appealed against the Order, submitting that the High Court had failed to give proper weight to the principle of open justice, and placed excessive weight on irrelevant factors. In particular, the Court of Appeal was asked to determine whether: (i) the judge was correct to hold the CMC in private; and (ii) the judge was wrong to make the Order to ensure that the Award would not become public as a result of the proceedings until otherwise determined by the Court. The Court of Appeal noted that it could not determine whether the Privity Application should be heard in private, as this was not actually decided in the Order, and appeals are against the content of orders not judgments; the role of the appellate court was to review a decision taken at first instance, not to undertake a decision for the first time.

- In reaching its decision, the Court of Appeal began by setting out the procedural framework, namely CPR 39.2 which states that *"the general rule is that a hearing is to be in public. A hearing may not be held in private… unless and to the extent that the court decides that it must be"* where one or more of the following matters applies:

    (i) publicity would defeat the object of the hearing;

    (ii) it involves matters relating to national security;

    (iii) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;

    (iv) a private hearing is necessary to protect the interests of any child or protected party;

    (v) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;

    (vi) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or

    (vii) the court for any other reason considers this to be necessary to secure the proper administration of justice.

- The defendants relied on sub-paragraph (iii), namely that the hearing involves confidential information (i.e. the contents of the Award) and sitting in public would damage that

confidentiality. Neither party suggested that the action would fall within the exception to CPR 39.2 provided by CPR 62.10 in respect of a defined set of "arbitration claims".

- The Court acknowledged that, for the most part, the question of arbitral confidentiality has been left to the common law. Returning to first principles, the Court noted that the obligations of privacy and confidentiality are contractual and where there is express agreement, normally as set out in the institutional rules governing the arbitration (in this case Article 30 of the LCIA Rules), those obligations must be interpreted and applied, though noting that the institutional rules often have a carve-out to the obligation of confidentiality recognised within them for "enforcing a strict legal right" or similar. Accordingly, once the defendants had established the confidentiality of the Award this was sufficient to engage CPR 39.2.

- Turning to the two points of the appeal:

    - The Court noted that the purpose of the CMC was to give directions for further conduct of the proceedings and to have discussed these matters in public would inevitably have revealed what the arbitrators had decided. Therefore the CMC would have involved the consideration of confidential information. However, confidentiality is not a trump card and the critical question was therefore whether it was necessary to sit in private to secure the proper administration of justice. The Court considered that a CMC is, in general, less likely to involve matters of public interest or to require public scrutiny of the court's conduct than a full trial and so a court may more readily conclude that to sit in private will secure the proper administration of justice to protect the interests identified by the parties. The High Court had clearly considered the requirements of CPR 39.2 in reaching its decision to hold the CMC in private and, therefore, the decision was not outside the generous ambit of discretion awarded to the first instance judge in taking such a decision. Accordingly, the judge was entitled to determine that the CMC be held in private in the circumstances.

    - As to whether the judge had erred by providing that the Award would not become public until the Court had determined that is should in the Order, thus suggesting that hearings in private would be the default and placing the onus on the claimants to continue arguing for a public hearing, this was wrong in principle. The starting point is that any hearing, including that of the Privity Application, should be heard in public and any derogation from this principle needs to be justified in accordance with CPR 39.2. The Court ruled accordingly that it is for the defendants to satisfy the court that a hearing in private is required when the lower court comes to take its decision as to the arrangements for hearing the Privity Application in due course.

PH*lit* comment:

This decision helpfully clarifies the operation of CPR 39.2 and reminds us that the starting point in any such case is that a hearing must be held in public. To deviate from this default position, the concerned party must not only demonstrate that one of the matters in CPR 39.2 is engaged, but it is also in the interests of the proper administration of justice for the hearing to be held in private.

Although each case will turn on its own particular facts, arbitral practitioners will be pleased to note the respect accorded by the Court of Appeal to the confidentiality of the arbitral process, recognising the significance of the principle of arbitral confidentiality as something worthy of protection. Any deviation from this default position regarding confidentiality of the arbitral proceedings would need to be expressly agreed between the parties in their agreement to arbitrate.

Court of Appeal gives guidance on jurisdiction rules in libel and data protection claims

Soriano v Forensic News LLC and others [2021] EWCA Civ 1952 (judgment available here)

21 December 2021

- The Court of Appeal, in the context of an appeal against an order granting permission for the claimant to serve proceedings out of the jurisdiction, has considered the meaning of the jurisdictional tests contained in section 9 of the Defamation Act 2013 (the "**Defamation Act**") and the General Data Protection Regulation ("**GDPR**").
- In brief overview, between June 2019 and June 2020, a series of eight publications appeared on the website *Forensic News* which referred to the claimant in unflattering terms. The defendants' are all associated with, or contributors to, *Forensic News* and are all based in the United States. The claimant issued proceedings in June 2020, making claims under the laws of libel, misuse of private information ("**MOPI**"), data protection, malicious falsehood and harassment, and sought permission to serve proceedings out of the jurisdiction. At first instance, the High Court granted permission to serve the claims in libel and some of the MOPI claims on the first five defendants. Permission was refused in respect of the bulk of the claims in MOPI, the claims in data protection, and the claims malicious falsehood. For more information regarding the first instance decision please refer to the January 2021 edition of PH*lit*.
- The first to fifth defendants appealed against that decision, and permission was also granted for the claimant to cross-appeal the decision that its claims in data protection and malicious falsehood could not proceed.
- In overview, the Court of Appeal held that: (i) the claimant's permission to serve out of the jurisdiction for the libel claims and limited MOPI claims should stand; (ii) the claimant was additionally granted permission to serve out of the jurisdiction on the data protection claim; and (iii) the claimant was denied permission to proceed with the malicious falsehood claim.

Cause of Action 1: The libel claim

- There are relatively few authorities on the application of section 9 of the Defamation Act, which provides that: *"a court does not have jurisdiction… unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement."*
- In reaching its decision on the libel action, the Court of Appeal disagreed with the High Court that the section 9 test represented any more than a modification of the *forum conveniens* test. Accordingly, the standard of proof which a claimant must meet under section 9 is the same as the well-established standard for *forum conveniens* disputes - that of a good arguable case. However the Court of Appeal agreed with the High Court that a defendant contesting jurisdiction under section 9 bears an evidential burden as to the reach and extent of the publication and therefore the "places" of publication. Accordingly, in spite of this disagreement as to the scope and application of the section 9 test, the Court of Appeal did not need to disturb the High Court's decision granting permission for the claimant to serve its libel claims outside of the jurisdiction.

Cause of Action 2: The MOPI claims

- Permission to serve outside of the jurisdiction had been refused at first instance in relation to the majority of the MOPI claims, save for those relating to four photographs published by the defendants. Taken in isolation, a MOPI claim in respect of four photographs would have been too trivial to justify the grant of permission to serve outside of the jurisdiction, but, taken in conjunction with the libel claims, the Court of Appeal found that the High Court was right to exercise its residual discretion to grant permission. In this regard, the decision to grant permission in respect of the MOPI claims concerning the photographs was parasitic on the libel claims and, accordingly, the Court of Appeal upheld the High Court's original decision to grant permission to serve out in respect of such claims.

Cause of Action 3: The data protection claim

- The original data protection claim alleged that the defendants acted in breach of GDPR Article 5(1)(a) (*processing must be fair, lawful and satisfy a condition under Article 6*), Article 5(1)(d) (*data must be accurate*), Article 10 (*processing of personal data relating to criminal convictions and offences)* and Article 44 (*international transfers of data*).

- The Court of Appeal noted that the Court's jurisdiction to entertain a data protection claim against a defendant based outside England and Wales is determined by reference to the GDPR and the general principles outlined above. In this regard, the claim was brought on the basis that the processing complained of by the claimant fell within the ambit of Article 3 of the GDPR, which provides that:

  "(1) This Regulation applies to the processing of personal data in the context of activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.

  (2) This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:

  (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or

  (b) the monitoring of their behaviour as far as their behaviour takes place within the Union."

- For the processing to come within Article 3(1) GDPR, the data controller or processor must have "establishment" within the EU. Based on authority on the meaning of "establishment", in a similar context, from the Court of Justice of the European Union, the Court of Appeal derived a number of propositions, including: (i) first, that there will be establishment in a state where a subsidiary is involved in "orientating" the controller's commercial activity towards the inhabitants of that state; and (ii) second, that the question is whether the orientation of the controller's commercial activity towards a particular state extends to "any real and effective activity – even a minimal one – exercised through stable arrangements". In this regard, the Court considered that it was arguable that the defendants had an "establishment" in the EU by the exercise of "stable arrangements" in one or more member states, through a subscription service available to individuals in the UK and EU.
- The Court of Appeal did also consider Article 3(2)(a) and held that it was arguable that the journalistic processing in question was "related to" an offer made by the defendants to data subjects in member states to provide them with services in the form of journalistic output. For similar reasons, the Court held that it was arguable that Article 3(2)(b), concerning the processing of data relating to the monitoring of individuals' behaviour, was also engaged. In this regard, the Court considered it arguable that someone who uses the internet to collect information about the behaviour of an individual in the EU for the purposes of writing and publishing an article using that information is *"monitoring … [a] data subject's behaviour"* in the EU for the purposes of Article 3(2)(b) GDPR.
- Accordingly, the Court concluded that the arguments made in relation to Article 3(1) and (2) GDPR were not "fanciful", and allowed the claimant's appeal on this issue, granting permission to serve the data protection claim outside of the jurisdiction.

Cause of Action 4: The malicious falsehood claim

- At common law, a claim in malicious falsehood requires a publication by the defendant about the claimant which: (i) is false; (ii) was published maliciously; and (iii) causes special damage. The Court of Appeal noted that proof of malice is notoriously difficult to establish and that it was trite law that malice is tantamount to dishonesty, and is not to be equated with carelessness or irrationality in arriving at a belief that the matter published is true. The Court did not accept that the claimant could establish malice, finding that its case appeared to confuse unfair or irresponsible publication with malice and was otherwise presented on too frail and tenuous a basis to allow a serious allegation of malice to proceed. Accordingly, the Court of Appeal upheld the High Court's decision to refuse the claimant permission to serve its claim for malicious falsehood outside of the jurisdiction.

PH*lit* comment:

Practitioners are reminded of the various factors to consider in determining relevant jurisdictional and merits thresholds, particularly in the context of privacy, data and libel actions where a number of differing legislative regimes are in play alongside the common law tests.

As noted in our commentary on the first instance decision, this litigation represents the first time—in the UK at least—that the GDPR's extra-territorial reach, particularly in respect of foreign websites, has really been tested. The Court noted that these issues will need further and definitive consideration in due course and invited the Information Commissioner's Office to consider intervening in this case. Interested parties will be monitoring closely as this case proceeds.

As to the claimant's libel claim, the Court has provided helpful clarification on the nature of section 9 of the Defamation Act, holding that it is simply a modification to the common law rules rather than a unique parallel regime. This will be welcomed by prospective claimants, who otherwise faced onerous obligations under the section 9 regime, although claimants based abroad or with a "global reputation" still face a potentially difficult hurdle to persuade the Court that England and Wales is clearly the appropriate place for the claim to be tried.

For more information and analysis regarding this decision, please refer to our Stay Current Article.

High Court considers beneficial ownership of assets in enforcement and tracing claim

Kazakhstan Kagazy plc and others v Zhunus (formerly Zhunussov) and others *[2021] EWHC 3462 (Comm) (judgment available here)*

21 December 2021

- The High Court has allowed claims brought by the claimant corporate group (the "**claimants**") for the purposes of enforcing an unsatisfied judgment debt of approximately USD 300 million (the "**Judgment Debt**"), which arose out of a 2018 judgment in which it was held that Mr Arip, the former Chief Executive Officer of the claimants, had perpetrated a very large and sophisticated fraud, with the connivance of his co-defendant, Ms Shynar Dikhanbayeva, the former Chief Financial Officer of the claimants.

- The claimants brought their claims on the basis that money stolen from them could be traced into a number of assets held by companies within Cypriot trust structures for the benefit of Mr Arip and his family. Those assets included four sets of UK properties worth over £30 million and £72 million held in cash in a Swiss bank account (together, the "**Assets**"). The claimants therefore sought enforcement of the 2018 judgment on the following grounds:

    - first, that the Assets could be traced to the claimants, and were traceable proceeds of Mr Arip's fraud, and therefore belonged beneficially to the claimants and could be used to satisfy the Judgment Debt (the "**Tracing Claim**");

    - second, and in the alternative, if the Assets did not belong to the claimants, they were held on bare trust by Mr Arip, and the claimants were entitled to a charging order against them (the "**Charging Order Claim**"); or

    - third, and in the further alternative, if the Assets did not belong to the claimants or Mr Arip, the transactions which resulted in the Assets being transferred to the companies within the Cypriot Trust Structure were transactions defrauding the claimants in breach of section 423 of the Insolvency Act 1986 (the "**s423 Claim**").

- On the other hand, the defendants argued that the Assets were owned by trusts for the benefit of, and/or were directly held by, family members of Mr Arip, such that the claimants were not permitted to enforce the Judgment Debt against the Assets.

- In relation to the Tracing Claim, the Court relied on the following principles set out in *Foskett v McKeown* [2001] 1 AC 102:

    - The process of ascertaining what happened to a claimant's money involves both tracing and following: (i) following is the process of following the same asset as it moves from hand to hand; and (ii) tracing is the process of identifying a new asset as the substitute for the old.

    - A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but also in its traceable proceeds, and their interest binds everyone except a bona fide purchaser for value without notice

    - Tracing is therefore neither a claim nor a remedy - it is merely the process by which a claimant demonstrates what has happened to their property, identifies its proceeds and the persons who have handled or received them, and justifies their claim that the proceeds can properly be regarded as representing their property.

- The Court also noted the decision in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453 in which Lord Neuberger concluded that tracing can occur even where the chain of payments and investments is complex: *"I do not doubt the general principle, reiterated by Lord Millett in Foskett v McKeown [2001] 1 AC 102, that if a proprietary claim is to be made good by tracing, there must be a clear link between the claimant's funds and the asset or money into which he seeks to trace. However, I do not see why this should mean that a proprietary claim is lost simply because the defaulting fiduciary, while still holding much of the money, has acted particularly dishonestly or cunningly by creating a maelstrom. Where he has mixed the funds held on trust with his own funds, the onus should be on the fiduciary to establish that part, and what part, of the mixed fund is his property."*

- The Court found that the duties which Mr Arip had been found to have breached under Kazakh law would be regarded as fiduciary duties under English law. On an investigation of the complex factual context, the Court also found that the Assets were traceable to the proceeds of the fraud which Mr Arip had committed on the claimants. Further, the Court held that, in circumstances where Mr Arip and his family members had successfully concealed much of the chain of the transactions in relation to the Assets, it would be inequitable to preclude the claimants from advancing their claim.

- Accordingly, the Court held that the Tracing Claim succeeded in respect of all the Assets. Even if it had no so succeeded, the Court would still have concluded that: (i) the Charging Order Claim should succeed on the basis that Mr Arip beneficially owned the Assets; and/or (ii) the s423 Claim should succeede. Accordingly, the Assets could be used to part-satisfy the outstanding judgment debt.

- In reaching its decision, the Court dismissed the defendants' arguments that the claim was time-barred as they were brought more than six years after the funds were stolen by Mr Arip as the Court held that the claimants could rely on section 32 of the Limitation Act 1980 which applied because the relevant facts were deliberately concealed from them by Mr Arip, and the claimants did not know all the relevant facts until 2017.

PH*lit* comment:

This is a notable judgment for victims of fraud in which the High Court has proven its willingness to look beyond complex trust structures, where the claimants can establish that the assets represent the traceable assets from a fraud, in order to allow enforcement against such assets. The judgment helpfully sets out the basis of a tracing claim: (i) the claimant needs to establish a breach by the defendant (or a third party) of one or more duties which English law would regard as fiduciary; and (ii) the claimant needs to establish that the assets represent the traceable proceeds of the fraud committed by the defendant (or the third party). Finally, the judgment also serves as a useful reminder that the usual six-year limitation period can be displaced in case of fraud and deliberate concealment.

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