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# *Court of Appeal considers vicarious liability in sexual abuse case; the Court of Appeal considers the parameters of a representative action under CPR 19.6(1); and the High Court holds that a settlement agreement can compromise all claims, even if based on fraud or dishonesty*

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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 High Court decision in which the Court ruled that a carefully worded settlement agreement is capable of compromising all claims, including those based on fraud or dishonesty.
- We review an unusual High Court ruling regarding termination of a contract for repudiatory breach, in circumstances where the claimant and defendant each alleged that the other had repudiated the relevant agreement.
- We reflect on a Court of Appeal decision in which the Court was tasked with considering whether a football club was vicariously liable for sexual abuse committed against young footballers by an individual loosely associated with the club.
- We note a High Court ruling concerning an unfair prejudice petition brought under section 994 of the Companies Act 2006 where the Court was asked to consider the novel preliminary issue of whether the appropriation of the petitioner's shares by the company, after the petition had been brought, meant that the petitioner was thereby deprived of his standing to pursue the petition.
- We consider a High Court decision concerning a "*fugitive from justice in Ukraine*" who successfully challenged English jurisdiction over the claim on grounds of *forum non conveniens*.

- We discuss a ruling of the High Court in which the Court held that a firm of accountants did not assume a duty of care by introducing its clients to three tax avoidance schemes and had not agreed to, or assumed a responsibility to, carry out due diligence in relation to those schemes.

- We note an interesting Court of Appeal ruling in which the Court was asked to consider whether a claim for "remediation relief" could be pursued by two named individuals by way of a representative action under CPR 19.6(1) on behalf of themselves and more than 28,000 other individuals and communities.

- Finally, we review a High Court ruling in which the Court determined that the defendant had engaged in a sufficiently "*bad case of breach of confidence*", as well as engaging in unlawful means conspiracy, such that exemplary (or punitive) damages were, in principle, available to the claimant.

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## High Court holds that a carefully worded settlement is capable of compromising all claims, including those based on fraud or dishonesty

***Maranello Rosso Ltd v Lohomij BV and Others*** **[2021] EWHC 2452 (Ch) (judgment available here)**

*6 September 2021*

- The High Court has upheld applications for summary judgment and / or strike out in circumstances where the parties had entered into a comprehensive settlement agreement in 2015. The Court held that the settlement agreement compromised all claims between the parties, including claims advanced in the proceedings for unlawful means conspiracy and deliberate breach of fiduciary duty, which the Court found had been raised in similar form during the settlement discussion.

- The claim related to:

  - a €90 million loan agreement dated 29 May 2014 between the first defendant and the claimant to enable the claimant to purchase a collection of classic cars worth more than £150 million. Under the terms of the loan, the claimant was required to sell the cars through the second defendant, a well-known auction house in London; and

  - a commercial agreement between the claimant and the third defendant, a US affiliate of the second defendant, pursuant to which the third defendant acted in the sale of the cars.

- The claimant advanced claims that the defendants, and in particular the fourth to seventh defendants, who are directors and officers of the first to third defendants, acted dishonestly and conspired to force an auction sale of a selection of the cars in the US in 2014, thereby breaking up the collection and achieving a lower price, when the best price would have been achieved by selling all of the cars together in England. The claimant alleged that the defendants did so to advance the profile of the second and third defendants in advance of a proposed business sale to a private equity investor.

- In 2015, the claimant alleged that the 2014 auction sale was carried out negligently and the parties entered into a settlement agreement to compensate the claimant for its losses. The settlement agreement contained a recital that specifically recorded that the claimant had *"made numerous allegations as regards the conduct of"* the second defendant. Clause

3 of the agreement provided that *"The Parties agree (for themselves and on behalf of each of their Affiliates and Agents) that this Agreement shall constitute full and final settlement, and irrevocable and unconditional waiver and release, of all and any Claims"*. The definition of *"Claims"* was very wide and included *"all claims, causes of action, rights or other interests"*, in any jurisdiction, whether present or actual, prospective or contingent, known or not known to the parties and arising in contract, tort, under statute or otherwise.

- In 2021, the claimant alleged that it had acquired knowledge that the defendants had not acted negligently, but deliberately and dishonestly pursuant to an unlawful means conspiracy and in breach of the fiduciary duties owed to it. The claimant commenced proceedings and asserted that such claims were neither compromised nor barred by the settlement agreement. The defendants disagreed and brought applications for summary judgments and / or strike out of the claimant's claims, on the basis that they had been compromised in the settlement agreement.

- In dismissing the claimant's submissions that, in the absence of express words releasing claims based on fraud or dishonesty, the settlement agreement should not be taken to release such claims, the Court held that the starting point was the text of the settlement agreement and its natural meaning, particularly in circumstances such as the present where "*the drafting of the contract has obviously been carefully considered*". The Court noted that the language of the settlement agreement was *"clear, precise, wide-ranging and comprehensive"* giving the impression that the *"draftsman, and therefore, the parties wished to cover all bases in drawing a line under their past dealings"* concerning the car collection. In addition, as the release expressly extended to unknown claims, the claimant took the risk that the element of bad faith might be worse than it had believed when entering into the settlement. The Court recognised the existence of the *"sharp practice"* principle pursuant to which there are circumstances in which reliance on the full scope of a release might be an "*imposition in a court of conscience*". However, it noted that it did not apply in the present case as the claimant was advancing claims that were in substance the same as those advanced in 2015 which led to the conclusion of the settlement agreement, noting that the difference seemed to be only that the claimant was now alleging that the acts complained of *"were not done ad hoc but were planned and done in furtherance of a conspiracy to injure".* The Court therefore granted the applications for summary judgment and strike out.

**PH*lit* comment:**

*This case is the latest in a series of recent decisions in which the Court has upheld the terms of a settlement agreement. The Court's application of the strict principles of contractual construction (confirming that the House of Lords decision in* BCCI v Ali *[2001] UKHL 8 remains the leading authority on the construction of contractual release clauses) serves as a potent reminder to commercial parties that caution needs to be exercised when entering a settlement agreement that contains extensive and clearly drafted release provisions. In this case, the Court held that claims based on fraud and dishonesty did not require express words to be released; instead, the broad language implemented in the release meant that such claims were compromised.*

*The extensive judgment (running to some 158 pages) also usefully restates the law of summary judgment, strike out and contractual interpretation/construction, which practitioners are well advised to note.*

## High Court considers relationship between material and repudiatory breach of contract

### *Digital Capital Ltd v Genesis Mining Iceland EHF* [2021] EWHC 2462 (Comm) (unreported)

*8 September 2021*

- The High Court has considered termination of a contract for repudiatory breach, in circumstances where the claimant and defendant each alleged that the other had repudiated the relevant agreement. Whilst finding that the defendant was, in principle, entitled to terminate the contract without notice in the event of a repudiatory breach by the claimant, the Court held that the breaches complained of were not repudiatory in nature. Accordingly, the defendant's termination was itself a repudiation, with the result that the claimant was awarded the sum of its unpaid invoices plus associated damages arising from the wrongful termination.

- Genesis Mining Hong Kong - the parent of the defendant, Genesis Mining Iceland EHF ("**Genesis Iceland**") - was established in 2014 as a platform offering bitcoin mining contracts to customers worldwide. Genesis Iceland was created to own and operate a bitcoin mining server farm in Iceland so as to benefit from the low energy costs in that jurisdiction, given the significant computer power required by cryptocurrency mining.

- The wider Genesis group launched a project to create a platform to exchange bitcoin into regular "FIAT" currency (e.g. pound sterling and dollar) to facilitate the use of bitcoin in typical commercial transactions. As part of that project, the claimant, Digital Capital Ltd ("**Digital Capital**"), was incorporated in England in June 2016 as a separate legal entity from Genesis Iceland, with independent shareholders and directors.

- On 12 January 2017, Digital Capital and Genesis Iceland entered into an agreement for the creation of a cryptocurrency exchange platform (the "**Agreement**") whereby Digital Capital was responsible for the exchange of cryptocurrencies into FIAT currency. Under the Agreement, Digital Capital provided associated services in exchange for fees, including: regulatory set-up; software set-up; operational; and, maintenance services (the "**Services**").

- Digital Capital subsequently issued a claim for unpaid fees in respect of the Services. Genesis Iceland counterclaimed, alleging that Digital Capital had failed to provide the Services as contractually agreed, which failure amounted to a repudiatory breach, which it had accepted on 3 June 2019 and then elected to terminate the Agreement. Accordingly, Genesis Iceland asserted that it was not liable for the unpaid invoices. Digital Capital, in turn, argued that Genesis Iceland's purported termination of the Agreement on 3 June 2019 was wrongful and itself a repudiatory breach, which Digital Capital accepted on 1 October 2019.

- The Court was asked to determine the following two key issues:

    - whether the Agreement contained an implied term that if the cryptocurrency exchange platform did not "go live" by 10 July 2018, Genesis Iceland no longer had to pay Digital Capital any operational or maintenance fees on the grounds that there was no system to maintain or operate; and

    - whether Genesis Iceland was entitled to terminate the Agreement on 3 June 2019.

- The Court dealt with the first question in short order. In view of the entire agreement clause contained in the Agreement, which expressly excluded implied terms, the argument put forward by Genesis Iceland was rejected.

- As to the second question, the Court first addressed the relationship between contractual and common law termination rights. Under the Agreement, either party was entitled to terminate where the other party had committed a material breach and, following notice of that breach by the other party, failed to remedy it within 30 days of receipt of such notice. However, Genesis Iceland asserted that Digital Capital's breaches were more than "*merely material*" and were in fact so serious that they amounted to repudiatory breaches at common law, which circumvented the requirement to give notice in accordance with the Agreement. It is worth noting that whilst all repudiatory breaches will necessarily be material, not all material breaches will be so serious as to go to the root of the contract and thereby engage common law termination rights.

- Considering, in particular, *Stocznia Gdanska SA v Latvian Shipping Co* [2002] 2 Lloyd's Rep 436, the High Court commented that there are no "*hard and fast rules*" as to the relationship between contractual and common law termination rights - such relationship is ultimately a matter of construction. It noted that the termination clause in the Agreement applied to all material breaches (not only 'non-repudiatory' material breaches) and that, read in isolation, whilst it did not function so as to exclude common law termination rights, it did legislate for how such rights should be exercised (i.e. by giving notice and allowing 30 days for remediation). However, elsewhere the Agreement expressly preserved "*any other right or remedy of either party in respect of the breach concerned*" and the Court ruled that this additional wording had the effect of fully preserving common law rights and remedies, which included the right to terminate immediately in the event of a repudiatory breach. Accordingly, in principle, Genesis Iceland was entitled to terminate without notice.

- However, the Court held that Digital Capital had not committed any repudiatory breach of the Agreement, given that (amongst other factors) it had still produced a functioning back-end system, and any shortcomings alleged by Genesis Iceland were not so serious so as to repudiate the contract. All such breaches were deemed to be capable of remedy, which further suggested that they were "*merely material*" as opposed to repudiatory.

- Accordingly, whilst Digital Capital was in breach of certain contractual specifications, Genesis Iceland had wrongly treated those breaches as repudiatory, with the result that it had no basis upon which to assert repudiatory breach and thereafter terminate the Agreement without notice on 3 June 2019. Genesis Iceland was therefore ordered to pay Digital Capital's outstanding invoices plus damages (to be assessed) arising out of the wrongful termination.

**PH*lit* comment:**

*This case serves as a useful reminder of the sensitivity that must be applied when asserting any termination right, particularly where repudiatory breach is being alleged. In this case, the wrongful exercise of a common law termination right was fatal to Genesis Iceland's defence in its entirety. Had Genesis followed the contractually prescribed termination route, and the breaches complained of had not been remedied satisfactorily within the 30-day period, its case (or at least part of its case) would likely have found favour with the Court.*

*The judgment also includes substantial commentary in respect of the quality of witnesses, and demonstrates the significance this can have on the outcome of a case. The defendant's principal witness was particularly highlighted for his "egregious lack of attention to detail". The claimant's witnesses by contrast impressed the Court, and it was their consistency with the contemporaneous documents that, above all, increased their credibility.*

## Court of Appeal rules on vicarious liability of football club in sexual abuse case

### *Blackpool Football Club Ltd v DSN* [2021] EWCA Civ 1352 (judgment available here)

*9 September 2021*

- The Court of Appeal was tasked with considering whether a football club was vicariously liable for sexual abuse committed against young footballers by an individual loosely associated with the club, who sometimes acted as an unpaid youth scout and as the manager of a local youth team. The Court was also asked to consider whether the claim was out of time for the purposes of the Limitation Act 1980 (the "**Limitation Act**"), having been brought approximately 30 years after the abuse was suffered.

- The claim arose out of the sexual abuse of a pre-adolescent boy, the claimant, whilst on a footballing tour of New Zealand in 1987. The trip was organised and run by Mr Frank Roper, a convicted sex offender with offences recorded in 1960, 1961, 1965, and 1984. Mr Roper died in 2005. Mr Roper had acted as an unpaid youth scout for the defendant, Blackpool Football Club, in the 1970s-1980s, and youth players from Mr Roper's own team (Nova Juniors) often went on to sign for Blackpool when they became old enough (known as a "feeder team"). It was the claimant's position that Blackpool FC was vicariously liable for Mr Roper's actions as Mr Roper was in a position akin to employment or was sufficiently connected with the defendant so as to make them responsible for the injury suffered by the claimant. Blackpool FC denied that it was vicariously liable, arguing that Mr Roper had no formal association with the club and that the trip to New Zealand (where the abuse took place) had no ties to the club whatsoever and was purely Mr Roper's own venture. In addition, the club argued that the claim was time-barred under the Limitation Act, having been brought approximately 30 years after the abuse took place.

- At first instance, the High Court held that Blackpool FC was vicariously liable for Mr Roper's actions. The High Court considered that there was a consistent thread of evidence that Mr Roper was associated with the club and that recognition led to him feeding players into it. Mr Roper would attend training sessions at the club, was treated like staff and could access all areas of the ground. The manager of Blackpool FC sent his son on the trip to New Zealand, and the club made a small financial contribution to its cost, creating an impression that the trip had its backing. On the issue of limitation, the High Court used its discretionary exclusion of time limits for personal injury claims under section 33 of the Limitation Act. The Court considered the potential prejudice to Blackpool FC caused by the delay in bringing the claim, but nevertheless concluded that the claimant could not have disclosed the abuse sooner or brought a claim before he did, due to the nature of the injury suffered and its psychological impact.

- Blackpool FC appealed, and the Court of Appeal overturned the decision of the lower court, holding that although Mr Roper's scouting activities conferred a benefit upon Blackpool FC that was important to its business, this was insufficient to justify a finding that Mr Roper's relationship with the club was akin to employment for this purpose. There were no ties imposing obligations on Mr Roper or the club to act in a particular way (Mr Roper was under no obligation to scout, and the club was under no obligation to Mr Roper). Similarly, Mr Roper was free from oversight when organising and conducting the New Zealand trip which could more properly be regarded as a *"frolic of his own"*. Accordingly, there was an insufficient connection between Mr Roper and Blackpool FC to justify imposing vicarious liability for his actions.

- In reaching its decision, the Court of Appeal rehearsed the applicable principles and recent case authorities before setting out the key propositions that:

- The policy objective underlying vicarious liability is to ensure, insofar as it is fair, just and reasonable, that liability for a tortious wrong is borne by a defendant with the means to compensate the victim. The employer is more likely to have the means to compensate the victim, and where the tort is committed as a result of activity undertaken by the employee on behalf of the employer, the employer has created the risk of the tort, and the employee is under the control of the employer. "Control" means that the employer can direct what the employee does, not how they do it.

- There must also be a sufficiently strong or close connection between the wrongful act and the employer's enterprise. It is not sufficient to simply provide the employee with the opportunity to commit the tort.

- Outside of an employment relationship, the tortfeasor must be described as doing something for, or for the benefit of, the "employer" or their enterprise, combined with a measure of "control" over how the tortfeasor conducts their activities. Together, these factors necessitate a close examination of the relationship between the tortfeasor and the person upon whom vicarious liability may be imposed. It is necessary to look for more than merely a beneficial involvement with (or for) the defendant's enterprise - a real *"degree of integration"* of the primary tortfeasor into the business or relevant activity is required.

- In the circumstances, Blackpool FC had no real involvement with the New Zealand trip, over which Mr Roper had complete control. The trip was certainly not part of the ordinary course of Blackpool FC's business activities. Outside of the trip itself, the association between Mr Roper and Blackpool FC was loose, informal and was not of the *"all-enveloping nature"* which had been a feature of previous authorities in sexual abuse cases.

- On the issue of limitation, and although a conclusion on this ground was rendered largely unnecessary by virtue of the Court's finding on vicarious liability, the Court noted that the power under section 33 of the Limitation Act confers an unfettered discretion to exclude the time limits, and an appeal court will only interfere with the exercise of a discretion where the judge has made an error of principle, or has exceeded the generous ambit within which a reasonable disagreement is possible. The reasoning of the High Court took into account the possibility that the evidence adduced by the claimant may be less cogent after the significant lapse of time, that a number of potential witnesses had since died, and that Blackpool FC was likely to have faced difficulty in obtaining relevant documents which shed light on the role played by Mr Roper. Accordingly, the High Court was cognisant of the potential prejudice and conducted the requisite balancing exercise as against the prejudice suffered by the claimant if the action was not allowed to proceed, and so there was no reason for the Court of Appeal to interfere with the exercise of discretion of the lower court. As such, the appeal on the limitation issues failed.

**PH*lit* comment:**

*Although the courts are sympathetic to the difficulties faced by claimants in this sort of case, this is a salutary reminder that vicarious liability is a limited doctrine and will not be imposed without strong justification that the acts of the tortfeasor are closely connected to the enterprise of the defendant. In particular, it will be insufficient that the acts of the tortfeasor benefited the defendant in some way - there needs to be more, which the Court described as a "degree of integration" of the tortfeasor into the business enterprise. On limitation, practitioners are reminded that the appellate courts are unlikely to interfere in the exercise of judicial discretion in the lower courts; particularly where the relevant factors have been taken into account and an appropriate balancing exercise conducted.*

## High Court considers unfair prejudice petition where the petitioner's shares had been appropriated by the company

***Re Motion Picture Capital Ltd (Company No. 07676259) Clarance v Nayar and others* [2021] EWHC 2504 (Ch) (judgment available here)**

*17 September 2021*

- In an unfair prejudice petition brought under section 994 of the Companies Act 2006 (the "**CA 2006**"), the High Court was asked to consider the novel preliminary issue of whether the appropriation of the petitioner's shares by the company, after the petition had been brought, meant that the petitioner was thereby deprived of his standing to pursue the petition.

- The petitioner, Mr Clarance, was a shareholder in the company, Motion Picture Capital, holding 20 "B-class" shares valued (by Mr Clarance) at approximately USD 5 million. The other two shareholders were Mr Nayar, a fellow director, and Reliance Big Entertainment (U.S.) Inc. (together the "**Respondents**"). Mr Clarance had also been the Chief Executive Officer of Motion Picture Capital until April 2017, when his employment was terminated.

- In his petition, Mr Clarance made a number of allegations of unfair prejudice against the Respondents, including (amongst other things) that they had:

    - caused Motion Picture Capital's shareholding in a subsidiary to be transferred for nil consideration to the Reliance Big Entertainment group – shortly after the subsidiary had secured a ten-episode series deal from Netflix;

    - diverted business opportunities to the Respondents' other business interests;

    - reduced Mr Clarance's day-to-day operational oversight of Motion Picture Capital - eventually excluding him from his position as CEO and removing him as a director;

    - made the entire business development team redundant, thereby diluting the business; and

    - refused to provide information which Mr Clarance was entitled to receive.

- The Respondents denied these allegations, claiming that Mr Clarance had diverted money (approximately USD 2 million) out of Motion Picture Capital to his own partnership, Cuckoo Lane LLP, and that this misappropriation of funds was the true cause of Mr Clarance's exclusion from the company. That dispute had previously been settled by agreement in August 2017 (the "**Settlement Agreement**"), with Mr Clarance agreeing to pay back the funds and granting a charge over his shares in Motion Picture Capital in satisfaction of the debt. However, no payments were made by Cuckoo Lane LLP or Mr Clarance, and so Motion Picture Capital sought a court order to enforce the Settlement Agreement, which was granted in January 2018.

- Mr Clarance still did not pay, and so in November 2020 Motion Picture Capital exercised their charge over his shares in the company, thereby appropriating them. Mr Clarance was removed from the register of members on 18 November 2020. However, by this stage Mr Clarance had already issued his unfair prejudice petition.

- The preliminary issues for the Court were threefold:

- Was Mr Clarance still a member of the company?
- If not, was he still entitled to continue with the unfair prejudice petition because he had the standing to do so?
- If he continued to have standing, did removing him as a member of the company deprive him of any interest in the outcome of the petition?

- The Court had no issue with determining the first of these questions. The CA 2006 defines a member of a company as either a subscriber of a company's memorandum or every other person who agrees to become a member of a company, and *whose name is entered in the register of members* (see section 112). Mr Clarance had been removed from the register of members and, accordingly, was no longer a member of the company.

- The second issue was more complex. The Respondents argued that the effect of removing Mr Clarance's name from the register of members was that he ceased to have standing to continue with the petition. The basis of this position was that if a party ceased to own the property from which a cause of action arose, then they also lost the cause of action. The Court disagreed, holding that on the true construction of section 994, so long as the petitioner had standing (i.e. by holding the shares) when the petition was issued, then there is no requirement in the legislation that the petitioner should continue to hold the shares until the petition has been heard.

- On the third issue, the Respondents argued that even if Mr Clarance did have standing, he no longer had any interest in pursuing the petition because it was plain and obvious he would not be granted the relief sought. The relief sought by Mr Clarance was the purchase of his shareholding by the Respondents at a fair value or any other such order as the Court deemed fit. The Court noted that the trial judge in an unfair prejudice petition has a wide discretion as to remedy, and may fashion the remedy according to the unfair prejudice found. The Court is also entitled to take into account conduct that has taken place after the presentation of the petition, as well as prior conduct.

- The Court noted that, where there has been an involuntary transfer of shares after the presentation of an unfair prejudice petition, the conduct of the directors and the company should be closely examined. If their conduct was clearly proper, the petition will likely be dismissed as the petitioner will have no interest in the remedy sought. However, if the directors have not exercised their powers: (i) for the purpose for which such powers are conferred (section 171(b) CA 2006); (ii) in a way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of the members as a whole (section 172(1) CA 2006); or (iii) in a situation in which they have, or can have, a conflict of interest with the interests of the company (section 175 CA 2006), then there may be something improper in their conduct.

- In the present case, the Court considered that rather than exercising the right under their charge to appropriate Mr Clarance's shares for the purposes of satisfying the debt owed under the Settlement Agreement, Motion Picture Capital had taken possession of Mr Clarance's shares with no intention of selling them. In circumstances where there was no obvious purpose or benefit to the company taking possession of the shares, the Court found that the only reason the Respondents would have sought to possess the shares would be to deprive Mr Clarance of standing. The Court therefore held that Mr Clarance had a good chance of showing that the Respondents had acted improperly as directors of the company at trial and obtaining the remedy he sought. In addition, even if the Court

did not grant the sale of his shares at trial, the Court could make any other order as might be necessary to restore the position and "right" the unfair prejudice in another manner.

- Accordingly, the Court found that although Mr Clarance ceased to be a member of the company in November 2020, he continued to have standing to bring the petition and he continued to have an interest in pursuing it, as it was not plain and obvious he would not be granted the relief he sought.

### PH*lit* comment:

*This is an interesting decision, notable for its novelty. Ultimately, the Court found that on the true construction of section 994 of the Companies Act 2006, there was no requirement for a petitioner to continue to hold shares in the company up until the time that the petition is heard. In addition, the question of whether the petitioner should be allowed to continue with the petition (the question of their "interest" in the petition) would depend on all the facts of the case.*

*The decision also illustrates the importance of demonstrating that a power conferred upon directors (whether to compulsorily acquire shares or any other power) has been exercised for a proper purpose, having regard to the best interests of the company, and in accordance with all other directors' duties. In the present case, where the only conceivable reason for exercising the power to appropriate the petitioner's shares was to deprive the petitioner of his standing to bring a claim, the Court found there was a good chance that the petitioner would be able to show that the directors had acted improperly at trial.*

## *"Fugitive from justice in Ukraine"* successful in challenging English jurisdiction on grounds of *forum non conveniens*

### *PJSC Bank "Finance and Credit" and Another v Zhevago and Others* [2021] EWHC 2522 (Ch) (judgment available here)

*21 September 2021*

- The High Court has granted an application for a stay of proceedings on the grounds of *forum non conveniens* in a claim brought by Ukrainian entities against the first defendant, a Ukrainian national, and a number of corporate entities controlled by, or affiliated with, the first defendant and a UK citizen, the fifth defendant, who had provided corporate, accounting and company secretarial services to the first defendant. Notably, the Court held that the fifth defendant did not submit to its jurisdiction by simultaneously challenging jurisdiction and applying for strike out of the claim.

- The claim arose out of allegations by the first claimant, a Ukrainian bank, and the second claimant, the Deposit Guarantee Fund of Ukraine, that the first defendant, with the assistance of the fifth defendant and others, and using corporate vehicles, including the second to fourth defendants, extracted in excess of US$500 million from the first claimant. When the claimants issued proceedings in the High Court, the causes of action pleaded against the defendants were all torts and delicts under Ukrainian law.

- The first to fourth defendants issued an application seeking: (i) a declaration that the English Court had no jurisdiction over the first defendant and that he had not been validly served; and (ii) a stay of the claims on grounds of *forum non conveniens*. The fifth defendant issued an application seeking: (i) an order that the claim against him be stayed pursuant to CPR 11(6)(d) on the grounds that it could be more appropriately heard with the other claims before the courts of the Ukraine; and (ii) strike out of certain paragraphs of the Particulars of Claim pursuant to CPR 3.4(2)(a) as not disclosing a reasonable cause of action against him.

- The Court first determined whether or not the first defendant had been validly served. The first defendant had been served at the registered address in London of one of his companies which was also shown as his "usual residential address" on Form 288a at Companies House. However, at the time of service, the first defendant was living in Dubai. The claimants maintained that service had been validly effected as, pursuant to section 1140 of the Companies Act 2006, service can be validly effected on the director of a company using their address shown in the public register. The first defendant argued that he lived outside the jurisdiction and that Form 288a had been filed as part of a bulk filing, without specifically consulting him or him appreciating that the address could be used as his personal address to effect service. The Court dismissed this argument, noting that the filing had been done on his behalf so that he had to take responsibility for it. The Court also noted that the meaning of section 1140 was clear, and did not require a physical presence of the defendant in the jurisdiction, which had been confirmed in case law, so that service had been validly effected.

- On the question of whether the fifth defendant had submitted to the jurisdiction by applying for strike out at the same time as challenging jurisdiction, the claimants submitted that the fifth defendant, by failing to include an express reservation that the strike out application was without prejudice to the challenge to the jurisdiction, had taken a step which was only necessary or useful if his objection to the jurisdiction had been waived. The Court held that the test derived from *Rein v Stein* (1892) 66 LT 469 as applied in *Williams & Glyn's Bank v Astro Dinamico* [1984] 1 WLR 438 that there will be a submission to the jurisdiction if the step is *"only necessary or only useful if the objection has been waived"* and the test derived from *SMAY Investments v Sachdev* [2003] EWHC 474 (Ch) that the conduct must be a *"wholly unequivocal submission to the jurisdiction"* are the same test. The Court went on to note that making both applications at the same time was *"at best equivocal"* and while the fifth defendant could have included an express reservation, the fact that he did not, did not make his conduct *"wholly unequivocal"*. The Court further noted that not making the applications would have been *"inimical to proper case management"* and that the submission that the fifth defendant's solicitor's witness statement dealt with the strike out application before the stay application *"verge[d] on the nonsensical"*.

- In relation to the applications challenging the jurisdiction, the Court held that it must apply the test recently reiterated by the Supreme Court in *Lungowe v Vedanta Resources* [2019] UKSC 20, emphasising that there are two limbs to the test:

    - Whether there is another available forum which is clearly and distinctly more appropriate than the English courts (the burden of proof rests on the defendant); and

    - If the defendant discharges that burden, the Court will usually grant a stay unless there are circumstances by reason of which justice requires that the case is tried here (the burden of proof rests on the claimant).

- Applying this test, the Court found that Ukraine was the more appropriate forum as that was the jurisdiction with which the first defendant had the closest connection, and that the legal issues, parties, documents and language were mostly Ukrainian. The Court also held that concerns that the first defendant would not submit to the Ukrainian jurisdiction, given that he is *a "fugitive from justice"*, could be alleviated by appropriate undertakings.

**PH*lit* comment:**

*This case usefully restates the tests the English courts will apply when determining a challenge to their jurisdiction and when considering whether or not a defendant has submitted to the jurisdiction. The case also serves as a useful reminder that service can be validly effected on a defendant using an address on the public register, and that directors and officers should be aware of this and keep such information up to date to avoid potentially missing service.*

## High Court holds accountants not liable for losses related to introductions made to clients

***Alistair Graham Knights and others v Townsend Harrison Ltd* [2021] EWHC 2563 (QB) (judgment available here)**

*24 September 2021*

- In view of the relative sophistication of the clients, limitation of liability letters and the paucity of documentary evidence, the High Court has determined that a firm of accountants did not assume a duty of care by introducing its clients to three tax avoidance schemes and a separate investment, and had further not agreed to, or assumed a responsibility to, carry out due diligence. In a case that relied heavily on witness recollection, the judge's assessment of the witnesses' credibility was of particular importance.

- The first claimant, Mr Knights, owns and operates (together with his wife) the second claimant, Evergreen Trees and Shrubs Limited ("**Evergreen**"). The third claimant, Knights Investment Management Limited ("**KIML**"), was incorporated in 2014 by Mr and Mrs Knights as an investment vehicle. The defendant, Townsend Harrison Ltd ("**THL**"), is a firm of chartered accountants and business advisers, which was instructed by both Mr Knights as well as Evergreen in 2011.

- In 2013 and 2014, following introductions from THL, Mr Knights and Evergreen engaged in three separate tax avoidance schemes (the "**Tax Schemes**"). Two such schemes (the OneE scheme and Qubic scheme) functioned through "disguised remuneration", which sought to mitigate corporation tax. In 2017, HMRC issued a Notice of Decision determining that PAYE and NIC was payable in respect of money filtered through disguised remuneration schemes, with the result that Evergreen entered into a monetary settlement with HMRC in 2019. The third scheme (the Elysian scheme) operated through "pension liberation", and was designed to enable Mr Knights to obtain tax-free access to funds in his pension before the age of 55. HMRC has opened enquiries into this scheme and is expected to levy a 55% tax, albeit such a levy has not yet been imposed against Mr Knights.

- In 2014, again following introductions from THL, Mr Knights, through KIML, invested in an FX trading scheme (the "**CWM Scheme**"). It thereafter transpired that the CWM Scheme was an elaborate "Ponzi scheme", through which the entirety of KIML's investment was lost.

- The claimants brought the following two claims against THL: (i) that THL owed a common law duty of care in both introducing and advising on the Tax Schemes, which duty was breached causing loss in the form of Evergreen and/or Mr Knights' additional tax liabilities (the "**Tax Schemes Claim**"); and (ii) that THL had agreed to (but failed to) carry out due diligence and/or owed a duty of care to carry out such due diligence on the CWM Scheme, and/or assumed a duty of care in encouraging the KIML investment to be made (the "**CWM Scheme Claim**"). The defendant's position, in short, was that it acted as a mere introducer, and therefore owed no duty (contractual or tortious) to the claimants.

*The Tax Schemes Claim*

- First, the Court was satisfied that any claim concerning Mr Knights' and Evergreen's use of the OneE scheme was statute-barred on grounds of limitation. In signing a letter of engagement on 21 June 2013 in respect of the OneE scheme, Evergreen had committed to pay £5,000 to THL, thereby incurring a loss. Whilst Evergreen subsequently suffered more significant losses by paying £250,000 into the OneE scheme (which loss would not have been time-barred due to a standstill agreement made between the parties), the limitation period started running on 21 June 2013, being the date when loss was first suffered in respect of the allegedly negligent introduction/advice. Therefore, the claim was outside of limitation (as well as the scope of the standstill agreement).

- Applying the "assumption of responsibility" test, the Court determined that THL did not owe a duty of care to the claimants with regard to any of the Tax Schemes. Significant attention was afforded to limitation of liability engagement letters whereby THL made clear that (amongst other things): (i) it was not authorised to advise on a particular investment or scheme; (ii) it did not assume any responsibility for investment decisions; and (iii) there were inherent risks associated with tax avoidance schemes. The Court was satisfied that the letters were expressed as more than a mere compliance formality, and therefore Mr Knights was made aware that THL was not assuming any responsibility. The Court was further persuaded that Mr Knights was a sophisticated businessman who had expressed himself to be *"fully up to speed"* with the nature of the investments being made. As such, there had been no assumption of responsibility, and therefore no duty of care arose in respect of the Tax Schemes.

- The Tax Schemes Claim was accordingly dismissed. Even if a duty had been established, the Court was not convinced that factual causation had been established, as the claimants may have entered into the schemes in any event, or would have otherwise incurred the same, or part of the same, loss through inevitable PAYE and NIC payments.

*The CWM Scheme Claim*

- The Court determined that, for lack of consideration and certainty, an oral contract had not been formed that required THL to perform due diligence in respect of the CWM Scheme. The parties had not agreed for THL to be remunerated for carrying out due diligence (and, accordingly, there was a lack of consideration) and there was stark uncertainty as to what was said between Mr Knights and THL so as to prove, on the balance of probabilities, that an oral contract had been formed.

- The Court was further unable to conclude that THL had assumed any responsibility to carry out a due diligence exercise, particularly due to a lack of clarity as to the scope of THL's instruction. The claimants' case was further hindered by the passage of time: in the Court's view, had Mr Knights genuinely relied on THL carrying out due diligence, he would surely have brought a claim much earlier, in circumstances where the issues surrounding the CWM Scheme surfaced in March 2015.

- The claimants further contended that THL had made statements encouraging investment into the CWM Scheme, and thereby assumed an advisory duty of care. The primacy of witness recollection due to limited documentation meant that the Court was unable to conclude that the statements complained of had been made. Even if such statements had been proven, the Court did not consider that they amounted to an assumption of responsibility, given: (i) the limitation of liability letters; (ii) the fact that THL could not recommend investments and had made clear that it could not so advise; and (iii) the fact

that Mr Knights was a sophisticated businessman who had made separate enquiries about the CWM Scheme with advisers.

- Accordingly, the CWM Scheme Claim was also dismissed.

### PH*lit* comment

*The judgment helpfully sets out the types of factors a court will consider in determining whether a duty of care has arisen in the context of allegedly negligent advice. Whilst the claims against the accountants were dismissed, practitioners are reminded that, depending on the circumstances, the act of introducing an investment or scheme could give rise to a duty of care. Accordingly, introducers must ensure that their engagement letters include appropriate disclaimers, and that their clients are not led to believe that such letters are a "mere formality".*

*As noted, the evidence in this case relied heavily on the recollection of two key witnesses, and paragraphs [180] to [206] of the judgment provide helpful commentary as to how the law approaches the reliability of memory. The Court cited Gestmin SGPS S.A. v Credit Suisse Limited [2013] EWHC 3560 (Comm) as to the limited reliability of witness recollection in illustrating what was said in meetings and conversations, especially when there has been a significant lapse of time. Where a case relies almost single-handedly on witness testimony, the spotlight of scrutiny will be all the more pronounced.*

*One particular point of note raised by the Court was that Mr Knights had included very important evidence in his witness evidence that the judge was surprised not to have seen in the statements of case, and which therefore gave the impression of embellishment in Mr Knights' recollection. This further reminds litigators to, as far as possible, plead their best case from the outset.*

## Court of Appeal considers "same interest" requirement in representative actions

### *Jalla v Shell International Trading* [2021] EWCA Civ 1389 (judgment available here)

*29 September 2021*

- The Court of Appeal has considered whether a claim for "remediation relief" can be pursued by two named individuals by way of a representative action under CPR 19.6(1) on behalf of themselves and more than 28,000 individuals and communities. The question for the Court was whether the individuals and communities purportedly represented fulfilled the "same interest" requirement under CPR 19.6, so as to allow the claim to proceed by way of representative action.

- The underlying claim arises out of an oil spill off the coast of Nigeria in December 2011. Mr Jalla and Mr Chujor (the claimants) occupy land adjacent to the affected coastline. They brought claims against Shell based on the rule in *Rylands v Fletcher* and for negligence, nuisance, breach of statutory duty, trespass and breach of human rights under Nigerian law, on behalf of themselves and as representatives of the Bonga Community, which was said to comprise 27,830 individuals and 457 communities that are located along the impacted coastline or inland from it (the "**Represented Parties**"). The geographical area covered by the claim was described as roughly the size of Belgium. The first defendant, Shell Nigeria Exploration and Production Company Ltd, is domiciled in Nigeria and operated a Floating Production Storage and Offloading facility in the Bonga oilfield. The second defendant, Shell International Trading and Shipping Co Ltd, is domiciled in the UK and was added to the proceedings subsequently (as an "anchor" defendant to establish jurisdiction in the UK). The claimants allege that the oil spill caused extensive damage to the coastline and inland river system, causing a dramatic and deleterious effect on fishing, farming, the mangrove forests and drinking water.

- The claimants originally sought relief by way of individual damages for the Represented Parties and for "remediation relief" (a mandatory injunction or the costs of a clean-up exercise). The defendants argued that the claim could not be brought as a representative

action because the parties did not have the "same interest" in the claim, including as to the level of damage suffered, which would need to be calculated, and which would be different, on an individual basis. The claimants responded by dropping the claims for individual damages, which are now being pursued in separate proceedings, and pursuing the claim for "remediation relief" only. The claimants argued that this meant that the Represented Parties fulfilled the "same interest" requirement for the purposes of CPR 19.6.

- At first instance, the High Court held that there was no doubt that the claims raised common issues of fact and law, and that the basis of the claims were effectively the same for all practical purposes. However, this was insufficient to satisfy the requirement that the multiple parties have the "same interest" for the purposes of CPR 19.6 because each individual or community would need to prove that the oil spill caused them damage. The fact that the claimants had abandoned the individualised claims for damages in these proceedings did not assist, as a claim for "remediation relief" would still require each individual to prove that they had been adversely affected by oil pollution.

- The claimants appealed, on the grounds that:

    - the facts of the present case were "*materially similar*" to the facts of *Lloyd v Google*, a claim which the Court of Appeal had allowed to proceed as a representative action on the basis that the claimant was not seeking to rely on personal circumstances of any individual but was claiming a uniform sum in respect of the loss of control of data; and

    - the High Court had erred in holding that the claimants and Represented Parties did not have the "same interest" in the claim on the basis that each Represented Party would need to prove that they had suffered loss and damage as a result of the oil spill.

- In making its decision, the Court of Appeal first rehearsed the relevant principles of representative actions:

    - There must be a congruity of interest between the representative and the represented and there must be certainty at the outset about the membership of the represented class.

    - The threshold for a representative action is that the representing parties must have the "same interest in a claim" as the parties that they represent. The "same interest" is a statutory rule which cannot be abrogated or modified. The Court will take a common sense approach to this issue – it must be the same interest "for all practical purposes".

    - The represented parties need to have the same interest as the claimant because the represented parties are bound by the result of the action.

    - It may not affect the making of an order for a representative action if the represented parties also have their own separate claims for damages; the existence of individual claims for damages is not necessarily a bar to their being dealt with via a representative action. It will depend on the facts.

    - It is necessary to consider the likely defences as part of the "same interest" analysis. Limitation defences may be a factor to take into account when assessing whether or not the case can proceed as a representative action.

- The Court noted that CPR 19.6 was designed to prevent multiplication of action and thereby save time and costs in cases where one action would serve to determine the rights of a number of persons simultaneously. CPR 19.6 is also designed to avoid procedural complexity. The Court concluded that, on the present facts, none of the purposes of a representative action could be achieved and that, practically speaking, issues of limitation, causation and damage to each parcel of land would have to be addressed on an individualised basis.

- The Court had limited sympathy for the claimants' argument that they would be denied justice if the claim was not allowed to proceed as a representative action, as the limitation period had since expired. The Court stated that if there was a problem with the way in which the action was initiated, that is of the claimants' own making and not a question of access to justice. The Court should not engage in a fiction merely to protect the claimants from the limitation consequences flowing from its decision that the action cannot proceed as a representative action under CPR 19.6.

- Turning to the specific grounds of appeal, on the first ground the Court held that the case was indeed distinguishable from its decision in *Lloyd v Google*. In *Lloyd v Google*, the claimant could disavow the individual facts of each represented person to claim uniform losses for "loss of control of personal data". In the present case, proof of actual damage to land is required to complete the cause of action. The individual facts relating to each parcel of land will be different and will need to be investigated to see whether or not the owner / occupier of the land has a cause of action at all. The claim for "remediation relief" only did not remove this hurdle because different areas of land will have been impacted by the spill differently; impacting on the nature, scope and extent of any remedial work required. In addition, the present claim faced a causation issue, as there had been numerous cases of oil pollution in the area and each individual would need to show that the 2011 oil spill had a causative link to the damage suffered. There was no such causation issue in *Lloyd v Google*. Accordingly, the Court found that the variables going to each parcel of land also went to duty, breach, causation, loss and damage, making the case materially different to the position in *Lloyd v Google*.

- On the second ground of the appeal, the Court considered that it mischaracterised the reasoning of the High Court and therefore could not succeed. The High Court had not simply ruled that the represented parties did not have the "same interest" because each had to prove individual damage. Instead, the analysis of the lower court was more nuanced and took into account a variety of issues which would prevent the case from proceeding as a representative action. The High Court had applied the principles correctly.

- As such, the Court of Appeal dismissed the appeal, finding that this action was not (and could never have been) a representative action under CPR 19.6.

## PH*lit* comment

*Ultimately, this claim could not proceed as a representative action as it gave rise to the possibility of a "patchwork of success" as between represented individuals: for example, some parties could be successful on limitation issues whereas others would fail (depending on when the spill reached their land), and some may have been able to demonstrate damage whereas others would be unable to show a causative link (perhaps because their land had been impacted by multiple sources of oil pollution in the past). Accordingly, the proceedings would always have been incapable of comprising a representative action as the circumstances of each individual would nevertheless have to be considered separately.*

*The claimants' argument that their claim was "materially similar" to that in* Lloyd v Google *was an interesting one, but the Court ultimately rejected it. In that case, the claimant's disavowal of the "personal" factors affecting each individual party made room for the argument that they each had the "same interest" in the claim. As such,*

*the issues of causation and loss which would have been different for each represented individual were dispensed with. However, that was simply not possible in the present case where causation and loss depended on individual circumstances which could not be disavowed. In any event, we await the outcome of Google's appeal to the Supreme Court on this question – so there may yet be further developments in this area.*

*Another point of note was that the Court addressed the criticism that it was "shying away from" large-scale environmental actions of this kind, suggesting that, in fact, the converse was true. However, the Court made clear that representative actions are only appropriate for certain types of cases and not, for example, where each individual purportedly represented has a claim for different injuries arising from the alleged tort. Such a case would be more suited to a Group Litigation Order (GLO), where different types of loss can be accommodated. Accordingly, the Court will only allow large-scale environmental claims to proceed where they are brought in an appropriate manner from the outset.*

## High Court awards exemplary damages in "bad case" of breach of confidence

### *Salt Ship Design AS v Prysmian Powerlink SRL* [2021] EWHC 2633 (Comm) (judgment available here)

*30 September 2021*

- In a claim relating to the design of a cable laying vessel ("**CLV**"), the High Court, whilst rejecting the claimant's "*plain vanilla*" breach of contract argument, determined that the defendant had engaged in a "*bad case of breach of confidence*", as well as unlawful means conspiracy with a third party. The judge further ruled that exemplary (or punitive) damages were, in principle, available in relation to the unlawful means conspiracy.

- The claimant, Salt Ship Design AS ("**Salt**"), tendered for and won a contract to design a new CLV for Prysmian Powerlink SRL ("**Prysmian**"). A CLV is a specialist vessel used to lay undersea cables for the purpose of, amongst other things, telecommunications and transmission.

- Salt and Prysmian entered into a contract on 13 July 2017 (the "**Salt Contract**"), which envisaged that if the CLV building project progressed, Salt would be retained to provide further design services beyond the preliminary design phases. In April 2018, Prysmian entered into a shipbuilding contract with Vard Group AS ("**Vard Group**") but also contracted with Vard Group's subsidiary, Vard Design AS ("**Vard Design**"), for the ongoing design services that it had been envisaged would be provided by Salt.

- Salt brought two principal claims: (i) first, that Prysmian had breached the exclusivity provisions set out in the Salt Contract by contracting with Vard Design; and (ii) second, that Prysmian had breached the confidentiality provisions contained in the Salt Contract, and/or an equitable duty of confidence owed to it, by disclosing Salt's CLV design to Vard Design. In this latter regard, Salt noted the "*striking similarities*" and the speed at which the design process had been carried out (described by Salt as the "*Christmas miracle*").

- In addition, Salt asserted that in breaching the Salt Contract and/or misusing its confidential information, Prysmian engaged in unlawful means conspiracy with Vard. Whilst the conspiracy tort did not, in theory, add to Salt's claim, the cause of action was prosecuted in order to claim exemplary damages, in circumstances where it is presently the position at common law that exemplary damages are not available in claims for breach of confidence. The Court remarked that this is something that may be challenged in future cases.

- The "*plain vanilla*" breach of contract argument boiled down to fundamental principles of contractual construction: what a reasonable person with all relevant background knowledge (and taking into consideration business common sense) would have understood

the relevant provisions to mean. In short, the Court agreed with Prysmian's submissions that the Salt Contract only envisaged exclusivity in respect of the specific CLV design that Salt produced (i.e. not any CLV constructed for Prysmian), and, in any event, Prysmian was contractually entitled to "*go back to the drawing board*" if a shipbuilding contract had not been concluded by 31 January 2018. The breach of contract claim therefore failed.

- Salt's breach of confidence claim was primarily prosecuted on the basis that Prysmian had breached the confidentiality provisions found in the Salt Contract, by which all designs, data, documents and know-how associated with Salt's CLV design remained the intellectual property of Salt and could not be "*made accessible to third persons*". This prohibition was subject to Prysmian's right to disclose "*relevant documentation only to its suppliers and employees on a need to know basis*".

- Prysmian contended that it was free to discuss the relevant documents in conjunction with Vard Group as potential shipbuilder, and any onward disclosure to Vard Design was not something that Prysmian could be held liable for. The Court concluded that Prysmian had wrongly treated the Salt design documents as its own by actively encouraging Vard to use those designs in order to produce an alternative CLV design.

- The Court focused on the contractual breach of confidentiality, but remarked that obligations of confidentiality can concurrently exist in equity (as derived from the seminal case of *Coco v Clark* [1968], F.S.R. 415, [1969] R.P.C. 41 at 47), and provided a useful recitation of the necessary qualities that confidential information should possess (in particular that such information is neither trivial nor in the public domain). The Court was satisfied that the information in the Salt CLV design documents was protected both in equity and pursuant to the Salt Contract, and Prysmian had unlawfully made the information available to Vard Design. Such unlawful disclosure engaged the contractual prohibition as well as the equitable test for breach of confidence.

- In light of the Court's findings as to breach of confidence, it was satisfied that Prysmian had conspired with Vard to unlawfully injure Salt, in that: (i) there was an understanding between Prysmian and Vard to use Salt's CLV designs; (ii) Prysmian sought thereby to injure Salt by depriving it of its proprietary rights in the confidential information; (iii) the breach of confidence was an unlawful act; and (iv) loss was caused to Salt as a result.

- Parasitic on the determination that Salt had engaged in unlawful means conspiracy, the Court was able to consider whether the infringement justified exemplary damages, which are intended to go beyond compensating the injured party, where the damages awarded would be inadequate to address the unlawful act. It is generally understood that torts comprising a wilful element can trigger exemplary damages, and the case of *Rookes v Barnard* [1964] AC 1129 established that they might arise in the following two scenarios: (i) where there has been an abuse of executive power by servants of government; or (ii) there has been a calculated and deliberate act taken in the pursuit of profit.

- The Court was satisfied that the conspiring acts of Salt were *"sufficiently high handed or egregious"* in a *"bad case of breach of confidence"* so as to justify exemplary damages in principle. However, a final determination would require an assessment of the compensatory damages awarded at an upcoming split quantum trial in order to determine whether those damages are adequate in themselves to address Prysmian's wrong.

- Finally, the Court was asked to determine whether The Trade Secrets (Enforcement etc.) Regulations 2018 (the "**Trade Secret Regulations**") applied to this case, for the purposes of remediation. The Court was satisfied that Salt's CLV design information constituted trade

secrets for the purpose of the Trade Secret Regulations, and that they applied to Prysmian (notwithstanding that the parties and the infringements complained of were not in England) due to the English Court's *in personam* jurisdiction over Prysmian, and the resulting application of English law.

- Accordingly, Prysmian was found liable for breach of confidence, with damages to be separately assessed, including by reference to the Trade Secret Regulations.

**PH*lit* comment:**

*This lengthy judgment offers practitioners guidance in various areas of law and, in particular, claims for breach of confidence (whether in equity or under contract). It is also worth noting that the judgment provides a useful review of the law on adverse inference, with the Court ultimately concluding that it should draw adverse inferences from Prysmian's failure to call witnesses to speak to certain key issues of fact.*

*In respect of the claim for unlawful means conspiracy, we are reminded again of the collateral risk of internal company policies, and how these might inadvertently increase risk (as we saw, albeit in different circumstances, in the case of* Vedanta Resources PLC and Konkola Copper Mines plc v Lungowe and others *[2019] UKSC 20). One of the four bases upon which the Court determined that Prysmian had engaged in unlawful means was that it had fallen "*significantly below*" the standards set out in its "Ethical Code". Whilst in this case the code was appended to the Salt Contract, claimants should consider whether similar company policies should be sought by way of disclosure so as to enhance a case where wilful misconduct is in issue.*

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