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PH*lit*

February 2021

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PH Insight for News and Analysis of the Latest Developments from the Courts of England and Wales

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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 review a High Court ruling in the British Airways data breach litigation that considered the "cut-off" date for potential claimants to join a group action and the recovery of costs for advertising the group action.
- We note a Court of Appeal decision regarding the committal for contempt of a solicitor who instructed a client to "burn it all" in the face of a search order.
- We analyse a high-profile Supreme Court decision regarding the test for establishing jurisdiction to bring a claim in England and Wales against a UK parent company for alleged tortious acts committed by a foreign subsidiary abroad.
- We reflect on two recent decisions on the application of section 67 of the Arbitration Act 1996 regarding the "substantive jurisdiction" of a tribunal. In the first, the High Court considered whether an agreement to arbitrate could be implied into a contract by reason of custom alone (and absent any course of dealing). In the second, the High Court considered whether non-compliance with a multi-tiered dispute resolution clause was an issue of jurisdiction for the tribunal.
- We note an interesting Court of Appeal ruling on the correct standard for adjournment of an upcoming trial when an important witness is temporarily incapacitated due to illness.
- Finally, we consider a much-discussed High Court decision arising from LIBOR-manipulation, where the Court considered the "reliance" aspect for establishing a claim for fraudulent misrepresentation.

Group litigation: High Court addresses cut-off dates and advertising costs

***Weaver & Ors v British Airways Plc* [2021] EWHC 217 (QB) (judgment available here)**

2 February 2021

- British Airways Plc ("**BA**") was subject to a cyber-attack in September 2018, in which its customers' personal data was compromised by an unknown criminal actor. BA notified approximately 500,000 individuals that their data might have been compromised and damages claims were subsequently brought by various customers, principally on the basis that BA had failed to put in place appropriate or sufficient security measures to protect their data.

- In October 2019, BA applied for, and was granted, a group litigation order pursuant to CPR 19.11. Those with a particular interest in group litigation will have since followed the case closely. The latest development was a costs and case management conference held on 2 February 2021 (the "**CCMC**"), in which Mr Justice Saini addressed the following two issues:

    i. the claimants' application to extend the cut-off date by which additional claimants could be joined to the group action; and

    ii. the recoverability of advertising costs incurred, and to be incurred, by the claimants' solicitors in publicising the group action.

- In respect of the first issue, whilst CPR 19 does not mandate a cut-off date, the parties had agreed that one should apply. An initial cut-off date was ordered by the Court by consent, which was subsequently extended by agreement between the parties to 3 April 2021.

- In November 2020, the Court then ordered that there should be a split trial of liability and quantum issues. As a result, the claimant group applied to extend the cut-off date for a further one-year period, such that it would end one year after the liability trial. The claimants argued that they had originally supported a cut-off date on the basis that the case would proceed quickly to a combined trial on liability and quantum, where in such circumstances it made practical sense for a cut-off date to be imposed. When the Court ordered that there should be a split trial on liability and quantum, the claimants' position was that this reasoning no longer stood.

- As at the date of the CCMC, the claimant group consisted of 22,230 claimants, representing under 5% of the total potential class. The claimants' solicitors envisaged this number would increase by 20,000 by mid-March. The application was therefore made on the grounds that the order for a split trial marked a relevant change to the nature of the litigation and to allow an extension of the cut-off date would be in the interests of proportionality (in terms of cost savings) and access to justice.

- BA opposed the application on the principal bases that: (i) the original cut-off date was sufficiently generous; (ii) there was no good reason to vary that date; and (iii) to further extend the cut-off date would give rise to uncertainty, thereby preventing BA from ascertaining its own exposure and potentially entering into any settlement negotiations from a necessarily informed position.

- The Court viewed its decision as a point of pragmatic case management weighing up access to justice on the one hand and the benefit of certainty on the other. The Court was not attracted by the application to extend the cut-off date to one year after the commencement of the liability trial. It found that this would create a very substantial level of uncertainty

for BA and would work against the general principle that a defendant should know the level of its exposure, and also be able to "*cut its cloth*" appropriately (i.e. devote appropriate resources according to the potential level of liability). This led the Court to extending the cut-off date by only two months, to 3 June 2021. The Court further noted that additional claimants could still apply to court to join the group action after the cut-off date, and therefore access to justice would not be precluded after 3 June 2021.

- On the second issue concerning the recovery of advertising costs, the claimants' argued that an inherent feature in advancing group litigation is the need for solicitors to undertake significant publicity measures in order to achieve a *"critical mass"* of claimants. As such, the claimants' costs budget included a total sum of £1,000,000 on account of incurred and future advertising costs.

- The Court dealt with this claim tersely, characterising the expenditure as the cost of *"getting the business in",* and therefore part of the solicitors' general overhead expenses. As a matter of authority, the Court ruled that the advertising costs should not be recoverable from BA (save to the extent that such costs corresponded to any court order to take reasonable steps to publicise the group action).

PH*lit* comment:

Lawyers and litigation funders alike will be well versed in the growing trend of group litigation. This case reminds practitioners bringing a group action that the costs of "getting the business in" will not generally be recoverable. Further, while CPR 19 does not mandate a cut-off date for claimants to join a group action, this case does highlight the need for the defendant to have, at some point, a level of certainty about the exposure it is facing (notwithstanding that potential claimants can still apply to join a group action after the cut-off date) and that this need is recognised by the courts.

Court of Appeal considers committal for contempt of a solicitor who instructed a client to "Burn it all" in the face of a search order

***Ocado Group PLC v McKeeve* [2021] EWCA Civ 145 (judgment available here)**

8 February 2021

- The Court of Appeal has unanimously overturned a first instance decision by allowing a committal application for contempt of court to be made by the claimants against the defendant, Mr McKeeve. The facts of the case were described by the Court of Appeal as *"remarkable"*: minutes after learning that a search order had been made against his client in underlying proceedings, the defendant gave instructions to his client's IT manager to *"burn it"* or *"burn all"*. On receiving those instructions, the IT manager disabled and deleted various IT accounts; the deletion of which could not be reversed.

- The underlying proceedings related to a claim brought by Ocado against two former employees and their start-up competitor business for conspiracy to misappropriate and misuse Ocado's confidential business information. Shortly after issuing the claim form, Ocado obtained a search order under CPR 81. When learning of the order, and in direct contravention of the requirement not to *"disturb or remove"* certain listed items, the defendant messaged the start-up company's IT manager on a private messaging service, 3CX, and instructed the IT Manager to *"burn all"*. He then followed up that message with a telephone call, which resulted in the disabling and deletion of 3CX, meaning that all records stored on it were irretrievably lost.

- Ocado subsequently sought permission to pursue the defendant for contempt of court, but the judge refused the application on the basis that Ocado had failed to demonstrate a

public interest in the matter and a strong prima facie case that contempt had been committed. The judge accepted an argument that one of the users of the messaging service had used the defendant's wife's name as a pseudonym. The defendant's wife was a Member of the European Parliament at the time and the defendant stated that he did not want her name to emerge for fear it might ruin her reputation.

- On appeal, the Court of Appeal was not impressed with the first instance judge's decision, noting that it was *"plainly wrong"*. The Court of Appeal confirmed that the test regarding the permission stage of a committal application was the demonstration of a *prima facie* case of sufficient strength to the extent that public interest is engaged. In circumstances where it is alleged that *"a solicitor has ordered the destruction of documentation, knowing of the existence of proceedings and of a Search Order, with a view to that documentation being unavailable for examination by the claimants"*, a committal application would be in the public interest. The Court of Appeal clarified that it was not making a decision on the merits, but that it had merely found sufficient prima facie grounds to allow the application. The Court therefore granted permission for the committal application against the defendant to proceed and ordered that such application be heard by a different first instance judge.

PH*lit* comment:

Whilst the outcome of this case may appear common-sense to practitioners, from a legal perspective it nevertheless serves as a useful reminder of what constitutes a sufficient ground to make out a prima facie *case for an application for contempt. We shall now have to wait for the outcome of the committal application against Mr McKeeve and also the action taken by the Solicitors Regulation Authority, to which Mr McKeeve has self-referred.*

*In addition, and perhaps more interestingly, the Court of Appeal noted that the messaging app 3CX itself constituted a "*document*" for disclosure purposes, with the messages sent thereon constituting "*documents*" as well. With electronic messages now a key part of the disclosure process, the confirmation that an application/platform itself constitutes a document is noteworthy.*

Supreme Court reconfirms sufficient intervention in the affairs of a subsidiary can give rise to parent company liability in tort

***Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2021] UKSC 3 (judgment available here)**

12 February 2021

- This judgment concerned the circumstances in which a UK-domiciled parent company of a multi-national group of companies may owe a common law duty of care to individuals who had allegedly suffered serious harm as a result of failings by of one of the parent company's overseas subsidiaries.

- By way of background, a class in excess of 40,000 members brought claims for damages arising from numerous oil spills from oil pipelines and associated infrastructure in the Niger Delta, which was operated by the Shell Petroleum Development Company of Nigeria Ltd ("**SPDC**"), a Nigerian entity ultimately owned by the UK-domiciled Royal Dutch Shell Plc ("**RDS**"). Proceedings were brought against both SPDC and RDS and, in the case of RDS, the charge was that it owed the claimants a duty of care either because it exercised significant control over material aspects of SPDC's operations and/or it assumed responsibility for SPDC's operations.

- Proceedings were served on RDS within the jurisdiction and the claimants filed for permission to serve SPDC outside the jurisdiction on the basis that SPDC was a *"necessary*

or proper party" to the claims against RDS. In order for jurisdiction to be established on this basis, the claimants had to demonstrate that that there was a good arguable case in their claims against RDS as the jurisdictional anchor defendant.

- The court at first instance and the Court of Appeal held that there was not a good arguable case that RDS (the anchor defendant) owed the claimants a duty of care, with the result that permission to serve SPDC (the Nigerian entity) out of the jurisdiction was refused. The claimants appealed to the Supreme Court, which had to determine whether: (i) the lower courts had materially erred in law; and/or (ii) there was a real issue to be tried.

- Relying heavily on the 2019 case of *Vedanta Resources PLC and Konkola Copper Mines plc v Lungowe and others* [2019] UKSC 20 ("**Vedanta**"), the Supreme Court overturned the High Court and Court of Appeal decisions, ruling that they had made the following material errors of law:

  - Mini-trial: the lower courts were wrongly drawn into conducting a mini-trial on the substantive merits of the case, which led to them adopting an inappropriate approach to contested factual issues and evaluating the weight of documentary evidence that had been placed before them. This was not the correct approach to an interlocutory application. At the jurisdictional stage, the court should instead focus on whether the Particulars of Claim are arguable, accepting the factual assertions set out therein save *"where allegations of fact are demonstrably untrue or unsupportable".*

  - Relevance of future disclosure: the Court of Appeal was wrong not to give weight to the possibility of future disclosure of documents material to the claims. The likely importance of such documentation existing should not have been overlooked. In this regard, provided there is some evidential basis to advance a claim, it is relevant at the jurisdictional stage that there are *"reasonable grounds"* to expect that future helpful evidence will be produced in disclosure.

  - Group-wide polices: it is possible that a parent company's production and dissemination of group-wide policies will be sufficient to establish a duty of care over third parties affected by the parent's subsidiary. The lower courts were wrong to suggest that the dissemination of group-wide policies could not, of itself, give rise to a duty of care.

  - The *Caparo* test: it was not appropriate for the lower courts to have applied the *Caparo* test (which is based on whether there is sufficient proximity between the parties and whether it would be fair, just and reasonable to impose a duty of care) in circumstances where parent company liability for the acts of subsidiaries is not a *"controversial new category for the recognition of a common law duty of care"*.

  - Control vs. supervision/management: the lower courts had focused too much on the concept of "control", which is merely the starting point in determining whether there is a good arguable case for establishing parent company liability. The correct test is whether a parent exercises sufficient supervision and/or *"de facto management".* Accordingly, the key question in this case was "*the extent to which the parent did take over or share with the subsidiary the management of the relevant activity (here the pipeline operation)*".

- The Supreme Court ultimately found that there was a real issue to be tried as against RDS, as it was arguable that RDS might owe a duty of care to the claimants. It was clear on the available evidence that the Shell group *"is organised along Business and Functional lines*

rather than simply according to corporate status", and such vertical organisation paints the group as a *"single commercial undertaking"*.

- The following facts were of material relevance in establishing that a duty of care might be said to have arisen:
  - the imposition of global policies and standards, including in the area of Health, Security, Safety and Environment (the "**HSSE Policy**") across all of RDS's subsidiaries, including certain mandatory requirements;
  - RDS's active monitoring of compliance with the HSSE Policy and other standards;
  - that overall responsibility for implementing the HSSE Policy and other standards rested with RDS's executive committee, into which RDS's subsidiaries reported; and
  - the risk, both reputational and financial, of SPDC's operations in Nigeria meant that RDS took particular interest and concern in SPDC.

PH*lit* comment:

While it is not the case that a parent company will automatically owe a duty of care to third parties for the acts of its subsidiary, it is well-established that such a duty can arise in circumstances where a parent exercises a sufficient amount of management over the subsidiary's operations (including, for example, the implementation and promulgation of group-wide policies). It should be noted, however, that the Supreme Court in both this case and Vedanta *only determined the jurisdictional threshold of whether there was a real issue to be tried, i.e. whether the applicant had a real prospect of succeeding in its claim that the parent owed it a duty of care. This is a relatively low bar to meet. We therefore await the substantive trials in both cases, where further important guidance on this issue should be given.*

*Having said that, the decision is still significant. While formal control is not a determinative factor, parent companies that take active managerial steps in the operations of their subsidiaries should be mindful of potentially assuming a duty of care to third parties and the exposure that comes with this. Effective environmental, social and governance policies ("**ESG Policies**") are vital in today's business landscape, not least so as to ensure good corporate governance. However, parent companies would do well to review their ESG Policies (including how they are managed and implemented) as well as their group structures, given the potential liability that could arise from them.*

High Court rules that, absent any course of dealing, you cannot imply an arbitration agreement into a contract by reason of custom alone

***Black Sea Commodities Ltd v Lemarc Agromond Pte Ltd* [2021] EWHC 287 (Comm) (judgment available here)**

15 February 2021

- The High Court has considered a challenge to a tribunal's substantive jurisdiction to hear a claim under section 67 of the Arbitration Act 1996 (the "**Arbitration Act**"), in the context of an arbitration award concerning a dispute relating to an aborted transaction. Under section 67 of the Arbitration Act a party to arbitral proceedings may apply to the court challenging an arbitral award on the basis that the tribunal lacked substantive jurisdiction, and to seek a declaration that the award be set aside.
- The underlying dispute arose out of negotiations concerning a contract for the sale of Ukrainian corn between Black Sea Commodities and Lemarc. Negotiations took place through a broker in March 2018 and, by 9 March 2018, the parties had agreed on the key contractual terms, including those relating to: quantity, shipment and delivery, quality

standards, price and payment. There remained a number of terms to be decided and a draft contract, containing the standard GAFTA arbitration clause, was passed between the parties in continuing negotiations. Neither party expressed any objection to the inclusion of the arbitration clause.

- Negotiations eventually broke down, and Lemarc pulled out of the process. Lemarc then commenced GAFTA arbitration proceedings and obtained an award in its favour. Black Sea Commodities appealed to the High Court under section 67 of the Arbitration Act, arguing that the GAFTA tribunal had no substantive jurisdiction as there was no binding arbitration agreement.

- Lemarc argued that there was a sale contract in place that included an agreement to arbitrate or, alternatively, that an arbitration agreement should be implied as it was trade custom to include a GAFTA arbitration clause in sale contracts of the type that the parties were negotiating. The High Court resoundingly rejected these arguments, highlighting the difficulties that may arise if key terms have been agreed, however matters of jurisdiction, governing law or an agreement to arbitrate have not yet been considered.

- Lemarc's main argument was that the arbitration clause had been agreed by conduct in the course of negotiations (i.e. by neither party objecting to its inclusion). On this basis, Lemarc said the arbitration award should stand. The Court disagreed, holding that if no binding contract had come into existence, there was no consensus between the parties to arbitrate. Further, even if a binding contract had come into existence on 9 March 2018 (a point which the Court did not need to decide), arbitration had not been discussed at that point. It was not permissible to essentially cherry pick individual terms as being binding, in circumstances where no overall agreement had been reached in subsequent negotiations. To do so would fly in the face of the offer and acceptance doctrine under English law.

- Lemarc also ran an alternative argument that it was a trade custom in the industry that contracts concerning the trade of Ukrainian corn would include a GAFTA arbitration clause and therefore one should be implied. However, the Court considered the evidence was insufficient to imply such a term and, even if there was more evidence, the Court could not conceive of how it would be sufficiently certain to justify its implication.

- Accordingly, the Court concluded that the parties had not concluded an arbitration agreement and the GAFTA award was set aside.

PH*lit* comment:

The case ultimately involved the orthodox application of the law on offer and acceptance, familiar to all practitioners, to the question of whether an arbitration agreement had been properly concluded. The case serves as a reminder that agreements as to governing law and jurisdiction (including any requirement to arbitrate) are key provisions in any commercial negotiation and should be addressed at a relatively early stage.

It is further noteworthy that Lemarc's alternative argument, based on the implication of an agreement to arbitrate arising out of trade custom, would have failed as a matter of principle. Accordingly, parties cannot expect the court to imply an agreement to arbitrate if the intention to arbitrate has not otherwise been made clear.

High Court rules that non-compliance with conditions precedent to arbitration, such as mediation or negotiation, are not jurisdictional matters

The Republic of Sierra Leone v SL Mining Limited **[2021] EWHC 286 (Comm) (judgment available here)**

15 February 2021

- In another recent judgment concerning section 67 of the Arbitration Act, the High Court has declined to set aside an arbitral award on the basis that a multi-tier dispute resolution provision had not been complied with.

- The application was made by the Republic of Sierra Leone (the "**Republic**") in relation to a partial final award by which an arbitral tribunal found that it had jurisdiction to determine arbitration claims brought by SL Mining Limited ("**SL Mining**"), following the Republic's suspension, and subsequent cancellation, of a mining licence, which had been granted to it. Pursuant to its challenge, the Republic alleged that SL Mining had failed to comply with certain conditions precedent to arbitration, which were set out in a multi-tiered dispute resolution clause, and accordingly the tribunal did not have jurisdiction to determine SL Mining's arbitration claims.

- The multi-tiered dispute resolution clause provided that:

  > *"The parties shall in good faith endeavour to reach an amicable settlement of all differences of opinion or disputes which may arise between them. . . In the event that the parties shall be unable to reach an amicable settlement within a period of 3 (three) months from a written notice by one party to the other specifying the nature of the dispute and seeking an amicable settlement, either party may submit the matter to the exclusive jurisdiction of a Board of 3 (three) Arbitrators…"*

- SL Mining commenced the arbitration six weeks after serving a Notice of Dispute on the Republic. The Republic argued that SL Mining had not waited the three months required by the dispute resolution clause, and therefore the tribunal had no jurisdiction to hear the claim. The tribunal disagreed.

- The Republic then applied to set the award aside under section 67 of the Arbitration Act on the basis that the tribunal lacked *"substantive jurisdiction"*. *"Substantive jurisdiction"* is defined in the Arbitration Act by reference to the matters specified in section 30(1), namely:

  > *"Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to – (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement."*

- The Republic argued that this was a case that fell within (c), and argued that the dispute had not been submitted to arbitration in accordance with the arbitration agreement because proceedings could not be commenced until after the three-month negotiation window had expired.

- It was common ground that there is a distinction between jurisdiction and admissibility; that is, a challenge on the basis that the tribunal had no jurisdiction to hear a claim and a challenge on the basis that a claim was not admissible before the tribunal. Put another way: (i) issues of jurisdiction go to the existence or otherwise of a tribunal's power to judge the merits of a dispute; whereas (ii) issues of admissibility go to whether the tribunal will

exercise that power in relation to the claims submitted to it. Only jurisdictional challenges are available to a party under section 67 of the Arbitration Act, whereas matters of admissibility are generally within the competence of the tribunal only and not something that the English Courts will intervene in.

- Having considered international authorities and leading commentary, the Court confirmed that conditions precedent to arbitration are matters of admissibility, not jurisdiction, and therefore section 67 was not engaged.

- In interpreting section 30(1)(c), the Court considered that the provision intended to identify *what* matters have been submitted to arbitration, rather than *whether* such matters had been properly submitted to arbitration. The Court concluded that the former was a matter of jurisdiction falling under section 67, however the latter (for example, *whether* a claim has been brought too early in accordance with the relevant contract) is an issue of admissibility that is best decided by the tribunal.

- Finally, the Court considered the construction of the multi-tiered dispute resolution clause and found that the conditions precedent to arbitration did not mean that a claim could not be filed before the three-month negotiation period had expired. The Court held that the clause did not create an absolute bar to bringing proceedings for three months, but rather it created a window during which the parties could explore settlement. In this regard, proceedings could still be filed earlier if it was clear that the objective of an amicable settlement could not be achieved. The Court found that where proceedings are filed before the expiration of a negotiation window, the question is an objective one as to whether, at the point the proceedings were filed, there was still a chance that the parties might reach an amicable settlement before the end of the negotiation window. In this case, the Court held that "*there was not a cat's chance in hell of an amicable settlement*" and so the commencement of arbitration before the end of the negotiation period did not amount to a failure to comply with the dispute resolution clause.

PH*lit* comment:

The decision provides welcome certainty that non-compliance with a multi-tier dispute resolution provision gives rise to issues of admissibility, rather than forming the basis of a challenge to an arbitral tribunal's jurisdiction under section 67 of the Arbitration Act. Such non-compliance is a procedural issue that falls within the competence of the arbitral tribunal, not the English Courts. Accordingly, challenges to a tribunal's jurisdiction based upon conditions precedent to arbitration are not referable to the English Courts under section 67 of the Arbitration Act and such challenges are likely to fail.

Notably, the Court had to distinguish its previous decisions in Emirates Trading Agency LLC v Prime Mineral Exports Private Limited *[2014] EWHC 2104 (Comm) and* Wah (aka Tang) v Grant Thornton International (GTIIL) Ltd *[2012] EWHC 3198, in which a challenge under section 67 had been considered where there was a failure to comply with a multi-tiered dispute resolution clause. However, the Court noted that the distinction between jurisdiction and admissibility had not been argued in those cases.*

It is also noteworthy that the Court found that conditions precedent to arbitration (such as negotiation windows) do not act as an absolute bar to bringing arbitration proceedings. Instead, their purpose is to facilitate settlement and, if it becomes objectively clear that this purpose cannot be achieved, a party can commence proceedings earlier. However, parties should still be wary of compliance with multi-tiered dispute resolution clauses or risk a challenge and subsequent ruling from the duly appointed arbitral tribunal that the arbitration claim is premature and therefore inadmissible before it. Of course, the tribunal may instead mandate a stay of proceedings to allow for the relevant "cooling off" or negotiation provisions to be applied. However, non-compliance with such provisions may still, in any event, set the claimant off on the wrong foot, and lead to wasted costs and delay.

Court of Appeal considers adjournment in circumstances where an important witness was temporarily unavailable to testify

Bilta (UK) Ltd & Ors v Tradition Financial Services Ltd **[2021] EWCA Civ 221 (judgment available here)**

22 February 2021

- The Court of Appeal has held that a trial should be adjourned in circumstances where an important witness was unavailable to testify due to illness. The Court held that the relevant test for an adjournment is the same whether it relates to a party's own availability or the availability of an important witness. That test is whether refusing to grant the adjournment would lead to an unfair trial. However, even if the court determines that the trial would be unfair without the witness's evidence, it must still weigh this against the prejudice suffered by the other party as a result of the delay, and whether this can be compensated for.

- The underlying litigation related to a large-scale VAT fraud alleged to have been committed by the directors of the claimant companies in relation to the spot trading of carbon credits. The defendant was alleged to have dishonestly assisted the directors in their breach of fiduciary duty. A central tenet of the defendant's case was that it had not acted dishonestly and it relied on the evidence of its head of desk for EU Emissions Trading Allowances, Ms Mortimer, in support of this. Ms Mortimer provided a witness statement, but was later diagnosed with a serious illness and it became clear that it would be impossible for her to give evidence at trial. At one stage, it was doubtful that she would ever be able to give live evidence, but her prognosis improved, giving rise to the expectation that she would be able to give evidence some eight months after the original trial date.

- The judge at first instance dismissed the application to adjourn the trial, stating that Ms Mortimer's unavailability was not a sufficient reason for an adjournment so close to the trial date.

- The Court of Appeal disagreed, holding that the relevant test was whether the trial would be fair in all the circumstances if it were to proceed. This highly fact sensitive assessment will apply regardless of whether it is a party who is unable to attend trial, or an important witness.

- The Court recognised that the question of whether the trial can be conducted fairly without the presence of a particular witness will depend on the circumstances. It will in part depend upon the importance of the witness's evidence to the case and the desirability of that evidence being tested under cross-examination before the trial judge. The Court noted that, in some cases, contemporaneous documents may be more important than oral evidence and so a fair trial can proceed without the evidence of a witness. However, in the present case, the key documentary evidence consisted of transcripts of telephone conversations from which certain inferences had been drawn. The oral evidence of Ms Mortimer was therefore crucial to refute these inferences and, although she had given a witness statement to this effect, the weight accorded to that statement would be limited if her evidence could not be tested in cross-examination. Accordingly, it would be unfair to proceed in circumstances where Ms Mortimer would be unable to give live evidence at trial.

- In addition, the Court considered that there would be limited prejudice to the claimant by the delay, and this prejudice could be compensated via payment of the claimant's wasted costs in preparation for the adjourned trial.

- Notably, the focus of the enquiry is on fairness of the trial for the relevant party, not the witness, though the Court commented *obiter* that unfairness to the witness may also be a relevant factor. However, in the present case, even though the witness was accused of acting dishonestly, and there were important professional and personal consequences for her, it was not necessary to consider fairness to the witness as the Court had already concluded that to proceed with the trial would, in any event, be unfair to the defendant.

PH*lit* comment:

This case demonstrates a general principle that, subject to the specific circumstances of the case, if an important witness is temporarily incapacitated, the Court may order an adjournment of trial (even when close to the trial date), if to proceed would be unfair to the relevant party. The test is therefore one of fairness as regards the relevant party, but also potentially with respect to the witness.

The Court did acknowledge that the relative importance of a particular witness's oral evidence will be highly fact sensitive, and this could lead to difficulties applying the test in practice. Accordingly, in some circumstances it may be that a witness's attendance at trial in order that they may give evidence (and have that evidence tested) would not be so critical to the case that it would be unfair to proceed with the trial in their absence.

Reliance test for fraudulent misrepresentation not satisfied in latest LIBOR-rigging case

***Leeds City Council and others v (1) Barclays Bank PLC and (2) Barclays Bank UK PLC* [2021] EWHC 363 (Comm) (judgment available here)**

22 February 2021

- In the latest judgment in the litany of LIBOR-rigging cases, the Commercial Court has struck out claims of fraudulent misrepresentation brought by a number of local authorities (the "**Local Authorities**") against two Barclays entities ("**Barclays**"), for lack of reliance.

- The Local Authorities had entered into "Lender-Option, Borrower-Option" loans with Barclays between 2006 and 2008 (the "**Loans**"), which were pegged to LIBOR. The Local Authorities sought to rescind the Loans on the basis of alleged fraudulent implied misrepresentations that, in short, Barclays would not manipulate LIBOR.

- In determining Barclays' application to strike out the Local Authorities' claims, the Court had to consider whether the Local Authorities had properly pleaded a cause of action in misrepresentation and in particular: (i) whether reliance on the implied misrepresentations had been demonstrated; and (ii) if reliance had been shown, whether the Local Authorities had affirmed the Loans by way of continued interest payments. The Court decided that the applicable legal test for reliance had not been met, which was fatal to the Local Authorities' case. Accordingly, the affirmation issue did not fall to be determined. However, had reliance been demonstrated, the Court remarked that the affirmation issue—a question of fact—would not have been appropriate for summary determination.

- In order for a misrepresentation to be actionable, it must have been relied upon by the representee such that it induced the relevant contract (in this case, the Loans). Barclays argued that there are two necessary and distinct components of reliance: (i) that the representee was aware of the representation such that it was understood in the manner complained of; and (ii) that such awareness induced the contract. It was on the awareness limb that the parties were principally in dispute, with their respective positions summarised as follows:

- **Barclays**, relying heavily on *Marme Inversiones v Natwest* [2019] EWHC 366 (Comm), argued that the Local Authorities must have given *"contemporaneous conscious thought"* to the alleged representations such that there was *"active appreciation"* of them that could have caused inducement.

- **The Local Authorities** argued that there are various ways, both conscious and subconscious, that an implied representation can operate on the mind of the representee, such that it is an overly artificial exercise to compartmentalise awareness, on the one hand, and inducement on the other. What needs to be shown is that the representee was influenced by the representation, which can, in certain circumstances, be satisfied by assumption. By "assumption", the court likened this concept to a "*quasi-automatic understanding*" on the part of the representee arising from the words or conduct of the representor.

- The Court remarked that the awareness limb of reliance *"marks a critical boundary between a claim for misrepresentation (generally actionable) and non-disclosure (actionable only in situations of utmost good faith or where specifically contracted for)"*. In order for assumption to constitute awareness, the assumption or *"quasi-automatic understanding"* must have arisen from a representation (by words and/or conduct) made by the representor that was so obvious that it spoke for itself.

- Under the backdrop of the *"effectively identical"* LIBOR representations complained of in *Marme Inversiones* (as well as in *Property Alliance Group Ltd v The Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch)), the Court agreed with the bank's approach to assessing awareness that "*in a case of this sort more is needed than an assertion of subconscious operation*". That is to say that the alleged conduct of Barclays did not speak for itself, such that awareness could be satisfied by mere assumption.

- Turning to the second issue, that of affirmation, the Court firmly noted that, had the issue fallen for determination, it would not have been appropriate for summary assessment, as it involved complicated questions of fact as to the extent of the claimants' knowledge concerning:

  - the relevant facts giving rise to its claims for misrepresentation at the time of the alleged affirming events; and

  - their right of election as between rescission and affirmation.

- Of particular note, on the second question of knowledge, the Court rejected Barclays' argument that the retention of in-house counsel should lead to an automatic inference that certain of the Local Authorities had been properly advised as to their legal rights.

PH*lit* comment:

This case highlights the difficulties that can be faced in misrepresentation claims and, in particular, the requirement to demonstrate reliance on the representation which it is alleged was wrongly made. In some cases, the issue of reliance will be relatively straightforward. However, in others it may be a more complex question which is determined by reference to what the claimant consciously thought or what they were subjectively aware of.

The Commercial Court's judgment in this case will provide reassurance to banks who face LIBOR-related claims, and potentially other claims based on misrepresentations in relation to the sale of financial products, that in order to make good its claim, the claimant representee must have been actively aware of the alleged misrepresentation.

However, the Court stressed that "active appreciation" is not a universal test. More simplistic representations might be prosecuted successfully on the basis of subconscious awareness or assumption, where the words and/or conduct of the representor are so obvious such that they speak for themselves. The Court offered the example of a bidder raising a paddle at an auction as being sufficient to constitute a representation, even if the auctioneer does not give the paddle-raising conduct any conscious thought.

Practitioners should therefore be alert to the blurred lines of awareness, which must be analysed in the factual matrix within which a representation was allegedly made.

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