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An arbitration agreement prevents the enforcement of a US judgment in England; the Court of Appeal rules that litigation-funding agreements are not Damages Based Agreements; and the High Court considers the "iniquity" exception to legal advice privilege

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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 discuss a High Court ruling that *"extremely harsh"* clauses in a settlement agreement did not constitute unenforceable penalties where the detriment imposed was not extravagant, exorbitant or unconscionable.
- We consider a Court of Appeal decision in which enforcement of a US judgment in England was refused on the basis that that it had been obtained in proceedings brought in breach of an arbitration agreement.
- We review a Court of Appeal finding that Litigation-Funding Agreements do not constitute Damages Based Agreements under the Courts and Legal Services Act 1990, a decision which will come as a relief to litigation funders.
- We reflect on a High Court decision regarding a claimant's application for an order requiring the defendant to effectively give disclosure in relation to how it had complied with its disclosure obligations.
- We note a Court of Appeal ruling which clarifies the requirements for establishing deliberate concealment in order to suspend time under the Limitation Act 1980.
- We consider a High Court decision which provides guidance on when a court may decline to hand down a reserved judgment in circumstances where the parties reach a settlement after a hearing or trial has taken place.

- We review a High Court ruling concerning the "iniquity" exception to the privilege rule and whether privilege had been lost in relation to certain documents on the alleged basis that they had been brought into existence for an unlawful purpose.

- Finally, we consider a High Court decision on the assessment of *forum conveniens* in circumstances where there was a risk of multiple proceedings giving rise to inconsistent judgments.

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High Court rules that "extremely harsh" clauses do not constitute unenforceable penalties

***Permavent Ltd and Greenhill Industrial Holdings Limited v Stephen John Makin* [2021] EWHC 467 (Ch) (judgment available here)**

2 March 2021

- The High Court has determined that certain clauses contained in a settlement agreement did not constitute unenforceable "penalty clauses" because they were not disproportionate to the protection of the claimants' legitimate interest over its intellectual property rights, notwithstanding that they were "extremely harsh" on the defendant.

- The defendant in this case, Mr Makin, had operated a roofing-products business with a Mr Yeremeyev through a group of companies, which included the two claimants, Permavent Limited ("**Permavent**") and Greenhill Industrial Holdings Limited ("**Greenhill**") (together, the "**Companies**"). The shares in Greenhill were owned, as to one-third each, by Mr Makin, Mr Yeremeyev's wife and Mr Yeremeyev's associate, Mr Mikhalap. Greenhill owned all of the shares in Permavent.

- Mr Makin had primary responsibility for technical matters and had invented and developed various roofing products under the name "Easy Roof System" ("**ERS**"), in respect of which he was granted certain patents in his own name (the "**Patents**"). In 2014, he granted a licence to Permavent to manufacture, use, sell and supply ERS products (the "**Permavent Licence**").

- The relationship between Mr Makin and Mr Yeremeyev deteriorated and the pair decided to part company with one another. Negotiations concerning the termination of their relationship took place but a suitable arrangement could not be agreed. Towards the end of such negotiations, Mr Makin claimed that the Patents were owned by him personally and Permavent responded by issuing a claim seeking, amongst other things, a declaration that the Patents were owned by Permavent. Those proceedings were then settled by way of a settlement agreement (the "**Settlement Agreement**").

- Under the terms of the Settlement Agreement:

  – Mr Makin received a payment of approximately £620,000 for his shares in Greenhill together with an ongoing entitlement to payments in connection with the ERS products (the "**ERS Payments**");

  – Mr Makin promised not to claim any entitlement over, or otherwise challenge, the Companies' ownership of the Patents (the "**Promises**"); and

- in the event that Mr Makin breached the Promises, he would be liable to repay everything received under the Settlement Agreement and forfeit his entitlement to future ERS Payments (the "**Detriment Clauses**").

- In breach of the Settlement Agreement, Mr Makin sought to register an equitable interest in certain of the Patents. The claimants commenced legal proceedings for breach of the Settlement Agreement. On the issue of breach, summary judgment was awarded in the claimants' favour and injunctions were granted which required Mr Makin to cancel his purported registration of an interest in the Patents and prevented him from making any future claim to an interest in the Patents. However, one issue still remained for determination: a claim by Mr Makin that the Detriment Clauses in the Settlement Agreement constituted unenforceable penalties which could not be invoked against him.

- In reaching its decision, the High Court relied upon the seminal case of *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67 in which the Supreme Court held that the question as to whether a clause is unenforceable as a penalty is not whether it is a genuine pre-estimate of loss (as previously accepted), but whether it is penal in nature, taking into consideration the interest that the clause seeks to protect.

- Under *Cavendish*, whether a clause is penal in nature is based on a two-limbed test; first it is necessary to consider what legitimate business interest is protected by the clause and, second, it is necessary to determine whether the clause is nevertheless in the circumstances extravagant, exorbitant or unconscionable. Accordingly, in the present case, the Court had to consider:

  - whether any legitimate business interest of the Companies was protected by the Detriment Clauses; and

  - if so, whether the detriment imposed under the Detriment Clauses for breach of the Promises was nevertheless unconscionable, exorbitant, extravagant or out of all proportion to that legitimate interest.

- In the Court's view, it was clear that the Detriment Clauses served to protect the Companies' Patents from infringement and this was a legitimate business interest (the "**Protected Interest**").

- In determining the second question, the Court was satisfied on the claimants' evidence that the nature of the Protected Interest was "*fundamental to the claimants' business*", which, if left unprotected, would give rise to the "*potential for very serious harm*". Accordingly, the Court concluded that whilst the detriment to Mr Makin was "*undoubtedly extremely harsh*", this did not make it "*extravagant, exorbitant or unconscionable, as being out of all proportion to the Protected Interest*", so as to render the Detriment Clauses penal.

- In addition to the fundamental nature of the Patents to the claimants' business, the Court also considered it relevant that Mr Makin: (i) had entered into the Settlement Agreement with legal advice; and (ii) had behaved in a difficult and, at times, aggressive manner prior to the Settlement Agreement, which suggested that he would make "*life as difficult as possible for the claimants*" in respect of their Protected Interest.

PH*lit* comment

This judgment will be of particular interest to draftsmen seeking to robustly protect IP rights and shows that the courts recognise the importance of a company's IP rights and the need for them to be protected as a legitimate business interest. However, it also provides useful guidance as to the application by the courts of the Cavendish *test, and, in particular, the approach that is taken to determining whether a contractual provision that protects a legitimate business interest is nevertheless disproportionately extravagant, exorbitant or unconscionable and, therefore, unenforceable. It will come as some comfort to parties seeking to enforce protective provisions that they will not necessarily fall foul of the rule against penalty clauses, even if the effects of such provisions are "extremely harsh".*

However, the case does underscore the fact that every case will turn on its particular facts and there may well be a range of specific factors and circumstances that the courts will take into account. For example, in the present case: (i) the amount of the Companies' anticipated loss compared to the financial impact of the Detriment Clauses on Mr Makin; (ii) Mr Makin's conduct, both before and after the Settlement Agreement was entered into; and (iii) the fact that Mr Makin had received legal advice before entering into the settlement agreement, were all material factors that supported the court's decision not to treat the Detriment Clauses as unenforceable penalties, in spite of their harsh nature.

Court of Appeal rules that US judgment cannot be enforced in England where obtained in breach of an express arbitration agreement

***AdActive Media Inc v Ingrouille* [2021] EWCA Civ 313 (judgment available here)**

5 March 2021

- The Court of Appeal has allowed an appeal against the enforcement of a US judgment, holding that such judgment was unenforceable in England under section 32(1)(a) of the Civil Jurisdiction and Judgments Act 1982 (the "**1982 Act**") because it was obtained in breach of an express arbitration agreement.

- By a consultancy agreement dated September 2014 (the "**Consultancy Agreement**"), the defendant, Mr Ingrouille, agreed to assist and advise the claimant, AdActive, with strategic business development in South East Asia. The Consultancy Agreement contained two clauses conferring jurisdiction on the US District and State Courts of California (the "**US Court**"), but it also contained an arbitration clause, which applied to "*all claims, disputes, controversies, differences or misunderstandings between the parties*" arising out of the Consultancy Agreement (together, the "**Disputes Clauses**"). However, the scope of the arbitration clause specifically excluded disputes relating to two clauses of the Consultancy Agreement concerning the misuse and unauthorised disclosure of confidential information (the "**Carve-Outs**").

- AdActive brought proceedings in the US Court against Mr Ingrouille for a "*multi-faceted conspiracy*" against AdActive's business interests, in which it relied on various causes of action. Mr Ingrouille did not participate in the US proceedings, which resulted in judgment in default being entered against him in the amount of $11 million (the "**US Judgment**"). AdActive subsequently issued proceedings to enforce the US Judgment in England, where Mr Ingrouille resided. Mr Ingrouille defended the enforcement proceedings on the basis that the US proceedings had been brought in breach of the arbitration clause and therefore the US Judgment should not be recognised or enforced under section 32(1)(a) of the 1982 Act.

- Section 32(1)(a) provides that a judgment given by an overseas court in any proceedings shall not be recognised or enforced in the UK if the bringing of the proceedings in that overseas court was contrary to any agreement concerning the manner in which the underlying dispute should be determined.

- Mr Ingrouille's defence was rejected at first instance because the High Court held that: (i) the arbitration clause was inconsistent with the other Jurisdiction Clauses and was therefore unenforceable; and (ii) even if the arbitration clause was in fact valid, then the claims in the US proceedings included, or related to, the sharing of confidential information and therefore fell within the Carve-Outs to the arbitration clause. Accordingly, the High Court held that AdActive's claims had been correctly brought before the US Court.

- The Court of Appeal disagreed that there was any inconsistency between the Jurisdiction Clauses. In particular, it found that:

  - the starting point should always be that the parties are presumed to have intended the entire contract to take effect. For a term to be ineffective on grounds of inconsistency with another term, they must be in direct contradiction with one another;

  - the fact that the Jurisdiction Clauses were sat side by side in the Consultancy Agreement (being clauses 15, 16 and 17) made inconsistency between them all the more improbable, than if they appeared in separate and unrelated parts of the Consultancy Agreement; and

  - on a proper construction of the Jurisdiction Clauses, there was no inconsistency between them: the parties had intended for all disputes to be referred to arbitration, save for the Carve-Outs which would be determined by the US Court.

- The Court of Appeal also rejected the High Court's findings that the US proceedings were valid given that the underlying claims were in respect of, or related to, the Carve-Outs. Notwithstanding that the misuse and unauthorised disclosure of confidential information was an important part of the claims, the claims also encompassed misappropriation of funds and a conspiracy to undermine the company's business interests and to divert its contracts, clients and relationships to Mr Ingrouille. Accordingly, such claims did not fall outside of the scope of the valid arbitration clause and should not have been brought in the US Court.

- Therefore, given that the claims were brought in the incorrect forum, the US Judgment was unenforceable in England by virtue of section 32(1)(a) of the 1982 Act. It was not relevant that certain heads of claim in the US Court proceedings fell within the Carve-Outs, the proceedings as a whole were rendered invalid.

PH*lit* comment

This case provides helpful guidance on the approach of the English courts to interpreting seemingly inconsistent contractual provisions, particularly in the context of dispute resolution provisions where it is not uncommon for some claims to be reserved for arbitration and others to be reserved for the courts of a particular jurisdiction. While the case demonstrates the potential issues that can arise in relation to "dual-jurisdiction" provisions, such that their use should be considered carefully, it also highlights that the English courts will not readily find them to be inconsistent, but will rather look closely as to the manner in which they are presented and the precise wording that is used.

Indeed, if parties intend for specific claims arising out of a contract to be determined in different ways, then they should ensure that the relevant dispute resolution clauses are drafted as clearly as possible and any party that later seeks to bring any proceedings must ensure that they do so in compliance with such provisions, otherwise they face the risk of: (i) the other party bringing an anti-suit injunction; or (ii) any resulting judgment being unenforceable abroad.

Court of Appeal finds Litigation Funding Agreements are not Damages Based Agreements to the relief of litigation funders

***PACCAR Inc. v Road Haulage Association Ltd (Association of Litigation Funders of England and Wales intervening)* [2021] EWCA Civ 299 (judgment available here)**

5 March 2021

- The Court of Appeal has confirmed that litigation funding agreements ("**LFAs**"), that provide for remuneration at a fixed share of the damages eventually awarded, do not constitute "damages-based agreements" ("**DBAs**"). Accordingly, the strict rules which govern the operation and use of DBAs will not apply to LFAs, which will come as some relief to litigation funders.

- This case arose out of the so-called "*Trucks*" decision by the European Commission, in which the Commission found that five European truck-manufacturing groups had carried out a single continuous infringement of Article 101 of the Treaty of the Functioning of the European Union. Two applications for collective proceedings orders were subsequently issued before the Competition Appeal Tribunal (the "**CAT**") against certain of the five truck manufacturers (the "**Truck Companies**"). Both applications were funded by litigation funders.

- The Truck Companies opposed the funding arrangements on the basis that the applicable LFAs, which provided remuneration at a fixed share of any damages awarded, constituted DBAs under section 58AA of the Courts and Legal Services Act 1990 ("**CLSA**") which are prohibited in opt-out collective actions. For the purposes of the CLSA, a DBA is defined as a *"damages-based agreement…between a person providing advocacy services, litigation services or claims management."* In arguing that the LFAs constituted DBAs, the Truck Companies relied on a literal interpretation of *"claims management services"* and argued that this would encompass *"the provision of financial services or assistance in relation to the making of a claim"* and would therefore bring LFAs into the scope of the DBA definition.

- This argument was rejected at first instance by the CAT, which approved the funding arrangements. The CAT's decision was then appealed by the Truck Companies to the Court of Appeal. In unanimously dismissing the appeal, the Court of Appeal:

  - relied on its examination of the history of the CLSA and confirmed that the purposive approach to interpretation required it to take into account the full legal, social and historical context of the legislation, in addition to having regard to the ordinary meaning of the words used;

  - rejected the literal reading of the extended definition put forward by the Truck Companies, which did not give regard to the context of the legislation, and would have brought the provision of litigation funding by a third party, which plays no part in the management of a claim, into the definition of DBAs; and

  - relied on section 58B of the CLSA which contains a comprehensive scheme for the regulation of LFAs – noting that whilst section 58B has not been brought into force, neither has it been repealed and it remains on the statute book.

- In these circumstances, the Court argued that it would be *"most improbable"* if Parliament had intended for LFAs, which would be regulated under section 58B, to fall within the potentially conflicting regime governing DBAs. The Court therefore dismissed the appeal on its merits, but granted the Truck Companies permission to apply for a judicial review of the CAT's original decision.

PH*lit* comment:

The confirmation that LFAs do not constitute DBAs within the meaning of the CLSA regime will be most welcomed by litigation funders because, if the Court had found otherwise, it is likely that most existing LFAs would be unenforceable for failure to comply with the strict requirements set out in the CLSA.

However, it should be noted that this may not necessarily be the end of the matter. The Court did grant the Truck Companies permission to apply for a judicial review of the CAT's original decision. At the time of writing, leave to appeal has not yet been granted by the Supreme Court and so we will need to watch this space.

High Court rejects application concerning a party's compliance with its disclosure obligations under the Disclosure Pilot Scheme

***Eurasian Natural Resources Corp Ltd v Qajygeldin* [2021] EWHC 462 (Ch) (judgment available here)**

8 March 2021

- The High Court has rejected a disclosure application concerning a defendant's compliance with its disclosure obligations in relation to certain "*irretrievable documents*" and in particular its efforts in: (i) recovering data and documents from two email accounts; and (ii) establishing the theft of certain personal devices.

- The case concerns the claimant's allegations that the defendant, Ake-Jean Qajygeldin, a former Prime Minister of Kazakhstan, breached obligations of confidentiality that he owed in respect of its confidential information. As the proceedings are in the Business and Property Courts, they are subject to the disclosure pilot scheme under Practice Direction 51U ("**PD 51U**") contained in the Civil Procedure Rules.

- Upon completing the Disclosure Review Document (the "**DRD**"), the defendant stated that two personal electronic devices, including a laptop, had been stolen from him in Germany in 2018 and that two email accounts were no longer accessible. The claimant thereafter sought further information from the defendant and was neither satisfied with the defendant's response nor with the efforts that he had undertaken to retrieve the email accounts or the stolen devices. Accordingly, the claimant applied for a wide-ranging order requiring, in broad terms, the defendant to: (i) contact his German lawyers and the German police in order to seek information concerning the theft of his personal electronic devices, the details and outcome of the ensuing investigation and any assigned crime reference numbers; and (ii) contact Google in relation to his two email accounts and, in particular, to seek information concerning the current status of those accounts, whether any data within them was recoverable and the attempts (if any) that had been made to log into them (the "**Application**"). The Application relied on:

  - paragraph 10.3 of PD 51U, which requires parties to update the DRD on an ongoing basis, and in particular to "*co-operate and constructively engage*" with that process; and

  - paragraph 17.1 of PD 51U, which allows the court to make an order in case of a failure of a party to adequately comply with a previous order for Extended Disclosure.

- In dismissing both grounds for the Application, the judge held that: (i) paragraph 10.3 requires a disclosing party to provide information as to any documents that are irretrievable, but it does not require a party to provide evidence on why documents are irretrievable and the steps that have been taken to recover them; and (ii) paragraph 17.1 did not apply because the date by which the parties were due to give Extended Disclosure had not yet arrived and therefore it could not be said that the defendant had failed to comply with an order for Extended Disclosure.

- Whilst the judge noted that the Court could nevertheless grant the Application on the basis of its inherent jurisdiction, this was ultimately refused on the basis that the issues upon which additional disclosure was sought were not issues that arose in the parties' statements of case, but rather related to the conduct of the disclosure exercise. The Court commented that the defendant was obliged to undertake a "*reasonable and conscientious search for disclosable documents, and that the claimant was entitled to enough information about the searches to show that the defendant has done so*". However, there was no basis for requiring the defendant to give detailed disclosure in respect of their compliance with a disclosure order, which the Court held to be wrong in principle and disproportionate.

PH*lit* comment:

This judgment clarifies that while PD 51U places significant emphasis on duties of cooperation and preservation of evidence, a court will not generally require a party to provide disclosure, or evidence, on its compliance with its disclosure obligations. In particular, it highlights the fact that the disclosure process under PD 51U is driven by the issues for disclosure in the case; that is, those issues which arise from the parties' statements of case and which need to be determined by the court with some reference to contemporaneous documents. While previous case law shows that the court does have the inherent jurisdiction to order disclosure on issues that do not arise on the statements of case, such power is only exercised sparingly, particularly on the basis that "[t]he parties' and the court's resources should be directed and focussed upon the matters which the court will need to decide in order for there to be a fair resolution of the claim at trial".

Practitioners should therefore take note of this judgment and think carefully before expending potentially significant costs on applications concerning disclosure which: (i) seek relief to which they are not entitled under PD 51U; or (ii) fail to otherwise meet the high bar required to invoke the court's inherent jurisdiction.

Court of Appeal clarifies the requirements for establishing deliberate concealment for the purposes of suspending limitation

***Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339 (judgment available here)**

11 March 2021

- Under section 32(1)(b) of the Limitation Act 1980 (the "**Limitation Act**"), where any fact relevant to a claimant's right of action has been deliberately concealed by the defendant, limitation does not begin to run until the claimant has discovered the concealment (or could, with reasonable diligence, have so discovered it). Further, under section 32(2) of the Limitation Act, the deliberate commission of a breach of duty, in circumstances in which such breach is unlikely to be discovered for some time, amounts to deliberate concealment of the facts.

- In this lengthy judgment, the Court of Appeal rejected a limitation defence asserted by the defendant lender, whose concealment of a high commission rate from the claimant, its borrower, rendered their relationship unfair within the meaning of the Consumer Credit Act 1974 (the "**CCA**").

- The claimant, Ms Potter, took out a loan with the defendant, Canada Square, in 2006. The defendant acted as an insurance intermediary and arranged payment protection insurance ("**PPI**") on the claimant's behalf, for which an amount of £3,834 was added to her loan. Unbeknown to the claimant, over 95% of this amount was paid to the defendant as commission for arranging the insurance. The claimant repaid the loan in full in 2010 and, following a Supreme Court decision in which it was held that the non-disclosure of a high commission rate for arranging an insurance product rendered the creditor-borrower relationship *"unfair"* within the meaning of section 140A of the CCA, she brought proceedings against the defendant in December 2018 to recover the balance of the premium she had paid.

- Both the Small Claims Court and the High Court dismissed the defendant's argument that the claim was time barred because it was brought more than six years after the relationship between the parties had ended. In this regard, the Small Claims Court found that the claimant could rely on sections 32(1)(b) and 32(2) of the Limitation Act and held that her claim was not time barred because she had only become aware that the defendant was likely to have received commission at an excessive rate in November 2018. The High Court then dismissed the defendant's appeal, finding that the claimant could rely on section 32(2) of the Limitation Act, but not section 32(1)(b) alone. The defendant then appealed this decision to the Court of Appeal.

- The Court of Appeal identified the following three issues in the appeal:

  - did the creation of an unfair relationship within the meaning of section 140A of the CCA amount to a breach of duty by the defendant for the purposes of section 32(2) of the Limitation Act?;

  - was the defendant's failure to disclose the existence and size of the commission a "*concealment*" of that fact by the defendant for the purposes of section 31(1)(b) of the Limitation Act?; and

  - if there was a breach of duty for the purposes of section 32(2) and/or a concealment for the purposes of section 32(1)(b), was the defendant's conduct "*deliberate*" within the meaning of those provisions.

- The Court of Appeal dismissed the defendant's appeal, finding that: (i) the creation of an unfair relationship was a breach of duty that the claimant could rely on for the purposes of section 32(2); (ii) the defendant's failure to disclose the existence and size of the commission amounted to a concealment of that commission within the meaning of section 32(1)(b); and (iii) the defendant's conduct in both cases was deliberate.

- In reaching its decision, the most important aspects of the Court of Appeal's judgment concerned the meaning of the terms "concealment" and "deliberate" for the purposes of sections 32(1)(b) and 32(2).

Concealment

- As it was agreed that there was no active "concealment" by the defendant, but rather a failure to disclose the commission, the issue for the Court was whether section 32(1)(b) could apply where the defendant had failed to disclose documents in circumstances where it had no distinct legal duty to disclose the information. In English law, freestanding duties to disclose information are generally limited to circumstances where there is a fiduciary relationship or an established relationship of "good faith" (such as with insurance contracts). There was no such relationship in this case. However, the Court concluded that an obligation to disclose is inherent in any prohibition on "concealing" something, and this need not amount to a pre-existing duty to disclose.

- In the absence of a pre-existing duty to disclose, the Court considered that the defendant's obligation to disclose will arise out of *"utility and morality"* and the question was therefore whether the defendant was *"under a sufficient obligation to disclose for the failure to disclose to amount to concealment"*. In the present case, the Court considered that the defendant's duty to act fairly under section 140A of the Consumer Credit Act meant that it was under a sufficient obligation to disclose such that a failure to disclose the information amounted to "concealment" for the purposes of section 32(1)(b).

Deliberate

- In order to rely on section 32(1)(b), the concealment needs to be "deliberate" (i.e. the defendant must have realised it should have disclosed the commission to the claimant but decided not to do so), for which the Court identified four possibilities:
  - actual awareness;
  - wilful blindness;
  - subjective and objective recklessness (i.e. the defendant was subjectively aware of the risk and it was unreasonable objectively to take that risk); and / or
  - subjective recklessness.
- The Court noted that there was no clear, natural meaning of the word "deliberate" in this context and prior case law construing the term was inconclusive. However, recklessness was a sufficient mental element for the previous iteration of the legislative provision (namely section 26 of the Limitation Act 1939). The Court therefore concluded that the relevant test in this context was subjective and objective recklessness. Accordingly, the claimant could rely on section 32 of the Limitation Act if she could show that the defendant had realised there was a risk that they had a duty to tell her about the commission, such that their failure to do so meant that they deliberately concealed that fact from her.

PH*lit* comment:

This decision provides helpful guidance on: (i) what will amount to a breach of duty for the purposes of section 32(2) of the Limitation Act; (ii) what constitutes "concealment" for the purposes of section 31(1)(b); and (iii) what a claimant must establish in order to show that a concealment under section 31(1)(b), or breach of duty under section 32(2), was "deliberate".

Notably, in respect of the first issue, the Court considered that the creation of an unfair relationship was a breach of duty that the claimant could rely on for the purposes of section 32(2).

In relation to the second issue, regarding the meaning of "concealment" for the purposes of section 31(1)(b), the decision confirms that active concealment is not required, and concealment may apply to cases where the defendant has merely not disclosed the information. Interestingly, there is no need for there to be a pre-existing duty (whether contractual, tortious or fiduciary) to disclose for the prohibition on concealment to bite.

With regard to the third issue, whether the breach of duty was "deliberate", the court usefully clarified the relevant test – there is no need to establish actual knowledge or wilful blindness in order for the concealment or commission of a breach of duty to be "deliberate". Recklessness is a sufficient mental element for concealment to be "deliberate" so long as: (i) the defendant is subjectively aware of the risk that they ought to disclose the information or their conduct amounted to a breach of duty; and (ii) it was objectively unreasonable to take that risk. This may make it easier for claimants to postpone the limitation period under sections 32(1)(b) and 32(2), as there is no need to show the defendant was aware of its wrongdoing.

High Court provides guidance on handing down reserved judgments after settlement

***Beriwala v Woodstone Properties (Birmingham) Ltd and another* [2021] EWHC 609 (Ch) (unreported)**

16 March 2021

- The High Court has given guidance on when a court may decline to hand down a judgment, in the unusual circumstances where the parties to litigation have reached a settlement following trial and after the draft text of the judgment has already been circulated for comment.

- The facts of the underlying dispute are inconsequential to the Court's decision; it suffices to say that the case concerned a commercial dispute between two private parties. After the hearing, the Court's draft judgment was sent to counsel for both parties, with the standard request for typing corrections or obvious errors to be provided within 5 days. The parties provided their corrections, but the claimant also sought to raise another issue which was consequential to the judgment but not part of its original case. After hearing submissions on the additional issue, the judge declined to make any findings in respect of it and indicated that he would instead hand down the original judgment and arrange for the additional issue to be determined by way of a separate, further hearing. The parties requested an extension of time to continue settlement discussions, which was granted. Ultimately, the parties reached a settlement, which was conditional upon the judge not handing down his judgment.

- In reaching its decision, the Court first noted that the purpose of providing a draft judgment under Practice Direction 40E of the Civil Procedure Rules was to allow the parties to consider consequential orders or typographical errors, and not to facilitate settlement discussions. However, whilst the provision of the draft judgment to the parties is seen as a step to eventual judgment, the court maintains the discretion to decide whether to continue the process and ultimately hand the judgment down.

- The Court noted that, in deciding whether or not to hand down the judgment, it should consider: (i) whether the case raises a point for which it is in the public interest to have a judgment; (ii) how far the preparation of the judgment has progressed by the time of the parties' request not to hand it down; and (iii) the parties' interests.

- In considering the circumstances of the parties' request, the Court noted the following factors in favour of handing down the judgment:

  - the judgment had already been prepared and provided to the parties in draft;

  - preparing the judgment had incurred court resources which would have otherwise been wasted; and

  - one point of law raised in the judgment regarding Quistclose trusts could have been of interest to litigants at large (albeit the particular issue was unlikely to arise in many cases).

- Against this, the Court noted the factors in favour of not handing down the judgment:

  - both parties had requested that the judgment should not be handed down;

- both parties were private individuals / entities and their dispute did not affect any third parties;
- the judgment was based almost entirely on factual findings and the application of conventional legal principles to those facts;
- there had been no allegations of dishonesty or any other behaviour which might be in the public interest to air publicly; and
- there remained a significant unresolved issue between the parties, which was likely to lead to further litigation without settlement.

- Balancing these factors, the Court decided not to hand down its judgment. Of particular importance to its decision was the fact that handing down the judgment might lead to further litigation between the parties, as the judgment did not resolve all of issues between them and the agreed settlement was conditional on judgment not being handed down. The Court noted that it was in the public interest to avoid further litigation and use of court resources and therefore it was preferable to facilitate a settlement of all matters between the parties.

PH*lit* comment:

Whilst this judgment does not raise any novel issues, and the circumstances are relatively unusual, it does usefully set out the issues the court should consider when determining whether or not to hand down judgment where the parties have requested that it not do so. In particular, the court must weigh up the wishes of the parties against the public interest of handing down judgment in the particular case. In making such determination, there are various factors that the court will take into account.

High Court considers the "iniquity" exception to privilege and determines that a strong prima facie case of iniquity had not been established

***Various Claimants v News Group Newspapers Ltd* [2021] EWHC 680 (Ch) (judgment available here)**

22 March 2021

- In a case relating to the "phone hacking" scandal of the late 2000s, the High Court has considered whether privilege in two documents had been lost because of the "iniquity" exception. The iniquity exception operates to prevent privilege being asserted in relation to documents that were brought into existence for a criminal or fraudulent purpose.
- In 2007, criminal proceedings were brought against the private investigator, Mr Glenn Mulcaire, who was employed by the defendant, a newspaper publisher. Mr Mulcaire was charged with illegally gathering information (including via voicemail interceptions), which he provided to the newspaper. As the criminal prosecution progressed, he engaged a lawyer to act for him in making employment-related claims against the newspaper.
- The defendant settled Mr Mulcaire's employment-related claims, but in doing so created two documents: (i) a set of post-it notes purportedly written by an in-house solicitor in connection with Mr Mulcaire's criminal proceedings (the "**Post-It Notes**"); and (ii) a memorandum setting out the defendant's "options" in relation to Mr Mulcaire's employment claim (the "**Memorandum**", and together with the Post-It Notes, the "**Documents**").
- These documents had been identified as relevant in the present proceedings; however, the defendant asserted privilege over them on the basis that they were created by its in-house

solicitor. The claimants challenged privilege on the bases that: (i) the Post-It Notes did not attract privilege at all; and (ii) any privilege that both sets of documents might have otherwise attracted had been lost because the documents evidenced the furtherance of an unlawful purpose or scheme, thereby engaging the "iniquity" exception.

- In this regard, the claimants argued that it was the defendant's unlawful intention, in creating the Post-It Notes and the Memorandum, to disguise the type of investigative work conducted by Mr Mulcaire, including the notorious phone-hacking activities. Mr Mulcaire was due to provide mitigation in a criminal sentencing hearing at the Crown Court, and the Memorandum was said to have contained options for "silencing" him and was intended to further the unlawful or improper purpose of inducing him not to "spill the beans" at his sentencing hearing, thereby protecting the defendant from revelations as to the widespread extent of phone hacking activities. The Post-It Notes were affixed to an email which contained a list of the activities Mr Mulcaire carried out for the newspaper. The claimant alleged that the Post-It Notes would likely have contained amendments to this list, in order to scale back the activities or make them appear less damaging to the newspaper. The defendant's solicitor provided a witness statement to the effect that the Post-It Notes were unrelated to the email they were affixed to, but nevertheless attracted privilege as notes made by a lawyer in the context of providing legal advice.

- The first question for the Court was whether the documents were in fact privileged. As to the Memorandum, it clearly attracted legal advice privilege in that it contained advice from both external lawyers and the defendant's in-house lawyer. However, the claim to privilege in the Post-It Notes was less clear-cut. Whilst there was a *"striking lack of detail"* as to the defendant's description of the Post-It Notes, the Court considered that to require any further specifics as to their content would be to jeopardise the privilege in the information the defendant sought to protect: on that basis the defendant's claim for privilege in the Post-It Notes was allowed.

- The Court then moved to consider whether privilege had nevertheless been lost as a result of the Documents being created for the purposes of an unlawful scheme. In order to rely on the "iniquity" exception to privilege, the claimant needed to establish a strong *prima facie* case that the in-house counsel was asked to advise, or took it upon himself to advise, as to the conduct of an unlawful or iniquitous enterprise. The Court noted that it was insufficient that the in-house solicitor gave advice in a context in which something unlawful was possible or in contemplation. The advice must go further and, in the present case, it did not. In particular:

  - although Mr Mulcaire's sentencing hearing might have exposed further illegal activity at the newspaper, and the Memorandum contemplated this risk, this did not in itself amount to a strong *prima facie* case that the in-house solicitor was promoting an unlawful scheme and that the Memorandum was created for this purpose; and

  - as to the Post-It Notes, the email to which these notes were affixed was not printed out until after the sentencing hearing. Therefore, the Court held that the Post-It Notes could not have related to the alleged unlawful purpose of obscuring the truth about the extent of the activities carried out by Mr Mulcaire on the newspaper's behalf, namely by incentivising Mr Mulcaire to be less candid in his sentencing hearing than he might otherwise have been.

PH*lit* comment:

This case highlights the high bar that an applicant will have to surpass in order to establish that privilege has been lost as a result of iniquity. There must be a strong prima facie case that the relevant document was brought into existence for the purposes of furthering an unlawful scheme or enterprise. Advice which is given merely in the context of some apparent iniquity, but which does not actually contribute to the conduct, promotion or furthering of an unlawful scheme will be not be sufficient.

In addition, whilst the Court did consider privilege to subsist in the documents in question, the case serves as a helpful reminder that when claiming privilege, the court will require specific evidence as to the content of the document, but without going so far as to infringe upon the information that the privilege is designed to protect.

High Court considers the *"forum conveniens"* where there was a serious risk of inconsistent judgments

***PJSC National Bank Trust and another v Mints and others* [2021] EWHC 692 (Comm) (judgment available here)**

23 March 2021

- This case concerns proceedings brought by two Russian banks against seven Russian individuals. The first to fourth defendants are resident in England, and the fifth to seventh defendants are resident in the USA, Israel and Russia respectively. The fifth to seventh defendants challenged the jurisdiction of the English courts, and the High Court was required to consider whether England and Wales was the *forum conveniens* (or appropriate forum) to hear the claim.

- The underlying dispute concerned a number of loans provided by the claimant banks. The claimants alleged that the loans were provided on uncommercial terms as part of a conspiracy between the first to fourth defendants, who ultimately owned the borrower company, and the fifth, sixth and seventh defendants who held high-ranking positions within the relevant banks. The cause of action relied upon in the English courts was a breach of statutory duty under Russian law. Proceedings were also commenced in Russia, Cyprus, New York and in a London-seated arbitration.

- At an ex-parte (i.e. without notice) hearing, the High Court granted the claimants permission to serve the proceedings outside the jurisdiction on the fifth, sixth and seventh defendants. Permission was given on the basis of the ground contained in paragraph 3.1(3) of Practice Direction 6B of the Civil Procedure Rules, namely that the fifth to seventh defendants were necessary and proper parties to the claims against the first to fourth defendants. The fifth to seventh defendants then applied to have that order set aside, either because: (i) England was not the appropriate forum (i.e. the *forum conveniens*) to hear the claim; and/or (ii) the claimants had failed to give full and frank disclosure in the *ex parte* application to obtain the order.

- The Court noted that questions of *forum conveniens* are determined by principles established in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 476, which generally require an examination of the connecting factors between the dispute and the jurisdictions in which it could be litigated. Such matters include: (i) practical convenience (e.g. accessibility to the relevant court(s) for the parties and witnesses or commonality of language); and (ii) the appropriate system of law (that is whether the law of the place where the wrongful act occurred or where the harm occurred should apply), albeit they are not in themselves necessarily conclusive. If another forum appears to be clearly or distinctly more appropriate, then jurisdiction will likely be refused, unless the claimant has a legitimate juridical advantage in pursuing its claim in England so that substantial justice cannot be achieved in an alternative forum. The burden is on the claimant to persuade the court that England is the appropriate forum for the trial of action.

- In applying these principles, the Court noted that the main reason the claimants sought to bring their claim against the fifth, sixth and seventh defendants in England, was that the claim against the first four defendants was being heard in England. In such circumstances, the risk of multiplicity of proceedings and of inconsistent decisions was a "*very important factor indeed*". The Court acknowledged that this argument lost some force in circumstances where the risk relied on by the claimants arose as a result of their own choice to bring proceedings in England rather than Russia. However, the Court considered the claimants' choice to be justifiable in view of the potential difficulties with enforcing a Russian judgment in foreign jurisdictions, when the defendants were known to have substantial assets outside Russia.

- A further important factor was that the claimants had alleged there was a conspiracy, meaning it was likely that either all of the defendants were complicit or none of them were. Accordingly, it was most convenient to hear the case against all defendants in the same forum. The defendants sought to argue that either the London arbitration or the proceedings in Russia would deal with the whole case in a single forum. However, the Court found that the Russian proceedings were dealing with different issues arising from the same facts, whilst the fifth and sixth defendants were not parties to the arbitration proceedings.

- As to the fifth to seventh defendants' argument that the claimants had breached the duty of full and frank disclosure in the *ex parte* application by failing to disclose a specific aspect of the Russian proceedings, the Court found that whilst this was a serious omission, permission to serve out of the jurisdiction would likely have been granted even if the relevant disclosure had been made. In addition, the failure was inadvertent, and the harm to the defendants caused by the breach was not severe.

- Accordingly, the Court dismissed the fifth to seventh defendants' application. However, the claimants were ordered to pay their own costs of the application, and a quarter of the costs of the fifth, sixth and seventh defendants due to their (inadvertent) failure to give full and frank disclosure in the *ex parte* application.

PH*lit* comment:

This case provides helpful guidance on the factors that will be taken into account when considering forum conveniens, particularly where conspiracy is alleged. Although there was no dispute as to the applicable principles, it is clear from this case that the English courts will consider the possibility of multiplicity of proceedings and inconsistent judgments as very material factors in determining their jurisdiction.

Interestingly, the case also demonstrates that an ex parte order for permission to serve out of the jurisdiction will not necessarily be set aside where the claimant has inadvertently failed to give full and frank disclosure in its application, provided that such non-disclosure is not so significant that the application would not have been granted had the court been properly informed and the harm caused to the respondent is minimal. However, there remains obvious and significant risks of failing to comply with the duty of full and frank disclosure (not least an adverse costs order), and so, when marking ex parte applications, applicants must ensure that they fully and accurately disclose all material facts which, if present, the respondent would have wanted the court to know.

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Our London litigators understand the business implications of litigation and are trusted by clients to counsel them through their most complex and significant disputes. Please do not hesitate to contact any of the following Paul Hastings' London litigators:

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