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June 2021

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The Supreme Court clarifies the approach to determining the scope of the duty of care of professional advisers; the Court of Appeal confirms that a petition for unfair prejudice may be based on breaches of directors' fiduciary duties; and the High Court and Court of Appeal consider cases concerning the duty of full and frank disclosure

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

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In this edition…

- We consider a High Court decision to discharge an order extending the time for the claimant to serve its claim form, on the basis of the claimant's failure to give full and frank disclosure when making its without notice application. The case serves as a reminder that litigants will not necessarily have discharged their duty of full and frank disclosure without having undertaken proper inquiries.

- We review a High Court ruling that a party's deception as to the true purpose of correspondence does not necessarily prevent that party from claiming litigation privilege over that correspondence as the dominant purpose test may still be met.

- We reflect on a High Court decision where the Court was asked to consider the meaning of 'substantial performance' of a party's obligations and the reasonableness of an exclusion of liability provision under the Unfair Contract Terms Act 1977 in circumstances where the purchaser failed to pay a supplier after completion of the project on the basis that limited 'snagging' issues remained.

- We note a Court of Appeal ruling which confirms that a petition for unfair prejudice may be based on breaches of directors' fiduciary duties and that there is no need for the petitioner to show that such duties were owed to them personally.

- We consider a high-profile Supreme Court decision that clarifies the approach to determining the scope of the duty of care owed by professional advisers and provides guidance on the proper application of the principles set out in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (otherwise known as the 'SAAMCO' Principle).

- We discuss a ruling of the High Court in which the Court held that, despite a 12-month delay, the defendant's set aside application was made 'promptly' in circumstances where the defendant was also challenging the Court's jurisdiction.

- We note an interesting High Court ruling that, despite all essential terms having been agreed, a distribution agreement did not constitute a binding contract as it had not been signed and therefore lacked the requisite intention to create legal relations.

- Finally, in a second decision regarding the duty of full and frank disclosure, we note the comments of the Court of Appeal in a ruling that upheld the discharge of an injunction for failure to give full and frank disclosure in circumstances where the trial judge had been well within the 'generous ambit' of her discretion to discharge an injunction without renewal.

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High Court discharges previous order for applicant's failure to give full and frank disclosure

***Formal Holdings Ltd and Fihag Finanz Und Handels Aktiengesellschaft v Frankland Assets, Inc. and other companies* [2021] EWHC 1415 (Comm) (judgment available here)**

2 June 2021

- In a debt claim worth £25 million involving multiple foreign defendants, the High Court has discharged a 2018 order extending the time for the claimant to serve its claim form (the "**September Order**") due to the claimant's failure to give full and frank disclosure in its without notice application.

- On 1 December 2016, Formal Holdings Ltd ("**Formal**") entered into a loan agreement with Fihag Finanz Und Handels Aktiengesellschaft ("**Fihag**") pursuant to which it loaned Fihag £25 million (the "**Debt**"). The next day, Fihag loaned the Debt amount to the defendants (the "**Second Loan Agreement**"). On 31 December 2017, by way of a short document described as a 'settlement agreement' (the "**Settlement Agreement**"), Fihag sought to assign its rights to recover the Debt from the defendants under the Second Loan Agreement to Formal.

- On 17 May 2018, Formal and Fihag issued proceedings to recover the Debt from the defendants. On 4 September 2018, the claimants applied without notice to extend the validity of the claim form for service (the "**Extension Application**"), and an extension was granted until 31 December 2018. The claimants served the claim on the defendants in Liberia and the BVI in advance of the service deadline. The defendants neither

acknowledged service nor filed a defence, but the claimants did not apply for default or summary judgment with the result that the claim was automatically stayed. The stay was lifted in September 2020 upon the claimants' application, with the Court extending the time for the defendants to acknowledge service, which they did, indicating an intention to contest jurisdiction. By way of application dated 11 December 2020, the defendants argued, amongst other things, that: (i) the September Order should be discharged, on the basis that there had been material non-disclosure in the Extension Application; and (ii) service of the claim should therefore be set aside.

- The key questions for the Court to consider were: (i) did the claimants breach their duty of full and frank disclosure when making the Extension Application; and (ii) if so, was there any other reason not to discharge the September Order?

- In respect of the first question, the Court provided a useful reminder of the ambit of the duty of full and frank disclosure that is required where one party is making an application without notice. Citing the case of *Brink's Mat Ltd. v. Elcombe* [1998] 1WLR 1350, the key consideration is whether the applicant has disclosed all 'material facts', which extends not only to those facts that the applicant was aware of at the time of the application, but also those facts that would have been discovered if 'proper inquiries' had been made. What constitutes a 'material fact' depends on '*the importance of the fact to the issues which were to be decided by the judge on the application*'.

- In the present application, the Court considered there to have been nine instances of material non-disclosure. Front and centre of these was the non-disclosure of information that a Mr King had been in sole control of the claimants and the defendants, and had exercised his control so as to effectively prevent the defendants from submitting a defence, thereby nullifying any genuine dispute. In that regard, the Court remarked that '*it is not the court's function to facilitate a claim in which all the parties are controlled by the same individual*'. The failure to disclose Mr King's unfettered control over the parties constituted a breach of the claimant's duty of full and frank disclosure, but the Court stopped short of ruling that there had been any abuse of process despite noting that the '*picture that has emerged [in respect of Mr King] is a troubling one*'.

- As to the second question, applying *The Libyan Investment Authority v. J.P. Morgan Markets Ltd.* [2019] EWHC 1452), the general principle (which should only be departed from sparingly) is that where there has been a breach of the duty of full and frank disclosure, the relevant order should be discharged. In exercising its discretion, a court must consider the degree and extent of material non-disclosure, as well as have regard to the penal nature of the court's jurisdiction. In view of judicial guidance, the Court determined that the non-disclosure was sufficiently serious so as to justify discharge of the September Order. The Court further remarked that whilst costs sanctions in place of discharge could be a proportionate response, it would not be so in this case.

PH*lit* comment:

The duty of full and frank disclosure in without notice applications is not a mere box-ticking exercise. It enables a court to deal with matters on an informed basis, and as fairly as possible, where one side is not being heard, and in so doing ensures fair process in accordance with the European Convention on Human Rights. These are critical issues for legal practitioners; the court must be able to rely on the applicant complying with its obligations fully.

This case serves as a serious reminder that litigants must very carefully consider all material facts and ensure that they are brought to the Court's attention in an accurate manner; litigants will not necessarily have discharged their duty without having undertaken proper inquiries. Whilst the responsibilities of the applicant's legal advisers is a 'heavy one' (in explaining what the duty is and in exercising a degree of supervision over the process), the

duty itself is ultimately imposed on the applicant. Practitioners are further reminded that the duty relates to both the material that is disclosed as well as the manner in which such material is presented—i.e. practitioners must ensure that the way in which the material is presented amounts to a fair presentation in all respects. These are important lessons to keep in mind, not least because without notice orders are commonly challenged on grounds that the full and frank obligation has not been adhered to.

As regards the question of whether or not the relevant order should be discharged in the event of a breach of the duty, the most important principle is that the jurisdiction to maintain the order is penal in nature, and should be exercised sparingly, having regard to the degree and extent of the non-disclosure, and the non-disclosing party's culpability for it.

High Court gives guidance on whether deception as to the purpose of correspondence prevents a claim for litigation privilege

***Ahuja Investments Ltd v Victorygame Ltd and another* [2021] EWHC 1543 (Ch) (judgment available here)**

8 June 2021

- The High Court has confirmed that a party's deception as to the true purpose of correspondence does not necessarily prevent that party from claiming litigation privilege over such correspondence as the dominant purpose test may still be met.

- The underlying proceedings concern a claim for damages for misrepresentation in the context of a property transaction between the parties. An important point of contention is what the claimant's former solicitor at the time knew and what he told the claimant. For this purpose, the claimant sought information from his former solicitor who was not cooperative. The claimant therefore sought to obtain the required information by threatening litigation against his former solicitor, and sent a letter of claim requesting certain information. However, the claimant alleged that there was no intention to commence proceedings against the former solicitor; instead, the claimant asserted that the real purpose of the letter was to obtain information for use in the present proceedings against the defendants.

- The defendants sought disclosure of the letter and the response from the insurers for the claimant's former solicitor. The claimant sought to assert litigation privilege over the correspondence. This was rejected by a Master at first instance, who determined that the dominant purpose test was not met as the correspondence had not been brought into existence for the dominant purpose of the present proceedings. In so finding, the Master held that he not only ought to consider the claimant's (concealed) intention in relation to the correspondence (i.e. to obtain information for claims against the defendant), but also take into account how the correspondence would have been viewed by the former solicitor and his insurer (who appeared to take the threat of litigation against them seriously). The claimant appealed the Master's decision.

- In its assessment of whether or not the dominant purpose test was met in relation to the correspondence, the High Court noted that, when establishing the dominant purpose of a document, the purpose that is relevant is the purpose of the person who was the instigator of the document in question. However, such purpose must be determined objectively based on all of the evidence (including the subjective intention of the instigator). The Court considered *Property Alliance Group v The Royal Bank of Scotland Plc* (No. 3) [2016] 4 WLR 3, in which a managing director of the claimant arranged a meeting with two former employees of the defendant stating that the meeting was to discuss business opportunities, when the real purpose was to obtain information to support the claimant's claim against them. The Court in that case held that the deception of the claimant allowed the Court to

assess the dominant purpose of the meeting not from the instigator's point of view but from the former employees' point of view.

- The claimant argued that the correspondence in the present case was to be distinguished from the meeting in *Property Alliance Group* as it contained an overt request for information relevant to the present proceedings and did not involve as active a deceit. On this basis, the claimant argued that the former solicitor and his insurer could have known that the information requested might be used in the present proceedings. On the other hand, the defendant suggested that the correspondence had two purposes: (i) first, the 'secret' purpose of obtaining information for the present proceedings; and (ii) second, the 'open' purpose of obtaining information for a possible claim for negligence against the former solicitor. The defendant submitted that there was no requirement for any deception as to the information that was requested, because the requirement for deception relates to the purpose of the request.

- The Court held that, assessed objectively, the dominant purpose of bringing the correspondence into existence was to obtain information for use in the present proceedings. The Court went on to note that, whilst the method utilised by the claimant in obtaining such information could not be condoned, having found that the dominant purpose of the correspondence was to obtain information, there was no principled reason to reject litigation privilege on the basis of the claimant's deception. However, the Court was careful to distinguish the level of deception in the current case from that in *Property Alliance Group.*

PH*lit* comment:

Whilst this case does not change the basic test for litigation privilege, it usefully clarifies that: (i) the dominant purpose test should be assessed objectively by the Court; (ii) the objective intention of the instigator/the party claiming privilege is key to establishing whether the dominant purpose test is met; and (iii) the burden of proof is on the party asserting privilege. Although the Court was careful not to overrule Property Alliance Group by distinguishing the level of deception, and condemning the claimant's approach, this judgment may encourage parties to litigation to employ similar tactics in order to obtain documents for use in litigation and thereafter seek to protect relevant correspondence from disclosure by asserting privilege over it. However, given that the Court extended litigation privilege to both the letter of claim and the insurer's response (where it appears difficult to argue that the dominant purpose was the present proceedings given the concealment of the true purpose of the letter of claim), it remains to be seen whether this decision will be followed if a similar issue arises in the future.

High Court considers 'substantial performance' and the reasonableness of an exclusion of liability under the Unfair Contract Terms Act 1977

***Phoenix Interior Design Ltd v Henley Homes plc and another* [2021] EWHC 1573 (QB) (judgment available here)**

9 June 2021

- In this case, the High Court was asked to determine whether payment had fallen due under an interior design contract and whether the claimant's terms of business: (i) had been duly incorporated into the contract; and (ii) if so, whether an exclusion of liability was 'reasonable' for the purposes of the Unfair Contract Terms Act 1977 ("**UCTA**") or should be declared void.

- The first defendant, Henley Homes, purchased a hotel in the Scottish Highlands, which it transferred to the second defendant, its subsidiary, Union Street Holdings, in 2014. The claimant was engaged by the defendants to design the interior of the hotel rooms, and to

supply and install furniture and fittings. The work was carried out in 2016-17, and the claimant sought payment for unpaid invoices amounting to £232,550.42 in June 2017.

- The defendants refused to pay the invoices, alleging that either: (i) the performance of the contract was so defective that the work could not be considered complete and, as such, payment had not fallen due; or (ii) in the alternative, the furniture supplied was so defective that the defendants were entitled to counterclaim for the cost of sourcing replacements.

- The issues before the Court were fivefold:

  - Was it a term of the contract that the furniture and fittings supplied had to be of 'five-star' quality?

  - Were the goods supplied of satisfactory quality and fit for purpose according to the contractual terms?

  - Had the claimant's standard terms been incorporated into the contract?

  - If so, did the claimant's exclusion of liability in circumstances where payment had been withheld or delayed satisfy the requirement of reasonableness under UCTA?

  - Finally, if payment was due on 'completion' when did the claimant 'complete' the works and when did the defendants' obligation to pay come into effect?

- First, the Court was unconvinced with the defendants' argument that it was a requirement of the contract for the fittings to be of 'five-star' hotel quality. The Court considered the requirement that the goods be '*hard-wearing and . . . easy to clean, maintain and replace but with a luxurious 5-star feel*' and found the term 'five-star feel' to be unspecific and not synonymous with a five-star 'standard'. Further, expert evidence dismissed the notion of there being a 'star-rating' for furniture quality. Accordingly, the Court found that the defendant had failed to prove that there was a contractual term or specification about a 'five star' standard.

- On the second issue, the Court accepted the evidence of the claimant that the defendants had been given ample opportunity to inspect and approve the products. After a walk-through of a 'mock-up' room, the defendants had approved the goods supplied. The hotel was awarded a five-star rating, and received acclaim, which specifically commended the design and fit-out of the bedrooms. Moreover, the defendants had used the fittings for over three years and had not replaced them at the time of trial. Accordingly, the Court agreed with the claimant that the defendant should not now be entitled to reject the goods as unsatisfactory.

- Third, the Court accepted the claimant's argument that it had taken sufficient steps to bring its standard terms to the defendants' attention. A copy of the terms had been provided at a presentation and subsequently as an attachment to an email containing the summary proposal for the works. The Court considered that the defendants had paid '*insufficient attention*' to the fact that the acceptance of the proposal was subject to those terms. Accordingly, the claimant's standard terms were found to have been incorporated into the contract.

- On the fourth issue, the Court agreed with the defendant that the claimant's attempt to exclude liability wherever there was non-payment would fall foul of the reasonableness requirement contained in UCTA. The Court noted that it was the claimant's responsibility

to show that the exclusion was reasonable, but that, in the circumstances, the claimant had failed to do so. It also found such an exclusion uncommon (not being a traditional anti-set off clause), and was *'tucked away in the undergrowth of the standard terms . . . without any particular highlighting of its consequences'*. The consequences of the clause were potentially exorbitant, in that the slightest delay in payment would bar all rights of redress relating to the quality of the goods. The Court concluded that such exclusion of liability was therefore unreasonable and unenforceable.

- On the final issue, the contract provided that any outstanding balance was to be settled 'on completion'. The term 'completion' was not defined in the contract. The Court heard that after inspection of the goods, a 'snagging' list was developed, which the claimant worked to rectify before a final walk-through was conducted in early June. The defendants indicated approval of the remedial works performed and the claimant requested payment on 20 June 2017. However, the defendants contested the obligation to pay on the basis of continuing 'snagging' issues. The Court, applying the concept of 'substantial performance', found that the work was completed by 20 June 2017 by any normal meaning of the word 'complete'. The remaining defects were trivial in the context of the work as a whole. Accordingly, the defendants were obliged to pay the invoices from 20 June 2017 onwards.

PH*lit* comment:

Although this decision does not create new law, it serves as a useful reminder of general contractual principles and demonstrates the importance of establishing the terms of a contract, including the incorporation of any standard terms of business, at the outset. The defendants clearly felt that they had not received the quality of goods desired, but ultimately, in the absence of a specific term regarding the 'five-star' standard, they were unable to demonstrate that the goods were indeed unsatisfactory for the purposes of the contract.

This case also highlights the necessity of drawing specific attention to any particularly onerous terms in your standard terms of business. Although the claimant had drawn sufficient attention to the existence of the terms as whole, for the purposes of incorporating them into the contract, they had not drawn adequate attention to the exclusion of liability. In addition, the Court indicated that a common exclusion is more likely to be acceptable than an unusual one. If the claimant had used a more traditional 'anti-set off' clause it may well have been enforceable. When attempting to exclude liability in your standard terms, best practice remains to:

- *bring the exclusion to the attention of the other party;*
- *ensure it's not disproportionate;*
- *make sure it is possible to determine when the exclusion will apply; and*
- *test the exclusion against the 'reasonableness' criteria in Schedule 2 to UCTA.*

Court of Appeal confirms that a petition for unfair prejudice may be based on breaches of directors' fiduciary duties

Zedra Trust Company (Jersey) Ltd v The Hut Group Ltd and others **[2021] EWCA Civ 904 (judgment available here)**

15 June 2021

- The Court of Appeal has confirmed that a petition for unfair prejudice under section 994 of the Companies Act 2006 may be based on breaches of directors' statutory duties. The Court also confirmed that it is not necessary for the petitioner to show that the fiduciary duty was owed to them personally and reiterated the well-established principle that allegations of bad faith and/or improper purpose akin to fraud must be supported by particular facts.

- In this case, the petitioner, Zedra Trust Company (Jersey) Ltd (the "**Petitioner**"), held shares in The Hut Group Limited (the "**Company**"). It issued a petition making a number of complaints, the most significant of which was that, as a result of share issues by the Company, the relative size of its shareholding was reduced from 13.12% to 8.34% and, accordingly, it claimed that the affairs of the Company had been conducted in a manner that was unfairly prejudicial to it. The Petitioner alleged that the steps taken by the Company and the directors to dilute its minority shareholding were: (i) in breach of the directors' fiduciary duties; and (ii) carried out in bad faith and/or for an improper purpose.

- The respondents applied under CPR 3.4 to strike out the petition, or parts of it, on the grounds that they were improperly pleaded, unsustainable, or abusive because: (i) the directors' duties were owed to the Company, not the Petitioner; and (ii) the allegations of bad faith and/or improper conduct were not properly particularised. The application was dismissed by the High Court at first instance but the respondents appealed.

- In relation to the alleged breach by the directors of their duties, the Court of Appeal clarified that it is not necessary for a director to owe a fiduciary or statutory duty to a shareholder personally in order for that shareholder to be able to bring an unfair prejudice petition based on a breach of such duty. The Court therefore declined to strike out this part of the petition and instead remitted it to the High Court for a case management conference.

- In relation to the allegation of bad faith/improper purpose, the Court noted that the Petitioner had failed to plead any information at all about the share issues, other than the dates on which they were made and their effect on the Petitioner's shareholding. In particular, the Petitioner did not challenge the commercial legitimacy of the share issues, nor did it allege that the value of its shareholding had declined as result; in fact, the respondents pleaded that the Petitioner's shareholding had increased in value in the years prior to the petition, and this was not disputed. Accordingly, reiterating the well-established principles that: (i) the powers of a court to strike out should only be used in a '*plain and obvious*' case; and (ii) relying on Lord Hope of Craighead's judgment in *Three Rivers DC v Bank of England* [2003] 1 AC 1, that allegations of '*fraud, dishonesty or bad faith must be supported by particular facts*', the Court found that the Petitioner had failed to establish the allegation and held the pleading unsustainable in this regard. The Court therefore ordered this part of the petition to be struck out.

PH*lit* comment:

This case usefully reiterates the principle that the deciding factor in pleading unfair prejudice based on directors' conduct is not to whom the directors' duties are owed, but whether or not such conduct is unfairly prejudicial to the petitioner as a shareholder of the company.

The case is also a helpful reminder to practitioners that allegations of fraud, or allegations akin to fraud (e.g. dishonesty/bad faith), will be subject to a rigorous degree of scrutiny. Whilst it may be tempting for parties to allege fraud, unless it is particularised properly, and supported by credible primary facts supporting the allegation, it is liable to be struck out. In addition, solicitors and barristers alike will be alert to their professional conduct obligations in respect of alleging fraud.

Supreme Court clarifies approach to determining the scope of the duty of care owed by professional advisers

Manchester Building Society v Grant Thornton [2021] UKSC 20 (judgment available here)

18 June 2021

- In a high-profile decision, the Supreme Court has unanimously allowed an appeal by Manchester Building Society ("**MBS**") holding that certain losses suffered by it fell within the scope of the duty of care assumed to it by the defendant, MBS's auditor, and were therefore recoverable as damages in a claim for professional negligence. The significance of the decision lies in the Supreme Court's guidance on the proper approach to determining the scope of the duty of care owed by professional advisers to their clients in tort, including the application of the principles first adopted in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 ("**SAAMCO**").

- The claim arose from Grant Thornton's engagement to audit MBS's accounts between 1997 and 2012. Between 2004 and 2010, MBS purchased and issued lifetime mortgages, funded by borrowing at variable rates of interest. In order to protect itself against the risk that the variable cost of borrowing would exceed the fixed rate of interest receivable on the mortgage loans, MBS entered into interest rate swap contracts. MBS sought Grant Thornton's advice as to whether it was permissible to use 'hedge accounting' to account for the interest rate swaps. Grant Thornton negligently confirmed that it was. MBS relied on Grant Thornton's advice that the use of hedge accounting was legitimate to prepare its accounts and when entering into more lifetime mortgages and swaps. In 2013, Grant Thornton informed MBS that it was not permitted to use hedge accounting after all and MBS was required to restate its accounts. As a result of these corrections, MBS had insufficient regulatory capital. To resolve the situation, MBS terminated all of its interest rate swap contracts early at a cost of c. £32.7 million, plus transaction costs, and sold its book of lifetime mortgages (though at a small profit).

- MBS claimed damages from Grant Thornton for the losses suffered as a result of relying on Grant Thornton's negligent advice. Grant Thornton defended the claim on the basis that its negligence did not cause MBS the losses claimed, or, relying on the decision in SAAMCO, that the losses were not recoverable in law because it did not owe MBS a duty to protect it from those sorts of losses. In SAAMCO, the House of Lords held that a person who owes a duty of care to another is not normally liable for all the consequences of a breach of that duty, but only for losses of the kind that fall within the scope of the duty that was owed. The justices in SAAMCO also drew a distinction between 'advice' cases, and 'information' cases. In 'advice' cases the adviser is responsible for all matters to be taken into account by its client and if any one of those matters has been negligently misjudged by the adviser, then the client will be entitled to recover all losses flowing from the course of action taken. In contrast, in an 'information' case, the professional adviser contributes only a limited part of the material on which the client will rely in order to decide whether to follow a course of action, and so the adviser's legal responsibility is limited to the consequences of that information being wrong.

- In considering Grant Thornton's defence, the Court of Appeal found that the case should be determined by considering whether Grant Thornton gave 'advice' or only 'information' to MBS in line with the principles set out in SAAMCO. The Court of Appeal concluded that this was not an 'advice' case, in the sense that Grant Thornton was not responsible for guiding MBS's whole decision making process such that it could be liable for all of the foreseeable financial consequences of the decision to enter into the swaps. Instead, the

Court of Appeal held that this was an 'information' case, such that Grant Thornton was only responsible for the foreseeable consequences of the information/advice it gave being wrong.

- MBS appealed, and the Supreme Court overturned the Court of Appeal's decision. Although the Supreme Court unanimously allowed the appeal, it was divided in the reasons given for reaching this conclusion between the majority (Lord Hodge and Lord Sales, with whom Lord Reed, Lady Black, and Lord Kitchin agreed) and the minority (Lord Burrows and Lord Leggatt). The majority held that the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, which is judged on an objective basis by reference to the purpose for which the advice is given. This essentially means that in order to determine the scope of the professional adviser's duty, you must consider the risk the duty was supposed to guard against and then assess whether the claimant's loss was the result of that risk coming to pass.

- The Supreme Court further proposed to dispense with the distinction between 'advice' and 'information' cases as it was not fit for purpose. Instead, the Court considered that the range of cases constitutes a spectrum, with pure 'advice' cases (i.e. those where the adviser assumes responsibility for all aspects of a course of action) at one end of the spectrum, and instances where the adviser has contributed only a limited part of the material that the client relies on at the other. In addition, while not to be entirely dispensed with, the majority also agreed that the use of the counterfactual analysis in 'information' cases (which involved a consideration of whether, but for the alleged breach, losses of the type and scale suffered would have occurred regardless) should be 'reigned in' and regarded as a tool for cross-checking the legal analysis rather than a test to be applied in every case.

- Applying the above to the circumstances in which Grant Thornton gave its advice to MBS, the majority of the Supreme Court considered it to be clear that the purpose of the advice was to provide technical accounting input as to whether MBS was entitled to use hedge accounting within the constraints of the regulatory environment in order to pursue its proposed business model. Grant Thornton's advice was supposed to allow MBS to assess the risk and its negligence meant that MBS did not understand the attendant risks of the swap transactions when it entered into them. The majority considered that it was important to have regard to the commercial reasons why MBS sought the advice and the fact that these reasons were appreciated by Grant Thornton.

- Accordingly, the Supreme Court considered that MBS was entitled to recover damages of £26.7 million, which represented the cost of closing out the swaps early, plus the transaction costs, minus the profits that it made on the sale of the mortgage book. However, these damages were reduced by 50% to accord with the findings of the trial judge that MBS had been contributorily negligent (a finding that was not subject to the appeal).

PH*lit* comment:

The so-called SAAMCO principle has proved difficult for practitioners and the courts alike to apply to any given set of facts. Hopefully, this decision of the Supreme Court will lead to greater clarity in defining the scope of the duty of care that a professional adviser owes to their client, particularly by dispensing with the often awkward distinction between 'advice' and 'information' cases and significantly reducing the emphasis on the complex 'counterfactual' test.

The key practical takeaway for professional advisers is that they should take care to ensure, at the outset of any engagement, that there is an agreement between them and the client as to the purpose for which the advice is

being given and how it will be used by the client, because it is the purpose of the advice that will ultimately govern the scope of the adviser's duty of care in tort. It is crucial that professional advisers understand exactly what their advice is contributing towards before it is given. Accordingly, it is likely that the engagement documentation will be a fundamental factor in determining the scope of duty.

For more information on this case and its practical implications please refer to our Stay Current article on this decision.

High Court holds set aside application made 'promptly' despite 12-month delay

***Miss Gabrielle Alli-Balogun (by her Mother & Litigation Friend) v On the Beach Ltd and others* [2021] EWHC 1702 (QB) (judgment available here)**

22 June 2021

- The High Court has determined that a defendant's application to set aside default judgment was made promptly, despite the application being made 12 months after the default judgment had been awarded. However, the Court found that the relevant defendant had no real prospect of successfully defending the claim against it, and therefore the set aside application was ultimately refused.

- In August 2015, during a stay at a hotel in Spain, the claimant (a child) and her father attended the hotel's swimming pool, where there was a lifeguard on duty. When the father returned to the pool from a nearby gym, the claimant could not be seen and, after searches were made, was found at the bottom of the pool before being rushed to hospital. The claimant sustained a catastrophic brain injury as a result of these events and sought to sue (with her mother as her litigation friend) the following parties for damages: (i) the travel operator; (ii) the travel operator's insurer; (iii) the hotel; (iv) the company who supplied the lifeguard to the hotel (the fourth defendant); and, (v) the lifeguard company's insurer (the fifth defendant).

- Following service of a claim form, the fifth defendant failed to acknowledge service or file a defence by 3 October 2019, and default judgment was subsequently awarded against it on 20 December 2019. The fifth defendant acknowledged service of the default judgment on 7 January 2020, noting an intention to contest jurisdiction. Such application was then made on 20 January 2020 but was not combined with an application to set aside the default judgment. The jurisdictional challenge was based on a clause from the relevant insurance policy that stated, '*The coverage of the policy will only cover claims made before the Spanish courts for events occurring in Spain'*. On 4 February 2020, in a separate matter involving the fifth defendant, the same clause was determined by an English Court to be ineffective for jurisdictional purposes (the "**4 February Judgment**").

- In early December 2020, the fifth defendant abandoned its jurisdictional challenge, before making the present application to set aside default judgment. Pursuant to CPR 13.3, in order for such application to succeed, the applicant must demonstrate real prospects of successfully defending the claim, or it must appear to the court that there is some other good reason to set aside judgment. CPR 13.3(2) specifically notes that the court must have regard to whether the application was made 'promptly'.

- Applying the case of *Newland Shipping & Forward Ltd v Toba Trading FZC* [2017] EWHC 1416 (Comm), the Court considered that the fifth defendant could not have safely made an application to set aside default judgment pending the outcome of the jurisdictional challenge, for risk of submitting to the jurisdiction and thereby forfeiting its jurisdictional challenge. In addition, the Court did not consider that the fifth defendant had acted unreasonably in pursuing that jurisdictional challenge notwithstanding the 4 February

Judgment. Accordingly, the Court found that the jurisdiction application (which had the effect of a quasi-set aside application) had been made promptly, 13 days after service of the default judgment was acknowledged, and the set aside application was thereafter made promptly after the jurisdictional challenge had been withdrawn.

- As to whether the fifth defendant had a real prospect of successfully defending the claim, the Court noted that it was not fatal that a draft Defence had not been filed, notwithstanding that the commentary in the White Book (at paragraph 13.4.1) states it is preferable to do so. However, the Court did find that the absence of a draft defence reflected, in part, that the fourth and fifth defendants had not been able to set out a credible factual case. The swimming pool lifeguard (for whom the fourth defendant was vicariously liable, and which liability the fifth defendant had insured) had failed to provide any credible witness evidence to the Spanish Police at the time of the accident or subsequently, whereas the claimant had submitted cogent factual evidence demonstrating that the lifeguard had breached his duty of care (as a matter of Spanish law) to the claimant as a user of the swimming pool. Further, the summary of the fifth defendant's defence that was provided by its counsel consisted of little more than putting the claimant to proof, which the Court found is not a defence '*which carries any degree of conviction*'.

- Accordingly, the Court held that the fifth defendant did not have any real prospect of successfully defending the claim, and the default judgment against it was upheld.

PH*lit* comment:

There are four key points that practitioners should take away from this case:

- *First, the case of Newlands reminds us that where a defendant has cause to simultaneously make a jurisdictional challenge and a set aside application, the outcome of the former should be determined before the set aside application is made, so as to avoid inadvertently submitting to the jurisdiction.*

- *Second, set aside applications must be made promptly, but as Eder J commented in* Intesa Sanpaolo SPA v Regione Piemonte *[2013] EWHC 1994 (Comm), there is no 'arbitrary time limit', and every case 'must ultimately turn on its own facts'. Even after a significant passage of time there may be innovative ways of convincing a court that the application was indeed prompt. That being said, a claimant will not be lightly deprived of default judgment, as shown in* Standard Bank Plc v Agrinvest Internation *[2010] EWCA Civ 1400.*

- *Third, when making an application to set aside, whilst not mandatory, it is strongly advisable to file a draft defence. Failure to do so could indicate to the court that your case does not have a credible defence on the facts, which could weigh heavily against you.*

- *Finally, parties should take note that a defence that simply puts the claimant to proof is unlikely to be one that a court considers has a realistic prospect of success.*

High Court holds that contract fails for lack of intention to create legal relations despite agreement on key terms

***Jamp Pharma Corp v Unichem Laboratories Ltd* [2021] EWHC 1712 (Comm) (judgment available here)**

23 June 2021

- Despite all essential terms having been agreed between the parties, the High Court has determined that a pharmaceutical distribution agreement did not constitute a binding contract as it had not been fully signed and therefore, on the specific facts of the case, lacked the requisite intention to create legal relations.

- In early 2019, the claimant and the defendant entered into a supply and distribution agreement whereby the claimant would distribute one of the defendant's pharmaceutical drugs within Canada (the "**Head Agreement**"). Under the Head Agreement, it was stated that '*the Parties may by mutual consent expressed in writing add any product to [the Head Agreement]*'. On 15 March 2019, the claimant sought to add a second drug, Tizanidine, to the Head Agreement and by 15 April 2019, the parties had agreed the key terms in respect of the Tizanidine distribution, with the defendant requesting that the claimant share a draft addendum to the Head Agreement for review. On 12 May, the defendant confirmed that the addendum was acceptable, but also added two signature boxes and the names of the relevant signatories for the defendant.

- On 4 June 2019, the defendant explained to the claimant that the Tizanidine discussions were 'on hold'. At a meeting in Montreal the following day, the defendant confirmed to the claimant that it was in discussions with other Canadian distributors, and that the addendum needed to be signed by the defendant if it were to be legally binding. In July 2019, the claimant sought to execute the Tizanidine addendum, to which the defendant explained that it had contracted with a different distributor. The claimant brought a claim for damages for breach of the agreement, which it alleged was already binding, notwithstanding that the addendum had not been signed by the parties.

- The parties agreed that there had been an offer, being the claimant's offer to distribute Tizanidine, and there had been an acceptance of the associated terms by the defendant. The question for the Court was whether: (i) there was conditionality attached to that acceptance (i.e. the addendum being signed); and/or (ii) there had been no intention to create legal relations without the addendum being signed. In other words, whilst an agreement had been reached, did it remain 'subject to contract'? In setting out its decision, the Court highlighted four legal principles:

  - It is an objective matter of construction whether an acceptance must be expressed in a specified way, and it is not determinative that a draft contract merely contains signature blocks for the parties to sign.

  - Whether there was intention to create legal relations requires an objective examination of the words and/or conduct of the parties (i.e. it is not the subjective state of mind of the parties that is relevant), and the '*the onus of demonstrating that there was a lack of intention to create legal relations lay on the party asserting it and that it was a heavy one*'.

  - Taking into consideration the entire course of correspondence between the parties, the Court must consider what the parties would reasonably have been understood to mean by their words and conduct in the relevant context.

  - The conduct of the parties subsequent to the alleged contract being formed was admissible as to the existence of the contract, but not as to its interpretation.

- The Court considered that the communication between the parties, construed objectively, showed that the signed addendum was a condition to there being a binding agreement, notwithstanding that all key terms had been agreed and that the parties had not adopted express 'subject to contract' wording. Accordingly, the Court held that no valid and binding agreement had been reached, and the claim was dismissed.

PH*lit* comment:

*Whilst this case does rely on established legal principles, the key, perhaps obvious, lesson for practitioners is to make clear that any provisional agreement remains 'subject to contract'. That being said, the case reminds us that such express language is not a requirement to negating an intention to be legally bound (*RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co *KG [2010] UKSC 14, [2010] 1 WLR 753). However, the words 'subject to contract' can serve to achieve certainty and avoid costly litigation that will turn heavily on the facts.*

In any similar dispute, a sensible place to start will be to check whether 'subject to contract' wording exists, either in the contemporaneous correspondence or the contract itself. In the present case, in the absence of any 'subject to contract' wording, the defendant sought to rely on a 'counterparts' clause (i.e. this agreement may be executed in any number of counterparts) so as to demonstrate that the agreement would not be valid and binding until signed. However, whilst this did not ultimately affect the judgment, the Court considered the counterparts clause to be merely mechanical in nature and therefore not an expression of conditionality as to acceptance. That being said, it is worth noting that had the clause included wording similar to that included in RTS Flexible—*'[the agreement] shall not become effective until each party has executed a counterpart and exchanged it with the other'—then this would likely have had the desired 'subject to contract' effect.*

Court of Appeal upholds discharge of injunction for failure to give full and frank disclosure

***Valbonne Estates Ltd v Cityvalue Estates Ltd and another* [2021] EWCA Civ 973 (judgment available here)**

30 June 2021

- In another case concerning the duty to give full and frank disclosure when making a without notice application, the Court of Appeal has upheld the discharge of an injunction in circumstances where the applicant had failed to comply with the duty.

- The underlying dispute related to a leasehold interest in a property known as the Beckton Arms. The Beckton Arms was owned by Cityvalue Estates, and, in January 2015, Valbonne Estates and Cityvalue exchanged contracts for the sale of the property. The purchase was not completed, and a dispute arose as to whether the contract had been rescinded or whether Valbonne should be entitled to proceed with the purchase. As Valbonne and Cityvalue are both companies owned by members of the ultra-orthodox Jewish community, in 2018, they agreed to refer the dispute to arbitration before the Beth Din of the Union of Orthodox Hebrew Congregations (the "**Beth Din**"). In the meantime, Cityvalue entered into an option agreement with United Homes Limited, giving the latter an option to purchase the Beckton Arms for £2 million.

- On 1 October 2020, the Beth Din decided that Valbonne was entitled to complete the purchase, provided it did so within 28 days. Valbonne failed to do so, which led to a second hearing of the Beth Din, at which it was decided that Valbonne should pay £500,000 to the Beth Din by way of completion funds, following which Cityvalue would be required to provide Valbonne with a TR1 transferring the property to it (the "**Second Award**"). Following the Second Award, Valbonne deposited the £500,000 with the Beth Din, but Cityvalue disclosed that it had already signed a TR1 transferring the property to United Homes. Accordingly, the Beth Din issued a further award confirming that Cityvalue had informed it that a TR1 had been signed in favour of a non-Jewish buyer, and, therefore, it no longer had any power to enforce '*anything in this matter*'.

- Valbonne applied to the High Court seeking an injunction to prevent both Cityvalue and United Homes from dealing with the Beckton Arms in any way, including completion of the sale. On 10 December 2020, the High Court granted Valbonne a pre-action injunction on

a without notice basis. On the same date, and unbeknownst to Valbonne, the TR1 form between Cityvalue and United Homes was filed at the Land Registry.

- On the return date, Valbonne sought continuation of the injunction to trial. Cityvalue and United Homes sought to have the injunction set aside on the basis that Valbonne had materially breached its duty of full and frank disclosure when applying for the injunction. The High Court held that Valbonne had substantially breached its duty in numerous respects, which might well have affected the outcome of the hearing in a material way. In particular, the evidence given in relation to the Second Award was comprehensively inaccurate and the translation a 'complete fabrication', which had seriously misled the Court. In addition the fact that the Beckton Arms had already been sold to United Homes was not disclosed.

- Explaining its decision to discharge the injunction, the High Court emphasised that where an injunction has been obtained on the basis of a failure to give full and frank disclosure, the general rule is that the injunction should be discharged without renewal, which serves to act as a deterrent and deprive the wrongdoer of an advantage improperly obtained. We discuss the application of this discretion further above in the context of the High Court's recent decision in *Formal Holdings v Frankland Assets*, which also concerned a failure to discharge the duty of full and frank disclosure.

- When exercising its discretion in the present case, the High Court considered that the non-disclosures were not accidental omissions. They would have had a substantial impact on the outcome of the hearing and discharge of the injunction would not cause an injustice to Valbonne. In particular, the fact that the sale had completed and the TR1 filed with the Land Registry prior to the grant of the injunction meant that the continuation of the injunction would, in reality, have no practical effect.

- Valbonne appealed and contended that the approach taken by the High Court in the exercise of its discretion was incorrect, as the judge had failed to take a broader view of relevant policy considerations. In particular, Valbonne asserted that the judge had failed to take into account the future position of the parties, in particular the proprietary interest Valbonne might retain in the Beckton Arms via a trust over the property (even if properly owned by United Homes), which would not be protected if the injunction was not re-granted. In addition, the judge had over-emphasised Valbonne's culpability.

- The Court of Appeal disagreed, holding that the judge was well within the generous ambit of the proper exercise of judicial discretion, and none of the issues raised by Valbonne came close to being sufficient to surmount the high hurdle necessary to set it aside. In circumstances where there were numerous non-disclosures, relating to substantial matters that may have impacted the outcome of the without notice hearing in a material way, the judge was entitled to take as a starting point that the injunction should be discharged. In addition, the fact that the judge did not mention the alternatives to discharge, such as payments into court or an adverse costs award, did not lead to the conclusion that the judge failed to take account of something relevant. It was the judge's overall evaluation of the seriousness and significance of the breaches and her consideration of whether there was a compelling case of injustice if the injunction was discharged, which was important. Finally, the Court of Appeal found that the judge was entitled to take into account the fact that continuation of the injunction would be of no practical effect, given the steps already taken by Cityvalue and United Homes to effect the transfer of the Beckton Arms.

PH*lit* comment:

This case serves as another important reminder that discharging an injunction, which was obtained on a without notice basis and where there has been a breach of the duty of full and frank disclosure, is intended to have a penal and a deterrent element. Where the breaches are numerous or particularly egregious, it will be difficult to persuade the court to come to the aid of the applicant.

Moreover, this case demonstrates that the Court of Appeal will only intervene in the discretionary decisions of the lower courts sparingly, where the judge either failed to take account of a relevant matter or was misdirected in law. Quoting Sir Terence Etherton MR in Clearance Drainage v Miles Smith *[2016] EWCA Civ 1258, the Court stated that 'the fact that different judges might give different weight to the various factors relevant to an exercise of discretion does not make the decision one which can be overturned'. The judge took account of all relevant matters, was not misdirected in the law and exercised her judgment within the generous ambit afforded, and, as such, Valbonne's appeal was bound to fail.*

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