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In this issue

Welcome to the Summer 2016 edition of Commercial news.

There have been a number of interesting decisions at all levels so far this year and our first three articles review a selection of them. First, Jay Jagasia and John Virgo provide in depth consideration of the Supreme Court's recent ruling in *Asset Land Investments plc and another v Financial Conduct Authority* and the long overdue guidance it provides on collective investment schemes.

Next, I review the Court of Appeal's decisions in *Globe Motors Inc & Ors v TRW Lucas Varity Electric Sterring Ltd & Anr* and *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* and pose the question whether "no oral variation" clauses are worth the paper they are written on.

Then Oliver Mitchell ponders the question "when is expert evidence reasonably required?", with reference to two decisions in the High Court: *British Airways plc v Spencer and ors (present trustees of the Airways pension scheme) and RBS Rights Issue litigation*.

The commercial world, indeed the world in general, seems rather a different place post referendum and in our fourth article Lucy Walker takes an early look at what BREXIT might mean to mortgage and consumer credit, as well as giving us the low-down on the *Mortgage Credit Directive* which was implemented into English law on 21 March 2016.

In addition to all the new developments, we must not forget the importance of having a good grasp on existing principles. In our fifth article, Malcolm Warner provides a helpful recap on *Wrotham Park* damages and the issues still at large.

And finally, James Bennett and Brendon Moorehouse, members of Guildhall Chambers' Crime Team, update us on what is happening in the field of corporate criminal liability (including health and safety and environmental regulation) - an area unfamiliar to many commercial lawyers, but which may be of real import to our clients.

As ever, if you have any comments on this edition or suggestions for future topics, please do not hesitate to contact me at holly.doyle@guildhallchambers.co.uk

Holly Doyle, Editor

Asset land v FCA: Collective investment schemes and some long overdue guidance from the supreme court

The Financial Services and Markets Act 2000 (the "Act") is neither the most eloquently drafted statute nor is it the simplest to follow. The same holds true for the suite of secondary legislation that accompanies it. The problem is particularly acute where the legislation adopts general definitions intended to be flexible enough to cater for the ever-changing financial landscape. It is arguable that nowhere is this problem more evident than with the statutory definition of collective investment schemes ("CIS"), where the definition is intended to capture a wide range of different investments, ranging from vanilla unit trusts, to more esoteric investments such as certain tax mitigation and land banking schemes (to name just a few).

The Supreme Court decision in *Asset Land Investments plc and another v Financial Conduct Authority*[1] provides authoritative guidance in relation to the principles which will ultimately determine whether a given investment meets the statutory definition of a CIS. The Supreme Court (in particular, Lord Sumption) seized the opportunity to consider in a reasoned and principled manner the statutory definition of CIS, and proffered some important guidance of general application to the definition of CISs going forward.

The Definition

The definition of CIS is set out in s.235 of the Act, which provides (so far as relevant):

(1) In this Part 'collective investment scheme' means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.

(2) The arrangements must be such that the persons who are to participate ('participants') do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.

(3) The arrangements must also have either or both of the following characteristics:

(a) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled;

(b) the property is managed as a whole by or on behalf of the operator of the scheme

The definition interacts with other provisions in the Act (and its secondary legislation) in the following way:

(a) S.19 of the Act sets out a general prohibition that no person may carry on a 'regulated activity' unless that person is authorised or exempt. S.22 of the Act defines 'regulated activity' in general terms as an *"activity of a specified kind"* which *"relates to an investment of a specified kind"* or *"is carried on in relation to property of any kind"*;

(b) In order to ascertain what is specified, one must look to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001[2] (the "**Order**");

(c) The Order identifies specified activities as including: (i) activities such as promoting, advising on, managing or dealing in 'investments'; and (ii) *"establishing, operating or winding up a [CIS]"*[3];

(d) The Order identifies specified investments, which includes shares, bonds and other debt instruments, government and public securities, warrants and tradeable certificates for any of the foregoing, mortgages, options and futures, contracts for differences, units in a collective investment scheme, and similar financial instruments;

(e) Where a person engages in a regulated activity without authorisation or exemption, the infringer commits a criminal offence[4], and any contract made in the course of carrying on the

1 [2016] UKSC 17.

2 SI 2001/544.

3 Art.51ZE.

4 S.23 of the Act.

activity is unenforceable[5], and the infringer may also be required to pay compensation and restitution[6]; and

(f) Finally, s.417 of the Act is a general interpretation section which covers the entire Act, and it adopts the definition set out in s.235 for all other purposes.

The inherent difficulties of the statutory definition were expressed by Lord Sumption in the following terms: *"The definition and its statutory predecessor of 1986 have been regarded as highly unsatisfactory provisions by professional advisers ever since they were first enacted, mainly because of their generality, lack of definition and dependence on secondary legislation to take transactions outside of the scope of the legislation which ought not to be there"*[7].

In his judgment, Lord Sumption usefully describes the legislative background leading up to the Act[8]. For present purposes, it is sufficient simply to highlight the following:

(a) The tension between particularity and generality is an inherent feature of our financial services legislation. Prior to the enactment of the Financial Services Act 1986 (the "**1986 Act**"), Prof. LCB Gower was commissioned to examine the then existing arrangements for statutory investor protection. His report[9], which was largely followed in the 1986 Act, made extensive recommendations for overhauling the existing law. One of his principal objections to the existing arrangements was that their coverage was arbitrary, in the sense that it regulated certain modes of investment while leaving unregulated other forms of investment which were functionally similar. In other words, it was too precise, and could be circumvented rather easily. On this point, the White Paper which preceded the 1986 Act declared: *"The definition of 'investments' will set the boundary of the regulated area. It is therefore fundamental to the proposed system of regulation. In defining 'investments' the Government proposes, with minor exceptions, to adopt Professor Gower's approach. The definition...will be specific (to provide certainty...) and wide (to achieve consistency of treatment..."*;

(b) In so far as whether our modern system of financial services regulation should extend to physical assets (including land), Prof. Gower was of the view (which was subsequently adopted in the 1986 Act) that provided that the acquirer obtains exclusive control over the asset, and was not in reality buying rights under an arrangement whereby someone else controls and manages them, they should not be treated as investments worthy of regulatory protection; and

(c) The principles set out above, not only informed the drafting of the 1986 Act, but they also informed the drafting of the 2000 Act. The result is that CISs are treated very differently than other types of regulated investments which are specified clearly in the Order. As to this, Lord Sumption explains: *"...the draftsman resolved to deal with the regulation of [CISs] comprising physical assets as part of the broader system of statutory regulation governing unit trusts and open-ended investment companies, which they largely resembled. In keeping with the policy objectives identified by Professor Gower, there is an important difference, which runs through the whole of the Act between financial instruments and physical assets. With very limited exceptions, regulated activities must relate to assets specified [in the] Order...Regulated activities as defined do not relate to physical or other non-specified assets. [CISs] are the one exception to this. They may comprise arrangements with respect to 'property of any description'...the [Act] regulates only the indirect sale or holding through [CISs] of non-specified assets. It has no application to the direct acquisition, management or disposal of non-specified assets such as land"*[10].

The Facts

The case involved a land-banking arrangement pursuant to which the appellant company purchased a number of greenfield sites with the object of increasing their value by persuading the local authority to re-zone it for housing development. The sites would then be sold as a whole at a profit to a developer. The company subdivided the sites into plots and offered the individual plots for sale to investors. Mr Banner-Eve, the second appellant, was the controlling director and owner of the company. A number of plots were sold to investors, but the sites have not been rezoned, and there is little (if any) prospect of development in the short-term.

Although there were differing accounts by individual investors, the plots were sold on the basis of extravagant expectations as to profit and the short-term nature of the investment. Despite the varying accounts from investors, at first instance, Andrew Smith J found that they all shared a consistent understanding of the structure of the scheme, which involved the following features:

(a) The company would seek to progress planning procedures with a view to the sites being rezoned;

(b) The company would then procure their sale, probably to developers; and

(c) The investors who sold plots at the site would be paid a share of the total consideration paid by the purchaser.

Although the arrangements were such that the investor acquired the plot and was legally in control of the plot (to the extent that the investor could refuse to agree to sell the plot once the site had been rezoned and attracted a developer), the practical reality was that the investors would invariably sell their plots, because it was the only realistic way that they could extract a return from their investments.

Like many such arrangements which are designed in such a way as to avoid the regulatory consequences of a CIS, the scheme documents involved disclaimers and the like which were intended to give the impression that the company had no role to play once the plots had been sold to investors.

5 S.26(1) of the Act.

6 S.26(2) of the Act.

7 At para. 79. These difficulties are not as pronounced when one considers unit trusts, open-ended investment companies and recognised overseas schemes, where there are detailed provisions set out in Part XVII which complement the general definition set out in s.235.

8 See, in particular, paras 80 to 85.

9 Entitled 'Review of Investor Protection'.

10 At paras 85 and 86.

The FCA (as it then was) became aware in early 2007 that the company was selling land to investors, and was representing itself as responsible for seeking rezoning for residential development and for arranging a sale to a developer. Such activities clearly fell within the definition of a CIS. Following correspondence with the company's solicitors, the FCA accepted assurances that the representations would cease. In June 2011, however, the FCA formed the view that the agreed restrictions were not being observed, and reopened its inquiry. Proceedings were commenced in June 2012, following a worldwide freezing injunction against the company and Mr Banner-Eve.

In a judgment given on 8 February 2013, Andrew Smith J decided that the activities amounted to a CIS, in breach of the general prohibition, and restitutionary orders followed. The decision on liability was upheld by the Court of Appeal. The company and Mr Banner-Eve subsequently appealed to the Supreme Court. The only issue on appeal was whether the activities carried out by the company amounted to a CIS within the meaning of s.235 of the Act, and thus regulated activities for the purposes of the general prohibition. Although the issue on appeal was a narrow one, as Lord Carnwath explained in his judgment: *"This appeal raises the general question whether the FCA's understanding of the law is correct…It has potentially wide-ranging significance for the application of the Act to this and similar arrangements"*[11].

The Decision

The outcome of the appeal is perhaps the least interesting aspect, as it was hardly surprising that the appeal would be dismissed, and the arrangements would be characterised as a CIS. It is notable, however, that Lord Carnwath reached this decision much more easily than Lord Sumption (no other Law Lords provided substantive judgments).

Arrangements

As to the meaning to be attributed to 'arrangements' in s.235(1), Lord Sumption had the following to say: *"Arrangements is a broad and untechnical word. It comprises not only contractual or other legally binding arrangements, but any understanding shared between the parties to the transaction about how the scheme would operate, whether legally binding or not. It also includes the consequences which necessarily follow from that understanding, or from the commercial context in which it is made. In these respects, the definition is concerned with substance and not with form. It is, however, important to emphasise that it is concerned with what the arrangements were and not with what was done thereafter. Of course, what was done thereafter may throw light on what was originally understood…But it must be possible to determine whether arrangements amount to a [CIS] as soon as those arrangements have been made. Whether the scheme is a [CIS] depends on what was objectively intended at that time, and not on what later happened, if different"*[12].

Pausing there for a moment, this guidance should provide some welcome relief to those involved in advising on investments which could be characterised as CISs. Up until this point, there had been earlier judicial pronouncements, of lower authority, which suggested that one must look at the actual operation of the scheme to assess whether it satisfied the statutory test[13] (relying on the words "**purpose or effect**"): see in particular *The Russell-Cooke Trust Company v Elliott (No 2)*[14]. The approach suggested by Lord Sumption is more nuanced, and makes it clear that the objective assessment is temporally limited to the point in time when the arrangements were made. This must surely be right, as it would be desperately unfair to advisers if they could be held accountable in circumstances where a scheme is ultimately operated in such a way that is materially different from the arrangements proposed. Nonetheless, the term 'arrangements' remains very wide in scope. In particular, no formality is required[15]. Communications do not need to give rise to any legally enforceable agreement[16].

On the case-specific issue of whether the company entered into arrangements within the meaning of s.235(1), the Supreme Court had little difficulty determining that it did on the basis that the judge was entitled to conclude, based on the shared understanding of the investors (which was materially different to the disclaimers in the scheme literature), that arrangements were made when the plots were marketed and sold to investors, the object of the arrangements being that the company would achieve a sale of the site after seeking to enhance its value by improving the prospects for housing development.

Property

The issue on appeal was whether the judge was correct to determine that the relevant 'property' for the purposes of s.235(1) (i.e. the arrangements) was each of the sites taken as a whole, and not the individual plots (or a combination of the plots plus the ancillary rights attached to them). As the investors held the legal title to the plots, if the latter was accepted, it would be much more difficult to establish that the investors did not have day-to-day control, which is a necessary requirement of a CIS.

The Supreme Court was firmly of the view that the relevant property was the site. On this point, Lord Sumption held that *"the reason is that the property referred to in sub-s (1) is the property from whose acquisition, holding, management or disposal the profits or income were to be derived. On the judge's findings, that was the whole site. It was the whole site that was to be rezoned, and it was the whole site which was to be sold to a developer. The profit which each investor would derive from these transactions would be derived from an aliquot share of the entire sale price for the site"*[17].

Day-to-Day Control

A number of earlier decisions[18] have considered this requirement and concluded that it is directed to actual control and effective control.

11 At para. 12.

12 At para. 91.

13 See, in particular, the decision of Ouseley J in R (on the application of Chancery (UK) LLP) v FOS [2015] EWHC 407 (Admin).

14 Ch D, 16 July 2001 (unreported)

15 FSA v Fradley [2005] EWCA Civ 1183 Arden LJ at [33]

16 Re Duckwari plc (No 2) [1998] 2 BCLC 315 at 319

17 At para. 93.

18 See, for example, the decision of Hamblen J in Brown v InnovatorOne plc [2012] EWHC 1321 (Comm) at para. 1170, which was approved by the Court of Appeal in these proceedings.

Lord Sumption, however, disagreed with these conclusions for the following reasons: *"Control of property means the ability to decide what is to happen to it. I would accept that does not only mean the legal ability to decide. It extends to a case where the arrangements are such that the investor will in practice be able to do so. But the critical point is that the absence of day-to-day control...has to be a feature of the arrangements. This is necessarily prospective, viewed from the time when the arrangements are made. Either those arrangements confer or allow control on the part of the investors or they do not. The test cannot depend on what happens after the arrangements have been made. Nor would a test based on the actual exercise of control be realistic. Some kinds of property require little or nothing by way of management. Some situations do not require any exercise of management control. The question must necessarily be in whom would control be vested were control to be required. For the answer to turn on what exercise of control turned out to be required, would add an arbitrary element to the test which can hardly have been intended"*[19].

In the result, Lord Sumption was satisfied that the investors did not have day-to-day control for the simple reason that the requirement is intertwined with the arrangements. As the arrangements were that the company would take an active role and the investors a passive role, it naturally followed that the investors lacked day-to-day control over the property with respect to which the arrangements were made. Lord Carnwath arrived at the same result in a slightly different way, by focusing on the substance of the arrangements rather than the fact that the investors all held title to the individual plots.

Management of the Property as a Whole

As the contributions of the investors were not pooled, in order for the arrangements to qualify as a CIS, it was necessary to demonstrate that the property was managed as a whole by or on behalf of the company. It is this requirement which caused Lord Sumption the greatest difficulty because he was of the view that the company's role in finding a buyer was not an act of management if all they were expected to do was to put a proposal for sale before the investors for them to approve or reject as they saw fit. The position should be contrasted with a situation where the arrangements empowered the company to effect a sale on the investor's behalf, where it could not be argued that selling or procuring the sale of an asset was not an act of management. His view was that *"the distinction is necessary if there is to be a workable distinction between collective investment schemes and cases in which an intermediary such as an estate agent simply supplies professional services without assuming control over the assets"*[20].

Despite the fact that in strict legal terms the investors had not surrendered control over the plots to the company, Lord Sumption was of the view that the transaction could not be viewed only in legal terms, and was happy to defer to the judge at first instance (as was Lord Carnwath) and his finding that the practical consequences were such that the investors would never exercise the rights that they theoretically possessed: *"the dominion of the investors over their plots, although apparently complete, was in reality an illusion"*[21]. As a result, he was of the view that the statutory requirements had been satisfied and that the arrangements amounted to a CIS.

Conclusions

Although land banking arrangements are not identical, following the decision of the Supreme Court, it is perhaps most unlikely that any such arrangement will not be characterised as a CIS. The result is hardly surprising. Like many others before them, the appellants in this case had designed the scheme with the purpose of trying to put it out of the reach of the Act and the FCA. The inherent flexibility which is an essential part of the statutory definition was more than capable of rising to the challenge of overcoming the artificiality that was introduced to attempt to achieve that purpose.

Practitioners should welcome the guidance that has emerged from the highest court in the land. CISs have finally had their moment in the legal spotlight, and although there still remains a considerable amount of uncertainty, perhaps this is an inextricable feature of a statutory definition which is intended to cater for the specific and the general.

The implications of the decision are potentially wide-reaching, and are not limited to land banking schemes. The guidance to emerge from Lord Sumption's judgment is particularly useful. In two important respects, he appears to have shifted the established jurisprudence in a more reasoned direction. It must surely be correct that one should not look at how a scheme actually operates for anything other than as an index of how it was intended to be operated at the moment that the arrangements were made. The focus of any assessment should be temporally limited to this point in time, or else the result could be arbitrary and desperately unfair. In a similar way, it must also be correct that the assessment of day-to-day control should be underpinned to the arrangements, and involves a prospective exercise viewed from the time that the arrangements were made (rather than from some later date when the scheme is operational). Such guidance should be embraced for a host of reasons, not least because it will make it easier for those engaged in financial services to better understand whether an arrangement is a CIS or not.

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19 At para. 94.

20 At para. 101.

21 At para. 102.

"No oral variation" clauses: Are they worth the paper they're written on?

On 20 April 2016 the Court of Appeal handed down judgment in the case of *Globe Motors Inc & Ors v TRW Lucas Varity Electric Sterring Ltd & Anr* [2016] EWCA Civ 396. The case is of interest not for its ratio, but for the obiter discussions of other matters along the way - particularly the detailed (albeit ultimately obiter) consideration given by all three judges to the question of whether a clause in a contract prohibiting variations other than in signed writing did in fact do what it said on the tin.

In brief, the dispute revolved around a long-running exclusive supply agreement between TRW Lucas, a manufacturer power steering systems, and Globe Motors, which supplied TRW Lucas with electric motors and other parts needed for its products. In 2014, a High Court judge found that TRW Lucas had breached this agreement by instead purchasing 'next generation' motors from DEAS Emerson, a firm that it bought in 2006. The Court of Appeal overturned the High Court's judgment on the grounds that the new motors were a different product, and therefore not covered by the exclusivity agreement.

TRW Lucas argued that Globe's Portuguese subsidiary, which actually supplied it with the motors, was not a party to the agreement and therefore was not entitled to sue it for breach of contract. Globe's position was that by dealing directly with the subsidiary, TRW Lucas had effectively varied the agreement regardless of a provision in the contract which stated that any variation had to be made in writing and signed by both parties

As the Court of Appeal recognized, there were substantially inconsistent decisions at Court of Appeal level on this issue. In *United Bank Ltd v Asif*[22], Thorpe and Mantell LLJ upheld the summary judgment granted initially by a Master (and upheld by Wright J) on the basis (inter alia) that where a deed of guarantee contained an 'anti-oral variation clause' no oral variation of the written terms could have any legal effect. However, in *World Online Telecom Ltd v 1-Way Ltd*[23]. Sedley LJ held (albeit without reference to *United Bank*) that the question whether parties could orally override such a clause was sufficiently unsettled to be unsuitable for summary determination and that *"in a case like the present the parties have made their own law by contracting, and can in principle un-make or remake it"*. Indeed, in the trial of that matter in the Commercial Court, Steel J held that, notwithstanding the clause, the conditions in the contract in the case had been varied by oral agreement[24]. Gloucester LJ also tended to the view that there could be an oral variation notwithstanding such a clause (obiter) in *Energy Venture Partners Ltd v Malabou Oil & Gas Ltd*[25] and there are a number of other decisions in support at first instance and in other jurisdictions.

Which approach. then, is to be preferred?

It was argued on behalf of TRW Lucas that anti oral variation clauses promote certainty and avoid false or frivolous claims of an oral agreement, setting a useful evidential threshold. Further, if Parliament can stipulate for formality (eg for guarantees, dispositions of an interest in land etc), despite the potential injustices and hard cases that can result, how much more should the parties themselves, by consent, be able to adopt such a regime (particularly where the doctrine of estoppel provides a safety net where detriment is shown to result from a failed oral variation). In the leading judgment, Beatson LJ gave this argument short shrift - he considered that while there are common law and statutory restrictions on contracting parties, these are the exception to the general principle in English law that the contractual parties have freedom to agree whatever terms they chose to undertake and can do so in a document, by word of mouth or by conduct. In principle therefore the fact that a written contract contains an anti oral variation clause should not prevent the parties to it from later making a new contract varying the written one by an oral agreement or by conduct.

But what of concerns about manufactured allegation of oral agreements? Beatson LJ recognized that difficulties of proof may arise whenever it is claimed that a contract has been made orally or by conduct, but considered that evaluating evidence on this sort of issue is the day to day lot of the trial judge. It is only where the evidence on the balance of probabilities establishes that an oral

22 unreported

23 [2002] EWCA Civ 413

24 see [2004] EWHC 244.

25 [2013] EWHC 2118 at [271]-[274],

variation was indeed concluded that such a finding will be made,. In reality therefore the only danger is of unmeritorious claims slipping through at summary judgment stage.

Having decided as a matter of precedent he was not constrained by precedent to follow either previous decision of the Court of Appeal, but could essentially chose which he preferred, he preferred the approach in *World Online Telecom*.

The judge at first instance had ruled that the conduct of the parties was sufficient to vary the agreement; and Lord Justice Beatson said that there was "ample evidence" to justify that conclusion, since there had been *"open, obvious and consistent" dealings between TRW Lucas and the subsidiary over a considerable period, to the extent that "there was no other explanation but that the parties had intended to add [the subsidiary] as a party to the agreement"*.

Underhill LJ agreed, although more hesitantly[26], it seeming to him to be entirely legitimate that the parties to a formal written agreement might wish to be able to effectively insist that subsequent variations be agreed in writing not least as a protection against the subsequent raising of ill founded allegations of variation, which might make the obligations under the contract more difficult to enforce (most obviously by making it more difficult to obtain summary judgment). However, he concluded that, even if it were desirable to treat provisions of that kind as entrenched, the could not see a doctrinally satisfactory way of achieving that result.

Moore-Bick LJ was less hesitant. In his view the governing principle was one of party autonomy such that the parties are *"free to include terms regulating the manner in which the contract can be varied, but just as they can create obligations at will, so they can discharge or vary them, at any rate where to do so would not affect the rights of third parties. If there is an analogy with the position of Parliament, it is that Parliament cannot bind its successors"*.[27] While he could see the force of the suggestion that there could be practical benefits in being able to restrict the manner in which an agreement is varied, the fact that as a matter of principle the parties cannot effectively tie their hands and remove from themselves the power to vary the contract informally need not be a matter of concern given that nothing can be done without the agreement of both parties, *"and if the parties are in agreement, there is no reason why that agreement should not be effective"*. [120].

Although obiter dicta, this decision was very recently followed by the Court of Appeal in *MWB Buisiness Exchange Centres Ltd v Rock Advertising Ltd*[28] with Kitchen LJ (with whom LLJ McCombe agreed) stating at paragraph 34 that, given that the relevant principles, the material policy considerations, the earlier authorities and the issue of precedent were considered in depth and with the benefit of very full argument in *Globe*, it would require a powerful reason for this Court now to come to a conclusion or adopt and approach which is different from that of all members of the Court in that case, and no such reason had been put forward. To his mind the most powerful consideration was that of party autonomy. While this case adds very little to *Globe* in terms of substantive reasoning on the issue of oral variations (rather adopting wholesale the reasoning of Beatson LJ), it does contain some interesting observations on consideration and the doctrine of practical benefit which are well worth a read.

So what of the anti oral variation clause? Does it add any value to an agreement? Well, perhaps - in the words of Underhill LJ in Globe[29]: *'In many cases parties intending to rely on informal communications and/or a course of conduct to modify their obligations under a formally agreed contract will encounter difficulties in showing both parties intended what was said or done should alter their legal relations; and there may also be problems about authority. Those difficulties may be significantly greater if they have agreed to a provision requiring formal variation"*.

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26 see para [116]

27 see para [119].

28 [2016] EWCA Civ 553 (21 June 2016)

29 at para [117]

Helpful in proportion: When is expert evidence "reasonably required"?

"This is a case about the facts, isn't it?" Such a question has doubtless heralded the progress of more than one case towards an order to the effect that *"No expert evidence being necessary, there be no permission to rely upon expert evidence."* Indeed, a simple categorisation of a case along the lines suggested by the question – the instinct to see a case as either an 'expert' case or not – can prove very attractive. Often, everybody will be agreed on the point, but, where that is not so, is this really the preferred approach?

The starting point must be the provision within the Civil Procedure Rules. It is to be found at rule 35.1, headed *"Duty to restrict expert evidence"*, and says, straightforwardly enough (one might initially think) that *"Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings"*.

What does that mean?

A couple of recent High Court decisions on expert evidence suggest that, at least when cases become more complicated, a nuanced approach, routed in the detail of the pleadings and issues might be required.

The first of the two cases, *British Airways plc v Spencer and ors (present trustees of the Airways pension scheme)*[30], is a decision of Warren J on appeal from a deputy master's decision not to permit expert evidence. The case involves a challenge to decisions of pension scheme trustees, and is plainly highly complex. It is said by one party to have potential significance extending to hundreds of millions of pounds. The deputy master had seen the case as a 'facts and law' case, and had not permitted British Airways to adduce actuarial expert evidence. British Airways appealed, and Warren J took the opportunity to set out his understanding of the assessment required of the court under rule 35.1.

Warren J summarises his view of the correct approach at [68] in the judgment, but it is expanded upon elsewhere.

In essence, the court starts by considering whether or not the evidence is *necessary* for the resolution of an issue in the claim. If it is – and if that issue is fit to proceed to trial – then the expert evidence will be reasonably required to resolve the proceedings.

If the evidence is not, strictly, necessary, the court will then continue to consider whether it would be helpful. If the evidence would not actually assist the court at all, then that will, of course, be an end to the matter.

The tricky territory is, naturally, the middle ground. If evidence is liable to be helpful but is not necessary – if it is, as Warren J put it ([63]), *"of very marginal relevance with the court being well able to decide the issue without it"* – it is not automatically ruled out under CPR rule 35.1, but nor is it automatically ruled *in*. The court instead has to weigh the factors and determine the proportionate approach. A wide range of factors might be relevant to guide the making of the decision, including, as Warren J put it (at [63]) *"the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date)."* Warren J went on to note that the proportionality of allowing expert evidence on a live issue within proceedings might depend, if not strictly necessary to resolve the particular issue, on the context of that particular issue within the proceedings as a whole. In other words, evidence that is helpful (but not strictly necessary) in relation to a minor issue may not be proportionate in relation to the case as a whole.

Returning to the facts of *British Airways*, this article is not the place for a consideration of the specific issues and areas of potential expert evidence considered by the court. It will suffice to note that they were considered in considerable detail. The result was that Warren J concluded that, in respect of some areas, there should indeed be permission for reliance on expert evidence.

In the second case, the *RBS Rights Issue litigation*[31], Hildyard J adopted Warren J's test from *British Airways* along with a similarly focussed approach. Here, the court was required to consider whether or not equity analysis evidence ought to be allowed, alongside what appears to be a slew of other expert evidence, where the required content of a prospectus was in issue. Referring to Warren J's test as set out in the *British Airways* case, Hildyard J determined, on the facts of this case, not *at the time of his decision* to permit equity analysis evidence, although without entirely closing off the question. Of particular interest (and perhaps translatable to other contexts) was the concern expressed that, whilst there might be a recognised body of expertise,

30 [2015] EWHC 2477 (Ch)

31 [2015] EWHC 3433 (Ch),

an individual expert might nonetheless not be able to answer the *right* question for the specific test in issue before the court (such as a statutory test), or might be able to do so only in unduly subjective terms. The fear in this case was that what a given equity analyst might want would not necessarily reveal statutory requirements, and even a consensus of equity analysts (if there was one) might not reflect the requirements of *investors* (see, e.g., the observations of the judge at [48]-[49] and [54]).

In both of the above cases, the court was quick to recognise that the helpfulness of expert evidence may not be perfectly clear at the case management stage. Warren J (allowing expert evidence) made reference to the power of a trial judge to control evidence. Hildyard J (not allowing the evidence sought) left open the potential for a renewed application following the receipt of the other, already permitted, expert reports. Plainly, a judge dealing with an application for expert evidence at the case management stage may have to factor in to consideration how *likely* expert evidence is to assist alongside how *strongly* it will assist if it does.

Of course, things may very well be much more straightforward in many cases. Some, particularly those with a relatively narrow range of issues in play, may fairly obviously require – or not require – an expert. However, particularly where the issues within a case are complex or numerous, it might pay for a party or its advisors, if seeking either to obtain, or to avoid or limit, expert evidence, to start by reflecting on some questions in accordance with the sort which the judge might have to ask in due course. For example:

- Is the evidence of an expert said to be necessary, or merely helpful? Why?
- Is there any potential for the evidence to be actively unhelpful? Might it miss the mark (or obscure the mark)?
- How will expert evidence be brought to bear on *the specific issues* within the case, as well as on the case as a whole?
- Is this a case where proportionality favours a restrictive, or a generous approach? Is allowing evidence which *might not* be helpful the safe course, or risking a dangerous detour?

As with so many of the responses given to judges watching a case management conference take far longer than everybody might have hoped, the answer to the question *"This is a case about the facts, isn't it?"* might very well begin *"My Lord, yes, in part…"*

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Mortgage and credit update

The Mortgage Credit Directive

On 21st March 2016, the Mortgage Credit Directive was implemented into English law, introducing a single regulatory regime for mortgages and secured lending.

Prior to the implementation of the Directive, lending secured by a first charge legal mortgage was subject to regulation under the Financial Services & Markets Act 2000 (the "**FSMA**"). Lending secured by a second or subsequent charge was separately regulated under the consumer credit regulatory regime, including the provisions of the Consumer Credit Act 1974, (the "**CCA**").

Significantly, all lending secured by a mortgage or charge over residential property now falls to be regulated under the FSMA regulated mortgage regime, which has absorbed the secured lending regime under the CCA. With effect from 21st March 2016, secured loans which were previously CCA – regulated agreements are now treated as 'regulated mortgage contracts'.

In this context it is important not to overlook the fact that for the purposes of the Financial Services & Markets Act 2000 (Regulated Activities) Order 2001, (the "**RAO**") it is regulated activity not only to enter into a regulated mortgage contract as lender, but also to administer a regulated mortgage contract. 'Administer' essentially refers to activities relating to the post contractual administration and enforcement of a regulated mortgage contract.

This means that with regard to existing CCA regulated secured loans entered into prior to March 2016, a person who wishes to administer and enforce that existing secured loan will need to check whether or not they carry on the regulated activity of administering a regulated mortgage contract and whether or not they need to be authorised and regulated by the Financial Conduct Authority, ("**FCA**"). This is the case even if, at the time the secured loan was entered into, the person held the requisite consumer credit permissions.

In contrast to the position prior to implementation of the Directive, the definition of 'regulated mortgage contract' now covers first, second and subsequent charges over residential property and captures both legal and equitable mortgages and charges. Further, a loan secured by a charge over residential property can be made available for any purpose and still qualify as a regulated mortgage contract.

Whilst mainstream firms providing mortgages and secured loans should be equipped to cope with the changes, the definition of regulated mortgage contract is sufficiently wide to mean that a person who takes a mortgage or charge over residential property as security for a debt owed to them will now need to consider whether or not they undertake the regulated activity of entering into a regulated mortgage contract.

There are exemptions and exclusions which operate to carve out certain contracts and certain activities from the regulated mortgage regime. For example, special rules apply to secured bridging loans and certain exemptions apply to loans made available to commercial borrowers. Notably, consumer 'buy to let' mortgage lending is subject to a special 'light touch' regulatory regime provided that certain conditions are fulfilled.

However, it is vital to note that some exemptions under the RAO which operate to exempt the activities of persons such as professional firms, trustees and personal representatives from the regulatory regime are 'switched off' in respect of regulated mortgage activity within the scope of the Directive and so those exemptions will not be available in respect of regulated mortgage contracts within the scope of the Directive.

In summary, the introduction of the Directive means that lenders, administrators, mortgage advisers, mortgage intermediaries and professional persons who carry on activity in relation to mortgages and secured loan contracts will need to check whether or not the relevant contract comprises a 'regulated mortgage contract', whether or not they carry on regulated activity for the purposes of the RAO and whether or not they need to be authorised and regulated by the FCA.

Review of retained provisions of the Consumer Credit Act 1974

Following the transfer, in February 2014, of supervisory responsibility for the consumer credit regulatory regime from the Office of Fair Trading to the FCA, the Government committed to undertaking a review, by 2019, of the provisions of the CCA which were retained on the statute book and not repealed as part of the supervisory transfer process.

As part of the planning process for the review, the FCA circulated a 'call for input' on the retained provisions of the CCA and invited comments on, amongst other topics, the scope and mode of conduct of the review, the timetable for the review and whether or not any particular provisions of the CCA should be prioritised for earlier review.

The call for input closed in May and the FCA will consider the responses and circulate its response later this year.

Brexit

Finally, no bulletin on mortgage or consumer credit would be complete without mentioning the impact of Brexit.

Whilst very little will change immediately, the most obvious impact of Brexit will be on mortgage, consumer credit and payment services firms which rely on passport rights to supply services from other EU member states into the UK and from the UK into other EU member states. In essence, the passport system allows a firm to rely on its home state permission to authorise the supply of financial services to other EU member states without the need separately to be

authorised and regulated in each member state in which the firm operates. Passporting rights will be extinguished upon Britain's exit from the EU.

It is too early to speculate on the extent to which the UK will be able to negotiate the preservation of inbound and outbound passporting rights for financial services firms, or the type of system which might replace the existing rights. Firms which offer mortgages and secured lending, consumer credit, consumer hire and payment services on an EU wide basis will need to monitor this topic carefully and make contingency plans should it become necessary to seek authorisation in an EU member state in order to preserve passporting rights in the remaining member states.

Similarly, even mortgage, credit and payment services firms with a purely domestic focus will not be immune from the Brexit fall-out. First if, as seems likely at the time of writing, Scotland presses for a second referendum on independence and manages to remain within the EU, the mechanism by which financial services firms authorised in England and Wales may continue to offer financial services cross border into Scotland is potentially subject to the same uncertainties which affect the future ability of UK firms to continue to offer services to other EU member states.

Second, a substantial portion of the FSMA regulated mortgage regime, the consumer credit regulatory regime and the payment services regulatory regime derives from EU Directives. A huge and highly complex task lies ahead in terms of identifying the legislation which will remain in place upon Brexit and the legislation which automatically will fall away upon Brexit and repeal of the European Communities Act 1972. It will then be necessary for the Government to propose the necessary replacement legislation. The process will undoubtedly take several years creating a prolonged period of uncertainty for the financial services industry.

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Wrotham Park damages – recovering a slice of the wrongdoer's profits

What are Wrotham Park Damages?

The case itself[32] involved land that was purchased by a developer knowing it was subject to a restrictive covenant who built upon it in defiance of the covenant. The beneficiaries of a covenant sought a mandatory injunction the houses now in place should be pulled down but this was refused as an unpardonable waste of housing. In lieu of that injunction there was an award of damages calculated by reference to the sum which they would have received on a negotiated release of the covenant – being 5% of the developer's anticipated profit.

So note this is not a payment to compensate for a loss suffered in the usual course (e.g. damage to a building from vibration) but rather akin to an opportunity cost.

Although Wrotham Park is a first instance case and there are not many similar awards made it is a well established part of the law[33].

Note also that the remedy of an account may achieve a much higher recovery but it is not proposed to discuss that remedy here.

Issues still at large

There are really two main issues that arise for commercial practitioners when reviewing whether to add a claim for Wrotham Park damages to a claim:

(i) When can they be recovered?

(ii) What sort of monies will the court award?

These inter-relate because they are the two sides of any cost/benefit analysis of adding them to a claim. However the first in fact indicates when a practitioner may be forced by practical considerations to mount such a claim anyway (as below).

When can they be claimed?

The recent Court of Appeal decision in Morris-Garner v One Step (Support) Limited [2016] EWCA Civ 180 has essayed a detailed review of this issue but has been able to identify for us guidelines rather than some hard and fast rules – in fact they jettisoned some suggested clear-cut limitations.

The following is something of an explanatory checklist:

(i) A deliberate breach of contract by the wrongdoer for his own financial advantage – so knowing that there a restrictive covenant and going ahead anyway or selling a business with restraint of trade covenants and then setting up in covert competition.

(ii) The claimant would have difficulty in establishing their financial loss. It had been argued that if the Claimant could have a stab at assessing damages then Wrotham Park damages were simply not available, and we all know cases where assessing damages can be very difficult/speculative. This suggested limitation failed. A classic example is valuing the damage caused to the goodwill of a business that has been bought with a restraint of trade that has been flouted. Equally the fact that no conventional damages for which compensation could be awarded – as in Wrotham Park itself – is not a ground for refusing the Wrotham Park remedy. The assessment of whether it is too difficult for the Claimant is very much a matter for the first instance judge to assess and, of course, whether the justice of the case calls for such an award (in part might the Defendant otherwise "get away with it"). One could also instance disturbance of the market as an area where assessing damages could be very difficult or breaking a de facto monopoly. There has been some stress on the need for judges to be robust in this assessment i.e. not to be coy or conservative in approaching the sum to award.

(iii) The Claimant should have a legitimate interest in preventing the Defendant's profit-making activity. This seems to the writer a guideline likely to be added to by accretion since it may reflect a case by case basis for identifying which are the "exceptional" cases where Wrotham Park damages can be awarded.

(iv) It is doubtful if interim relief could be obtained to prevent the Defendant's breach. The fact that interim relief has not been sought is no bar to seeking Wrotham Park damages.

(v) The remedy is exceptional but practitioners seeking to differentiate cases that are or are not exceptional face exactly the same difficult as the Judges find establishing the key indicia. That means one is thrust back on the reported factual instances where it has been granted as a starting point. Plainly Judges do not want this remedy to be seen as the norm.

32 *Wrotham Park Estate Co Ltd. v Parkside Homes Ltd* [1974] 1 WLR 798

33 For instance see the clear approval of the Privy Council in Pell *Frischmann Engineering Ltd. v Bow Valley Iran Ltd. & Ors* [2009] UKPC 45

(vi) The remedy must be specifically pleaded. Plainly the above areas should be considered to incorporate into the pleading as a build up to the remedy.

(vii) There is certainly a starting point of assessing damages at date of breach – this is natural in a case where the assessment is what the parties would have bargained for to release the right but one can foresee cases where this will not meet the justice of the case (as has been recognised in the reported cases).

Size of Award

Readers familiar with Stokes v Cambridge Corp (1961) 13 P&CR 77 may have already contrasted a fairly standard starting point of 33% with the 5% award in Wrotham Park itself. As is well know awards under Stokes v Cambridge can go appreciably higher than 33% and in fact if the object of the exercise is in part to punish the wrongdoer (per encourager les autres) it seems curious to leave them with any profit at all. In Morris-Garner the talk was of "(a) fairly modest percentage of the profit…" which does not suggest a sword of Damocles hanging over would be contractual breakers to deter them from risking a breach for profit.

In Preston & Newsom's Restrictive Covenants Affecting Freehold Land 10th Ed at §9-26 et seq there is a detailed discussion of quantification but of especial interest to practitioners will be the analysis of a variety of Wrotham Park awards at §9-31 with instances of 26/28%, 35% and 40%.

In reality it is difficult to predict the size of the award but it is obvious that this remedy may yield very substantial sums quite removed from the sums that can in some circumstances be established as suffered and liable to be compensated for in a conventional award of damages.

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Corporate criminal liability

Recent years have seen a dramatic increase in the use of Criminal law as a means of regulatory control of business activities. Coupled with that we have seen a significant increase in the prosecution of individuals involved with companies – to the extent that the 'protection' once afforded by the corporate veil is in practical terms virtually non-existent for the majority of corporate entities. The personal and financial consequences of a criminal investigation, prosecution and any follow-on confiscation proceedings are often catastrophic.

Most of these enforcement provisions are inherently domestic and there is little prospect of any significant change in attitudes to enforcement as a result of the Brexit issue.

At the same time there has also been a noticeable increase in the use of criminal complaint as an adjunct to commercial practice or to justify employment law decisions. One of the authors has recently been providing pre-charge advice to a company director accused of trademark infringement when the UK subsidiary of an American based corporation accused his business of importing counterfeit goods. The goods had in fact been purchased perfectly legally and imported from another European based subsidiary of the parent company in the USA. Regardless of the positive outcome, the importer had his property impounded – tying up over £100,000 of stock – and was restricted in trading in this area for the duration of the investigation – protecting the UK arm of the operation from being undercut.

The area of corporate criminal liability is a constantly shifting sea, but we have highlighted a few areas:

The Most Dramatic Change in Health and Safety Enforcement since 1974

The updated Health and Safety Offences & Corporate Manslaughter sentencing guideline was the most dramatic change in health and safety enforcement since 1974.

Any company, director/senior-manager and self-employed person sentenced after 1st February 2016, regardless of when the breach in health and safety occurred, is caught by the guideline.

Whilst only 4 months have passed since the coming into force of the updated guideline, enough companies have now filtered through and been sentenced to allow considered reflection.

The new formulaic approach to calculating sentence was designed to increase the level of fines for companies (commentators have for years protested that companies – in particular large companies - were being under-fined) and reserve prison sentences for directors/senior-managers and the self-employed in only the most serious of cases.

Should companies, directors/senior-managers and the self-employed be worried? Absolutely, in particular large companies.

Recent post-guideline sentencing examples for what are relatively routine factual breaches of the Health & Safety At Work etc Act 1974 show how fines with genuine bite are now being imposed: Travis Perkins fined £2m when a customer was killed by company vehicle in the car-park; Balfour Beatty fined £2.6m following a sub-contractor's employee being killed when a trench collapsed on top of him; and McCains fined £800k after an engineer suffered a serious arm injury inspecting an unguarded factory machine belt. The most noteworthy of pending cases is in relation to the Alton Towers rollercoaster crash; Merlin Attractions have been warned to expect a substantial fine.

Why have sentences become more severe? The sentencing exercise now focuses upon the level of risk (the 1974 Act only requires proof of risk – regardless of whether or not it eventuates – for there to have been a breach). The greater the risk of serious injury or death, the greater the sentence. However, enforcement bodies in practice still look more closely at outcome; a company, director/senior-manager or self-employed person remains much more likely to be prosecuted where a serious injury or fatality has occurred. The consequence of this juxtaposition is that any company, director/senior-manager or self-employed person who is prosecuted is almost by default at risk of severe punishment if convicted, because there will probably have been a serious injury or death. At the same time the updated guideline advises fines at a much higher level than pre-guideline levels and a greater emphasis on determining a meaningful fine in light of pre-tax turnover.

For large (and some medium-large) companies this means a severe fine possibly requiring the liquidating of important capital assets (e.g. property and equipment) or reducing the wage bill (e.g. redundancies) to meet the fine, resulting in the additional problem of the company's ongoing profitably being harmed for many years. There was a perception of unfairness pre-guideline; a small or medium sized company was less likely to be able to absorb a fine than a large company. That perception is diluting given the increases in sentence for large companies.

However, for directors and senior managers - who can only be prosecuted if there is evidence the breach occurred with their consent

or connivance or was down to their neglect - there still remains possible unfairness. Such an individual is now at real risk of prison. Although the number of personal prosecutions (above and beyond their employer) remains relatively low. The potential unfairness that still remains is that a hands-on director or senior-manager remains much likely to be prosecuted than a similar person at a company with layers of management, because of the need for there to be evidence of their personal consent, connivance and/or neglect. Inevitably this means that such a person is likely to be working in a small company, often a small family business and those working in large companies remain out of reach of the enforcement bodies.

All companies, directors/senior-managers and self-employed people can protect themselves by having regular and independent advice (whether from a solicitor or health and safety consultant) on the robustness of their safety procedures and policies. Further, by accepting and implementing any advice and recommended improvements. This can provide particular protection for the hands-on director/senior-manager because utilising and following independent and competent health and safety advice puts distance between them and any alleged consent, connivance and neglect.

Environmental Regulation

There may be significant changes in the area of Environmental Regulation following the Brexit decision, since a significant body of law flows from Europe. It remains to be seen what aspects will still apply over the years to come, but the existing regulations are complex with some even being interlinked with many non-EU international agreements.

That said, there has been a significant UK based trend towards increasing penalties for non-compliance with environmental regulation, coupled with personal liability for managers and company directors suggests that whatever changes that may be made, they are unlikely to significantly reduce the sanctions.

As with changes to health and safety sentencing, there have been significant changes to environmental sanctions (including civil sanctions – which many insurers will still cover – if your client is in difficulties make sure that any policies are checked.) and unlimited fines for many offences. The sentencing guidelines give a flavour of what can be in store with large undertakings potentially facing fines from tens of thousands of pounds per offence to millions per offence, depending upon the circumstances of the offences - https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf. In broad terms the guidelines are a matrix considering liability (from deliberate acts to inadvertence) and damage/harm caused.

While confiscation hearings are not legally regarded as part of the sentence, it is rare for defendants in breach of environmental regulations not to be liable to the draconian lifestyle provisions that are often sought against company directors as well as their businesses.

Service of Criminal Summons on a Company Secretary

The authors have recent experience of advising a well-known high-street supermarket chain. The fleet manager erred in not returning a traffic enforcement notice requiring the name and address of the driver of their home-delivery van caught speeding in the Midlands. Fast-forward 3 months and to his surprise the Company Sectary at HQ in his City of London office receives a summons in his name, having been alleged to have failed to supply the driver's details. There is obvious concern for the situation the Company Sectary now finds himself in and in-house lawyers instruct counsel to advise on how the Company Secretary can avoid a conviction, fine and penalty points. This example demonstrates a common misunderstanding. Many criminal regulations dictate that an enforcement body can only initiate a prosecution of a company by service of a summons on its registered Company Secretary. In the example cited section 172(8) Road Traffic Act 1988. The enforcement notice was therefore returned, the company was fined a modest amount and the Company Sectary suffered no personal detriment.

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