Guildhall CHAMBERS

Newsletter

COMMERCIAL NEWS SUMMER 2014

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EDITORIAL

There is something for everyone in this Summer 2014 edition of Commercial News.

First Ross Fentem reviews the recent developments in the law relating to contractual endeavours clauses, considering both whether they are enforceable and, if so, what they actually mean in practice.

Then, Hugh Sims QC and Douglas Leach analyse the Court of Appeal's decision in *Personal Hygeine Services Limited and Ors v Rentokill Initial (UK) Limited (t/a Initial Medical Services) and Anor* [2014] EWCA Civ 29 on breach of confidence claims and review the modern approach of the Courts in this area.

Next Stefan Ramel considers the recent decision in *Integral Petroleum SA v SCU – Finanz AG* [2014] EWHC 702 (Comm) which serves as a reminder in this post Mitchell climate of the possible utility of CPR rule 3.10, which treats as valid a procedural act rendered invalid by some failure to comply with a rule or practice direction unless the court otherwise orders.

And to finish, regular contributors Neil Levy and Lucy Walker update us on what is going on in the fields of Banking and Consumer Credit respectively. If you have not yet visited Neil's website (www.banknotesuk.com), it is well worth a look.

In our team news, we were very pleased to welcome three new members to Chambers in Autumn 2013: James Wibberley (2009 call), Oliver Mitchell (2009 call) and Jay Jagasia (2012 call, formerly a solicitor from 2010). And at the other end of the team spectrum, we are delighted to announce that our head of team, Hugh Sims QC, has taken silk (well, the clue was in the title).

Finally, you may have noticed that the face looking out from the front page of this edition of Commercial News has undergone a transformation, as Gerard McMeel has stepped down as editor after many years of sterling service. He leaves large shoes for me to fill and I can only do my best to man the tiller (and try not to mix too many metaphors in so doing) 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

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When they work and what they mean

'Endeavours' clauses: why analyse them at all?

The title of this article may be thought somewhat ambitious. 'Endeavours' clauses, which oblige a party to a contract to use his 'best', 'reasonable' or 'all reasonable' endeavours to bring about a particular result, generate a large volume of litigation, of notoriously uncertain result. They are encountered across the full range of commercial contracts from share sale/purchases, through distributorship agreements and franchises, to development contracts and options. Business people seem to like them, perhaps because they allow a flexibility about predicting the outcome of future events which is not allowed by an 'absolute' obligation.

Therefore, the types of litigation, and so of judicial experience, in which such clauses fall to be considered are as various as commercial endeavour itself. Pronouncements on what is meant by, for instance, 'best endeavours' in a franchising dispute will, in the right context, be relevant to a contract concerning a land option. It is, however, a counsel of prudence to bear in mind that any contract must be construed against the specific, admissible factual background in which it came to be concluded. Except (generally) in the context of printed standard terms, it cannot be assumed that the words in one contract bear the same meaning as the identical words in another. At first instance in *Jet2.Com Ltd v Blackpool Airport Ltd* [2011] EWHC 1529 (Comm), HHJ Mackie QC expressed this caution as follows:

'The meaning of the expression remains a question of construction not of extrapolation from other cases ... the expression will not always mean the same thing.'[1]

"... the courts are unwilling to give binding force to an obligation use 'reasonable endeavours to agree"

Despite that caution, I remain wedded to my title, and am supported in this respect by the recent decision of the Singapore Court of Appeal in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] SGCA 16,[2] in which VK Rajah JA sensibly concluded that:

'decisions on the meanings and effect of certain commonly-used phrases provide authoritative guidance on the prima facie meaning of similar phrases when they are used in documents that are intended to have legal effect. This is especially so because the contracting parties would have taken into account the general law in reaching their agreement. Furthermore, attributing prima facie meanings to similar phrases ... promotes commercial certainty.'

I will address first the issue of whether an 'endeavours' clause is enforceable at all, before turning to recent authority on the ambit of the obligation imposed by the usual 'endeavours' clauses.

'Endeavours' clauses: when are they enforceable?

Shortly stated, the issue is this: when is an obligation to use endeavours to obtain a result enforceable?

In the very recent case of *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 817 (QB), Andrews J was concerned with a settlement agreement in a dispute about works on a luxury car, which contained an obligation to 'use ... reasonable endeavours to fulfil the Condition Precedent'. The 'Condition Precedent' meant 'entering into an agreement with [a named third party] on or before 30 May 2012 to carry out the Works' to the car, which were more or less defined. The claimant said the clause was an uncertain 'agreement to agree'. The judge agreed. Her rationale was founded on a series of cases, concluding with *Jet2.Com* in the Court of Appeal[3] which it is useful to consider.

It is not unusual for an 'endeavours' clause to impose an obligation to enter into some form of legal relationship with a third party; for instance common clauses in option and development contracts requiring an option-holder or developer to enter into an enforceable s.106 agreement with the relevant local planning authority or to agree a price with a vendor of land.

The well-known case of *Yewbelle Ltd v London Green Developments Ltd* [2008] 1 P&CR 17 concerned an obligation to use 'all reasonable endeavours' to conclude a s.106 agreement.[4] It was never in doubt that the clause was enforceable. In *Dany Lions*, the judge was satisfied that this was correct, because there is no difference in kind between that obligation and an obligation to use endeavours to obtain planning permission 'which would plainly be enforceable'.[5]

In *Jet2.Com* in the Court of Appeal, Moore-Bick LJ (who was in the majority) said that 'in general, an obligation to use best endeavours, or all reasonable endeavours, is not in itself regarded as too uncertain, provided that the object of the endeavours can be ascertained with sufficient certainty.' He distinguished between:

a) clause whose content is so uncertain that it is incapable of creating a binding obligation; and

b) clause which gives rise to a binding obligation, the precise limits of which are difficult to define in advance, but which can nonetheless be given practical content.

The other former Commercial Court judge on the panel, Longmore LJ, agreed with Moore-Bick LJ and suggested that an 'endeavours' clause should usually be held to be enforceable,[6] unless:

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[1] See also the decision of the High Court of Australia in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41.

[2] Although of course not binding on English courts, this decision provides the best recent survey of the field of 'endeavours' clauses. Anyone facing a problem of interpretation of these clauses could do little better than read paras [42] to [95].

[3] [2012] EWCA Civ 417.

[4] I.e. an agreement with the relevant local planning authority under s.106 of the Town and Country Planning Act 1990.

[5] The reason there is no difference is because in many cases, the s.106 agreement will be a condition of obtaining permission, and the parties must be assumed to know this.

a) The object intended to be procured is too vague or elusive to be a matter of legal obligation; or

b) The parties have provided no criteria on the basis of which it is possible to assess whether the endeavours have been carried out.

On that basis, the courts are unwilling to give binding force to an obligation use 'reasonable endeavours to agree': *Phillips Petroleum Co UK v Enron Europe Ltd* [1997] CLC 329 at 343. For a judge to intervene in a dispute about whether such endeavours have been carried out would require him to police a territory in which the parties may 'legitimately have differing views or interests, but have not provided for any [objective] criteria on the basis of which a [judge] can assess or adjudicate the matter in the event of a dispute.' In the most extreme case, the problem is both as to the object intended to be procured (how clear are the terms of the future agreement?) and as to the objective yardstick (how can the court determine, particularly as between the two contracting parties themselves, the reasonableness of the endeavours of either in deciding whether to make a new contract?).

"The consensus as to why an obligation to use endeavours to obtain planning permission, or to conclude a s.106 agreement as in Yewbelle, is generally considered to be enforceable is because there are objective criteria governing the circumstances in which planning permission may be granted"

In the Scottish case of *R&D Construction Group Ltd v Hallam Land Management Ltd* [2010] CSIH 96, the defendant had agreed to sell land at an agreed price to the claimant, but the land was first to be purchased by the defendant from a third party at a price that was 'wholly acceptable' to the defendant. The defendant was obliged to use 'all reasonable endeavours' to conclude that purchase. Although the Court of Session held the clause to be effective, the Court of Appeal in *Jet2.Com* was clearly uncomfortable with this conclusion. With delicious judicial understatement, Moore-Bick LJ said he had 'some reservations' about it, because there were no objective criteria against which to judge the defendant's satisfaction as to the price; it was an agreement to agree terms with the third party if and howsoever he wished. Lewison LJ (dissenting as to the result in *Jet2.Com*) shared those reservations. I would suggest that the reservations were properly held; in the English courts, an agreement to use reasonable endeavours to purchase land from a third party at a price which is in the obligor's whim is not, without more, justiciable.[7]

Thus the questions for the court considering an 'endeavours' clause challenged as to enforceability are these: (1) is the object of the endeavour sufficiently certain to allow the court to know what it is that the obligor must try to achieve?, and (2) are those objects capable of evaluation by reference to a sufficient, objective criterion? If so, the clause can be enforced.

Returning to *Dany Lions*, Andrews J had this to say:

'Those two essential requirements of certainty of object and a yardstick by which to measure the endeavours are applicable across the board, whatever the object may be. They will not be satisfied in a case in which the object is a future agreement with the other contracting party, because even if the first requirement is satisfied (e.g. there is a draft contract on the table) the second will not be... They may be satisfied if the object is a future agreement with a third party, but such cases are likely to be exceptional. If the essential terms of the prospective agreement with the third party are identified in advance, there may be both the requisite certainty of object and sufficient criteria by which to judge the endeavours. If those terms are left open for negotiation, satisfying the second requirement is just as problematic as it would be in a case where the prospective agreement is with the other contracting party, and for precisely the same reasons.'

The consensus as to why an obligation to use endeavours to obtain planning permission, or to conclude a s.106 agreement as in *Yewbelle*, is generally considered to be enforceable is because there are objective criteria governing the circumstances in which planning permission may be granted, and a local planning authority's decision is made against those criteria. It is not the same as an 'arms' length' negotiation between two private contracting parties.

However, the general judicial consensus set out in the above paragraph may be vulnerable when it comes to agreements to use endeavours to conclude s.106 agreements. In *Yewbelle*, the contract contained a draft form of a s.106 agreement, such that the obligor knew what it was that he should use endeavours to obtain. It is therefore easy to see how this chimes with Andrews J's views as to enforceability in *Dany Lions*. What if there were no draft? Andrews J would take the view that it would still generally be enforceable, but on one view an agreement to conclude a future s.106 agreement whose terms are not known and whose terms may be subject to quasi-commercial negotiation with the local planning authority is not especially different in substance from an agreement to conclude a future commercial agreement of any other sort. Perhaps the principled answer is that the criteria on which the authority will seek to determine the s.106 obligations are subject to the principles of public law (and indeed are published), so that the parties to the 'endeavours' clause know objectively what they are up against.

'Endeavours' clauses: what do they mean?

The obvious starting point is to note that an 'endeavours' clause of any sort does not impose an absolute obligation to achieve a result. Even a 'best endeavours' clause is not to be treated as the next best thing to a guarantee of performance: *Midland Land Reclamation Ltd v Warren Energy* [1997] EWHC 375 (TCC).

In a dispute about an 'endeavours' clause, it inevitably follows that the result will not have been achieved. The question is whether the obligor did what was expected of him by the clause. Although the three main general of 'endeavours' clauses have spawned various species and subspecies (e.g. 'all reasonable and commercially justifiable endeavours'), this paper is only concerned with the usual triumvirate.

Most laymen would probably assume that there is a hierarchy of obligations, leading from 'reasonable endeavours' (the lowest of the three), through 'all reasonable endeavours', to (at the highest end) 'best endeavours'. This was the view of Rougier J in the relatively early case of *UBH (Mechanical Services) Ltd v Standard Life Assurance Co* Times, 13 November 1986: 'all reasonable endeavours', he thought, meant 'something more than reasonable endeavours but less than best endeavours'. As the caselaw has developed, and the meaning of the phrases has been explored in more depth, this assumption has turned out to be wrong. Although the logician may think there to be a difference between 'all reasonable endeavours' and 'best endeavours', on the state of the authorities the practical lawyer would find it hard to fit a page of Chitty between them.

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[6] It remains to be seen whether this will be treated as giving rise to a specific presumption, or whether it will be treated as merely a specific example of the general presumption that parties intended their contractual words to have legal effect.

[7] A fortiori where the future agreement is with the other contracting party. See *Little v Courage Ltd* [1995] CLC 164, concerning a lease-renewal condition that the tenant should enter into a business agreement with the landlord. Millett LJ refused to imply a term that the landlord should use its best endeavours to do so, as that would create an unenforceable agreement to agree. Contrast an agreement to use endeavours to become a party to an existing agreement. The terms of the agreement are known; the negotiation if any only concerns 'getting in'.

Reasonable Endeavours: Nevertheless, a 'reasonable endeavours' clause is agreed to impose the lowest burden. In *Rhodia International Holdings Ltd v Hunstman International LLC* [2007] 2 Lloyd's Rep 325, it was suggested that in a case where a number of reasonable courses could be taken in a given situation to achieve the particular object, the obligor need only take one of them. He is entitled to put all relevant commercial considerations into the scales, and to weigh up the likelihood of succeeding in the endeavour before taking any particular course. He is in particular entitled to look first and foremost, if not only, to his own interests in determining whether any particular action should be taken.

Best Endeavours: Obviously, an obligation to use 'best endeavours' imposes a heavier burden. In the very early case of *Sheffield District Railway Co v Great Central Railway Co* (1911) 27 TLR 451, it was said that the obligor must 'broadly speaking, leave no stone unturned' in his endeavours to achieve the objective. The metaphor was given more specific content in *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335, in which the Court of Appeal suggested that it mirrored the standard of all those reasonable steps which would have been taken by a prudent and determined man, acting in the obligee's own interests and anxious to achieve the object (in that case, the obtaining of planning permission). In *Rhodia International*, Julian Flaux QC held that, in contrast to a 'reasonable endeavours' clause, a 'best endeavours' clause requires the obligor to take all of the reasonable courses of action open to him.

Firstly, then, 'best endeavours' requires the obligor to act in the obligee's interests, and not merely in the interests of someone under a contractual obligation. So, in *IBM*, if planning permission were first refused, the obligor would have then to consider the prospects of appeal to the Secretary of State and , if prospects were reasonable, to seek to appeal. It is therefore obvious that a 'best endeavours' clause will or may require expenditure by the obligor.

Secondly, however, the obligation is qualified by reasonableness. Although the obligor must take all the reasonable courses open to him, he is not required (in the absence of any other indication in the contract) to drive himself to certain commercial ruin: *Terrell v Mabie Todd & Co Ltd* [1952] RPC 234.

All Reasonable Endeavours: There has been some suggestion in the cases that 'all reasonable endeavours' imposes an obligation somewhere between the two extremes: see *UBH* and *Jolley v Carmel Ltd* [2000] 2 EGLR 153. But that approach, based at least in linguistic logic, does not sit well with the meaning that has been attributed to 'best endeavours'. Logically, an 'all reasonable endeavours' obligation would suggest that where there are a number of reasonable courses open to achieve the end, the obligor must take all of them; which is more or less exactly what is required by a 'best endeavours' clause.

So, in *Yewbelle*, the Court of Appeal decided (as did Lewison J at first instance) that although the obligor did not have to sacrifice his commercial interests, he did have to keep on using his reasonable endeavours until he reached the point where there were no more reasonable endeavours left to try. Account should be taken of events as they unfolded, which may therefore increase or reduce the number of reasonable courses existing from time to time, but if there proved to be an insuperable obstacle to success, endeavours could properly cease. Similarly, in *Jet2.Com*, Moore-Bick LJ said that in using its 'best endeavours', the obligor had to do 'all that it reasonably could'.

Interestingly, he may be required to keep the other party informed of difficulties as they are encountered in order to find out whether there is a solution: *EDI Central Ltd v National Car Parks Ltd* [2011] SLT 75. Commercial suicide is not required, but substantial expenditure may well be: *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] NPC 74.[8]

That approach is so similar to the approach to a 'best endeavours' clause as to admit of no real distinction. In the Scottish case of *EDI Central Ltd*, Lord Glennie suggested that 'any difference [between the two obligations] is likely to be metaphysical rather than practical'. The following, from *KS Energy* in the Singapore Court of Appeal, is a justified conclusion:

'Perhaps lawyers may occasionally perceive an apparent spectral difference between these two types of 'endeavours' obligations due to the difference in their wording. However, without the parties specifying how these two types of 'endeavours' obligations differ and what steps are required to fulfil each type of 'endeavours' obligation, any difference between them would merely be a pointless hair-splitting exercise.'

Given that each contract falls to be construed on its own terms and against its own background 'matrix of fact', it follows that 'all reasonable endeavours' cannot mean the same as 'best endeavours' in every case; not least because 'best endeavours' logically cannot itself mean the same thing in every case – but that is a different, and probably more 'metaphyscial', point. In the vacuum of the ***prima facie*** meaning given to commonly-used phrases, the two types of 'endeavours' clause are now to be treated as identical. Hence, in *Jet2.Com*, it was simply agreed by the parties that they were the same, even when used in the same clause to qualify different obligations.

Guidelines on Best and All Reasonable Endeavours: The following guidelines as to the standards expected in these clauses are adapted from *KS Energy*:

a) The obligor must go on using his reasonable endeavours until the avenues available are exhausted, but need only do what has a significant or real prospect of successfully achieving the end in any case.

b) An insuperable obstacle to success will entitle the obligor to cease taking steps to overcome other problems which stood in the way of procuring the outcome, as there would be no utility to doing so. It would be unwise to cease action, even in reliance on professional advice, without engaging with the obligee about the issue.

c) The obligor cannot sit back and say that he could do no more where, if he had engaged with the obligee, he would have been told about another course open to him to achieve the end.

d) The obligor need not sacrifice his own commercial interests and drive himself to financial ruin, unless the contract expressly or impliedly so provides.

e) It appears that, once the obligee establishes that there were certain reasonable steps which, if taken, could (or perhaps probably would) have achieved the contractual object, the burden[9] shifts to the obligor to show that it did take those steps, that those steps would not have achieved the object.

Conclusion

The conclusion must be that, at present, nothing is finally concluded. There remains no authoritative pronouncement that 'all reasonable endeavours' means the same as 'best endeavours'. Given judicial caution about codifying contractual interpretation, and the reasons for that caution, it is unlikely that any 'final' pronouncement could ever be given. Pragmatically, though, clients would be well-advised to leave 'all reasonable endeavours' clauses well alone. Notwithstanding the advice that will often if not always be taken in large-scale development and option agreements, business people may well think they mean something different from 'best endeavours'.

Those lawyers faced with the task of drafting such clauses would themselves be well-advised to try to persuade their clients to fix the ambit of the obligation more specifically, by reference to discrete and specified steps,[10] ambit of expenditure, duties to keep the obligee informed, rights vesting in the obligee to insist on steps being taken and time-limits. Much though developer clients may wish to avoid further technicality and specificity in their contracts, 'endeavours' clauses give rise to uncertain litigation when the object is not achieved; it is obviously far better to try to pin down the nature of the endeavours in advance.

Ross Fentem

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[8] In that case, Vos J said that the obligation does not 'always' require the obligor to sacrifice his commercial interests. It is doubtful that the adverb added anything to the reasoning.

[9] Query whether the Singapore court meant the legal or the evidential burden. The latter would be considerably less objectionable as a matter of practice.

[10] I accept that this is bound to result in clauses saying 'including but not limited to....', but at least then a court has a yardstick to look to.

A textbook case

***Personnel Hygiene Services Ltd and ors v Rentokil Initial (UK) Ltd (t/a Initial Medical Services) and anor* [2014] EWCA Civ 29.**

In *PHS v Rentokil*, the Court of Appeal had to consider whether to overturn final injunctions granted by HHJ Havelock-Allan QC in the Bristol Mercantile Court. While not breaking new ground in terms of legal principle, the case does provide a useful practical example of the operation of a breach of confidence claim, in the particular context of the misuse of customer details, which more commonly involves departing employees.

Facts

PHS bought a clinical waste business which was known as UK Hygiene ("UKH"). UKH had used Rentokil Initial as a sub-contractor to provide its services, but PHS intended to perform the service itself following the purchase. PHS thus gave Rentokil Initial notice to terminate the sub-contract, which prompted activity by Rentokil Initial consisting of systematically contacting PHS customers and making untrue representations with a view to encouraging the customers to switch their business from PHS to Rentokil Initial. That activity ceased when PHS applied for an interim injunction (in respect of which application Rentokil Initial gave limited undertakings).

Rentokil Initial had entered into a confidentiality agreement with UKH at the point of tendering for the sub-contract, in respect of confidential information provided for the purposes of assessing the merits of entering into the sub-contract. It was unlimited in duration. The sub-contract subsequently entered into was however silent on the issue of confidentiality.

High Court grants injunctions

At an expedited trial in the Bristol Mercantile Court, a final injunction was granted by HHJ Havelock-Allan QC restraining Rentokil Initial from misusing PHS's confidential information, together with a "springboard" injunction restraining Rentokil Initial from dealing with the customers that had been contacted prior to the interim injunction application.

HHJ Havelock-Allan QC implied a term into the sub-contract equivalent to the relevant clause in the confidentiality agreement, in respect of new customers introduced pursuant to the sub-contract. Breaches of both the express and implied terms were restrained by the injunctions. Rentokil appealed to the Court of Appeal.

Appeal dismissed

On appeal, Rentokil Initial argued that it was an error of law to imply such a term into the sub-contract, relying on *Caterpillar Logistics Services (UK) Ltd v Huesca de Crean [2012] IRLR 410 (CA)*. It was argued that the reason why an injunction restraining misuse of confidential information was refused in *Caterpillar*, was because Caterpillar had failed to secure an express term in the employee's contract to that effect.

Lord Justice Rimer (giving the leading judgment of the Court in *PHS v Rentokil*) concluded that *Caterpillar "said nothing that provides a shred of support"* for Rentokil Initial's submission. No injunction to restrain misuse of confidential information was granted in that case, because on the facts there had been no suggestion of any likelihood of any such misuse arising. If there had been, an injunction might well have been granted restraining misuse of confidential information. No express term was required. Where the Court of Appeal had decided (*obiter*) that an express term was required in *Caterpillar*, was in relation to a separate claim for "barring out" relief, preventing the employee from even being employed by a competitor. But that aspect of the decision in *Caterpillar* had nothing to do with the claims in *PHS v Rentokil*.

In this case, the reasonable man would have had no hesitation in concluding that the information relating to new customers should have been subject to the same confidentiality obligation as was set out in the confidentiality agreement. Any other conclusion would have been *"extraordinary"*. Use of the confidential information had been admitted, and the Judge had been perfectly entitled to grant the injunctions.

Comment

The breach of confidence action is primarily an equitable cause of action, which is not dependent on any terms of a contract, whether express or implied. However, there is nothing to stop parties from including express confidentiality clauses in contracts and seeking to enforce them: if they turn out not to be enforceable because the information said to be confidential is drawn too widely (for example), there is no reason why the same party should not be able to fall back on the equitable obligation of confidence and hold the former employee to it to the extent that the law allows.

"In this case, the reasonable man would have had no hesitation in concluding that the information relating to new customers should have been subject to the same confidentiality obligation as was set out in the confidentiality agreement."

In *PHS v Rentokil*, the claims had been argued at first instance on an equitable footing in the alternative, but since the Judge was happy to imply the necessary contractual term (which the Court of Appeal upheld) the Judge did not consider it necessary to elaborate on the equitable alternative.

The utility of the express confidentiality agreement or clause

If an express confidentiality clause is used (whether in a commercial or an employment contract), its utility is likely to stretch beyond, making it easier to imply an equivalent term where necessary in the circumstances of the case, as occurred here. The terms of an express confidentiality clause may

"In PHS v Rentokil, at first instance HHJ Havelock-Allan QC had little difficulty with the idea that customer contact details, details of their requirements and (most importantly) the fact of their being customers of the claimant, constituted confidential information."

also help to form the basis of a conclusion by the court as to whether or not the information in respect of which protection is sought, falls within the protectable category of confidential information.

Of course, there will not be *carte blanche* simply to use an express term or agreement to try to convert otherwise trivial or public information, or an employee's acquired skill and knowledge, into confidential information: confidentiality only applies to matters which are not in the public domain, and the doctrine of restraint of trade will apply where the effect of the clause is unreasonably restrictive resulting in such a clause being unenforceable.

But in borderline cases, if (for example) an employee is effectively told in his or her contract, and agrees, that certain pieces of information are being imparted in circumstances where they are to be regarded as confidential, then this will certainly help, even if it only turns out to be of evidential value in that it determines what information the parties considered to be truly confidential and to fall within the *Faccenda Chicken* "class 3" ("trade secrets") category. The wording of the express term will also assist in drafting the terms of the proposed order that the employer will be asking the Court to make. In this way, an express confidentiality clause may continue to be of some use even in a case where the claim is being considered on equitable principles because the express contractual clause is unenforceable in contract for some reason.

The trick will be in the drafting of such clauses: if identified information is not realistically likely to fall within "class 3", it would be wise to attach some temporal limit and not to seek to prohibit its use indefinitely.

If the worst happens and the court takes the view that the clause was too widely drafted, equitable principles can be relied on in the alternative so that at least the level of protection that the courts will imply will remain, even if the attempted contractual prohibition which went further, is not allowed to stand.

Confidential information: customer details

"Class 3" information is of course a reference to the categories identified in *Faccenda Chicken v Fowler [1987] Ch 117 (CA)*. The Court famously considered that information will fall into three categories:

- Trivial or public information which is not confidential.
- Information that the employee must treat as confidential during his employment because he is expressly told that it is confidential, or because it is obviously so, but which once learned remains in his head and becomes part of his own skill and knowledge which he is free to use after he leaves.
- Specific trade secrets that are so confidential that though they may have been learned by heart, cannot lawfully be used for anyone's benefit other than the employer.

It is clear that "class 3" information may never be used post termination. The real issues are as to the precise scope of "class 3", or alternatively the extent to which the law implies a duty (either by way of an implied term or in equity) preventing the use of information that might be said to fall under "class 2", post-termination.

In *Herbert Morris v Saxelby [1916] 1 AC 688*, Lord Atkinson made it clear that *"tabulated information as to the requirements of existing customers and probable requirements of prospective ones"* were highly confidential. But at that time, the House of Lords did not regard them as a trade secret capable of protection (in that case by a post-termination covenant). However, the law has moved on.

"... in determining whether information is part of the employee's stock of skill and knowledge, or confidential information, it is the nature of the information that is important ..."

In more modern times, in *Lansing Linde Ltd v Kerr [1991] 1 WLR 251 (CA)*, it was recognised that a customer list containing information not available or not readily available in the public domain is capable of being treated as a trade secret, the use of which could be prevented by injunctive relief.

In *Norbrook Laboratories (GB) Ltd v Adair [2008] IRLR 878*, Elizabeth Slade QC relied on Staughton LJ's judgment in *Lansing Linde*, where he said that a trade secret:

"can thus include not only secret formulae for the manufacture of products but also, in an appropriate case, the names of customers and the goods which they buy. But some may say that not all such information is a trade secret in ordinary parlance. If that view be adopted, the class of information which can justify a restriction is wider, and extends to some confidential information which would not ordinarily be called a trade secret."

This approach was adopted in *JN Dairies Ltd v Johal Dairies Ltd & Singh [2009] EWHC 1331 (Ch)*, which involved a claim of breach of confidence against a former employee who was alleged to have taken copies of the claimant's invoices and given them to the new employer, who then made use of the customer information and pricing details. The claim (against both the former employee and his new employer) succeeded, despite there being no express term in his contract prohibiting the conduct described.

In *PHS v Rentokil* itself, at first instance HHJ Havelock-Allan QC had little difficulty with the idea that customer contact details, details of their requirements and (most importantly) the fact of their being customers of the claimant, constituted confidential information. The Court of Appeal did not have to deal with any challenge to that conclusion, which had been reached below despite the fact some elements of the information were available in the public domain on websites which would facilitate a degree of "reverse engineering". The confidentiality of the information derives from its being collected together within the knowledge of the defendant, in such a way as to avoid the need to go through the reverse engineering process. The avoidance of that labour is what constitutes the illegitimate competitive advantage.

The modern approach is therefore something of a departure from the strict stance taken in *Faccenda Chicken* itself, to the effect that customer details and pricing information did not constitute a trade secret within "class 3". *Faccenda Chicken* now has to be modified in light of *Lansing Linde* and the subsequent cases.

Drawing the distinction between classes 2 and 3 is not easy however, as pointed out by Sir Thomas Bingham MR in *Lancashire Fires Ltd v S A Lyons & Co Ltd [1997] IRLR 113 (CA)*:

"It is plain that if an employer is to succeed in protecting information as confidential, he must succeed in showing that it does not form part of an employee's own stock of knowledge, skill and experience. The distinction between information in Goulding J's class 2 and information in his class 3 may often on the facts be very hard to draw, but ultimately the court must judge whether an ex-employee has illegitimately used the confidential information which forms part of the stock-in-trade of his former employer either for his own benefit or to the detriment of the former employer, or whether he has simply used his own professional expertise, gained in whole or in part during his former employment."

Of course in *PHS v Rentokil*, which was not an employment case, the issue of whether the customer details had become part of an employee's skill and knowledge did not arise. But the utility of the express confidentiality agreement that existed in that case nonetheless provides a salutatory lesson for employment cases in that they can provide a fast route to drawing the distinction identified by Sir Thomas Bingham MR above.

Indeed, there is support for the notion that "class 2" information may nevertheless be treated effectively as "class 3" information, where the parties have expressly agreed that it is to be protected. In *Towry EJ Ltd v Bennett [2012] EWHC 224 (QB)*, Cox J indicated that a court is likely to reject an argument that part of the customer information cannot be confidential if an employee would naturally remember it, if it is within the ambit of what the parties have agreed (see paras.416-421). Essentially, in determining whether information is part of the employee's stock of skill and knowledge, or confidential information, it is the nature of the information that is important and not simply whether the employee has been able to memorise it.

And finally...

It is also worth noting that the European Commission has published a draft Trade Secrets Directive[11], with a view to harmonising the law in this area across Member States. The proposed Directive will protect against the unlawful acquisition, use or disclosure of trade secrets (Art.1). "Trade secrets" are defined in Art.2 as information that:

- is secret, in that it is not generally known among or readily accessible to relevant persons in the field;
- has commercial value because it is secret; and
- has been subject to reasonable steps to keep it secret.

The acquisition of a trade secret will be unlawful in a range of circumstances including where it is the result of breach of a confidentiality agreement or other practice *"contrary to honest commercial practices"*. Thus, express confidentiality agreements are likely to take on an additional importance. However, overall the proposed Directive is likely to lead primarily to changes of form rather than substance in this country.

The final version of the Directive could be promulgated by the European Parliament and Council by the end of the year. Of course, it is likely to be some time thereafter before we see Regulations implementing the Directive in domestic law.

Hugh Sims QC and Douglas Leach

Hugh and Douglas represented PHS at first instance and in the Court of Appeal

[11] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0813:FIN:EN:PDF

THE DECISION IN *INTEGRAL PETROLEUM SA V SCU-FINANZ AG* [2014] EWHC 702 (COMM) (14 MARCH 2014)

Two Swiss companies walked into an English Court...

Two Swiss companies walked into an English Court in March 2014 to argue over the judgment in default which Integral Petroleum SA (*"Integral"*) had obtained under Part 12 of the Civil Procedure Rules against SCU-Finanz AG (*"SCU"*) in the sum of US$1,078,547. SCU's application engaged both CPR rules 13.2 (mandatory setting aside of the judgment) and 13.3 (discretionary setting aside of the judgment). The rules referred to in this article are all in the CPR.

Civil practitioners currently find themselves in a "new" and, it seems, unwelcome post-*Jackson*, post-*Mitchell* world where a failure to comply with a rule or practice direction translates into a need to make what are often daunting applications for relief from sanctions. In that context, *Integral* serves as a useful reminder to practitioners of the utility of rule 3.10, which treats as valid a procedural act rendered invalid by some failure to comply with a rule or a practice direction unless the Court otherwise orders. In *Integral*, it was argued that particulars of claim were served both late and by a method which was not available on the facts of the case (email); the Court had to consider the applicability of rule 3.10 in that context.

The case also highlights a potential pitfall to be aware of when contracting with a Swiss company. Swiss company law provides that, in certain circumstances, in order to be valid a contract must be signed by two officers of the company. At first blush, that rule was engaged in *Integral*. The contract (governed by English law) was only signed by one officer. Surely that could not amount to a complete defence to the claim?

The background facts and the procedural history

On 18 October 2011, Integral and SCU entered into a contract under which SCU agreed to deliver oil to Integral. By all accounts, SCU failed to deliver any oil. Integral sued in the English Courts, relying on an English choice of law and jurisdiction clause. The claim was issued on 11 February 2013 and was served in Switzerland on 21 March 2013.

SCU filed an acknowledgment of service form (N9(CC)) on 15 April 2013 indicating an intention to defend the whole of the claim, and to dispute jurisdiction. On the same form, in the box for the Defendant's address (for which the explanatory note is: "This must be either the business address of your solicitor or European Lawyer or your own residential or business address within the UK or in any other European Economic Area state") SCU inserted the words "Me Errol Cohen" and a postal address. No telephone number, fax number, DX number or email address were supplied. Integral solicitors undertook some detective work to determine that Me Errol Cohen was a French Avocat. They also found out his email address.

Pursuant to rule 58.5(1)(c), Integral had to serve Particulars of Claim by 13 May 2013. A day later, on 14 May 2013, Integral's solicitors emailed Me Cohen asking for an extension of time to 6 June 2013 (the solicitors had said in their email that the maximum extension which could be agreed was 28 days, which would have taken the period up to 10 June 2013). The solicitors chased on 21 May 2013. Me Cohen responded on that day, by email, agreeing to the request for an extension. Thereafter, Integral's solicitors noticed their error in calculating the dates, and sought the extra 4 days to 10 June 2013, but they received no response from Me Errol. The Court was updated on 27 May 2013 to the effect that the parties had agreed an extension to 6 June 2013.

As it happens, the Particulars of Claim were sent to Me Cohen by email on 10 June 2013 – late - at 6.41pm. Applying rule 6.26 on deemed service, that meant that, because the email was sent after 4.30pm, the Particulars of Claim were deemed to have been served on 11 June 2013. Provided that those steps amounted to valid service (which SCU disputed) then pursuant to rule 58.10(2), the period for filing a defence expired on 9 July 2013. SCU did not file a defence by that date.

On 17 July 2013, Integral's solicitors applied for default judgment under Part 12. In so doing, they filed a certificate of service in purported compliance with rule 6.17(2) to the effect that the particulars of claim had been validly served. Judgment in default was entered on the same day in the sum of US$1,078,547.

On 13 September 2013, SCU became aware of the default judgment. On 6 December 2013, having instructed English solicitors, SCU sought Integral's consent to setting aside the default judgment. No such consent was given, so that on 30 December 2013, SCU applied to the Court to set aside the default judgment.

Particulars of claim not validly served: judgment to be set aside automatically (rule 13.2)?

SCU's argument under rule 13.2 was simple. Integral's particulars of claim could not be validly served by email on Me Cohen, because neither Me Cohen, nor SCU had indicated that service of statements of case by email was acceptable. Moreover, the particulars of claim were served late in any event. If service of the particulars of claim was defective, then time for serving the defence had never started to run, and so could not have expired for the purposes of rule 15.4(1)(b) (para. C3.2(a)(i) of the Commercial Court Guide).

As a result of rule 6.23, it is necessary for a party to proceedings to supply an address for service. That can include an email address (rule 6.23(6)). Practice Direction 6A contains well-known rules which govern how a party may supply (or be taken to have supplied) an email address at which service of documents can be effected. The material provision is set out in paragraph 4.1(b): i.e. an email address set out on the writing paper of the solicitor acting for the party, but only where it is stated that the email address may be used for service. Paragraph 4.2 is also relevant, since it places an onus on the party serving to check with the party to be served whether there are any limitations on an agreement to accept service by electronic means. In this case, none of those provisions were complied with. The acknowledgement of service did not set out Me Cohen's email address, neither was there any writing paper emanating from Me Cohen which contained the email address. In fact, it was Integral's solicitors who had, by a process of investigation, discovered Me Cohen's email address.

Integral's answer to that was to rely on rule 3.10(1), which provides that an error of procedure does not invalidate any step taken in the proceedings, unless the Court so orders. The defective service of the particulars of claim was an error of procedure. As a result of rule 3.10, that error did not invalidate service of the particulars of claim, so that time did start to run for filing a

defence on 11 June 2013. Integral relied on the decision of the House of Lords in *Phillips & Another v Symes & Others (No 3))* [2008] 1 WLR 180. *Phillips* was a case about rule 6.9 (at the time, dispensing with the need for service of the Claim Form) as it applied to service of the claim form (whereas *Integral* is a case which concerns service of the particulars of claim).

The judge in *Integral* (Popplewell J) extracted a number of principles from *Phillips*, one of which was that rule 3.10 was to be given a wide meaning so as to be used to beneficially cure defects. That was particularly the case where, as here, the document to be served was not the originating process (the claim form), but the particulars of claims. In this case, service by email had been sufficient to bring the particulars of claim to Me Cohen's attention. Me Cohen was SCU's chosen lawyer. As the judge put it: "The document reached the appropriate destination in just the same way as if it had been sent by post to the Paris address given in the acknowledgement of service which would have constituted good service". Indeed, (compliant) service by email is a valid method of service: rule 6.20(1)(d).

Popplewell J held that the error of procedure in serving the particulars of claim by email was precisely the sort of error which fell within rule 3.10(1). As a result, the necessary consequence was that the relevant step (service of the particulars of claim) was validated, and time had started to run for service of the defence. Accordingly, SCU could not bring itself within the provisions of rule 13.2.

Oil trading contract not validly entered into: judgment set aside on discretionary grounds (rule 13.3)?

Whilst SCU was unsuccessful in placing reliance on rule 13.2, it could still succeed in getting the judgment set aside under rule 13.3, provided that it could demonstrate that it had a real prospect of defending the claim. SCU relied on three arguments. The principal argument was based on Swiss law. SCU argued that, under Swiss law, for the contract between SCU and Integral to be binding, it had to be signed by a minimum of two officers. SCU had two officers at the material time: Mr Albert Bass and Ms Marine Vartanyan. The contract had been signed only by Ms Vartanyan. If SCU was correct in its contention that Swiss law governed that issue, then it had a complete answer to the claim.

Under Article 460 of the Swiss Code of Obligations, where a prokurist (an authority to sign on behalf of a company) is issued to more than one person, then all are required to sign. The identities of the prokura in respect of a Swiss company are registered in the Swiss Register of Commerce (a rough equivalent to Companies House). Each entry will specify the extent and type of prokura. By Article 933(1) of the Code, entries in the Register are considered express notice to third parties. In the same way that Companies House is searchable on the internet, so is the Swiss Register of Commerce.

This aspect of the case turned on the proper characterisation of the question which the Court was being asked to resolve. Was it, as SCU contended, a question of company law: could SCU contract by means of the signature of a single prokurist; or to put it another way, did Ms Vartanyan have the power and authority to enter into a contract so as to bind the company by her sole signature. Or, was it instead, as contended by Integral, a question of formal validity of the oil supply contract. That issue, pursuant to Article 10 and 11 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (i.e. Rome I), would be governed by the law of the contract (in this case, English law). In his judgment, Popplewell J summarised capacity and validity as follows:

- **capacity** connotes: "... the concept of whether someone can do something as a matter of physical or legal capability... For legal persons it may connote legal capability by reference what the objects or powers of a company or public body enable it to do... In this respect questions of a 'power' under a company's constitution are categorised as questions of capacity just as are those which govern its legal ability to enter into a transaction of a particular type" (para. 53)
- **validity**, on the other hand, connotes: "...the concept of whether a contract or transaction is binding or effective by reference to the particular circumstances of the transaction itself, rather than by reference to any characteristics of a contracting party. This is the sense in which the concept is used for the purposes of the relevant conflict of laws principles. Material validity is concerned with the existence and validity of a binding contract by reference to such matters as formation, consideration, fraud, duress, misrepresentation, mistake or legality..." (para. 54)

He also referred to those parts of Lord Hoffmann's speech in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 which concern the rules of attribution that apply to corporate entities.

Popplewell J analysed *Integral* as a case which concerned rules of attribution: is the act of an individual (Ms Vartanyan) in signing a document a sufficient act to bind a company. That is not a matter of form or substance which is intrinsic to the contract; it is a matter which is peculiar to one of the parties. The rules of attribution are to be found primarily in the rules contained in a company's constitution, to which the law of agency adds a supplement as regards issues of actual authority. Once the judge had reached that point, it is plain that his view was that the proper characterisation of the issue before him was one of capacity, not validity. He expressed his conclusion thus:

"[58] A company can only act through natural persons. Which persons, what acts and how such acts are carried out, are all questions which may affect the issue of whether the acts are within the authority or power of the natural person in a way which allows them to be treated as the acts of the company itself. Those questions are ones to which it is peculiarly apposite that the law governing the constitution of the company should primarily provide the answer, because such constitution (in the wide sense in which the term is used in Haugesund Kommune v Depfa ACS Bank (Wickborg Rein and Co) [2012] QB 549 of identifying the rules which the constitutional system of law applies to such a company) is the primary source for the rules which define the authorities and powers which enable the persona ficta of a company to act through natural persons."

He went on to find that SCU's constitution included, in a wide conflicts of law sense, the rules of attribution (including whether the officers had actual authority to bind SCU) which are contained in the Swiss Code of Obligations. That was, effectively, the end of the matter, subject to any points in relation to the exercise of the Court's discretion. SCU's application succeeded, not least because, on the judge's analysis, SCU did not just have a defence with a real prospect of succeeding, it had a defence which was a complete answer to the claim.

It is worth noting that Integral's statements of case and evidence at the hearing of SCU's application to set aside the default judgment did not, it seems, include a case based on ostensible authority. SCU's counsel, in the course of his argument in reply, sought to raise, ostensible authority for the first time relying on the fact that SCU had not submitted any evidence to indicate that Ms Vartanyan was not authorised to act or bind the company in the way she did. The judge rejected that line of argument summarily, describing it as hopeless. Of course, if SCU had been able to make out a case on ostensible authority, that is an issue which would have been governed by the law of the contract, which in this case was English law.

That conclusion rendered it unnecessary for the Court to rule on SCU's two other grounds for defending the claim. They were, firstly, that it was a condition precedent of SCU's liability to deliver oil under the supply contract that Integral should have opened a letter of credit (had it been necessary to do so, the judge would have rejected that argument). Secondly, SCU argued that Integral's calculation of loss was flawed and in any event was caught by an exclusion clause. Integral had claimed by reference to its loss of profits; the judge would have held that SCU had a reasonable prospect of demonstrating that that was not the correct basis for assessing loss (instead, the *prima facie* measure of damages is the difference between the contract price and the market price; s.51(1) of the Sale of Goods Act 1979).

Even though it was correct to point out that SCU had waited a number of months between September 2013 and December 2013 before applying to set aside the default judgment, when that was placed in the balance and weighed against the fact that SCU appeared to have a complete defence to the claim, and the fact that Integral had made a complete mess of serving the particulars of claim, including filing an incorrect certificate purportedly confirming that service had been valid, the judge had little hesitation in setting aside the judgment. Practitioners should note that an appeal against Popplewell J's decision is pending in the Court of Appeal.

Stefan Ramel

Banking update

Neil Levy offers a selection of finance related cases decided since the start of the year. These and similar brief digests of many other recent cases of interest to banking and finance lawyers are collected together at www.banknotesuk.com.

Agency

Moran Yacht & Ship Inc v Pisarev [2014] EWHC 1098 (Comm), 10/4/14

Considers principles applicable when an agent or broker claims commission on the basis that he was the effective cause of a transaction [93]. On the facts a broker had not been the effective cause of the sale of a yacht and the claim failed. Suggests it is unlikely that a director may be liable for inducing a breach of contract by a company as this would undermine the concept of limited liability [115].

Bovingdon v Belcher [2014] EWHC (Ch), 3/2/14

Monies paid to an agent as a result of the agent's undue influence or breach of duty as agent, were ordered to be repaid.

Administration

Shaw v Webb (Re Brown Bear Foods Ltd) [2014] EWHC 1132 (Ch), 10/4/14

The court refused in its discretion to make an administration order and instead transferred in a winding-up petition and appointed a provisional liquidator so that payments made after the winding-up petition had been presented remained void unless validated.

Berntsen v Tait (Re Coniston Hotel (Kent) LLP) [2014] EWHC 1100 (Ch), 8/4/14

The court summarily dismissed a claim by members of an insolvent limited liability partnership to discharge the administration of the LLP and remove the administrators. Allegations of conspiracy to defraud the members by selling property at an undervalue and sham marketing were unfounded and should not have been pleaded. The members had no pecuniary interest to give them standing to apply for an examination of the conduct of the administration under Sch B1 para 75 Insolvency Act 1986, because any reimbursement of fees would benefit only the secured creditors.

Assignments

Co – operative Group Ltd v Birse Developments Ltd [2014] EWHC 530 (TCC), 28/2/14

A building contractor's claims in negligence against sub-contractors were time-barred by s 2 Limitation Act 1980 because the cause of action accrued at the latest on practical completion which had occurred 12 years before the proceedings were started. Considers the principles to be applied in determining whether an attempt to assign the benefit of a contractual warranty without the contractually required consent gives rise to a trust in favour of the purported assignee. On the facts no such trust existed in favour of theclaimant.

Stopjoin Projects Ltd v Balfour Beatty Engineering Services (HY) Ltd [2014] EWHC 589 (TCC), 13/1/14

A sub-contractor had purported to assign its book debts to a factoring company. The sub-contracts prohibited assignment so the claim based on the assignment was struck out. But a claim that the failed assignment gave rise to an implied trust of the book debts in its favour was arguable and would not be struck out.

Banking relationship

Barclays Bank Plc v Svizera Holdings BV [2014] EWHC 1020 (Comm), 8/4/14

The relationship between the parties as defined in agreed facility documents excluded any advisory relationship or fiduciary duty on the part of the bank and gave rise to a contractual estoppel precluding the defendant from alleging that it had relied on any advice from the bank [70]. No assumption of responsibility could be inferred. The defendant had entered into the agreement on the basis of its own judgment. On the evidence the bank had not been required to obtain a currency swap for the defendant as a condition precedent to the facility agreement, the bank had not made any representation that it would obtain the swap and the defendant had not relied on any such representation. Nor had there been any collateral warranty that the swap would be obtained.

Companies

Bucci v Carman; Re Casa Estates (UK) Limited [2014] EWCA Civ 383, 4/4/14

In proceedings under s 238 Insolvency Act 1986 to recover payments made at an undervalue, a company was held to be insolvent at the relevant time. Although it had been able to pay its debts as they fell due, it had only been able to do so by borrowing funds held as deposits for by third party property purchases, thereby getting deeper into long-term debt.

Elsworth Ethanol Co Ltd v Hartley [2014] EWHC 99 (IPEC), 3/2/14

Contains a useful summary of the law as to whether an individual has become a de facto director [51-4]. On the facts the individual concerned had not been a de facto director and had not in any event breached any fiduciary duty to the company.

LSI 2013 Ltd v Solar Panel Co (UK) Ltd [2014] EWHC (Ch), 14/1/14

Where a company genuinely disputed a debt on substantial grounds, it was wrong to make a winding-up order on the basis that the petitioning creditor could be regarded as a contingent creditor.

Key Homes Bradford Ltd v Patel [2014] EWHC B1 (Ch), 10/1/14

Section 1140 Companies Act 2006 provides a method for serving a company director with any document, including a claim form.

Exclusion clauses

West v Ian Finlay & Associates [2014] EWCA Civ 316, 27/3/14

Considers the application of the Unfair Terms in Consumer Contracts Regs 1999 to an exclusion clause in a construction contract effectively limiting a contractor's liability for loss for which it was responsible with others to the level of contribution which would be payable under the Civil Liability (Contribution) Act 1978 (regardless of the insolvency of the others who were liable). On the facts the clause was fair. It also satisfied the requirement of reasonableness in the Unfair Contract Terms Act 1977. The court also considered the correct approach to the award of interest [75] and the level of awards of damages for distress and inconvenience [84]. On the facts interest at 4.5% pa over base was appropriate and damages for distress were reduced to reflect the guidance in *AXA Insurance UK Plc v Cunningham Lindsay UK* (2007).

Fujitsu Services ltd v IBM United Kingdom Ltd [2014] EWHC 752 (TCC), 21/3/14

Contains a useful analysis of the principles of contractual construction when considering exclusion clauses and the circumstances in which contracting parties may assume fiduciary duties. On the facts a clause excluding the liability of a main contractor to a sub-contractor for loss of profits was excluded, there was no fiduciary relationship between the parties and no duty of good faith was owed.

AB v CD [2014] EWCA Civ 229, 6/3/14

Where recoverable damages were limited or excluded by a contractual provision, an applicant for an interim injunction can properly argue that damages would not be an adequate remedy for a threatened breach of contract.

Guarantees and security

Urban Ventures Ltd v Thomas (Re Black Ant Co Ltd) [2014] EWHC 1161 (Ch), 15/4/14

On their true construction, new loan facility letters did not constitute a further advance within s 49(3) Land Registration Act 2002 so as to give the lender priority under its charge to a second charge.

Your Response limited v Datateam Business Media Limited [2014] EWCA Civ 281, 14/3/14

A service provider could not exercise a common law lien over the electronic database it had managed for the defendant. It is not possible to exercise a common law lien over intangible property.

Barclays Bank Plc v Unicredit Bank AG [2014] EWCA Civ 302, 20/3/14

A bank's refusal to consent to the early termination of guarantees it had given in respect of loan portfolios had been exercised in a "commercially reasonable" manner in the terms of the guarantees because early termination would have deprived the bank of significant revenue over the remaining term of the transaction. The bank had been entitled to take account of its own interest in preference to that of the counterparty to the guarantees.

Thakker v Northern Rock (Asset Management) Plc [2014] EWHC (QB), 6/2/14

Non-compliance with the Mortgage Conduct of Business Rules (MCOB) did not provide a defence to a mortgagee's claim for possession.

Bank of Scotland Plc v Joseph [2014] EWCA Civ 28, 23/1/14

The bank's subrogated claim to an unpaid vendor's lien, which had been protected by a unilateral notice on the register, took priority over a registered charge in favour of a third party mortgagee and bound a purchaser who bought the charged property when it was sold by the third party mortgagee. The fact that the unilateral notice wrongly referred to the existence of a charge (which had turned out to be ineffective and which led to bank to rely on a right of subrogation) did not cause the notice to be ineffective to preserve priority. A unilateral notice under the Land Registration Act was effective to preserve the Bank's priority even if the basis on which the Bank claimed an interest in the property was not accurately recorded.

Day v Shaw [2014] EWHC 36 (Ch), 17/1/14

A wife was entitled to an equity of exoneration against her husband so that borrowing was paid first from his share of sale proceeds where the couple charged their property to secure the husband's guarantee of the borrowing of a company.

Injunctions

Bank St Petersburg v Arkhangelsky [2014] EWHC 574 (Ch), 5/3/14

Committal proceedings for contempt of court are the appropriate remedy for an alleged breach of a freezing injunction, not an application for a declaration that the respondent had acted in breach.

Fortress Value Recovery Fund I LLC v Blue Skye Opportunities Fund LP [2014] EWHC (Comm), 4/2/14

Where certain assets of the defendant were subject to a freezing order, the court restrained the defendant from using the assets to meet business and legal expenses when funding to cover those expenses was likely to be available from co-defendants.

Georgian American Alloys Inc v White & Case LLP [2014] EWHC (Comm), 31/1/14

Applying *Bolkiah v KPMG* (1999), a final injunction was granted restraining solicitors acting in litigation where there was a real risk that confidential information acquired by the firm when acting for the applicant might be used.

ISDA Master Agreements

Greenclose Ltd v National Westminster Bank Plc [2014] EWHC 1156 (Ch), 14/4/14

Considers how notice may be validly given under s 12a of the International Swaps and Derivatives Association (ISDA) Master Agreement (Multi Currency-Cross Border Form) 1992. On the facts notice to extend a collar transaction had not been in compliance with the ISDA terms and had been ineffective.

Issue estoppel

Littlewoods Retail Ltd v Revenue & Customs Commissioners [2014] EWHC 868 (Ch), 28/3/14

In a claim for an indemnity for overpaid VAT, the court considered the application of the principles of issue estoppel, the extent to which companies in the same group are to be regarded as privies [214], contractual estoppel [229], and abuse of process [243]. The court held that the loss of use of the overpaid tax should be compensated by an award of compound interest.

JCA BTA Bank v Ablyazov [2014] EWHC 455 (Comm), 28/2/14

There was no issue estoppel preventing the bank from seeking a declaration that the defendant was the beneficial owner of shares against which the bank wished to enforce judgments. Although the bank had failed to establish this in committal proceedings, that had been determined on the criminal standard and since then the bank had adduced new material which it relied on to show the defendant had adduced untrue evidence.

Loan Notes

Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro – rata Clo 2 BV [2014] EWHC 1083 (Ch), 9/4/14

Loan note repayments had been correctly applied to repay senior notes rather than being reinvested. The reinvestment criteria required that the note ratings had not been downgraded. For that purpose it was sufficient that the ratings had been downgraded even if the ratings had later risen back to their initial ratings. Contains a useful summary of the applicable principles of contractual interpretation [37]. Where the transaction is one where rights can be transferred (such as title documents or tradable financial instruments) it is reasonable to assume that the parties will have been particularly conscious of the need for clarity and certainty in the language used and the court should be particularly cautious about departing from the ordinary and natural meaning of the words.

PPI

Figurasin v Central Capital Ltd [2014] EWCA Civ 504, 16/5/14

In selling a PPI policy with a loan, the lender failed to explain that the entire PPI premium was to be paid in advance. The borrower was misled into thinking that the premium was merely paid over the term of the loan and did not give rise to additional borrowing. The lender had therefore acted in breach of the requirement of ICOB 2.2.3(1)R to communicate in a way that is fair, clear and not misleading. The fact that the loan documentation did make the position clear was not enough to break the chain of causation because the misleading explanation had caused the borrower not to bother to read the detail in the documents which followed the misleading explanation.

Proceeds of Crime Act

National Crime Agency v Namli [2014] EWCA Civ 411, 4/4/14

It could properly be inferred that a bank lending to a customer relied on statements that funds coming into the customer's account were from a legitimate source. The statements had been false because the funds were in fact derived from criminal activities, as the defendant was aware. The making of false statements as to the source of funds coming into an account, made to a bank which has had concerns about the integrity of its customer, is inherently likely to be relied on by the bank to which they are made in relation to all its subsequent dealings with him. Such a misrepresentation is material to it and likely to induce any loan contracts it enters into with the client. In such circumstances inducement may be inferred without the need for direct evidence (St Paul and *Marine Insurance Co Ltd v McConnell Dowell Construction Ltd*, 1996). The monies loaned were, for that reason, obtained by or in return for unlawful conduct and profits derived from the use of the funds could be made the subject of a civil recovery order under POCA.

R v O'Brien [2014] UKSC 23, 2/4/14

Breach of a restraint order under s 41 Proceeds of Crime Act 2002 is punishable as a contempt and is not in itself a crime.

Tracing

Relfo Ltd v Varsani [2014] EWCA Civ 360, 28/3/14

The judge below had been entitled to infer that funds which a director caused a company to transfer to another company's account were the source of money paid by that company to the defendant. What matters is that there has been an exchange of the value of the claimant's property into other property for which it was substituted, and so on down the chain of substitutes (*Foskett v McKeown*, 2001). There is no need for the payments to be in chronological order so long as they are made in exchange for a promise of reimbursement. There was also an alternative claim in unjust enrichment. Although any principle for recovery in unjust enrichment from indirect recipients needed refining in later cases, here on the judge's findings, as a matter of substance, or economic reality the defendant was a direct recipient or the causal connection between the payment and receipt was sufficiently made out.

Unjust enrichment

Harrison v Madejski [2014] EWCA Civ 361, 28/3/14

A judge had been entitled to find that the sale of a car at auction had excluded its personalised registration mark, and that the buyer had been unjustly enriched by acquiring the mark. The enrichment was rightly measured as the mark's market value, not the lower value the buyer assigned to it at the auction. Subjective value could be defeated by a claimant proving that the defendant had received an incontrovertible benefit, or that the defendant had requested or freely accepted the benefit (*Benedetti v Sawiris*, 2013). The judge had been entitled to make a Bullock order for payment by the purchaser of the claimant's unsuccessful costs of a claim against the auctioneers as second defendants.

Other news

New Libor Administrator, 17/1/14

It was announced that ICE Benchmark Administration (IBA) will officially take over as the new administrator of the London Interbank Offered Rate (LIBOR) from 1/2/14.

Investment Bank Special Administration regulation, 14/1/14

Final report of Peter Bloxham published.

Neil Levy

Consumer credit update

Transfer to the Financial Conduct Authority

The main news concerning the consumer credit regulatory regime is the transfer of supervisory responsibility for consumer credit and consumer hire from the now defunct Office of Fair Trading to the Financial Conduct Authority, ("FCA").

With effect from 1st April 2014 (and pursuant to the provisions of the Financial Services & Markets Act 2000 (Regulated Activities)(Amendment) (No.2) Order 2013, (the "RAO")), entering into consumer credit and consumer hire agreements and carrying on activities such as credit brokerage, debt collection and offering debt advisory services are now regulated activities for the purposes of the Financial Services & Markets Act 2000, (the "FSMA"). It follows that a person carrying on credit related activity and hire related activity by way of business now needs to be authorised and regulated by the FCA, (or hold an 'interim permission') in order lawfully to do so and avoid breaching the 'general prohibition' at s.19 FSMA.

The end of the Consumer Credit group licence scheme

One aspect of the new regime which has caused confusion and concern is the loss of the old 'group licence' provisions under the Consumer Credit Act 1974, (the "CCA"). Under the group licence scheme, a professional firm undertaking CCA regulated consumer credit and consumer hire activity did not need to hold its own Consumer Credit licence (as it otherwise would have been required to do) if the professional body which regulated that firm held a Consumer Credit group licence which covered the firm's consumer credit and consumer hire activity.

Many firms engage in consumer credit activity in the course of their professional activities. For example, firms may undertake credit brokerage by introducing clients to banks and other lenders, or alternatively, the firm might itself offer credit to clients by way of deferred fee payment plans. With regard to firms of solicitors which undertook activities of the type mentioned above, those firms usually were covered by the Consumer Credit group licence previously held by the Law Society.

With effect from 1st April 2014, the group licence is no more and therefore, firms which used to benefit from the Consumer Credit group licence scheme will need to examine their activities and consider first, whether or not they are engaging in credit related activity, or indeed, any other regulated activity for the purposes of the RAO; and second, whether the firm needs to be authorised and regulated by the FCA.

"A borrower may apply to the Court and invite the Court to determine that the relationship between the lender and the borrower arising out of a credit agreement (or related agreement) is unfair to the borrower."

A particular difficulty is presented to firms which previously benefitted from a group licence by the fact that only persons who held a valid Consumer Credit licence in their own right could register with the FCA for 'interim permission'. The 'interim permission' scheme effectively provides a temporary permission to carry on credit related activity, pending application for full FCA authorisation, to firms which previously held a valid Consumer Credit licence and registered with the FCA for interim permission prior to 1st April 2014. Therefore, professional firms which benefitted from a Consumer Credit group licence would not be eligible to register with the FCA for interim permission and instead, would need to apply to the FCA for full authorisation from 1st April 2014 onwards.

Exempt professional firms

There is provision in the FSMA for certain professional firms carrying on FSMA regulated activity (which now of course, includes credit related activity) to be exempt from the requirement to be authorised and regulated by the FCA in order lawfully to carry on such regulated activity. A professional firm which is a member of a designated professional body may carry on certain regulated activities under the regulation and supervision of the relevant designated professional body rather than under the supervision of the FCA, provided that the firm fulfils those certain criteria set out at s.326 – s.327 FSMA and is thus an 'exempt professional firm'.

In addition to the arrangements for exempt professional firms, other exemptions may also apply to certain activities such as debt collection undertaken in the course of contentious business. However, if professional firms do not fulfil the criteria to qualify as an exempt professional firm, or benefit from another exemption category then, as noted above, the firm will need to consider whether it needs to be authorised by the FCA.

Unfair relationships

The unfair relationships provisions of the CCA (which remain on the statute book post 1st April 2014) have never been considered by the Supreme Court. However, it now looks as if that situation may change.

The unfair relationships regime is set out at s.140A – 140D CCA. A borrower may apply to the Court and invite the Court to determine that the relationship between the lender and the borrower arising out of a credit agreement (or related agreement) is unfair to the borrower. The relevant test is a wide one: when assessing unfairness, the Court may take into account the factors listed at s.140A(1) CCA including the terms and conditions of the relevant credit agreement; the way in which the lender has exercised its rights and remedies; the acts and omissions of the lender and its associates (which would include actions taken 'on behalf of' the lender); and the Court shall have regard to all matters it thinks relevant, (s.140A(2) CCA). If the Court determines that an unfair relationship has arisen, then the Court may exercise its wide discretionary powers under s.140B CCA so as to do justice between the parties.

Crucially, the question for determination by the Court is whether or not the relationship arising out of the credit agreement between the lender and the borrower is unfair, (see *Upendra Patel v Vithalbhai Patel*). Therefore, whilst the Court may take into account issues such as the terms of the relevant credit agreement, or the acts and omissions of a lender, ultimately the determination must pertain to the relationship between the parties.

A further nuance of the test is that once a borrower alleges that an unfair relationship has arisen, then it is for the lender to prove that the relationship between lender and borrower is fair, (s. 140B(9) of the CCA).

"In Plevin, the Court of Appeal considered the question of which acts and omissions could be said to have been undertaken 'on behalf of' a lender and thus fall to be considered as part of the assessment of fairness for the purposes of s.140A CCA."

To date, the limited jurisprudence which exists has provided little joy for borrowers. The majority of decisions favour lenders. The leading authority on unfair relationships remains the Court of Appeal judgment in *Harrison and Anor v Black Horse Limited***.** However, this case considered the unfair relationships provisions specifically in the context of payment protection insurance mis-selling.

This year however, the Court of Appeal has handed down judgment in the conjoined cases of *Conlon v Black Horse Limited* and *Plevin v Paragon Personal Finance Limited***.** In *Plevin*, the Court of Appeal considered the question of which acts and omissions could be said to have been undertaken 'on behalf of' a lender and thus fall to be considered as part of the assessment of fairness for the purposes of s.140A CCA. The Court opted for a wide interpretation, so that a lender potentially could be held liable for the acts and omissions of a person (on the lender's side of the transaction) even if that person as a matter of law was not the agent of the lender.

Permission to appeal to the Supreme Court has been granted. Should these cases proceed to the Supreme Court then the outcome obviously will be of interest and significance for borrowers and lenders alike. In addition, as the new regulatory regime settles down, it will be interesting to observe whether or not the unfair relationships provisions continue to provide a useful and relevant protection for borrowers.

Under the new consumer credit regulatory regime the consumer credit chapter of the FCA Sourcebook ('CONC') contains detailed rules and guidance for consumer credit firms on topics such as financial promotion, advising and selling, debt collection and conduct generally. Under the provisions of the FSMA, in the event of a breach of the rules set out in CONC, a private person has a statutory right of action in damages where that person can demonstrate loss as a result of the rule breach in question, (s.138D FSMA).

Accordingly, the new regime offers the borrower a broader range of remedies. It will be interesting to see whether the unfair relationships provisions continue to be relied upon by borrowers or whether the statutory right to damages assumes prominence. In any event, the Government is committed, by 2019, to conducting a review of those provisions of the CCA which remain on the statute book in order to consider whether those provisions remain necessary and relevant.

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