GUILDHALL
CHAMBERS

Commercial News

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Contents

Thursday 16th October is a date for your diary, as we hope you are able to join the Guildhall Commercial Team for a half-day seminar at the Watershed in Bristol on the topic of urgent interlocutory injunctions. The event will be chaired by Mercantile Judge Havelock-Allan QC, and features external speakers in addition to members of our team.

In this Newsletter Martha Maher surveys the Chancery and Mercantile Users' Committees and, in advance of our autumn seminar, introduces the Checklist for Emergency Injunctions devised by Chancery Judge McCahill. Hugh Sims tackles two recent cases in the Court of Appeal on the thorny issue of estate agents' commission, which adopt contrasting approaches to whether an introduction needs to the efficient cause of the deal. Daisy Brown and Henry Stevens provide a Banking Update, including the important decision of Andrew Smith J that bank charges are subject to the fairness standards of the Unfair Terms in Consumer Contracts Regulations. Lastly, Martha Maher considers the implications of unsuccessful mediations, and in particular the scope of the without prejudice privilege and the issue of costs.

We look forward to seeing as many of you as possible at the Watershed on 16th October, but feel free to contact either myself or Dan Cuthbertson, the Commercial Team clerk, if you have any comments or queries in the meantime.

Gerard McMeel

Commercial practice update

Chancery Court Users Committee; Mercantile Court Users Committee

1. Chancery Court Users Committee

The new Chancery Judge in Bristol, Judge McCahill QC, has been in position now for just over a year. He usually chairs the Bristol Chancery Users Group which meets bi-annually and more frequently when this is required. The meetings provide a forum to discuss any issues affecting the use of the Chancery Court in Bristol and how the service it offers may be improved so as to be in a position to compete effectively with the service provided in other Court Centres and of course in London.

Much of the current focus of the Committee is directed at the new Bristol Civil Justice Centre which is presently under construction and which is due to be completed in Spring 2010 with view to opening in October 2010 , on present estimates. The New Centre will be used to hear Chancery, Mercantile, other Civil, Fraud and Family cases.

The meetings are attended by the Presiding Chancery High Court Judge, currently Mr Justice Lewison, when his diary permits. Representatives from the Solicitors professions and the Bar attend the meetings and the Guildhall representatives are Stephen Davies QC and Martha Maher. A Bristol County Court District Judge, the Specialist Court Listing Manager, currently Andy O'Brien, and the incumbent Bristol County Court Business Manager usually attend the meetings.

If there are any issues affecting the practice or user of the Chancery Court in Bristol that you would like to bring to the Committee's attention please contact either Martha Maher, whose email address is martha.maher@guildhallchambers.co.uk, or Stephen Davies QC, whose email address is stephen.davies@guildhallchambers.co.uk, and they will raise your feedback, concerns or comments with the Committee. It next meets on the 23 November 2008.

Mercantile Court Users Committee

His Honour Judge Havelock-Allan QC chairs the Mercantile Court Users Committee which is similarly constituted and has parallel functions to the Chancery Court Users Committee in relation to Mercantile work. The Guildhall representatives on that Committee are John Virgo, john.virgo@guildhallchambers, Neil Levy, neil.levy@guildhallchambers.co.uk, and Hugh Sims, hugh.sims@guildhallchambers.co.uk. In addition, Gerard McMeel, gerard.mcmeel@guildhallchambers.co.uk, sits on the committee as the representative of the Western Chancery and Commercial Bar Association (the regional specialist Bar association). Again they will be pleased to relay your feedback and comments to the Committee which meets bi-annually at present and its next meeting is due to be held on 8th October 2008.

2. Checklist for Emergency Injunctions

In the spirit of improving the Court service for all while at the same time channelling judicial resources as efficiently as possible, a checklist has been devised by His Honour Judge McCahill to assist users of the Chancery Court. A similar checklist is likely to be introduced into the Mercantile Court in the near future. The objective is that emergency applications may be accommodated at short notice around the existing Court list with minimum disruption to the smooth functioning of that Court. The checklist has been introduced with the objective of addressing issues experienced with the accuracy of information supplied to the Court at the time of requesting a specific appointment for an emergency injunction. In the past in some cases, a specific hearing time has been sought when the information available is extremely limited or non existent, resulting in alterations to the time and date of the injunction hearing with inevitable knock-on effects for the remainder of the Court list. The new checklist, entitled "The Emergency Injunctions Checklist", is designed to help practitioners and the Chancery Court staff more accurately to predict the readiness for and timing of hearing of emergency injunctions and indeed, for that matter, other urgent applications. As has been the practice, the Judge will make time available each day for urgent applications which for some reason cannot be accommodated in the Friday Applications list. Any inquiries about emergency injunctions in either Court ought to be directed to the Specialist Court Listing Manager, Andy O'Brien. There is also an out of hours pager service operated by the Bristol Courts covering all disciplines and through which both Chancery and Mercantile Judges are contactable. The pager number for Bristol, Gloucester and Somerset is 07795 302944; for Devon and Cornwall the number is 07795 800 ; for Hampshire and Dorset the number is 07795 801 293; For Wiltshire, the number is 07795 801293.

The Checklist, in its current format, is set out opposite. Once again, practitioner feedback is always welcome.

3. Guildhall Chambers Commercial Team Morning Seminar 16th October 2008

Practitioners might like to know that the Guildhall Chambers Commercial Team is hosting a morning seminar on Urgent Injunction law and practice to include Freezing Orders and Search Orders. The seminar is due to take place on Thursday

16th October 2008 between 9.15 and 1pm at The Watershed, Harbourside, Bristol. The seminar will include sessions presented by Jackie Sheftali, Head of Third Party Legal Orders, Royal Bank of Scotland, Ben Daniels, Partner Beachcroft LLP, Philip May, Partner TLT Solicitors and Clare Robinson, Partner Osborne Clarke Solicitors as well as members of the Guildhall Chambers Commercial Team. The seminar will be chaired by His Honour Judge Havelock-Allan QC. The seminar is accredited with 3.5 CPD points. The fee is £125 to include a comprehensive delegate pack, lunch and refreshments. We suggest that you book it in your diary now. Detailed information will be forwarded in August 2008. If you would like any further information or to register an interest, please email seminars@guildhallchambers.co.uk.

Martha Maher
Guildhall Chambers

Checklist for Emergency Injunctions

Question	Answer
What is the injunction concerning?	
What papers have been prepared?	
When can the judge expect the papers?	
How will they be received ie by email or fax?	
How many pages are there?	
How long should they take to read?	
What is the time estimate (allowing for judicial pre-reading and judgement)?	
How long for submissions?	
Is it exparte or inter partes?	
Are there existing proceedings? If so, case number?	
Will you issue in the County Court or the High Court?	
What time will you be ready to be heard?	
Any other information?	

Commercial law update

Agency commission claims and the doctrine of effective cause

Introduction

Agency commission claims were often decided in the past by answering the question, were the services provided an effective cause of the transaction? This has become referred to as the "effective cause doctrine". In particular, in estate agency cases the courts will readily imply a term into the contract, or construe the contract, so that the agent's commission is not payable unless the services provided by the agent are an effective cause of the house sale. Such a term will not be implied, however, if it is inconsistent with the express terms of the contract. Lawyers acting for agents have now become more sophisticated in their drafting of agency commission contracts and in particular have designed the contracts so that their clients need not prove that they were the effective cause of the transaction. Those contracts have been tested by the courts in two recent cases in the Court of Appeal.

The County Homesearch Co (Thames & Chilterns) Ltd v David Cowham

[2008] EWCA Civ 26

In *County Homesearch v Cowham* the claimant company issued proceedings against the defendant for unpaid commission in relation to home finding services provided by the claimant to the defendant prior to the purchase by the defendant of a £2.3m residential property. Clause 3 of the claimant's standard terms and conditions provided that *"...For the purposes of our Agreement, we shall be deemed to have introduced a property to you, if you have either received the particulars of a property from ourselves directly or indirectly, or from any of the firms of estate agents with whom we have regular contact, or through agents or individuals whom you have instructed us to negotiate with on your behalf..."*. The claimant had provided the defendant with details of Hunter's Moon along with other properties, but that information was not acted on by the defendant at the time. The defendant gave evidence to the effect that Hunter's Moon was only pursued by the defendant when a third party surveyor suggested it as a possibility for the defendant and introduced the sellers to the defendant. That evidence was accepted by the Judge at first instance, Mr Recorder Hollander QC.

The central question, therefore, was whether or not there was any scope for an implied term that the claimant should only be entitled to its fees if it was an effective cause of the purchase. The Recorder concluded that there was no need for such an implied term on the facts of the case, which was not the usual seller/agency contract, but was a home finders contract which only contemplated the instruction of one agent and where that agent was required to take specific steps to discharge its contractual obligations. He concluded that any implied term based on the effective cause doctrine would be inconsistent with clause 3 of the standard terms and conditions, which provided for a deemed introduction of the property, whether or not such there was in fact an introduction.

In the course of his judgment the Recorder set out a useful statement of the applicable principles:

1. The starting point must always be a consideration of the contract in question. The effective cause doctrine must be subject to the express terms;
2. The express terms may be inconsistent with the implication of the effective cause doctrine, or may render its implication unnecessary;
3. The court will start from the principle that a vendor who may instruct more than one agent is unlikely to intend to have to pay more than one and the contract will be construed to avoid such a result. The effective cause doctrine assists in preventing such a result;
4. The usual contract between vendor and selling agent does not oblige the agent to take any specific steps to carry out any specific work. Such a scenario militates in favour of the effective cause doctrine where commission is linked with cause;
5. The doctrine is less likely to apply and the implication less likely to be necessary, where the agency contract is outside the norm, either because there is not a conventional seller/agent contract, or because the wording of the contract as to the circumstances when payment is due renders such doctrine unnecessary.

A notable omission from the arguments raised on behalf of Mr Cowham at first instance was the absence of any reliance on other parts of the 1999 Regulations which would have enabled him to argue that the term relied on was unfair.

Mr Cowham was not satisfied with that decision and appealed the decision. The Court of Appeal dismissed the appeal. Longmore LJ gave the leading judgment and took the opportunity to analyse the rationale for the effective cause doctrine. He concluded that the main rationale was the need for the client to avoid the risk of having to pay two commissions. Whilst sellers might often engage more than one agent, buyers were much less likely to do so, especially on the terms of the present contract, which included a requirement for an initial down payment. The Court also upheld the Recorder's decision that an implied term incorporating the effective cause doctrine would be inconsistent with the express terms of the contract and the concept of the "deemed" introduction. Finally, the Court also dismissed a novel argument based on regulation 7(2) of the Unfair Terms in Consumer Contract Regulations 1999. That regulation provides that where there is doubt as to the meaning of a written term, the meaning most favourable to the consumer is to be preferred (and as such is distinct from the "unfairness" provisions of the 1999 Regulations). Longmore LJ held that this only applied where there was doubt about the meaning of a written term and not where it was arguable that a term should be implied.

The House of Lords refused Mr Cowham permission to appeal.

Foxtons v Pelkey Bicknell & Anr

[2008] EWCA Civ 419

The *County Homesearch v Cowham* decision was swiftly followed by the decision of the Court of Appeal in *Foxtons*. Interestingly, Lord Neuberger sat in the Court of Appeal for this case and gave the leading judgment (perhaps the House of Lords is insufficiently taxing for him). In *Foxtons* the agents were selling agents and were seeking to recover commission in accordance with the standard wording contained in the Schedule to the 1991 Estate Agents (Provision of Information) Regulations (made pursuant to section 18 of the Estate Agents Act 1979) in relation to sole agency rights. Before turning to consider *Foxtons* further it is worth briefly considering the earlier decision in *Dashwood v Fleurets Ltd* [2007] EWHC 1610 (QB). In *Dashwood v Fleurets* the standard wording for sole selling rights fell for consideration. The material parts of the Schedule to the 1991 Regulations state as follows in relation to sole selling rights:

> "You will be liable to pay remuneration to us, in addition to any other costs or charges agreed, in each of the following circumstances – if [unconditional contracts for the sale of the property are exchanged] in the period during which we have sole selling rights, even if the purchaser was not found by us but by another agent or by any other person, including yourself;
>
> if [unconditional contracts for the sale of the property are exchanged] after the expiry of the period during which we have sole selling rights but to a purchaser who was introduced to you during that period or with whom we had negotiations about the property during that period."

Nelson J, hearing an appeal, concluded that the wording meant there was no room for implying the "effective cause doctrine" into the contract. All the estate agent needed to show was that he had introduced a person who turned out eventually to be the purchaser during the currency of the agreement, even if that person became the purchaser by another route unconnected with the original agent.

One might have thought that the case of *Dashwood v Fleurets Ltd* would be the first and last word on the issue in this case, it being consistent with the interpretation favoured by leading practitioner's texts (such as *Bowstead & Reynolds*). However in *Foxtons* the meaning of the standard wording used for "sole agency" agreements in the 1991 Regulations fell for consideration (the difference being, in sole agency cases is that the seller is not precluded from selling the property themselves). That wording was in the following terms:

> "You will be liable to pay remuneration to us, in addition to any other costs or charges agreed, if at any time [unconditional contracts for the sale of the property are exchanged]
>
> with a purchaser introduced by us during the period of our sole agency or with whom we had negotiations about the property during that period; or
>
> with a purchaser introduced by another agent during that period."

As such the material wording is very similar (though not identical) to that in the sole selling rights case, yet Lord Neuberger, without apparently considering *Dashwood v Fleurets Ltd*, concluded that the words "with a purchaser introduced by us" should be interpreted to mean "a purchaser who becomes a purchaser as a result of our introduction", in effect re-introducing the doctrine of effective cause, rather than "a person introduced by us who at some time in the future becomes a purchaser", which requires no such introduction. The correctness of the decision in *Dashwood v Fleurets Ltd* must now be in issue.

Lord Neuberger set out a useful list of the general principles to apply in paragraph 20 of his judgment, in the following terms:

1. The effective cause doctrine, or term, is very readily implied, especially in a residential consumer context, unless the provisions of the particular contract or the facts of the particular case negative it;
2. The main reason for implying the term is to minimise the risk of the consumer having to pay two commissions;
3. It remains unclear as to whether the test is "the" or "an" effective cause;
4. Whether an agent was the effective cause very much turns on the facts of each case;
5. While two commissions are to be avoided, there will be some cases where the contract terms and the facts compel such a result;
6. Where the term is to be implied, the burden of proving effective cause rests with the agent.

Comment

Where does this leave us? The efficacy of many agency agreements, and in particular those estate agent sale contracts which rely on the standard wording for sole selling or sole agency contracts in the 1991 Regulations, or wording based on the same, appears to have been significantly eroded by the decision in *Foxtons*. However where the agency contract is not a standard estate agency contract, where the rational for the effective cause doctrine is absent or where such doctrine is simply inconsistent with the express drafting, it remains possible to recover commission without having to prove that the agent was the effective cause of the transaction on which the commission fee is based. It is time to dust down the standard terms and conditions and consider them again in the light of the decisions in *County Homesearch* and *Foxtons*.

Hugh Sims, Guildhall Chambers
Tony Cockayne, Michelmores

Hugh and Tony successfully represented County Homesearch in *County Homesearch v Cowham* at first instance and in the Court of Appeal.

Banking update

Bank charges – subject to fairness regime under 1999 Regulations

The Office of Fair Trading ("OFT") sought a declaration that bank charges imposed by the eight defendant banks were subject to an assessment of fairness under the Unfair Terms in Consumer Contracts Regulations 1999 ("the 1999 Regulations"). The particular charges were those levied on customers by the banks where they were, in effect, being requested to make a payment for which the customers did not hold the necessary funds or for which there was no pre-arranged overdraft facility. The banks argued that these charges were excluded from assessment, relying on regulation 6(2) which provides that insofar as it is in plain intelligible language, the assessment of fairness of a term shall not relate to the adequacy of the price and remuneration of services or goods supplied.

The court considered whether each of the banks' terms were 'sufficiently clear to enable the typical consumer to have a proper understanding of them for sensible and practical purposes'. It concluded that the terms of four banks were in plain intelligible language whilst the terms of the other four were generally in plain intelligible language save for specific minor aspects. As the court went on to hold that the terms did not fall within the protection of regulation 6(2), it did not go on to rule on the practical effect of the specific aspects of non-compliance that had been identified.

In respect of the banks' counterclaims for a declaration that the charges were not penalty clauses and therefore unenforceable at common law, the court considered that none of the relevant provisions related to a contractual obligation on the part of the customer. The terms merely advised customers that no overdraft facility was available and that further borrowing was not permitted. It was held that these clauses did not state that, should an account become overdrawn, the customer would be in breach of contract any more than the bank would be in breach of contract if it allowed the account to become overdrawn. Accordingly, the charges were not imposed following a breach of contract and could not be considered penalty clauses. The court rejected the banks' ancillary argument that the 1999 Regulations replaced the common law rules on penalty clauses and held that the scheme under the 1999 Regulations was not intended to circumscribe consumer's common law rights.

With regard to the central argument on the applicability of regulation 6(2), the banks argued that the charges constituted the 'price or remuneration' of the services that they provided, whether those services were viewed as a package for the whole account or merely the specific service of providing borrowing where no facility had been arranged. The court held that although the banks did supply "services" within the meaning of regulation 6(2), the charges could not be considered the price or remuneration for that service. It was noted that there was no equivalent cost for a pre-arranged overdraft facility.

The court also held that the effect of regulation 6(2) would be that the term would be excluded from assessment of the *adequacy* of the price/remuneration and not a complete exclusion from assessment of fairness under the 1999 Regulations. Permission to appeal has been granted to the banks. The OFT has not sought permission to appeal. The hearing to consider the unfairness of the terms in question will take place later this year. *Office of Fair Trading v Abbey National Plc & 7 Ors* [2008] EWHC 875 (Comm).

Possession proceedings - estoppel

The borrower successfully appealed a possession order made in favour of the bank on the basis that the bank was estopped from bringing an action by an assurance given by one of its employees. The borrower argued that the bank's employee had assured him that if he brought his account below its overdraft limit within a three month period, the bank would not bring any possession proceedings against him within that period and would review his account at the end of that period. The judge at first instance found on the balance of probabilities that the alleged conversation did take place with one of the bank's employees but that the bank had retained all of its legal rights and was not bound by such an assurance. On appeal, the Court of Appeal found that on the judge's finding of fact that the conversation had taken place, the bank was estopped from bringing proceedings within the three month period. The borrower had changed his position by borrowing money from friends and family to ensure he kept below the overdraft limit and accordingly the bank was estopped from reneging on that promise. *Royal Bank of Scotland Plc v Luwum* [2008] EWCA Civ 648.

Business loans - penalty clauses

A clause in a business loan that obliged the borrower on termination of the agreement to pay both the principal amount of the unpaid loan amount as well as interest over the entire outstanding period (up to 20 years) was a penalty clause on the basis that the borrower could be required to pay 20 years of interest even if he defaulted in the first week. The clause was also found to render the agreement an extortionate credit bargain for the purposes of s138 Consumer Credit Act 1974. However, even though the court had found that the claimant's demand was over £800,000 in excess of what it was entitled to, as the borrower had not put forward any offer or made any payments of a lesser sum than that demanded, the

demand itself remained valid and the claimant was entitled to judgment for the lesser sum. *County Leasing v East* [2007] EWHC 2907 (QB).

Limitation period - accessories to breach of trust

The claimant company alleged that the defendant had facilitated the misapplication of moneys from the claimant's assets in dishonest breach of his fiduciary duties. The claimant company had been purchased by a holding company run by two directors, of whom the defendant was a business associate. The defendant's bank account was used to receive and disburse the claimant's corporate funds and he also acted as trustee of a secret trust set up by the director of the holding company and into which substantial sums of the claimant's money passed. The claimant had already brought a successful fraud action against the directors but the defendant contended that, unlike the claimant's claim against the directors, the claim against the non-director was statute-barred. It was held that the defendant was a de facto director of the holding company. As such he owed the claimant fiduciary duties and accordingly his limitation defence failed as s21(1) of the Limitation Act 1980 applied. Evans-Lombe J went on to state that even if he had not found on the facts that the defendant was a de facto director, the disapplication of time limits for fraudulent breach of trust extended to accessories to a breach of trust as if they were fiduciaries or trustees, applying *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216. *Statek Corporation v Alford* [2008] EWHC 32.

Guarantee or demand bond

Mr and Mrs Van Der Merwe (V) appealed against an order for summary judgment made against them ([2007] EWHC 2631 (Ch)) in respect of a claim brought by the respondent IIG Capital LLC (G). G made a loan agreement with a company (H). V, the directors of H, executed deeds of guarantee in favour of G. Clause 4.2 of the guarantee stated "A certificate in writing signed by [officers of G] ... stating the amount at any particular time due and payable by the Guarantor ... shall, save for manifest error, be conclusive and binding on the Guarantor for the purposes hereof." G demanded from H the sums due under the agreement. Neither H nor V paid the claim. V sought to rely on defences available to H.

The question was whether the guarantees were performance bonds (payable on presentation of a demand) in which case no defences could be raised by the guarantor, or simply contracts of guarantee permitting V to rely upon defences open to H. Where the party undertaking liability is not a bank there is a strong presumption against a guarantee being a demand bond, but the documents must be looked at as a whole: *Marubeni Hong Kong & South China Ltd v Mongolia* [2005] 1 WLR. 2497 applied. Here clause 4.2 of the guarantee sealed the matter and the presumption was rebutted: apart from manifest error, V were bound to pay on demand as primary obligor. The guarantee was therefore in the nature of a performance bond and V could not rely on defences available to H to dispute liability. *Van Der Merwe v IIG Capital LLC* [2008] EWCA Civ 542

Consumer Credit Act 1974 – bailment and hire

TRM was in the business of leasing photocopying machines from a finance company and installing them in sub-post offices and shops for retailers on the terms of a location agreement for an initial period of 36 or 60 months. As part of the agreement the retailers received a commission linked to the number of copies made by customers. The Retailers paid no rent for the machines. Customers paid a set fee per copy. Lanwall supplied copiers to finance companies, which leased them to the retailers; it then serviced and maintained the copiers. TRM discovered that at a number of its outlets Lanwall was removing its machines and enticing retailers to enter into its lease hire agreements.

TRM's case was that Lanwall's actions constituted the tort of inducing the retailers to breach their Location Agreements with TRM. It was Lanwell's case that the agreement, in the case of a retailer who was an individual, was a regulated consumer hire agreement for the purposes of s15 CCA 1974. Lanwall claimed that so long as a period of statutory notice was served the agreement could be ended without TRM obtaining rights to liquidated damages (s101 and s173 of the CCA). It followed that a major part of Lanwall's defence was that the agreement entered into by TRM and individual retailers were regulated agreements. At a trial of this preliminary issue Flaux J decided that they were not (see [2007] EWHC 1738 (QB)).

Lanwall's appeal was dismissed. The court held that in assessing the nature of the agreement it is necessary to examine the commercial purpose of the agreement and ask the question, "Is this a contract of hire?" The court found in this case that the absence of any financial obligation on the retailer, other than the provision of shop space, and the fact that only the user of the machine paid for the machine, meant that this was not a hire agreement. "In any ordinary and commercial sense of the word, the Retailer is not hiring the machine; he is providing space in the shop for the owner of the machine to install the machine from which they will jointly hope to make money." (Thomas LJ at para [45]). Although there was a bailment, it was not a bailment by way of hire and therefore not a hire agreement within s15 CCA. *TRM Copy Centres (UK) Ltd & Ors v Lanwall Services Ltd* [2008] EWCA Civ 382

Adverse Possession – Limitation

The appellant bank (N) appealed against a decision ((2007) EWHC 494 (Ch)) determining that a mortgage in its favour over a property had been extinguished by the operation of the Limitation Act 1980.

A married couple (C) granted a mortgage in 1989 by way of all monies charge over their registered leasehold interest in their domestic property to secure the husband's business liabilities with N. Some payments were made but the husband was then made bankrupt. N informed the husband that he remained liable to it on his account that was secured by the mortgage and that it would accept monthly instalments over a 10-year period, failing which N would continue to await an eventual sale of the property to repay his liabilities. A number of years passed during which there was intermittent correspondence

between N and the husband in which N made formal demands for payment. No further payments were paid and no legal proceedings were issued by N to enforce its rights. Legal proceedings were commenced by the husband's trustee in bankruptcy (T). T sought a declaration that, given that the last payment to N had been made over 12 years previously, N's legal charge on the property had been extinguished. The trial judge held that C had been in adverse possession of the property and that section 15 and section17 of the 1980 Act had extinguished the mortgage in favour of N.

N contended that C's possession of the property had only been with its express or implied consent so that their possession could not be treated as adverse possession and that N's right of action for possession had not accrued 12 years before T's action commenced. The Court of Appeal held that the requirement of adverse possession had to be applied in accordance with *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419. Thus, adverse possession referred to the capacity of a person in possession of land and not to the nature of that person's possession. Possession had to be given its ordinary meaning. It followed that C were prima facie in adverse possession of the property at all relevant times and were persons in whose favour time could run under the 1980 Act. There was no good reason for treating C as being in anything other than ordinary possession of the property. There was no evidence that C had applied for or been given express permission to remain in possession after the charge was executed or after default. N had simply failed to enforce its right of action. C had been in adverse possession for a period of over 12 years and the judge was right to grant the declaration that N's legal charge was extinguished by reason of the operation of section15 of the 1980 Act. *National Westminster Bank Plc v Ashe* [2008] EWCA Civ 55

Mortgage Indemnity Guarantee – no duty to account on the lender

The mortgagors appealed against an order for possession. They argued that the mortgagee (Leeds) was obliged to account to them in respect of a mortgage indemnity guarantee that they had taken out at the commencement of the mortgage. They also asserted that they had applied for a repayment mortgage but had been provided with an endowment mortgage and that Leeds had been wrong not to effect the surrender of the second of two endowment policies. They maintained that had it done so, there would have been no arrears at the date when the possession proceedings were issued. The judge at first instance had made findings in favour of Leeds on all three issues.

The Court of Appeal dismissed the appeal saying that the judge had been right to make the possession order, applying the principle that a person who had the benefit of a mortgage guarantee was not obliged to account to the mortgagor. *Woolwich Building Society v Brown* [1996] C.L.C. 625 QBD (Comm) and *Bristol and West Building Society v May May & Merrimans (No.2)* [1998] 1 W.L.R. 336 Ch D applied. The court also found that the judge had been entitled to conclude that the Banfields had agreed to take out an endowment mortgage and that at the date when the proceedings were issued, the arrears would have justified the initiation of proceedings. *Banfield v Leeds Building Society* [2007] EWCA Civ 1369

Henry Stevens and Daisy Brown
Guildhall Chambers

Alternative dispute resolution update unsuccessful mediations: the fallout

Mediation is one of the most effective tools, if not the most effective, to emerge from the Woolf reforms of the late 1990s. Good mediators are like gold dust and are indispensable to the real overriding objective which, for every commercial law practitioner, is to obtain a favourable outcome for the client, *as cheaply and quickly as possible*. It is they who are the unsung heroes of the litigation process.

Privilege

It is essential to the effectiveness of the mediation process that the process is protected by the without prejudice privilege. This is why, when the parties sign up to the process they expressly contract that the communications will not be used in any current or subsequent litigation between the parties or indeed between related parties. Such privilege was upheld by Lloyd J in *Instance and Instance v Denny Brothers Printing Limited* [2000] FSR 869 as against a related party following his analysis of previous cases. He concluded that to hold otherwise would be to subvert both the public policy which underpinned the protection of the without prejudice communication and the expectation of the parties.

Where a mediation is successful to settle a case, it is unlikely to trouble the Court again, although one should note *Nicholson v Phillipa Knox and Knox Ukiwa* [2008] EWHC 1222 which was an unsuccessful attempt by a client to sue his solicitor for allegedly failing to keep client informed of terms of mediated settlement, alleging that he had not known the settlement was inclusive of interest.

Where the mediation is unsuccessful at settling a dispute such that litigation or arbitration of the dispute becomes inevitable, the question can sometimes arise as to the ramifications of one party having acted unreasonably in the mediation such that a settlement was lost, or worse still, where one party actively abused the privilege of mediation itself such that the other party wants to raise his mediation conduct in the litigation as being a substantive issue in its own right or for the purposes of attacking credibility.

To set aside the privilege an aggrieved party would have to demonstrate either that the privilege was waived bilaterally that is by both sides in the ensuing litigation or that there was an abuse of privilege. References to the contents of the mediation made in the course of pleadings on sides and/or witness statements before the Court, and which have not been deleted by way of later amendment, will prove waiver of privilege. Indeed in *Brunel University v Webster* [2007] EWCA Civ 482 the Court of Appeal held that a successful application to amend pleadings to delete reference to the without prejudice material would be effective to withdraw the waiver. However it said that the grant of such an amendment would be discretionary. The time at which the application to amend was made would be highly relevant. If it was made soon after close of pleadings and/or if the without prejudice material was peripheral to the case, then the amendment might have better chances of success than where it was made late in the day or where the amendment was to have a radical effect on the case. But if, as in that case, an application to amend had not been made by the time of the Court hearing ,and where the application to withdraw the without prejudice material would have had a radical effect on the proceedings the Court would not hesitate to say that it was then far too late to retrieve the position and the waiver would have to stand.

The contents of a mediation would also lose its protection from admissibility where there is evidence of "unambiguous impropriety", that is such impropriety as to lead one to the conclusion that the without prejudice privilege itself is abused. That such an occasion had arisen in relation to without prejudice negotiations where an admission was made inconsistently with previous witness statements so that the party was shown to have lied in those statements, was accepted by Patten J at first instance but rejected on appeal by the Court of Appeal in *Savings and Investment Bank v Fincken* [2004] 1 WLR 667. The Court of Appeal said that the philosophy behind the "unambiguous impropriety" exception to the privileged nature of without prejudice discussions ran contrary to treating an admission as an impropriety unless the privilege itself was abused. The public interest in the privilege rule was great and was not to be sacrificed save in truly exceptional circumstances. A mere inconsistency between an admission and a pleaded case or stated position with the possibility that such a case, if persisted, might lead to perjury, should not result in the admitting party losing the protection of privilege. It is of the essence of the without prejudice rule to encourage parties to talk frankly to one another with the objective of reaching a settlement, and the public interest in that rule is very great and not to be sacrificed except in truly exceptional and needy circumstances. The Court gave examples such as the use of the privileged occasion to make a threat in the nature of blackmail, if this was unequivocally proved; or using the occasion as a "cloak for perjury" in other words a blackmailing threat of perjury.

The writer has had occasion recently to apply, in the context of a professional partnership arbitration, to lift the mediation privilege where it was alleged that one partner had used the mediation process to try to bounce his fellow partner out of the partnership under threat of reporting that partner to the relevant professional body if demands for resignation had not been acceded to. The conduct became the subject matter of the ensuing pleadings and witness statements on both sides although the Defendant sought at the same time to reserve mediation privilege. No application to amend had been made

by the date of the trial and instead the Defendant sought to rely on without prejudice privilege. Both waiver and abuse of privileged occasion were argued. In the event the Arbitrator decided to lift the privilege on the grounds of bilateral waiver, which of course is and was in that case easier to prove.

Costs

Where a party agrees to mediation but then takes an unreasonable position in the mediation, it has recently been held by Mr Justice Jack (formerly Judge Jack of the Bristol Mercantile Court) that he is in the same position as a party who unreasonably refuses to mediate. That was something the Court could and would take account of in its costs order. See *James Carleton, Seventh Earl of Malmesbury v Strutt and Parker* [2008] EWHC 424 (QB). In that case the Claimant had won on liability and had recovered substantial damages but the Defendant had succeeded in cutting down the sum awarded to a fraction of what the Claimant had been asking for. The Court decided in the circumstances that the Claimants should not have the whole of their costs and made significant percentage deductions both from liability costs and damages costs. At paragraph 48 of his judgement his Lordship referred to the leading Court of Appeal case on the effect of refusals to agree to mediation namely *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 and to his own previous decision in *Hickman v Blake Lapthorn* [2006] EWHC 12 (QB) and to the principles summarised by him in *Hickman* at para [21] of that judgment (cited at para [48] *Carleton*). It is to be inferred that those principles are also applicable (with adjustment) to cases of unreasonable conduct in mediations too. The principles identified by his Lordship are as follows:

> "(a) A party cannot be ordered to submit to mediation as that would be contrary to Article 6 of the European Convention on Human Rights....
>
> (b) The burden is on the unsuccessful party to show why the general rule of costs following the event should not apply, and it must be shown that the successful party acted unreasonably in refusing to agree to mediation ...It follows that , where that is shown, the Court may make an order for costs which reflects that refusal.
>
> (c) A party's reasonable belief that he has a strong case is relevant to the reasonableness of his refusal, for otherwise the fear of costs sanctions may be used to extract unmerited settlements...
>
> (d) Where a case is evenly balanced-which is how I understand the judgement's reference to border-line cases, a party's belief that he would win should be given little or no weight in considering whether a refusal was reasonable: but his belief must not be unreasonable...
>
> (e) The cost of mediation is a relevant factor in considering the reasonableness of a refusal to agree to mediation, but not determinative..
>
> (f) Whether the mediation had a reasonable prospect of success is relevant to the reasonableness of a refusal to agree to mediation , but not determinative...
>
> (g) In considering whether the refusal to agree to mediation was unreasonable, it is for the unsuccessful party to show that there was a reasonable prospect that the mediation would have been successful...
>
> (h) Where a party refuses to take part in mediation despite encouragement from the court to do so, that is a factor to be taken into account in deciding whether the refusal was unreasonable ..."

In *Lobster Group Limited v Graphic Equipment Limited and Close Asset Finance Limited* [2008] EWHC 413 (QB)it was held that where a lengthy period of mediation had taken place in excess of two years pre-action and had failed to settle the case, security for costs would not be awarded against a Respondent company in liquidation in respect of the pre-action period (which costs included the costs of an unsuccessful mediation). This was for a number of reasons. First, where extensive costs had been racked up in relation to a pre-action period there was a risk that the subsequent attempt to obtain security was penal in nature. Second, under the terms of the mediation itself, the parties had agreed to bear their own costs and it would be a breach of that agreement if one party now sought to recover the costs of the mediation from the other. There was no attempt to stipulate what might happen in relation to wasted costs in the event that the mediation was unsuccessful.

The judge went on to say at para 16 of his judgement that unlike the costs incurred in a pre-action protocol, the costs in a separate pre-action mediation which occurred two and a half years previously were not in his view describable as "costs of and incidental to the proceedings". They were costs incurred in pursuing a valid method of alternative dispute resolution which was privileged and outside the pre-action protocol. They were not recoverable under section 51 of the Supreme Court Act 1981 and the case of *McGlinn v Waltham Contractors* [2005] 3 All ER 1126 was distinguishable. That case had held that costs incurred in complying with pre-action protocol were capable of being costs "incidental" to any proceedings subsequently commenced if the protocol procedure failed to lead to early settlement. They were thus recoverable under section 51 of the SCA 1981. But even then, the Court in *Lobster Group* took the view that mediation costs would only be recoverable if, in some way, the parties had agreed, despite their agreement that the costs of the mediation would be shared, that "those specific costs could be the subject of any subsequent application". If they had not then there was only scope to argue for example that the cost of material evidence subsequently deployed in the proceedings which costs had been incurred in the mediation would comprise "materials ultimately proving of use and service in the action" . , For example the cost of an expert's report which was used in the later proceedings would be recoverable as costs in the action itself (see paragraph [18] of the *Lobster Group* judgment). Two of the lessons to be learned from this case to increase costs protection for clients are: (a) make sure you have a fall-back arrangement in place regarding costs of a mediation in the event that it is unsuccessful and (b) make sure that your mediation is conducted within the ambit of the pre-action protocol.

Martha Maher
Guildhall Chambers

Guildhall Chambers Commercial Seminar

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- **Ben Daniels**, Partner Beachcroft LLP, specialist in urgent injunction work
- **Phil May**, Partner TLT, on supervising solicitors and
- **Clare Robinson**, Commercial Litigation Partner, Osborne Clarke

and will be chaired by **His Honour Judge Havelock-Allan QC**, the Bristol Mercantile Court Judge

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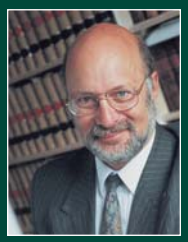

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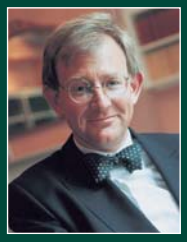

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