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From the editor

Welcome to the latest edition of *Corporate and commercial disputes review*.

A major theme of this edition is the extent to which the actions of companies can give rise to liability in multiple jurisdictions. We consider the latest decision of the Court of Appeal on the extent to which a company can be liable for the actions of its overseas subsidiary and look at the extent to which US statutes apply extraterritorially.

We also examine the first reported decision since the Recast Brussels Regulation took effect which looks at whether EU member states lack the power to grant an anti-suit injunction restraining court proceedings commenced in another EU member state.

Separately, we consider a recent Supreme Court's decision on the measure of damages for breach of a business sale agreement and the High Court's decision on whether an entire agreement clause can exclude liability for misrepresentation. We also review the Court of Appeal's timely reminder on the issue of shareholder claims and the "no reflective loss" rule.

Turning away from contract law, we examine the heavily anticipated Court of Appeal decision on litigation privilege and how this will impact on investigations. We also consider the new frontier of litigation arising as a result of cyber attacks.

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New guidance on parent company liability for the actions of foreign subsidiaries

The Court of Appeal has provided further guidance on when a parent company of an international group will be liable for the actions of its foreign subsidiaries.

On July 4, 2018, the Court of Appeal handed down its judgment in *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532, upholding the High Court's decision that there is no good arguable claim that Unilever owed a duty of care to individuals affected by violence at a tea plantation operated by its Kenyan subsidiary, UTKL. As a result there is no anchor defendant in England.

This is the third in a line of recent Court of Appeal decisions in which the Court has ruled on whether foreign nationals can bring tort proceedings in England against an English parent company and its foreign subsidiary in respect of events occurring in the foreign country where that subsidiary carries on its operations.

The Supreme Court granted permission to appeal in *Vedanta* earlier this year and is currently considering an application for permission to appeal in *Okpabi*.

Background

In the present case individuals based in Kenya brought a claim in England against Unilever Plc (Unilever), the England-incorporated parent company of an international group, and its Kenya-incorporated subsidiary, Unilever Tea Kenya Limited (UTKL). The claimants are employees and former employees of UTKL and residents on a tea plantation run by UTKL in Kenya. The claimants alleged that both Unilever and UTKL owed a duty of care to take effective steps to protect them from the inter-tribal violence which occurred during the 2007 Kenyan presidential election when marauding mobs came onto the tea plantation operated by UTKL (on which they worked and lived) and caused them serious harm.

In assessing whether there was a good arguable claim that Unilever owed the claimants a duty of care (such as to allow jurisdiction to hear the case in the UK), the Court considered the three-part test in *Caparo Industries Plc v Dickman* [1990] 2 AC 605: (i) proximity; (ii) foreseeability; and (iii) reasonableness.

On February 27, 2017, Laing J held that

- The claimants did not have a good arguable claim that Unilever or UTKL owed them a duty of care because the damage suffered by the claimants was not foreseeable by either of the defendants.
- In relation to Unilever, it would not be fair, just and reasonable to impose a duty of care, since the duty alleged required, in effect, Unilever to act as a surrogate police force to maintain law and order, whereas Unilever had been entitled to rely on the Kenyan authorities to do that.
- There was a sufficient degree of connection between the activities of (and omissions to act by) Unilever, as the ultimate holding company of UTKL, and the damage suffered by the claimants to create proximity in line with the guidance in *Chandler v Cape Plc* [2012] EWCA Civ 525.
- It was reasonably arguable for the appellants that limitation defences would fail.
- If, contrary to her view, there were viable claims against both Unilever and UTKL, then England would be the proper forum to hear those claims.

The Court of Appeal has upheld the High Court's judgment, rejecting the claimants' appeal, albeit on different grounds. The Court of Appeal concluded that, applying the test in *Chandler*, there is no proximity between Unilever and the claimants in respect of the damage suffered by them. As a result of this, there was no anchor defendant for proceedings in England. The leading judgment in this case was given by Sales LJ who also heard the *Okpabi* case.

Proximity between the claimants and Unilever

Despite the fact that Unilever had control of UTKL (the company which operated the tea plantation on which the harm to the claimants unfolded) the Court of Appeal held that there is no proximity between the claimants and Unilever on the basis that UTKL

- Prepared its own "Crisis and Emergency Management" policy, which specifically accounted for this sort of situation, with no "direction or ... specific or detailed advice from Unilever".
- Conducted its own crisis management training programme with no input from Unilever.
- Produced its accounts as a separate company, which set out the distinct governance structures which applied within UTKL itself.
- Carried out a different business to Unilever.
- Provided a positive assurance to Unilever's head office confirming that "business risks have been reviewed, relevant actions have been included in management plans etc.".

Comparison with Vedanta and Shell

As mentioned above, this decision is the third in a line of recent Court of Appeal decisions addressing the extent of parent company liability for the actions of its foreign subsidiaries.

In October 2017, the Court of Appeal held that 1,826 Zambian villagers could bring a claim in the English courts against UK-based Vedanta Resources Plc (Vedanta) and its Zambian subsidiary Konkola Copper Mines Plc.

Separately, in February 2018, the majority of the Court of Appeal (Sales LJ dissenting) held in favour of English-incorporated Royal Dutch Shell Plc (RDS) and its Nigerian operating subsidiary, Shell Petroleum Development Company of Nigeria Ltd, refusing residents of the Niger Delta region the ability to bring a claim in the

UK on the basis that the claimants had failed to put forward a good arguable case that RDS owed them a duty of care.

In each of the three cases, the Court of Appeal referred to two types of case where the test for duty of care might be made out in respect of a parent company

(i) Where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of (or jointly with) the subsidiary's own management; or

(ii) Where the parent has given relevant advice to the subsidiary about how it should manage a particular risk.

In *Vedanta*, the Court concluded that (i) had been successfully made out by the claimants on the basis that Vedanta had: published a sustainability report which emphasised how the Board of the parent company had oversight over its subsidiaries; entered into a management and shareholders agreement under which it was obligated to provide various services to KCM, including employee training; provided health, safety and environmental training across its group companies; provided financial support to KCM; released various public statements emphasising its commitment to address environmental risks and technical shortcomings in KCM's mining infrastructure; and exercised control over KCM, as evidenced by a former employee.

In *Okpabi* the Court of Appeal made the opposite conclusion on the evidence. The Court emphasised that the issuance of group-wide mandatory policies by a parent company is not in itself sufficient grounds to establish proximity. It is necessary to show that the parent company had assumed "complete" or "joint control" over the relevant operations, for example by enforcing the mandatory policies.

In the present case, the claimants conceded that (i) (which had been successfully argued in *Vedanta*) was not applicable and the Court of Appeal found that the claimants were "nowhere near being able to show that they have a good arguable claim" against Unilever on the basis of (ii). While Sales LJ's dissenting opinion in *Okpabi* raises questions about the degree of control necessary to establish proximity, the facts and evidence in *Unilever* seem comparatively unambiguous. UTKL provided enough evidence to convince the Court that it did not rely on Unilever for direction in the design or implementation of its conflict risk management policies.

Lessons

The current position is that courts will be reluctant to conclude that there is a good arguable case that a UK parent company owes a duty of care to individuals affected by the acts of its foreign subsidiaries unless the claimants can show that the parent took positive steps (i) to manage the relevant activity carried out by the subsidiary and/or (ii) to advise the subsidiary on how it should manage the relevant risk. We await conclusive guidance from the Supreme Court on this issue.

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US courts retreat from applying major federal statutes to extraterritorial activity

Business transactions routinely touch the United States in one manner or another. A recent and discernible trend from the US Supreme Court indicates a clear retreat from reflexively applying major federal statutes to extraterritorial conduct.

Multinational businesses frequently engage in activities that may, however circumscribed, touch the US One concern of non-US parties is whether conduct that touches the US in a *de minimis* manner is enough for a US court to apply its law to those actions. Recent US Supreme Court cases have marked a reversal from the historic trend of expanding the scope of US law. Indeed, the Court has recently stated that "United States law governs domestically but does not rule the world." To that end, the Court now presumes that a statute does not apply extraterritorially unless the text clearly shows the US Congress intended such a result. With President Trump solidifying a conservative block in the Supreme Court's majority for the foreseeable future, this trend will likely continue unabated. Commercial disputes practitioners should be familiar with this significant trend in US law.

Threshold matter of personal jurisdiction

Although distinct from the extraterritorial application of US law, a threshold step in any US lawsuit is the court's determination of whether it may properly exercise jurisdiction over a non-US defendant. There are two types of personal jurisdiction in the US: general and specific. Where an entity is subject to general jurisdiction, US courts may exercise jurisdiction over that entity for any dispute no matter where it occurred, even if it has no connection to the forum. Recent US Supreme Court case law has significantly limited the scope of general jurisdiction. Historically, US courts exercised general jurisdiction over an entity if it conducted business in the forum state on a regular and continuous basis. Now, general jurisdiction is limited to where a party is "home," meaning the locale in which it is incorporated or has its principal place of business. While the precise contours of this approach will be developed in future case law, for non-US entities with their place of incorporation and principal place of business outside of the US, this likely means they are no longer subject to general jurisdiction in the US. On the other hand, US courts will continue to exercise specific jurisdiction over parties where the claims arise from the party's transaction of business in the forum state or where it engages in a tort outside the US that causes injury in the forum state. Thus, specific jurisdiction requires a nexus between some aspect of the claim and the forum state; it does not extend to all claims regardless of where they arise. These developments significantly narrow the potential forums to which non-US entities might be subject to suit, and provide greater predictability about where foreign parties may be sued.

The presumption against the extraterritorial reach of federal statutes

The Supreme Court's presumption against extraterritoriality stems from the conservative majority's strict adherence to the principle that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the *United States." Morrison v Nat'l Australia Bank Ltd.*, 561 US 247, 255 (2010). Accordingly, "unless there is the

affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect," the Court will "presume it is primarily concerned with domestic conditions." If a statute has no clear, affirmative indication that it applies extraterritorially, the Court will then examine the statute's "focus" to determine whether the application of the statute in the case at hand involves a domestic application of the statute in question. *RJR Nabisco, Inc. v European Cmty.*, 136 S. Ct. 2090, 2101 (2016).

The Supreme Court has stated that the presumption "serves to avoid the international discord that can result when US law is applied to conduct in foreign countries" and "also reflects the more prosaic commonsense notion that Congress generally legislates with domestic concerns in mind." Therefore courts must apply "the presumption across the board, regardless of whether there is a risk of conflict between the American statute and a foreign law."

The Securities Exchange Act

Although global practitioners may be aware of the Supreme Court's 2010 groundbreaking opinion in *Morrison v National Australia Bank Ltd.* holding that Section 10(b) of the Securities Exchange Act (and Rule 10b-5 promulgated thereunder) does not apply extraterritorially, it is helpful to review as it is an important bellwether[1].

Section 10(b) is used to challenge material misstatements and omissions made in connection with the purchase or sale of securities. In *Morrison*, the Court first held that the statutory text of these anti-fraud provisions does not apply extraterritorially. The Court next examined whether the activity

1 See 561 U.S. 247 (2010).

at issue – the purchase of securities of a foreign issuer by foreign persons on a foreign exchange – fell within the "focus" of Section 10(b). Plaintiffs argued that because the misstatements at issue arose from the activities of the defendant issuer's Florida subsidiary and public statements made in Florida, they were seeking a domestic application of the statute that fell within the statute's focus. The Court disagreed and held that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." Accordingly, Section 10(b) would only apply to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies." As the late Justice Scalia stated for the Court: "For it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case."

The Racketeer Influenced and Corrupt Organizations Act (RICO)

In 2016, the Supreme Court extended *Morrison*'s reasoning to RICO in *RJR Nabisco, Inc. v European Cmty.*, 136 S. Ct. 2090 (2016). RICO is a major federal statute that encompasses dozens of separate state or federal offenses committed in a pattern of racketeering activity. The acts are termed "predicate acts" and include crimes such as mail and wire fraud, money laundering, bribery, and embezzlement. A private right of action exists for persons injured in their business or property to sue for treble damages, costs and attorneys' fees.

In *RJR*, the Court first asked, does the statute giving rise to the predicate act in question give a clear, affirmative indication that it applies extraterritorially? This answer might not be straightforward. For example, federal courts are presently split as to whether the federal wire fraud statute applies extraterritorially.

Second, if the predicate act statute does not apply extraterritorially, does the case involve a domestic application of the statute? This question is answered by looking to the statute's "focus." According to the Court, "[i]f the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in US territory."

Finally, a private plaintiff in a civil RICO action must allege and prove injury in the US to business or property and cannot recover for non-US injuries. The Court held that the statute providing a private right of action did not provide for extraterritorial application, and allowing recovery for non-US injuries in a civil RICO action – including treble damages – presents a danger of international friction.

The Bankruptcy Code

The trend against extraterritoriality has extended into the bankruptcy context as well. In a high-profile decision from the Southern District of New York, the court barred the clawback of subsequent transfers made from offshore feeder funds of Madoff Securities to non-US investors. See *Sec. Inv'r Prot. Corp. v Bernard L. Madoff Inv. Sec. LLC*, 513 B.R. 222 (S.D.N.Y. 2014). The court determined that the avoidance and recovery statute at issue did not apply extraterritorially and that the "focus" of the statute was on the transfers themselves – which here occurred outside the US The court also recognised that mere passage through a New York bank account did not make a transfer sufficiently domestic to fall within the statute's reach. In the court's words, "[i]t cannot be that any connection to a domestic debtor, no matter how remote, automatically transforms every use of the various provisions of the Bankruptcy Code in a [Securities Investor Protection Act] bankruptcy into purely domestic applications of those provisions."

Notably, the court held that even if the statute applied extraterritorially, it would rule that international comity concerns would preclude its application in this instance. It recognised that many of the foreign feeder funds were currently involved in their own liquidation proceedings in foreign countries, and concluded that "[t]he Trustee is seeking to use SIPA to reach around such foreign liquidations in order to make claims to assets on behalf of the SIPA customer-property estate – a specialised estate created solely by a US statute, with which the defendants here have no direct relationship ... [T]hese foreign jurisdictions have a greater interest in applying their own laws than does the United States."

The Foreign Trade Antitrust Improvements Act (FTAIA)

In the antitrust realm, by statute the FTAIA limits the extraterritorial application of the Sherman Antitrust Act. As interpreted by the US Supreme Court, the FTAIA "initially lays down a general rule placing *all* (non-import)

activity involving foreign commerce outside the Sherman Act's reach." *F. Hoffmann-LaRoche Ltd. v Empagran S.A.*, 542 US 155, 162 (2004). The FTAIA then "brings such conduct back within the Sherman Act's reach *provided that the* conduct *both* (i) sufficiently affects American commerce, *i.e.*, it has a direct, substantial, and reasonably foreseeable effect on American domestic, import, or (certain) export commerce, *and* (ii) has an effect of a kind that antitrust law considers harmful, *i.e.*, the effect must 'giv[e] rise to a [Sherman Act] claim'."

One notable application of the FTAIA occurred in the recent Foreign Exchange Benchmark Rates Antitrust Litigation in the Southern District of New York. See *In re Foreign Exchange Benchmark Rates Litigation*, 74 F. Supp. 3d 581 (S.D.N.Y. 2015); No. 13 Civ. 7789 (LGS), 2016 WL 5108131 (S.D.N.Y. Sept. 20, 2016). In this series of cases, plaintiffs claimed that over a dozen large banks conspired to "fix the Fix," which they alleged to be the most widely used bid-ask spread for currency trading globally. The court held that Sherman Act claims could proceed where a US entity operating in the US trades foreign exchange with a foreign desk of a defendant because such claims fall squarely within the FTAIA's import commerce exclusion. However, the FTAIA barred Sherman Act claims for transactions where a US-domiciled plaintiff transacted in FX instruments on a foreign exchange, or where a US-domiciled plaintiff operating abroad transacted in FX instruments directly with a foreign desk of a defendant. The import commerce exception did not apply because the transactions occurred exclusively abroad. Plaintiffs argued that there was a "single" global FX market and that supra-competitive prices in the US directly impacted the prices paid in foreign FX transactions, meaning that without US domestic effects, there would be no foreign injury. The court rejected this argument and held it failed to show the foreign prices paid were proximately caused by any domestic effects.

Conclusion

Application of US law is a concern for global businesses. In light of the recent trends against extraterritorial application of major federal statutes, non-US companies can take some comfort that US courts will not reflexively apply its laws to foreign activity.

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Cyber litigation: the new frontier

Hardly a day now passes without news of a cyber attack making the headlines. From airlines to supermarkets, from banks to professional firms, every sector of the global economy is vulnerable to ever more sophisticated cyber fraud, carried out by highly skilled attackers who are extremely difficult to identify.

There is much that organisations can do to address this threat: from investing in IT security in order to prevent attacks happening in the first place, to procuring cyber insurance and breach response services aimed at mitigating the immediate consequences of an attack. Those consequences may be proprietary, in the sense that they concern a loss of the victim's own assets (for example, a redirection of funds following the introduction of malware, or a ransom payment in return for removing ransomware). Or they may concern third parties, such as regulators and customers or clients whose data has been accessed, all of whom may need to be notified within a short period of time. An urgent forensic exercise may need to be undertaken in order to shore up the victim's IT defences and prevent another attack.

However, when the initial crisis has passed, different legal questions arise: such as whether it is possible to trace lost assets, if it is feasible to locate the perpetrators and claim damages or even how best to defend a Group Litigation Order. These are familiar questions, but with a technological spin that necessitates an innovative response. The recent announcement of a new court in London that will specialise in cybercrime, fraud and economic crime recognises this. But at the same time, the English Courts (at the prompting of litigants and their lawyers) are developing the existing procedural armoury to meet the challenges posed by modern communications and business.

The latest case from this new frontier of litigation is *CMOC Sales & Marketing Limited v Persons Unknown* [2018] EWHC 2230 (Comm), involving the theft of some US$8 million from the bank account of the claimant, a company whose business is the sale and purchase of Niobium, a metal. The theft resulted from the hacking of a director's email account, enabling the perpetrators to send fake emails and counterfeit payment instructions to the company's bank. By the time that the fraud was detected in October 2017, some 20 unauthorised payments had been made. From that point onwards, there seems to have followed an impressively forensic and considered campaign of litigation aimed at freezing the stolen funds, identifying the primary perpetrators and conspirators, and bringing the case against them to trial with a view to making good the company's losses. According to the judgment of HHJ Waksman QC, this involved no less than 14 pre-trial hearings.

At the very first hearing, only 10 days after the fraud was discovered, a worldwide freezing order was sought against "persons unknown": the first innovation for which this case is particularly notable. While there was legal precedent for injunctions against "persons unknown" being granted in libel and trespass and data ransom cases, this was the first occasion on which a freezing order of this nature had been made. The need for such an order was a function of the hackers' anonymity, but the judge also stressed the practically important point that the injunction would help the company to identify certain defendants based on information that could be obtained from banks, supplemented by disclosure orders.

The second innovation concerned the alternative modes of service which the Court allowed, in order to effect service on uncommunicative defendants for whom scant details had been located. Hitherto, the Courts had allowed service by posting materials on a public social media platform. However, in view of the practical difficulties of this case, the Court permitted service on certain defendants by social media

messenger service, and on certain defendants (including banks) by data room. On data room service, the judge remarked that it has proved a successful means of serving large quantities of documents in a cost effective way.

Aside from these novelties, the interlocutory orders successfully obtained by the company enabled it to trace the stolen funds into accounts held with 50 banks in 19 jurisdictions, and to identify 30 individual defendants (only two of which engaged in the litigation process to any meaningful extent). As so many of the known defendants opted not to participate in the proceedings, quite apart from the defendants who remained unknown, it was necessary for the company to prove its case whilst ensuring that the defendants' position was fairly presented.

The legal bases for the company's claims, all of which succeeded, were as follows

- A proprietary claim against all defendants who it could be shown received the stolen funds, on the grounds that the funds were impressed with a constructive trust that enabled the funds to be traced. Based on the lowest intermediate balances of the receiving defendants' bank accounts, this resulted in approximately US$1.5 million being categorised as traceable funds.

- Claims for compensation for dishonest assistance, and in damages for unlawful means conspiracy, against those defendants who perpetrated the hack and against those defendants who knowingly assisted in the fraud. All of these claims also succeeded in full.

- A claim for knowing receipt against all of the defendants who received the company's funds, whether directly or at a level (or two) removed. In relation to those defendants who received the company's funds but did not actively participate in the fraud, they were found to have the requisite knowledge because they knew that the funds had been fraudulently obtained by deceit and illegal hacking, if not necessarily the identity of the victim.

- A restitutionary claim against the direct recipients of the company's funds on the grounds of their unjust enrichment at the company's expense.

The case is, in many ways, a blueprint for how cyber attack victims should go about recovering stolen funds via the Courts. First and foremost, the company acted very quickly to obtain a worldwide freezing order, maximising the chances of a significant proprietary claim. Then the company used the resulting information, showing the flow of funds, to identify a large number of defendants. No doubt the next stage will be to enforce the judgment against the known defendants in order to address the US$6.5 million shortfall between the company's losses and the value of the traced funds, which may pose further practical problems requiring original solutions. However, the overall – very encouraging – feature of this case is that, although it was not possible to identify the "persons unknown" who compromised the company's systems, by the litigation process it was possible to identify their co-conspirators and collaborators and mitigate the consequences of their actions.

An effective (and speedy) litigation response is an important element of any organisation's cyber strategy, whether it be offensive – as in this instance – or defensive. The frequency and incidence of cyber attacks would also suggest that this type of litigation is likely to become more commonplace. But as this case shows, English civil procedure will continue to evolve in step with the march of technology and the new threats and challenges that it presents.

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Norton Rose Fulbright was awarded the Cyber Law Firm of the Year Award at the *2018 Insider Cyber Rankings* Awards

Internal investigations: when does privilege apply?

The Court of Appeal has handed down an eagerly awaited decision[1] addressing, in particular, fundamental issues as to the ambit of litigation privilege in investigations.

Summary

The appeal sought to overturn the High Court's decision that various communications connected with an internal investigation (including notes of interviews and forensic accounting materials) were not protected by litigation privilege. The High Court had held that litigation privilege did not apply because: a Serious Fraud Office (SFO) investigation was not sufficiently adversarial for the purposes of litigation privilege; it could not be said that litigation was in contemplation; and that even if litigation was in contemplation, the documents were not created for the dominant purpose of use in the litigation.

The Court of Appeal reversed the decision in relation to litigation privilege, holding that litigation was in reasonable contemplation from the outset of the investigation and that the materials in question (including interview notes and forensic accounting materials) were created for the dominant purpose of resisting or avoiding contemplated criminal proceedings, and so protected by litigation privilege. The Court of Appeal's decision resets the boundaries of litigation privilege in investigations.

This article summarises the Court of Appeal's decision and provides key practical takeaways in relation to the application of privilege to investigations.

Key takeaways

- Companies faced with allegations of wrongdoing can conduct investigations with greater confidence that documents relating to the investigation will be protected by litigation privilege under English law. The Court of Appeal stressed that it is in the public interest for companies to be able to investigate allegations prior to reporting to a prosecutor without losing the benefit of legal professional privilege.
- The decision does not mean there is blanket protection for internal investigations: the party asserting litigation privilege will still have to show that the dominant purpose of the communication in question related to adversarial litigation that is in progress or reasonably in contemplation (see Litigation Privilege below).
- Documenting the purpose and scope of an internal investigation and the justification for documents being covered by privilege is vitally important at the outset of and throughout an investigation. When assessing whether or not privilege applies, the court will consider carefully the nature, quality and content of the evidence supporting the claim for privilege.
- The narrow definition of "client" for the purposes of legal advice privilege still stands (although the Court made clear that it views this narrow definition as unworkable). Notes of interviews with witnesses who do not constitute "the client" will therefore only be privileged where litigation privilege applies.
- Lawyers' working papers will only be covered by legal advice privilege to the extent that they betray the tenor of legal advice. As a result, notes taken by lawyers of investigation interviews will not automatically be privileged by virtue of the fact the notes were taken by a lawyer.

1 *ENRC v SFO* [2018] EWCA Civ 2006.

Background

An internal investigation was launched following whistle-blower allegations of fraud, bribery and corruption. Lawyers were engaged in early 2011 to carry out a fact-finding investigation, followed by forensic accountants a few months later.

The SFO initiated discussions with the company in August 2011 following a press report. In April 2013 the SFO began a criminal investigation. As part of its investigation, the SFO sought disclosure of certain documents generated during the internal investigation, which had continued in the interim period. The company claimed that these documents were privileged, and the SFO sought a declaration from the English court that they were not.

Requested documents

By the time of the appeal, there were essentially three categories of documents in respect of which privilege was disputed

- **Interview notes:** notes taken by external lawyers of internal investigation interviews with employees, former employees and officers of the company and its subsidiaries, suppliers and other third parties. It was claimed that these documents were protected by litigation privilege on the basis that the dominant purpose of the interviews was to enable the company's lawyers to obtain relevant information and instructions and to provide advice in connection with anticipated adversarial criminal litigation. Alternatively it was claimed that the notes were protected by legal advice privilege on the basis that they constituted lawyers' work product and revealed the trend of the legal advice being provided. Legal advice privilege over the interview notes was not claimed on any other grounds, presumably recognising the difficulties in doing so given the narrow definition of the "client" following *Three Rivers (No. 5)* as confirmed in December 2016 by the *RBS Rights Issue Litigation* case (the RBS Litigation).

- **Accountants' materials:** materials generated by external accountants as part of "books and records" reviews carried out to identify controls and systems weaknesses and potential improvements. Litigation privilege was claimed in respect of these documents.

- **Documents referred to in correspondence between the law firm and the SFO:** 17 documents referred to in a letter sent to the SFO by the company's lawyers. The majority of these documents were or reflected the accountants' reports. Litigation privilege was claimed. Two of these documents were internal company communications between a senior executive and the then Head of Mergers and Acquisitions (a qualified lawyer who had previously acted as the company's General Counsel); legal advice privilege was claimed in respect of these two documents.

Litigation privilege

It was common ground that communications between a party/their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation attract litigation privilege so long as

- The litigation is adversarial, not investigative or inquisitorial.

- Litigation is in progress or reasonably in contemplation.

- The communications are made with the sole or dominant purpose of conducting the litigation.

Litigation is adversarial

The High Court had held that criminal investigation by the SFO should not of itself be treated as adversarial litigation for litigation privilege purposes. The Court of Appeal did not specifically comment on this conclusion but it is clear from the judgment that it considers that adversarial litigation may – depending on the facts – be reasonably in prospect whether or not a formal SFO investigation has commenced or the SFO has been notified of the matter.

Litigation in contemplation

The High Court held that the reasonable contemplation or onset of a criminal investigation by the SFO did not necessarily equate to the reasonable contemplation of a prosecution. Further, the Judge took the view that even where allegations of criminal conduct were being investigated, prosecution only becomes a real possibility once it is discovered that there is some truth in the allegations.

The Court of Appeal rejected this approach, holding that the Judge had been wrong "to suggest a general principle that litigation privilege cannot attach until either a defendant knows the full details of what is likely to be unearthed or a decision to prosecute has been taken. The fact that a formal investigation has not commenced will be one part of the factual matrix, but will not necessarily be determinative". While the Court of Appeal cautioned

that not every SFO manifestation of concern would properly be regarded as adversarial litigation, when the SFO specifically makes clear to a company the prospect of its criminal prosecution, and legal advisers are engaged to deal with that situation (as in the present case), there are clear grounds for contending that criminal prosecution is in reasonable contemplation. Further, they considered that whilst a party anticipating possible prosecution will often need to make further investigations before it can say with certainty that proceedings are likely, that uncertainty does not in itself prevent proceedings being in reasonable contemplation.

The Court of Appeal held that on the facts, litigation (i.e. an SFO prosecution) was in reasonable contemplation when the company initiated its internal investigation and certainly when it received a letter from the SFO in August 2011. Significantly, this was held to be so notwithstanding that the letter expressly stated that the SFO was not carrying out a criminal investigation at that stage but instead made reference to "recent intelligence & media reports concerning allegations of corruption and wrongdoing by [ENRC]" and urged the company to consider carefully the SFO's 2009 Self-Reporting Guidelines whilst undertaking its internal investigations.

Dominant purpose test

At first instance, it was held that the primary purpose of the investigation was to find out if there was any truth in whistleblowing allegations and then to decide what to do if there was.

The Court of Appeal again rejected the High Court's approach, holding that "where there is a clear threat of a criminal investigation, even at one remove from the specific risks posed by the SFO should it start an investigation, the reason for the investigation of ... allegations must be brought into the zone where the dominant purpose may be to prevent or deal with litigation." Indeed, the Court of Appeal stressed that nothing in the judgment should be taken to impact adversely on the operation of the Deferred Prosecution Agreements scheme set out in Schedule 17 of the Crime and Courts Act 2013, noting that it is obviously in the public interest that companies should be prepared to investigate allegations prior to going to a prosecutor without losing the benefit of legal professional privilege for the work product and consequences of their investigation. Were they to do so, the temptation might well be not to investigate at all.

Further, the Court commented that in both the civil and the criminal context, seeking to head off, avoid or even settle reasonably contemplated proceedings is as much protected by litigation privilege as resisting or defending such contemplated proceedings. This analysis reflects the approach in the earlier case of *Bilta (in liquidation) v RBS* [2017] EWHC 3535 (Ch).[1]

1 In *Bilta*, the claimants sought documents relating to an internal investigation carried out by external lawyers but RBS argued that the internal investigation documents sought were created for the dominant purpose of use in the litigation (i.e. the HMRC assessment). The court noted that a key point in the chronology was a letter from HMRC stating that it had decided (after two years of investigating) to make an assessment but was prepared to wait to consider the bank's comments before it did so – and it was at this stage that the bank instructed external lawyers. The fact that the bank tried to cooperate with, and met with HMRC on several occasions did not preclude the internal investigation being conducted for the dominant purpose of expected litigation. It was held that the documents were brought into being for the dominant purpose of expected litigation and were therefore privileged.

Legal advice privilege

The High Court held the following to be correct

- The narrow definition of "client" per *Three Rivers (No. 5)* , i.e. that only communications between lawyers and those individuals at the corporate client authorised to seek and receive legal advice on behalf of the corporate will be protected by legal advice privilege.

- The position taken in the RBS Litigation in relation to lawyers' working papers, i.e. that legal advice privilege protection over lawyers' working papers will only be justified if the working papers would betray the tenor of the legal advice.

Narrow definition of client

Notwithstanding extensive criticism of the Court of Appeal's decision in *Three Rivers (No. 5)*, the Court of Appeal in *ENRC* considered it could not ignore the Court of Appeal's previous determination and held that the matter was for the Supreme Court to decide. The Court noted that English law is out of kilter with other common law jurisdictions on this point and stated that "had it been open to us to depart from *Three Rivers (No. 5)*, we would have been in favour of doing so."

Lawyers' working papers

The Court of Appeal took the view that the question of whether lawyers' working papers should be protected generally by legal advice privilege was a matter for the Supreme Court. In the meantime, legal advice privilege will only be justified if the working papers would betray the tenor of the legal advice (although there may be greater scope to argue that litigation privilege applies to such papers in light of *ENRC*).

What next?

The decision in relation to litigation privilege in the context of investigations with a criminal or regulatory element is to be welcomed. Not only does it clarify the ambit of litigation privilege in investigations but it also removes the distinction created by the first instance decision between civil and criminal proceedings as to when litigation is in contemplation.

The main outstanding question in relation to legal advice privilege is whether *Three Rivers* will be overturned and if so, when. Adopting a broader definition of "client" would give much greater protection to internal investigations and bring the English law position closer to that of other common law jurisdictions. However, the SFO decided not to appeal the decision, with the result that English law will be left with the narrow definition of client for the foreseeable future.

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Shareholder claims and the "no reflective loss" rule

Economic uncertainty often gives rise to sharp fluctuations in share prices, even among those companies that are perceived to be the stalwarts of the business landscape. Any reduction in the value of their shares will be of concern to shareholders particularly if they perceive the cause to be actions or decisions of the company with which they do not agree. As such, the continued climate of economic uncertainty, exacerbated by Brexit, is likely to give rise to an increase in shareholder activism and potential disputes.

Generally speaking, however, claims open to shareholders in this scenario are not straightforward. In particular, such claims are restricted due to the "no reflective loss" rule, which has traditionally prevented shareholders from bringing claims where their loss merely reflects the loss suffered by the company.

The recent case of *Sevilleja Garcia v Marex Financial Ltd* [2018] EWCA Civ 1468 provided a timely reminder of the application of the rule. While the question before the court was whether the "no reflective loss" rule extended to claims brought by a non-shareholder creditor, the decision is instructive because the court considered the development and rationale behind the rule in making its decision.

The "no reflective loss" rule

The origins of the rule come from the decision in *Prudential Assurance v Newman Industries (No. 2)* [1982] 1 Ch 204, in which the court said: "what [the shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a three per cent shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The share themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company." The rationale was to avoid subverting the "proper plaintiff" rule in *Foss v Harbottle* (1843)2 Hare 461.

Subsequent authorities have confirmed that the rule extends beyond the diminution of the value of shares; it extends to the loss of dividends and all other payments which the shareholder might have obtained from the company had it not been deprived of its funds.

Following consideration of the authorities, the court in *Sevilleja Garcia* concluded there were four considerations which justified the rule against reflective loss

- The need to avoid double recovery by the claimant and the company from the defendant.
- Causation – if the company chooses not to claim against the wrongdoer, the loss to the claimant is caused by the company's decision and not by the defendant's wrongdoing.
- The public policy of avoiding conflict of interest; particularly that if the claimant has a separate right to claim it would discourage the company from making settlements.

- The need to preserve company autonomy and avoid prejudice to minority shareholders or other creditors.

The court also considered whether the exception, recognised in *Giles v Rhind* [2002] EWCA Civ 1428, applied so that the rule of reflective loss does not bar a shareholder/creditor from bringing an action against the wrongdoer where the company is unable to pursue an action itself. It was decided that the exception is a narrow one and only applies where, as a consequence of the actions of the wrongdoer, the company no longer has a cause of action and it is impossible for it to bring a claim or for a claim to be brought in its name by a third party. The impossibility must be a legal one – a factual impossibility, such as lack of funds, would not be sufficient. If the impossibility is cured by an injection of funds by a shareholder or creditor or the company's claim being assigned to a third party the exception will not apply.

Shareholder remedies

The right to take any action for any wrongdoing to the company therefore lies with the company itself and the decision as to whether to pursue an action against a wrongdoer will be taken by the directors. That is not to say there is no recourse for shareholders who believe they or the company have been wronged; well-established options are available including those set out briefly below. But the relief available under each of these does not generally subvert the rule of reflective loss and will not necessarily make the shareholder "whole", but they are likely to cause inconvenience and expense to the company.

- **Unfair prejudice claim (section 994, Companies Act 2006 (CA 2006)):** This is often the most useful tool, particularly for a minority shareholder. A shareholder may bring an action for relief where the affairs of the company are being conducted in a manner that is unfairly prejudicial to the member's interests as a member. This will apply to actual or proposed acts or omissions.

  Generally the courts will not interfere with commercial decisions, but examples of actionable conduct may include: (i) breaches of fiduciary duty on the part of the company's

directors prejudicing the interests of the members; (ii) mismanagement which is serious considering the scale of financial loss arising and the frequency and duration of the acts and omissions; and (iii) improper failure to pay dividends or payment of excessive remuneration.

The court has a wide discretion to make such orders as it sees fit to remedy the unfair prejudice, including: (i) ordering the sale/purchase of the petitioner's shares on terms to be determined by the court; (ii) regulating the conduct of the company's affairs; (iii) requiring the company to refrain from or carry out an act; and (iv) authorising proceedings be commenced in the name of the company. The most common remedy is likely to be an order for the petitioner to be bought out. In practice, while this might be the least disruptive from the company's perspective, it should be born in mind that the court has a wide discretion when setting the terms of the sale.

- **Derivative claim (Part 11, CA 2006):** Generally, shareholders can, subject to obtaining court approval, bring a derivative claim on behalf of the company (against a director, third party or both) for an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. Again, the parameters of this claim reflect the proper claimant rule: the proper claimant in wrongs committed against a company is the company itself and any proceeds will belong to the company.
- **Petition for winding up on just and equitable grounds (section 122, Insolvency Act 1986):** Shareholders (among others) satisfying certain conditions may petition for the winding up of the company on the grounds that to do so would be just and equitable. Common examples of just and equitable grounds include: (i) loss of "substratum" – the original purposes of the company have been fully achieved or may no longer be pursued; (ii) deadlock which is not contemplated by the articles of association; and (iii) where the conduct of directors or other managers in relation to the management of the company's affairs leads to a justifiable loss of confidence from the shareholder. Obviously this is not an action to be brought lightly and the court will consider other options available before ordering the winding up of an otherwise healthy company.

Comment

The decision provides an important illustration of the limits of claims that may be brought by a shareholder in respect of loss suffered by a company. While it is trite that the liability of a shareholder is limited, being a shareholder in any company comes with inherent risks. Most significantly, the shareholding may reduce in value due to acts or omissions which are entirely (or significantly) outside of the shareholder's control and in many cases the shareholder will not have a personal remedy.

It is important for shareholders to appreciate in relation to any wrongdoing by third parties what claims properly lie with the company and what claims the shareholder may bring in their own right. As the court's decision demonstrates, where a diminution in shareholdings is attributable to loss caused to the company by a third party, it is the company which will generally have the claim, not the shareholders themselves. However there are means for shareholders to challenge decisions by the directors and any shareholder claim will likely be lengthy and expensive for the company. As such, directors should be conscious of the actions shareholders can take and attempt resolve any shareholder discontent before it escalates.

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When does an entire agreement clause exclude liability for misrepresentation?

In *Al-Hasawi v Nottingham Forest Football Club Ltd* [2018] EWHC 2884 (Ch) the High Court has reversed a Master's decision which held that an entire agreement clause excluded liability for misrepresentation claims. The High Court held that the entire agreement clause was not effective in excluding misrepresentation claims and the parties had not separately agreed any such exclusion.

The Claimant/Buyer purchased Nottingham Forest football club from the Defendant/Seller under a Share Purchase Agreement (SPA). The Buyer alleged that during the due diligence process the Seller had represented that the financial liabilities of the club were lower than the actual liabilities. The Buyer relied on a spreadsheet uploaded to a dataroom purporting to set out the liabilities. The Buyer issued proceedings against the Seller, seeking amongst other remedies, damages for statutory misrepresentation (pursuant to s. 2(1) Misrepresentation Act 1967).

The entire agreement clause

The key issue was whether the entire agreement clause in the SPA excluded claims for misrepresentation. It provided:

"This agreement (together with the documents referred to in it) constitutes the entire agreement between the parties and supersedes and extinguishes all previous discussions, correspondence, negotiations, drafts, agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter".

The Buyer's position

The Buyer argued that the drafting of the entire agreement clause was not broad enough to exclude misrepresentation claims. It contended that it was only intended to preclude reliance on representations which otherwise could be alleged to be terms of the contract. The Buyer also argued that a "cumulative remedies" clause had the effect of preserving claims for misrepresentation. The clause provided: "[e]xcept as expressly provided in [the SPA], the rights and remedies provided under the agreement are 'in addition to and not exclusive of any rights or remedies provided by law'".

The Seller's position

The Seller argued that the entire agreement clause should be construed against the contractual indemnity claims scheme in the SPA. It contended that, in this context, it was clear that the entire agreement clause was intended to exclude liability for misrepresentation. In particular, the Seller relied on a clause conferring a right on the Buyer to claim indemnity from the Seller relating to losses suffered "arising out of or in connection with" the amount of the club's financial liabilities. It also relied on the fact that the SPA contained a detailed procedure for making contractual indemnity claims e.g. including time limits and notification requirements.

The Master's decision

The Master's approach was based on the Court of Appeal's decision in *Axa Sun Life Systems v Campbell Martin*. The Master identified two "themes" arising from this decision

- An exclusion of liability for misrepresentation must be clearly stated.
- This is conventionally achieved by well established "formulas", such as clauses reciting that no misrepresentations have been made/relied upon, or an express exclusion of liability for misrepresentation. In

the absence of such formulations, an entire agreement clause (particularly one "where the word 'representations' takes its place alongside words expressive of contractual obligation") will not normally by itself exclude liability for misrepresentation. The courts' expectation is that any exclusion will be "separately and clearly provided".

The Master concluded that misrepresentation claims were "expressly excluded" by the entire agreement clause. The Master appeared to rely principally on two points

- Contractual provisions excluding liability for misrepresentation do not have a fixed form requirement. In this case, the existence of the contractual indemnities demonstrated that the parties "core contractual intention" was to preclude claims relating to the subject matter of the SPA other than via the contractual indemnity scheme.

- Textual distinctions between the wording of the entire agreement clause in Axa and in the SPA relevant to the present case. The Master concluded that the language in the SPA was "deliberately wide" so as to evidence an intention by the parties to exclude claims other than under the SPA.

The High Court's decision

The High Court reversed the Master's decision, holding that misrepresentation claims were not excluded. In short, the court concluded that

- The existence of the contractual indemnities did not amount to an agreement to exclude misrepresentation claims. The court expressed caution about "improving the bargain the parties had actually made by inserting provisions that would make commercial sense but were not actually contained in the written agreement they had made."

- The differences between the wording of the entire agreement clause in Axa and in the SPA did not amount to clear wording establishing an intention to exclude other claims.

Discussion

This decision is a reminder that exclusions of liability for common law claims in a contract must be clearly and expressly stated. In relation to misrepresentation specifically, this may be through the established formulations (i.e. a non-reliance clause or express exclusion language).

Each case will turn on the words used in the contract, although this decision suggests that, in general, the courts will not treat an entire agreement clause and/or contractual indemnity provisions as themselves establishing intention to exclude common law claims, in the absence of express exclusion language.

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Measuring damages for breach of a business sale agreement

Agreements for the sale of a business often contain prohibitions preventing the seller from competing with the business, or soliciting clients or employees of the business for a period of time following the sale. Breach of any of these covenants by a seller can be extremely harmful to the buyer and will accordingly give rise to a claim for damages.

However, while the buyer may be able to adduce evidence to demonstrate the seller's breach, establishing the buyer's own loss can often be problematic. For example, how much greater turnover would the buyer have had, had the seller not been in breach of covenant in setting up a rival business? Is the buyer entitled to a proportion of the seller's profits from the rival business achieved as a consequence of breaching the covenants in question? Or is the buyer entitled to a hypothetical fee for the release or relaxation of the covenants in question?

This issue was considered by the Supreme Court in the case of *Morris-Garner and another v One Step (Support) Ltd* [2018] UKSC 20.

That case involved the sale of a 50 per cent share in a business providing support for young people leaving care, which sale was subject to restrictive confidentiality, non-compete and non-solicitation covenants. The High Court found that the defendants had breached the restrictive covenants and the claimant was entitled to damages to be assessed "on a Wrotham Park basis (for such amount as would notionally have been agreed between the parties, acting reasonably, as the price for releasing the defendants from their obligation), or alternatively ordinary compensatory damages". The Court of Appeal concurred. Both courts noted the difficulty the claimant may have in identifying the financial loss it had suffered by reason of the defendants' wrongful competition. The claimant elected for damages to be assessed on the so-called Wrotham Park basis.

"Wrotham Park damages" (albeit this expression was rejected by the Supreme Court in favour of "negotiating damages") were traditionally available principally in a property context (in relation to invasion of property or IP rights). Nevertheless, more recent cases have suggested that such an award may be more widely available.

The issue to be considered by the Supreme Court was: "in what circumstances can damages for breach of contract be assessed by reference to the sum that the claimant could hypothetically have received in return for releasing the defendant from the obligation which he failed to perform". In giving the main judgment, Lord Reed noted that this was the first occasion on which this "important question in relation to the law of damages" had been brought before the highest court for decision and noted that the "confused state of the authorities, have reflected a lack of clarity as to the theoretical underpinning of such awards, and consequent uncertainty as to when they are available."

Lord Reid considered the key authorities on this issue in two phases, beginning with *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798. The two phases are said to be divided by *Attorney General v Blake* [2001] 1 AC 268, a case for which negotiating damages was not at issue, but is said to have sown the "seeds of uncertainty" as to when such damages are available.

The Supreme Court unanimously reversed the earlier decision of the Court of Appeal; finding that the lower courts were mistaken in their approach to the assessment of damages, and determined that the case should return to the High Court for a hearing on quantum to measure the claimant's actual financial loss.

The Supreme Court confirmed that damages for breach of contract are not a matter of discretion nor is the basis on which damages are awarded. They are claimed as of right, and they are awarded or refused on the basis of legal principle.

Lord Reed stated that negotiating damages can be awarded "for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed. The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset". Examples given by the court of cases where such circumstances might exist were breach of a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement. The court said it was "not easy to see" other circumstances when negotiation damages might be an appropriate measure of loss but declined to describe these examples as exhaustive.

However, outside of those circumstances, damages should be assessed in the ordinary way. Damages are intended to compensate the claimant for loss or damage resulting from the non-performance of the obligation in question. They are therefore normally based on the difference between the effect of performance and non-performance upon the claimant's situation.

Negotiating damages would not normally be available for breaches of non-compete and non-solicitation covenants. While this claim also involved breach of a confidentiality covenant, which in isolation might have been considered to be of a character to attract such damages, the court determined that the claimant's loss was a cumulative result of breaches of a number of obligations, of which the non-compete and non-solicitation had been treated as the most significant.

In this case, the effect of the defendants' breach of contract was increased competition for the claimant and loss of profits and good will. While recognising that the loss may be difficult to quantify precisely in some circumstances, the court described this as a familiar type of loss for which damages are frequently awarded and possible to quantify in a

conventional manner. According to Lord Reed, where the breach results in economic loss, "that loss should be measured or estimated as accurately and reliably as the nature of the case permits. The law is tolerant of imprecision where the loss is incapable of precise measurement, and there are also a variety of legal principles which can assist the claimant in cases where there is a paucity of evidence".

As such, the lower courts were mistaken in considering that the claimant had a right to elect how its damages should be assessed and supposing that the difficulty in quantifying the claimant's loss justified the abandonment of any attempt to quantify it.

The Supreme Court also confirmed that common law damages for breach of contract cannot be awarded merely for the purpose of depriving the defendant of profits made as a result of its breach, other than in exceptional circumstances (following *Attorney General v Blake*).

Lord Sumption agreed with the result but differed from the majority with regard to the reasoning.

Conclusion

The Supreme Court's decision purports to restore orthodoxy to the principles regarding calculation of damages.

While the court did not overturn any prior cases awarding negotiating damages, it is clear from the judgment that negotiating damages are not the norm and will not be awarded by way of discretion. Nevertheless, the precise circumstances in which negotiating damages may be appropriate remain somewhat unclear.

For cases arising from breaches of covenant in a business sale context, it is clear that the courts will have to assess damages in the usual way: that is by determining losses suffered by the buyer attributable to the breach. This will often be difficult to ascertain, so businesses will need to think from the outset about what evidence will be required and whether an expert will need to be engaged. Although the decision in *Morris-Garner* acknowledges that there may be imprecision in calculation of damages and courts will have to do the best they can, the clearer and more comprehensive the evidence a claimant has been able to collate, the greater the chance that the level of damages awarded will reflect the claimant's expectations.

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West Tankers stays on course in recent anti-suit decision

The English High Court's judgment in *Nori Holding and others v Public Joint-Stock Company Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm) (Nori Holdings) provides an important reminder of the court's approach to antisuit injunctions. The case reaffirmed the ECJ's decision in *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc* (Case C-185/07) [2009] AC 1138 (West Tankers) that the court of an EU member state lacks the power to grant an anti-suit injunction restraining court proceedings commenced in another EU member state. This is the first reported decision on the issue since the Recast Brussels Regulation took effect.

Background

The underlying dispute in this case concerned a number of pledge and loan agreements, and related termination agreements, entered into between the claimants and the defendant bank. Most of these contained London-seated LCIA arbitration agreements. Upon termination of the loan and pledge agreements, a restructuring resulted in the bank purchasing US$600 million of long-term unsecured bonds issued by a company within the claimant's group.

Several weeks after the restructuring, the Central Bank of Russia appointed a temporary administrator over the defendant. The administrator and the defendant commenced proceedings in the Russian and Cypriot courts respectively, seeking to invalidate the restructuring and reinstate the loan and pledge agreements.

English High Court proceedings

The claimants sought anti-suit injunctions from the English High Court for the purposes of restraining the defendant from continuing the Russian and Cypriot court proceedings. The action was brought on the basis that such proceedings had been commenced in breach of the relevant arbitration agreements which provided that any disputes related to the termination agreements should be referred to a London-seated arbitration subject to the LCIA rules.

The High Court granted an anti-suit injunction ordering the defendant to discontinue proceedings in the Russian courts. Males J refused the claimants' application to do the same, however, in respect of the Cypriot court proceedings.

The ruling in *West Tankers* fell under the old Brussels regime. The ECJ held that granting an intra-EU anti-suit injunction would undermine the effectiveness of the 2001 Brussels Regulation by restricting the court of an EU member state from determining for itself whether or not it has jurisdiction. This was in spite of the exclusion of arbitration proceedings within the 2001 Brussels Regulation.

The Recast Brussels Regulation in some respects reinforces the arbitration exception. For example, the ruling in *West Tankers* restricted the courts of EU states from deciding on the validity of an arbitration agreement prior to the conclusion of concurrent proceedings in another EU member state court. The new legislation overturned this part of the ruling. The present case, however, confirms that it has not changed the position in respect of intra-EU anti-suit injunctions. Males J commented that if the Recast Brussels Regulation intended to permit intra-EU anti-suit injunctions then this would be clear from the drafting of the legislation.

Other options

This leaves the question of what steps can a party take to restrain proceedings in an EU member state where it considers the relevant EU court has no jurisdiction? As Males J made clear in his judgment, the claimants had the option to seek an anti-suit injunction from the arbitral tribunal which could then be enforced by the relevant EU court under the New York Convention.

Arbitral tribunals are frequently able and willing to issue anti-suit injunctions. It is advisable for the party making the application to obtain an award, rather than any other instrument such as an order, for an anti-suit injunction, so as to avoid any jurisdictional issues. Subject to limited exceptions, parties to the New York Convention are bound to enforce arbitral awards handed down in any other signatory state and treat them as though the award were a judgment made by the local courts of its own jurisdiction. New York Convention signatory courts are allowed the right to deny enforcement of foreign awards on public policy grounds, however this has a narrow scope and would be unlikely to extend to the enforcement of an anti-suit injunction.

It is yet to be seen whether, following Brexit, English courts will be able to grant anti-suit injunctions against the courts of EU member states. The position may depend on whether or not the UK adopts a law mirroring the effect of the Recast Brussels Regulation. At least until then, the decision in *West Tankers* continues to hold, leaving arbitral tribunals alone the power to grant intra-EU anti-suit injunctions.

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