COMMODITIES CASE UPDATE

JULY 2020

HFW COMMODITIES CASE UPDATE

July 2020

We are delighted to present the ninth Commodities Case Update with a bumper edition for Summer 2020. Given the events of 2020, we took the decision to delay our spring case update. This edition therefore covers a longer period than usual and provides a summary of some of the key cases relevant to the commodities sector from the last nine months.

With a market leading commodities team we have over 100 lawyers that provide a full service internationally. The group is led by a team of over 25 partners, who are based in all our offices around the world, including in the major trading hubs of London, Paris, Geneva, Dubai, Singapore, Hong Kong, and Sydney.

If you would be interested in receiving a bespoke training session and presentation about the cases referred to in this update or any other cases of interest, please contact your usual contact at HFW, or the authors of this update Andrew Williams and Damian Honey.

As well as being of general interest for those working in commodities, our intention is that for lawyers working in-house, a bespoke training session tailored to your specific needs will allow you to meet the change in CPD requirements introduced by the SRA. It will allow you to demonstrate that you have reflected on and identified your L&D needs and met these. Please do contact us if this would be of interest.

We hope that you find this update useful.

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Volumatic Ltd v Ideas For Life Ltd [2019] 8 WLUK 183

Court Intellectual Property Enterprise Court

Date 29 August 2019

Summary

The Court found that a commercial document, written and signed by both parties, did not show an intention to create legal relations but simply recorded the parties' agreement as to next steps.

Facts

In 2004 and 2005, discussions took place between Volumatic Ltd (Claimant) and Ideas for Life Ltd (Defendant) regarding the possibility of the Defendant designing and manufacturing a banknote pouch to fit the Claimant's cash counting machines. During a meeting between the parties in February 2005, a consensus was reached as to how the relationship would proceed. In May 2005, the parties signed a document which recorded the consensus (the **Agreement**).

In 2016, eleven years later, the Claimant brought a claim for specific performance against the Defendant. In response, the Defendant argued that the Agreement was unenforceable because it was not legally binding. The key issues for the Court to decide were whether there was an intention to create legal relations and whether the terms of the Agreement were sufficiently certain.

Findings

The Court confirmed that because the Agreement was an express, written, commercial document, the burden of proof lay on the party asserting that there was no intention to create legal relations - and that this burden was a heavy one. The Court applied an objective test to determine whether the parties intended the Agreement to be legally binding.

The Court held the Agreement was not signed to create legal relations, but simply to record the parties' agreed consensus. It found that the Defendant had met the heavy burden of proof, agreeing with its submissions that:

- the Agreement did not contain the level of detail that would be expected from commercial parties intending to enter into an agreement which created legal relations.
- there were other agreements made between the parties that could be contrasted with the Agreement in respect of length and detail.
- when the Agreement was signed, the pouch (which the Defendant was manufacturing) was not yet complete, such that the Defendant could not be bound to purchase particular quantities.
- the producer of the pouches had not been made a party to the Agreement.

Various arguments raised by the Claimant were found to be non-determinative. These included the use of headed paper; the use of the words "agree", "agreement" and "subject to contract"; and the fact that the document had been reviewed by lawyers.

The Court also took into account the fact that neither party had suggested that the Agreement might constitute a binding agreement until 11 years after it was signed and found that in those circumstances, even if the Agreement was legally binding, it was likely the Claimant would have been estopped from relying on its terms.

HFW Comment

This unusual case is a rare example of the Court finding an express, written document to be non-binding, based on its interpretation of the parties' intentions. The parties' conduct and the delay in bringing a claim were significant factors in the Court's decision.

New Balance Athletics Inc v Liverpool Football Club and Athletic Grounds Ltd
[2019] EWHC 2837 (Comm)

Court Commercial Court

Date 25 October 2019

Summary

This case considered the scope of the implied duty of good faith. The Court found that the duty could be breached by conduct that lacked fidelity to the parties' bargain as well as by dishonesty. When determining whether there had been fidelity to the parties' bargain, the court considered the nature of the bargain, the terms of the contract and the context in which the matter arose.

Facts

The Claimant, New Balance Athletics Inc. ("New Balance") entered into a sponsorship agreement with the Defendant, World, European and Premier League Champions: Liverpool Football Club ("Liverpool FC"), under which it was agreed that New Balance would manufacture and sell Liverpool FC replica football shirts. New Balance had matching rights under the agreement so that on its expiry, Liverpool FC was obliged to enter into a new sponsorship agreement with New Balance so long as New Balance made an offer no less favourable than the terms of an offer made by an interested third party.

Nike made an offer to Liverpool FC, which included terms that Nike would (i) pay Liverpool FC £30 million per season and (ii) sell and distribute Liverpool FC's products in at least 6,000 stores worldwide and (iii) market their products through initiatives featuring no less than three "*non-football global superstars of the calibre of LeBron James, Serena Williams, Drake, etc.*"

Following receipt of this third party offer from Nike, Liverpool FC rejected a purportedly matched offer from New Balance, arguing that it had not been made in good faith because New Balance was unable to distribute its products in the stated number of stores. Liverpool FC also argued that New Balance had not matched Nike's marketing terms because it had omitted the reference to the use of global superstars.

New Balance brought a claim in the English High Court to enforce its matching rights.

Findings

Whilst it was common ground that there was an implied duty of good faith, the parties disputed what was required in order to establish that duty and accordingly, how it could be breached. New Balance submitted that there could only be a breach if it did not reasonably believe that it could perform the terms of its offer. Liverpool FC argued that there would be a breach where a party either knew, or did not care, whether it would be able to perform the terms of its offer or had no reasonable grounds for believing it would be able to do so.

The Court held that the duty of good faith can be breached not only by dishonesty but also by conduct that lacks fidelity to the parties' bargain. In assessing this conduct, it is necessary to consider the nature of the bargain, the contractual terms and the context of the claim. Ultimately, the court must assess whether "*reasonable and honest people would regard the challenged conduct as commercially unacceptable*."

The Court found that New Balance had not been in breach of its duty of good faith in asserting that it would be able to match Nike's distribution offer. In fact, it had carried out a due diligence exercise to confirm whether it was able to do so. Although successful in relation to its good faith argument, New Balance failed in its claim to enforce its matching rights because it had not matched Nike's offer to market Liverpool FC using influential superstars.

HFW Comment

This case is noteworthy because it concerns the best football team in the world and provides guidance on the scope of the implied duty of good faith. It is also a reminder that expressly agreed terms as to the scope of good faith obligations offer greater commercial certainty. Given that the due diligence exercise was significant in the Court's finding that New Balance had fulfilled its implied obligation of good faith, it would be sensible for parties to take and record actions demonstrating how they meet their good faith obligations.

Alianca Navegacao e Logistica Lda v Ameropa SA (*The Santa Isabella*) [2019] EWHC 3152 (Comm)

Court Commercial Court

Date 22 November 2019

Summary

An owner's claim for demurrage following delays in the discharge of a cargo of maize which had suffered extensive damage during a sea voyage failed. Referring to the Supreme Court's decision in Volcafe v CSAV [2018] UKSC 61, the Commercial Court found that the carrier had breached its duty to properly care for the cargo by failing to ventilate it adequately, and inadequate cleaning of the vessel's topsides had led to repeated weevil infestations. However, the carrier had been contractually entitled to choose a longer route for the voyage than the most direct geographical route where no route was contractually specified and the route taken was a usual and reasonable route.

Facts

The vessel was chartered by Ameropa SA (**Ameropa**) to deliver a cargo of 44,000mt of maize from Western Mexico to Durban. The charterparty incorporated the Hague Visby Rules.

Upon arrival in South Africa, discharge was delayed when the cargo of maize was found to be infested with weevils and had suffered damage as a result of excess condensation. The disponent owners, *Alianca Navegacao e Logistica Lda* (the **Owner**), immediately claimed demurrage from Ameropa.

Ameropa argued that it could not be held liable for demurrage because it was the Owner's breaches that had caused the damage to the cargo and therefore, the resultant delay. It was alleged that the Owner's breaches included (i) a failure to care for the cargo in accordance with a sound and proper system of ventilation, (ii) a failure to proceed at the warranted speed, (iii) a failure to choose the most direct route (having sailed around Cape Horn, rather than through the Panama Canal) and, (iv) a failure to properly disinfest areas of the holds following loading.

Ameropa accepted that it bore the burden of proving a breach of contract by the Owner under article III rule 2 of the Hague-Visby Rules, but argued on the basis of Volcafe v CSAV that the Owner had the evidentiary burden of showing that the cargo damage was not its fault. The Court declined to accept this: in Volcafe v CSAV, the Supreme Court had decided that in a contract of bailment the carrier bore the legal burden; this was not a contract of bailment (Alianca was the disponent not the head owner).

Findings

It was an established rule that no demurrage would be payable where breaches by the Owner caused delay to discharge.

Route - Whilst it was found that the Cape Horn route was 2% longer and provided fewer opportunities to safely ventilate the cargo, the Owner was not found to be in breach of the charterparty in this regard because no route was specified and therefore the Owner was permitted to choose a route that was 'usual and reasonable' bearing in mind the interests of the parties involved. In these circumstances, the Cape Horn route was reasonable because it was a widely used and no other route had been recommended by Ameropa. Furthermore, the Owner was not under an obligation to analyse the effect of a route's predicted climatic conditions on the need to ventilate the cargo.

Ventilation - However in respect of ventilation, the Court did find that the Owner had breached its duty to carry the cargo in accordance with a 'sound system' pursuant to Article III(2) of the Hague Visby Rules and that general industry practice was relevant in determining this. Additional breaches were found in respect of speed, reinfestation and quarantine.

HFW Comment

This case provides important guidance on a shipowner's obligation to care for cargo and is of interest for its application of the Supreme Court's decision in Volcafe v CSAV in terms of which party bears the burden of showing that the cargo has been properly cared for, or not.

Deepak Abbhi -v- Richard John Slade (trading as Richard Slade and Company)

[2019] EWCA Civ 2175

Court Court of Appeal

Date 6 December 2019

Summary

In this recent Court of Appeal decision, the Court found that an oral agreement to pay another person's bill was not a guarantee but a primary obligation and was therefore valid and binding.

Facts

An individual had instructed a solicitor in relation to a dispute. In a meeting arranged between the solicitor and the client's son-in-law (the defendant), it was orally agreed that the defendant would put his father-in-law in funds so that he could pay the solicitor's fees because the father-in-law would not be able to pay such fees himself. The father-in-law later died insolvent owing the solicitor a significant sum of money.

Section 4 of the Statute of Frauds 1677 ("Section 4") prevents action being taken against certain agreements which have not been made in writing. This includes agreements to answer for the debt, default or miscarriages of another person (e.g. in the form of a guarantee).

In the Commercial Court, judgment was given against the defendant. It was held that the defendant had reached an oral agreement with the solicitor and that agreement was not a guarantee. Section 4 therefore did not apply.

The defendant appealed. The key question on appeal was whether the agreement to pay the solicitor was conditional upon the father-in-law's failure to do so (as the obligation pursuant to a guarantee would be) or whether it was an agreement to pay in any event. This would determine whether the agreement fell within Section 4 and was therefore required to be made in writing in order to be enforceable.

Findings

The Court of Appeal dismissed the appeal. The defendant had agreed to fund the litigation. The promise to pay was not contingent on the default of a third party. Therefore, his liability was a primary not a secondary liability. The agreement was an independent and primary obligation to put the father-in-law in funds in sufficient time to pay. As such, Section 4 did not apply and the oral agreement was enforceable.

HFW Comment

This is a reminder that certain types of agreements, including guarantees, carry specific requirements (e.g. the requirement to be in writing or to be signed in a particular form). It also highlights the importance of being sure of the type of commitment being made when seeking or giving a commitment to pay on another party's behalf, particularly so as to ensure that it is valid.

Aden Refinery Company v Gunvor SA [2019] EWHC 3555 (Comm)

Court Commercial Court

Date 18 December 2019

Summary

Pursuant to a contract for the sale of gas oil, the buyer Aden Refinery Company ("Aden") agreed to buy at a price fixed at an average of July 2014 prices, by way of a prepayment. The parties agreed to defer delivery, following which the listing price for gas oil fell. The Court found that the parties' agreement to defer delivery did not have the effect of changing the price.

Facts

Gunvor agreed to sell Aden 60,000 tonnes of gas oil for delivery in July 2014. Aden was to make full payment before discharge and pay the average July listing price of US$1,028/MT. Clause 10 of the contract read as follows:

"10-PRICE
DES Little Aden in USD per metric ton, related to "Prem UNL 10ppm" for "Med FOB Italy" as published by Platts European markets scan, Platts prices defined as the average of the mean of July, 2014 plus premium of 24.75 USD/mt (two four point seven five USD per metric ton "air")
The invoice that shall be raised by the seller for prepayment shall be based on the available prices until the B/L or provisional invoice date. If cargo has B/L at the end of the previous month of delivery, then prices for the previous month shall be considered for prepayment invoice"

Aden subsequently asked to postpone delivery until September 2014, without a change to the price. Gunvor agreed. By September, the listing price had fallen to US$963/MT. Aden asked for a change in price which Gunvor refused. Aden prepaid US$58.5m which Gunvor alleged was insufficient for 60,000 tonnes of gas oil at July prices. Gunvor therefore ordered the third party in charge of delivery to halt discharge after only 56,345 tonnes of gas oil had been delivered. The remaining quantity was then sold to another buyer.

Aden brought a claim against Gunvor, arguing that it had in fact overpaid by US$4.4m because on the true construction of the contract, if the delivery period moved, the price also moved. Whilst Gunvor accepted that Aden had overpaid slightly for the cargo delivered, it argued that it was entitled to damages for non-acceptance due to Aden's failure to make full payment for 60,000 tonnes at July prices, on the basis of the difference between the contract price and the market or current price at the time when the goods ought to have been accepted.

Findings

The Court found that Clause 10 provided for pricing to be generated on the basis of average July 2014 prices (plus a premium) and this was not dependent upon delivery taking place in July. It also envisaged the possible need for a provisional invoice to be issued, followed by a final invoice once all pricing data was available.

By failing to pay the amount required, Aden was in breach of contract. Gunvor had been required to move and sell the remaining gas oil at US$943/MT, as against the contract price of US$1028/MT, and was entitled to its market loss arising from that sale, together with its onward shipping costs, and demurrage on another contract. However, the balance of payment was ultimately in Aden's favour as it had overpaid for the gas oil which it had actually received when calculated at July prices.

HFW Comment

This decision was based on contractual interpretation. When amending contractual terms, parties should always consider whether they have taken into account all the consequences.

Signature Living Hotel Ltd v (1) Andrei Sulyok (2) Roxana Monica Cocarla [2020] EWHC 257 (Ch)

Court Commercial Court

Date 9 January 2020

Summary

Two deeds of guarantee were enforceable as contracts, even though they had been signed by a sole director without the signature being attested by a witness, as required for a deed under section 44(2)(b) of the Companies Act 2006.

Facts

Signature Living Hotel Ltd (the applicant company) was involved in developing hotels and residential units. It sought funding for projects by marketing investment opportunities to individuals and inviting them to make loans to separate entities created for the purpose of each project, offering security by way of a corporate guarantee from the company. The borrower in this case was one such entity which had obtained a loan from each of the respondents. The company and the borrower were associated companies, with the same individual recorded as the sole director of both companies. The director executed the guarantees on behalf of the company but did not do so in the presence of a witness. Neither loan was repaid and statutory demands were served on the company.

The applicant company applied for injunctions to restrain the respondents from presenting a petition to wind it up. It submitted that the deeds of guarantee were not enforceable as they had not been witnessed, and so could not form the basis of any insolvency proceedings. The respondents submitted that the guarantees were enforceable as a matter of contract law, despite the fact that they had not been duly executed in accordance with the s 44 of the Companies Act 2006. Under section 43(1)(b) of the Companies Act 2006, all that was required for the validity of a contract entered into by a company was for it to be made by a person acting under its authority (express or implied), and it was clear on the facts that the executing director was so authorised. The two guarantees could therefore stand as simple contracts and they were sufficiently supported by consideration to be enforceable.

Findings

The application was refused. The Court held that if an otherwise complete contract of guarantee was intended to be embodied in a deed, but the formalities had not been complied with, the creditor could still enforce the agreement as a contract if it was supported by consideration. The consideration did not have to benefit the surety directly but could consist of some advantage conferred on the principal debtor by the creditor at the surety's request, such as lending the debtor money. Even if the guarantee post-dated the entry into that transaction, the court would look at the commercial realities.

The loan agreements expressly provided that the borrower had agreed to secure the repayment of the loan by executing security documents, including the guarantees from the company. The guarantee agreements had been sufficiently supported by consideration. Although the second respondent's loan had been advanced the day before the parties had entered into the relevant agreements, the court was satisfied that the loan had been entered into as part and parcel of a series of interlinked transactions involving not only the entry by the borrower into the loan agreement, but also the entry by the company into the guarantee. Had the guarantee not been given, the second respondent would have been entitled to call for the return of her money on the basis of a total failure of consideration. The guarantees were enforceable against the company, and so the company was a debtor and each respondent was a creditor. There was no reason to restrain presentation of the winding up petitions.

HFW Comment

This case is unfortunately likely to be of interest in the current economic climate. It is a reminder that even where it is not enforceable as a deed because of a failure of formalities, an otherwise complete contract of guarantee can still offer a creditor some protection provided the creditor can show consideration.

TAQA Bratani & Ors v Rockrose UKCS8 LLC [2020] EWHC 58 (Comm)

Court Commercial Court

Date 17 January 2020

Summary

The court considered general principles of implied terms in the context of "*relational contracts*" and good faith.Whilst it found that the agreements under scrutiny were possibly relational, it refused to imply any terms. This case also affirms the concept of good faith which can affect a commercial contract in three distinct ways:

- By parties expressly agreeing that they will act in good faith.
- By incorporating the well-recognised duty of rationality under which a party must exercise a contractual discretion in good faith and not act arbitrarily or capriciously (known as the *Braganza* duty).
- By the courts implying a general duty of good faith in a contract, or using the concept of good faith to imply other fact-specific duties, but these duties will only arise in a limited class of "*relational*" contracts.

Facts

The claimants were participants in five unincorporated joint ventures concerning the operation of oil and gas blocks on the UK Continental Shelf. Rockrose was the appointed operator. Each joint venture was governed by a complex and professionally-drafted joint operating agreement which included an absolute right of the claimants to discharge the operator on giving a minimum notice period and provided there was a favourable majority vote by the non-operating participants.

Whilst the parties expressly agreed that their relationship did not constitute a partnership, they also agreed that they owed one another fiduciary duties. The defendant contended that the claimants' rights to discharge them as operator were constrained by an implied term which:

1) either required the claimants to exercise this right in good faith and absent arbitrariness, capriciousness or irrationality (relying upon the "*Braganza* principles");
2) or qualified as a result of the mutual trust, confidence and loyalty arising under longer-term joint venture agreements which were said to be "*relational' contracts.*"

Findings

The Court disagreed, holding that:

1) in respect of the defendant's first argument, whilst the circumstances in which the *Braganza* duty could be implied into commercial agreements was a developing area of the law, the *Braganza* doctrine had no application to unqualified discharge provisions "*within expertly drawn complex commercial agreements between sophisticated commercial parties*" and;
2) in respect of its second, the express wording of the joint operating agreements conferred an absolute and unqualified power to the claimants to discharge the operator, which meant that whilst the agreements were indeed "relational contracts", it would be "*impermissible*" and "*wrong*" to imply a term qualifying the power to discharge. The parties had already legislated for the degree of communication, co-operation and predictable performance that they intended and this should therefore be followed.

HFW Comment

In this case much weight was placed by the court on the complexity of the particular agreements, their professional drafting, and the sophistication of the parties. The court also relied heavily upon existing case law which holds that the exercise of express termination rights cannot be circumscribed by implied terms of good faith and reasonableness.

VTB Commodities Trading DAC v JSC Antipinsky Refinery [2020] EWHC 72 (Comm)

Court Commercial Court

Date 20 January 2020

Summary

Where a party has already obtained an urgent *ex parte* injunction to preserve evidence/assets in relation to arbitral proceedings under section 44(3) of the Arbitration Act 1996 ("the Act"), it is required under section 44(4) of the Act to obtain either the tribunal's permission or the consent of all parties before making an application to continue the injunction in circumstances where the urgency for making such an application has passed.

Facts

The defendant (JSC) owned a Russian oil refinery and the claimant (VTB) was an Irish-registered commodity trader. The parties entered into contracts under which the claimant agreed to purchase all of JSC's gas oil and paid EUR 194.7 million in advance. However, the oil was not delivered, and VTB discovered that its cargoes were being delivered by JSC to a third party.

VTB commenced arbitration proceedings and applied urgently to the court for interim relief under section 44(3) of the Act. The Court granted a worldwide freezing injunction on JSC's assets up to EUR 225 million, as well as a cargo injunction to restrain JSC from selling, transferring or disposing of the oil to third parties.

When VTB applied to continue the injunctions, JSC challenged the court's jurisdiction to hear the application, stating that as the issue was no longer urgent, VTB could not make the application without having first obtained the arbitral tribunal's permission or the consent of all parties pursuant to section 44(4) of the Act. VTB subsequently obtained the tribunal's permission.

Findings

1) **Jurisdiction under s.44** – Where the urgency had passed, a party applying *on notice* to continue a *without notice* injunction granted under section 44(3) of the Act has to satisfy the requirements of section 44(4) because (i) it constitutes "*the initiation of an application*", (ii) if the court retained jurisdiction after the urgency has passed it would put an applicant in a better position by not having to establish its entitlement to relief afresh and (iii) section 44 was designed to respect party autonomy and restrict the scope of the court's jurisdiction and this should be upheld.
2) **Freezing injunction** – The court continued the freezing injunction despite VTB's non-disclosure of a deed of novation that was plainly relevant to considerations of quantum or the duration of the injunction. However, in all the circumstances, the court did not consider that this non-disclosure meant the injunction should be discharged. The issue was peripheral and the tribunal had since made a full award in VTB's favour, thereby changing its status from claimant to judgment creditor.
3) **Cargo injunction** – Conversely, the court discontinued the cargo injunction as there was a strong presumption that specific performance was limited to cases of specific or ascertained goods, except in very exceptional circumstances. It was held that no exceptional circumstances had been established in this application that justified the granting of an injunction which gave priority to VTB over other purchasers of JSC's goods, notwithstanding that: damages were not an adequate remedy in VTB's case, JSC was in financial trouble, JSC was double-selling its gas oil and VTB had prepaid to purchase that production.

HFW Comment

This case demonstrates that the court will interpret all applications for interim relief under section 44 on their individual merits strictly so as to protect the parties' autonomy and restrict the scope of the court's jurisdiction over arbitral matters. The court's response to the applicant's failure to make full and frank disclosure in relation to the freezing injunction is in interesting contrast to its response in Fimbank Plc v Discover Investment Corp [2020] EWHC 254 (Comm). However, there are clear differences in circumstances between the two cases and, in particular, the fact that VTB was a judgment creditor rather than a claimant made a significant difference. Lastly, the lifting of the cargo injunction is a timely reminder of the challenges that can be faced by unsecured creditors in recovering their losses.

R (on the application of Jet2.com Ltd) v Civil Aviation Authority [2020] EWCA Civ 35

Court Court of Appeal

Date 28 January 2020

Summary

The Court of Appeal found that in order to attract legal advice privilege (**LAP)**, the relevant document or communication must have been created for the dominant purpose of giving or receiving legal advice. It also took the opportunity to provide guidance on the applicability of LAP where emails are sent to multiple addressees, including lawyers and non-lawyers; how LAP will apply to email attachments; and circumstances where a collateral waiver of LAP may arise. Here, the Civil Aviation Authority appealed against an order that documents it had been ordered to disclose did not attract LAP.

Facts

Jet2 brought judicial review proceedings against the Civil Aviation Authority (**CAA**) to challenge the lawfulness of the CAA's decision to issue a press release in April 2018 criticising Jet2's decision not to participate in an alternative dispute resolution scheme. Jet2 had complained to the CAA about the press release before publication in January 2018 and the CAA had replied in writing in February 2018. Jet2 therefore sought disclosure of all drafts of the CAA's February letter and of all records of any discussions about those drafts. The court at first instance found that the documents should be disclosed. The CAA appealed.

Findings

The appeal failed. The Court of Appeal considered four issues and held as follows:

1. **Dominant purpose** – For LAP to apply, the party seeking it had to show that the dominant purpose of the document or communication was to obtain or to give legal advice, not just that it was one of a number of purposes.
2. **Multiple addressees** – Where an email is sent simultaneously to multiple addressees that included lawyers and non-lawyers, provided that the dominant purpose of the email is to obtain legal advice, in line with the dominant purpose test, it would attract LAP even where commercial advice was also sought from the non-lawyer addressees. Conversely, if the dominant purpose of such communications was to obtain commercial advice, then generally LAP would not apply, notwithstanding lawyers being included among the addressees. However, the Court noted that a document sent for the dominant purpose of obtaining commercial advice may still be privileged if disclosing it would reveal legal advice already requested or obtained.
3. **Attachments** – The Court repeated the well-established principle that a document which is not privileged will not become privileged simply by reason of it being sent to lawyers, even as part of a request for legal advice. Separate consideration must therefore be given to the email and its attachments when determining LAP.
4. **Collateral waiver** – The Court was not required to give a ruling on this because the documents were not found to attract LAP. However, the Court held that if the documents had been found to be privileged, then the voluntary disclosure of one email would not have waived privilege in related documents. In assessing whether it would, the Court would look at documents forming part of the same "transaction". This is not necessarily as wide as those which relate to the same subject matter.

HFW Comment

This confirmation from the Court of Appeal that the relevant document or communication must have been created for the dominant purpose of giving or receiving legal advice is helpful. LAP remains a challenge for in-house legal teams however. Communications with or including them will not necessarily attract LAP, particularly in circumstances where multiple legal and non-legal addressees are included in the same communication. LAP will only apply where the dominant purpose of the document or communication was the giving or obtaining of legal advice.

Fimbank Plc v Discover Investment Corp [2020] EWHC 254 (Comm)

Court Commercial Court

Date 5 February 2020

Summary

In proceedings concerning the misdelivery of a cargo of wheat, the Court refused to continue a freezing order against a shipowner where the applicant was found to have no good arguable case. The Court took into account the conduct of the applicant in circumstances where it emerged that it had not provided full and frank disclosure. HFW (Electra Panayotopoulos, Dimitri Exarchou and Steffi Gougoulaki) acted for the shipowner.

Facts

The Discover's vessel carried wheat from Ukraine to Egypt under a bill of lading on which a company (E) was the notified party. Fimbank had financed the purchase of the cargo by another company (B), which was in the same group of companies as E. In 2018 Discover discharged the cargo to E without production of a bill of lading and against a letter of indemnity issued to it by the vessel's time charterers. E transferred the cargo to a warehouse pending delivery to B's buyers. Fimbank alleged that the cargo was subsequently discharged from the warehouse on production of a forged bill of lading and argued that Discover had wrongly discharged the cargo to E.

Following negotiations, the parties signed a standstill agreement in March 2019, under which Discover promised not to sell or otherwise transfer title to the vessel and Fimbank promised not to arrest or otherwise interfere with the trading of the vessel. Subsequently Fimbank refused to extend the standstill period and after its expiry, Discover sold the vessel. Fimbank commenced arbitration proceedings against Discover and sought and obtained a freezing order on the basis that there was a significant risk of dissipation of Discover's assets.

Discover submitted that the freezing order should be discharged as Fimbank had failed to be full and frank in disclosing the facts and merits of its case, including the details surrounding its finance agreement with B and a stock management agreement between itself, B and a stock manager which allegedly authorised B to take delivery of the cargo without production of the bill of lading.

Findings

The English Court must be satisfied as to six conditions in order to grant a freezing injunction: the applicant must have a cause of action that is an underlying legal or equitable right, the English court must have jurisdiction, the applicant must have a good arguable case, there must be assets in existence which can be 'frozen' and there must be a real risk of dissipation of these assets.

Here, the Court refused Fimbank's application on the basis that:

(i) the factual position regarding the financing arrangements and stock management agreement was significantly and materially different from the position it had previously presented to the Court.

(ii) the Court at first instance had thereby been disabled from giving proper scrutiny to Fimbank's case.

(iii) on proper scrutiny, there was no good arguable case that Discover should be liable for substantive damages such as might have justified the continuation of a freezing order and it was therefore discharged.

Whilst unnecessary to decide, the Court noted two things. First, it noted that in respect of dissipation it was quite likely that Discover's motivation for selling the vessel was because it could not be confident that it could continue to trade if arrested rather than to prevent the vessel from being available as an asset against which a future arbitration award could be enforced. Second, it noted that Fimbank's failure to disclose that it was only exposed to Discover's dissipation risk because it had refused to extend the standstill agreement, and did not provide reasons for that refusal, was sufficiently serious to justify the discharge of the freezing order.

HFW Comment

This case is a reminder of the seriousness with which the English Court approaches the draconian step of freezing a party's assets - and the consequent extent of an applicant's duties of full and frank disclosure to the Court when seeking a freezing injunction.

Medina Dairy Ltd v Nampak Plastics Europe Ltd [2020] 2 WLUK 70

Court Commercial Court

Date 7 February 2020

Summary

The court ordered the continuation of an injunction which required a supplier of plastic bottles (Nampak) to continue to supply a milk producer (Medina) despite being owed substantial sums in respect of past supplies. The court was satisfied that there was a serious issue as to whether Nampak had acted in breach of contract by refusing to supply plastic bottles unless Medina accepted proposed amendments to the contractual payment terms. Nampak had not terminated the contract and could not withhold its supply while seeking to impose new contract terms.

Facts

Medina supplied fresh milk to supermarkets and was supplied with plastic bottles to do so by Nampak. Under the terms of the supply contract, Nampak was entitled to suspend its supply to Medina where payment was overdue, provided that it gave written notice of the overdue invoice and it remained unpaid after two weeks. Additionally, either party was permitted to terminate the contract on written notice if debts were owing and unpaid.

Medina owed a substantial sum to Nampak. At a meeting in January 2020 Nampak stated that if Medina did not agree to new terms (including payment in advance and a price increase) it would cease to supply bottles. Days later, Nampak emailed Medina to confirm that payment in advance was now required. Medina sought, and was awarded, an injunction that required Nampak to stop refusing to provide bottles.

Findings

The Court held that the original injunction had been properly granted and should continue. It was satisfied that there was a serious issue to be tried: by refusing to supply Medina unless it agreed to new payment terms, Nampak was effectively threatening to stop delivery with immediate effect, in breach of contract. Importantly, it agreed with the original findings that damages would be an inadequate remedy here, because Medina would be unable to supply its customers if Nampak stopped supplying it bottles.

Nampak had subsequently served notice regarding the outstanding amounts due and argued that the injunction should not continue past the date on which it was entitled, after that notice, to suspend its supply.

In considering whether the injunction should be continued in circumstances where Nampak had served notice under the contract, the Court found that Nampak could *lawfully* suspend supply for non payment but could not impose new contractual terms. If Nampak terminated the contract lawfully, the question of imposing new terms became moot. If it did not terminate, it could not impose conditions on delivery. Since Nampak had not withdrawn its threat to impose new terms, there was a continuing serious issue to be tried and damages remained an inadequate remedy.

Whatever the financial position of Medina, Nampak could not use its non-payment as a way of obtaining better payment terms than it had been able to negotiate at first instance. The balance of convenience lay in continuing the injunction, provided that terms were included which made it clear that Nampak was not prevented from lawfully terminating the contract or lawfully suspending deliveries.

HFW Comment

It is relatively unusual for the Court to order a party to continue to perform its contractual obligations in this way. It offers a timely reminder that in circumstances where your counterparty is behind on payment, it is important to find a solution that is both lawful and not in breach of your own contractual obligations. Sellers negotiating contracts in the current economic climate should consider carefully what express rights they require in the event of non-payment by the buyer.

Sports Direct v The Financial Reporting Council [2020] EWCA Civ 177

Court: Court of Appeal

Date: 18 February 2020

Summary

The Court of Appeal has overturned a High Court judgment[1] and held that legal professional privilege ("**LPP**") does apply to protected documents provided by a client to its auditor where disclosure is required by regulation. The parties have appealed to the Supreme Court.

Facts

The Financing Reporting Council ("**FRC**") is the professional regulator for auditors and is able to carry out investigations into the work of auditors under the Statutory Auditors and Third Country Auditors Regulations 2016 ("**SATCAR**"). Under SATCAR, the FRC can require certain information to be disclosed by an auditor or the corporate being audited using a Rule 10 Notice. Disclosure is not required where the recipient of the Rule 10 Notice would be able to refuse disclosure in High Court litigation on the grounds of LPP.

The FRC commenced an investigation into the conduct of Sports Direct's auditor and served a Rule 10 Notice on Sports Direct, requiring disclosure of email correspondence provided to the auditor for the purpose of the audit. These documents contained legal advice given to Sports Direct by its lawyers and were therefore covered by legal advice privilege. Sports Direct refused to provide them on that basis.

The High Court ordered that the documents be handed over. It accepted the FRC's arguments, first that there would be no infringement of privilege if the documents were handed over; and second that some of the attachments were pre-existing documents and were not protected by privilege simply by being attached to privileged emails. Sports Direct appealed.

Findings

The Court of Appeal was clear in rejecting the FRC's arguments on the infringement issue. In considering the wording in SATCAR, there was no provision expressly overriding LPP and indeed there were provisions which seemed to protect LPP. The FRC's attempt to identify a "no infringement" exception in a House of Lords decision in another case[2] failed and it was clear that there are no exceptions to LPP other than those already established. Any exceptions to LPP must be principled and clear, otherwise the confidence of the client in non-disclosure cannot exist.

As to the second issue, the Court of Appeal agreed with the FRC, confirming that documents which are not themselves privileged do not receive the protection of privilege by being attached to a privileged email or letter.[3]

HFW Comment

This decision confirms the protection afforded by LPP and in particular, that such protection applies to documents requested by a Rule 10 Notice from the FRC. However, it also confirms that attachments to privileged emails or correspondence which fall within the scope of disclosure, and which are not themselves privileged, do not acquire privilege by virtue of being attached to privileged emails or letters.

The parties have appealed to the Supreme Court, FRC on the no-infringement principle and Sports Direct on the application of privilege to non-privileged documents attached to a privileged document.

[1] [2018] EWHC 2284 (Ch).

[2] *Special Commissioner and Another, Ex P Morgan Grenfell & Co Ltd, R v*. [2002] UKHL 21,

[3] *Ventouris v Mountain (Italia Express) (No 1)* [1991] 1 WLR 607.

Pipia v BGEO Group Ltd [2020] EWHC 402 (Comm)

Court Commercial Court

Date 26 February 2020

Summary

In relation to a party's duty to disclose documents in litigation, the Court held that where a party to proceedings has an access arrangement in place with its subsidiaries allowing unfettered access to documents in the subsidiaries' possession, this amounts to "control" for the purposes of disclosure.

Facts

The Defendant applied for a declaration that, for the purposes of disclosure, it did not control documents held by either of its subsidiaries. It held 100% of the shares in one subsidiary and an indirect shareholding in the other.

The subsidiaries (who were at one time parties to the litigation) agreed that they would provide to the Defendant "all documents pertaining to the [claim] as requested by [the Defendant] or [their] advisors". This Defendant subsequently attempted to vary the arrangement, but this was rejected by the subsidiaries.

Findings

In determining whether the Defendant had the necessary level of control, the Court turned to the principles established in *Lonrho Ltd v Shell Petroleum Co Ltd (No 1)*[4], namely that a parent company:

- does not exercise control over the documents of or held by its subsidiaries merely by virtue of its shareholding in those companies; and
- a parent company has control over documents held by one of its subsidiaries in one of two circumstances: where there is an existing arrangement or understanding, whether or not legally enforceable as a contract, which in practice provides the parent with a right of access to documents held by its subsidiary; or
- where the parent company has a presently enforceable legal right to obtain the documents from its subsidiary.

The Court held that the access arrangement was sufficient to come within the first limb of the control test – there was a standing consent by virtue of the agreement between the Defendant and its subsidiaries.

The Court identified three points for determining access under a standing consent:

- **scope of the consent**: the relevant documents were covered by the standing consent;
- **type of consent**: the subsidiaries had agreed to provide the documents on request; and
- **quality of consent**: the Defendant had "free and unfettered access", and therefore control of the documents.

The Court also noted that:

- a control arrangement can be found where there is factual evidence that a parent has the consent of its subsidiary to inspect documents (where there is no reason to believe this position has changed); and
- an arrangement does not need to be legally binding to amount to control.

HFW Comment

This decision is welcome because it clarifies the position on the extent to which a parent company has control over the documents of its subsidiaries for the purposes of disclosure.

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[4] [1980] 1 WLR 627

As a result of the judgment, parent companies may wish to consider their current or future arrangements to ensure that they are happy with any exposure these agreements create in relation to the documents held by their subsidiaries.

Addlesee v Dentons Europe LLP [2020] EWHC 238 (Ch).

Court High Court (Chancery Division)

Date 3 March 2020

Summary

Legal professional privilege did not apply to documents held by a solicitors' firm for a client where investors claiming losses against that client had a strong *prima facie* case that the client had acted fraudulently and that the firm had been instructed for the purpose of furthering that fraud.

Facts

Anabus Holdings Limited, incorporated in Cyprus, was the operator of a gold dust trading scheme. The claimants were the 240 investors who had invested in the scheme and were claiming losses on the basis that the scheme was promoted through false representations as to the operator's trading history, the prospect of high returns, that the investors' money would be protected in investor accounts, and the provision of USD 100 million of insurance.

Dentons, the defendant, acted for Anabus throughout the scheme. In particular, Dentons had provided comfort letters on the firm's letterhead to investors, which the claimants argued were a key part of the attraction of the scheme. The scheme closed after 5 months and the claimants did not receive any repayment of their investments. They claimed collective losses of over EUR 6.5 million.

In this application, the investors applied for disclosure and inspection of all files that the defendant held for the operator. Dentons had previously challenged disclosure on two occasions, arguing for the protection of legal professional privilege so that its clients would not feel that their documents would be at risk of disclosure when seeking legal advice.

Findings

There is an exception to legal professional privilege on communications between lawyer and its client if the lawyer is instructed for the purpose of furthering crime, fraud or iniquity ("the fraud exception"). In this case, a question before the court was whether the burden of proof on the party seeking disclosure is a strong *prima facie* case or a very strong *prima facie* that the fraud exception applies. As the defendant did not admit that the scheme was fraudulent, a higher standard was required than when the fraud is not in dispute.

The Court decided that the burden of proof was a strong *prima facie* case, given the circumstances of the case, including:

- The defendant had not denied that the scheme was fraudulent, but had just not admitted it;
- The relevant fraud was not that of the defendant, but of their client; and
- The client had been dissolved and therefore the notion of invading its rights was somewhat artificial.

The Court was satisfied that the claimant had established a very strong and compelling case that Dentons had been instructed to further a fraudulent scheme. In particular, the scheme exhibited the hallmarks of a fraudulent scheme, such as the prospect of impossibly high returns, reliance on exotic investments and financial instruments, and reliance on solicitors to produce comfort letters and provide plausibility.

Importantly, the purpose of the defendant's comfort letters was to encourage, directly or indirectly, investment in the scheme, a purpose that fell outside the normal lawyer-client relationship. Therefore, the claimants had a strong *prima facie* case that the defendant was instructed for the purpose of furthering the scheme.

HFW Comment

Legal professional privilege protects confidential communications between a lawyer and its client, where legal advice is sought, from inspection in legal proceedings. This case confirms the fraud exception to this principle and clarifies that the burden for applicants seeking disclosure of such documents where the fraud is not admitted is a strong, rather than very strong, *prima facie* case. In addition, this exception to legal professional privilege can apply to prompt the disclosure of documents otherwise privileged at any stage of the proceedings and not just at trial.

Enka Insaat Ve Sanayi AS v OOO “Insurance Company Chubb” & Ors [2020] EWCA Civ 574

Date 29 April 2020

Court Court of Appeal

Summary

The Court of Appeal granted an anti-suit injunction restraining a party from pursuing court proceedings in Russia, in breach of an arbitration agreement. The seat of the arbitration was England.

Facts

Enka was a subcontractor involved in the construction of a power plant in Russia. The subcontract contained an arbitration clause which provided for ICC Arbitration with its seat in London but did not contain an express choice of law governing the arbitration agreement. A fire occurred at the power plant and the OOO "Insurance Company Chubb" (Chubb) paid out US$400m to its insured for damage caused by the fire.

Chubb brought its subrogated claim against Enka and filed its claim in the Moscow Arbitzrah Court. Enka then issued proceedings in the English Commercial Court seeking an anti-suit injunction to restrain Chubb from continuing the Russian proceedings and a declaration that Chubb was bound by the arbitration agreement.

In the first instance, the Commercial Court refused to grant an anti-suit injunction. It held that the power to grant an anti-suit injunction did not arise from its position as the elected supervisory power over the arbitration. It arose from the court's power to restrain a defendant, over whom the court had personal jurisdiction, from breaching a contract. Therefore, in the view of the Commercial Court, the court was required to consider the concept of *forum non conveniens*. The Moscow court was the appropriate forum to determine the scope of the arbitration agreement and whether Russian proceedings were permissible. Enka appealed.

Findings

In granting Enka's appeal, the Court of Appeal considered and summarised the principles to be applied when determining the proper law of an arbitration agreement, when it is found in an agreement governed by a different system of law:

1. Apply the three stage test required by English common law conflict of laws rules, which is: (i) is there an express choice of law? (ii) if not, is there an implied choice of law? (iii) if not, with what system of law does the arbitration agreement have its closest and most real connection?

2. Where there is an express choice of law in the main contract, it may amount to an express choice of the law of the arbitration agreement. This will be a matter of construction of the whole contract, including the arbitration agreement, applying the principles of construction of the main contract law if different from English law.

3. In all other cases there is a strong presumption that the parties have impliedly chosen the curial law as the law of the arbitration agreement. This general rule may give way to another system of law governing the arbitration agreement where there are powerful countervailing factors in the relationship between the parties or the circumstances of the case.

Applying these principles to this case, the Court of Appeal found that the proper law of the arbitration agreement was English law.

The Court of Appeal also considered what constitutes "undue delay" in bringing an application for an anti-suit injunction. Enka was justified in delaying its application to the English court until it was clear whether the Moscow court would accept the claims.

HFW Comment

This decision has provided welcome clarifications to some of the key principles in determining the proper law of an arbitration agreement and is a reminder that making an express choice in the contract is best. It also establishes that the English court is willing to use its powers as a curial court to protect and enforce the integrity of arbitration agreements, which makes England an attractive choice as an arbitral seat.

Times Trading Corporation v National Bank of Fujairah (Dubai Branch) [2020] EWHC 1078 (Comm)

Court High Court (Queen's Bench Division, Commercial Court)

Date 5 May 2020

Summary

In *Times Trading Corporation v National Bank of Fujairah* (*Dubai Branch)* the English High Court granted a conditional anti-suit injunction to restrain the Dubai Branch of the National Bank of Fujairah ("**NBF"**) from continuing proceedings in the Singapore High Court in breach of an arbitration clause. The injunction was conditional upon Times Trading Corporation ("**Times**") undertaking to refrain from arguing in the arbitration that the claim was time-barred and despite the fact that the existence of an underlying contract containing the arbitration agreement was disputed.

Facts

NBF was the holder of 27 bills of lading in respect of cargo shipped on board a vessel (the "**Vessel**"). The cargo was discharged against letters of indemnity and NBF pursued misdelivery claims against the carrier. All parties accepted that the bills incorporated an arbitration clause from a voyage charterparty, referring disputes to London arbitration, as well as a General Paramount Clause pursuant to which the Hague Visby Rules 12 month time-bar applied. However, there was a question as to who was NBF's contractual counterparty and whether Times was the bareboat charterer of the Vessel.

NBF commenced a claim for misdelivery against the carrier in the High Court of Singapore on 2 January 2019 ("**Singapore Proceedings**"), addressing it to the Vessel's registered owner, Rosalind Maritime LLC ("**Rosalind**") "*c/o Times Navigation Inc*". The writ was addressed in standard form to "*Owners and/or Demise Charterers and/or other persons interested in the Vessel*". Security was provided by Trafigura by way of a guarantee to NBF, pursuant to a Claims Handling and Cooperation Agreement (the "**CHC Agreement"**) between Trafigura, Rosalind and Times, which gave Trafigura responsibility for claims handling of the NBF misdelivery claims. In that agreement, Times was described as the Bareboat Charterer. However, NBF had received neither a copy of the charterparty nor a copy of the CHC Agreement until they were disclosed as part of the injunction proceedings.

On 4 June 2019, NBF also commenced London arbitration proceedings for misdelivery against Rosalind as the carrier (the "**London Arbitration"**), within the 12 month time limit. Only after the time limit had expired did Reed Smith, "*acting for Owners"* appoint an arbitrator for the carrier. They further sent a letter stating the Notice of Arbitration was issued against the wrong party because at the time the bills of lading were issued, the Vessel was under bareboat charter to Times, not Rosalind, and therefore the claim was not valid. NBF's position was that the bareboat charter was a sham and that there was no genuine contract between Times and Rosalind.

The London Arbitration did not proceed. A potential stay of the Singapore Proceedings was discussed at pre-trial conferences (PTC), with NBF showing a willingness to stay the proceedings if Times waived any time bar defence it might have raised in relation to the arbitration proceedings. Times declined. On 9 March 2020 Times applied to the High Court in England for an interim anti-suit injunction under section 12 Arbitration Act 1996 (the "Act"), restraining NBF from pursuing its claims against Rosalind in the Singapore High Court. NBF also issued an application to the English court on 20 March under section 12 of the Act on a "conditional or protective basis" to extend time for NBF to commence arbitration against Times in London on the premise that the bills of lading were issued on behalf of Times.

Findings

Under the *Angelic Grace test*[5], the court has the power to exercise its discretion to grant an anti-suit injunction unless the defendant can show that there are strong reasons to refuse relief. In a contractual case there must, to a high degree of probability, be an agreement to arbitrate which governs the dispute, or in a non-contractual case the litigation must be "frivolous or vexatious". Further there must be strong reasons to refuse relief. In this case the Court granted the anti-suit injunction, but applied conditions to it, namely that Times was not allowed to rely on the time-bar in the London Arbitration.

[5] *Angelic Grace* [1995] 1 Lloyd's Rep 87

The Angelic Grace Test

In reaching a decision the Court firstly examined whether the *Angelic Grace* test applied by examining whether it was satisfied to a high degree of probability that an arbitration agreement was in place. NBF argued that the test could not be met, as the identity of the carrier was an open issue; whereas Times argued that there was a "quasi-contractual" basis for an anti-suit injunction. The Court concluded that there was a "*common and consistent thread*" in applying the *Angelic Grace* test to quasi-contractual anti-suit injunctions. Here, however, the case did not fit into either category as Times sought an injunction asserting that there was a contract, whereas NBF denied the existence of a contract between Times and itself, but nonetheless added Times to the Singapore proceedings on a "belt and braces" basis. The Court concluded that the *Angelic Grace* test should apply by analogy. Even if there was no quasi-contractual case, the jurisdictional hurdle for a contractual anti-suit injunction had been met.

Strong reasons to refuse relief

NBF argued that the fact that the substantive proceedings in England would be time-barred was a strong reason to refuse the injunction, as NBF had acted reasonably (and at least not unreasonably) in not commencing arbitration against Times before the time-bar expired. The Court held that in accordance with case law, there was insufficient material to support the view that missing a time bar in this way would amount to a strong reason for not granting an injunction. Further, as NBF's application under Section 12 was still outstanding, the existence of a time bar was not yet established and if the application was granted, NBF would not be out of time to commence arbitral proceedings against Times.

Discretionary Factors

The Court considered a number of discretionary factors, even when such factors did not individually constitute "strong reasons". These included the fact that Times had not sought or agreed to a stay in Singapore and the delay in making the anti-suit injunction application. Here these were not so egregious as to refuse the injunction all together, but an anti-suit injunction application must be made promptly before foreign proceedings are too advanced. Finally, the element of "unclean hands" was considered, as Times, Rosalind and Trafigura were all aware of NBF's original understanding of who the "carrier" was at the time it issued arbitration proceedings. The Court considered these three issues when granting the injunction on the condition that Times give an undertaking not to rely on any time-bar in the London Arbitration.

Comments

The judgment shows that English courts will be inclined to grant an anti-suit injunction where court proceedings have been commenced in breach of an arbitration agreement unless there are strong reasons not to do so. A dispute as to the existence of the relevant contract will not necessarily be a bar; nor will the fact that the case does not fit neatly within existing categories. The conditional nature of the injunction is a reminder of the court's discretion not only to decide whether to grant relief but also to tailor that relief where circumstances require it.

Fortescue Metals Group and Chichester Metals Pty Ltd v Argus Media Ltd and S&P Global Inc [2020] EWHC 1304 (Ch)

Court High Court (Chancery Division)

Date 22 May 2020

Summary

A recent decision looked at the relationship between commodities producers and price reporting agencies ("**PRAs**") in the context of confidentiality, freedom of the press and market transparency. It found that there is an important public interest in the publication of price information so that iron ore producers could not prevent PRAs from publishing information about a component of the producers' monthly discount used as part of a formula for pricing sales of iron ore.

Facts

The claimants are both part of the group known as FMG, an iron ore producer. From about late 2018, FMG started to focus increasingly on the long-term contracts ("**LTC**") market. These long-term contracts contained a pricing formula under which the price is determined in each month for the contract's life for deliveries of iron ore in the following month. Part of the formula is the DMTU (dry metric tonne unit) discount.

Since 2014 various PRAs, including the defendants, published market reports and analysis containing information about FMG's monthly DMTU discounts. The claimants sought an injunction to restrain the defendant PRAs from continuing to publish the DMTU discount for May 2020 and later months, arguing that the DMTU discount was confidential information. (The claimants had previously been granted a short interim injunction that restrained both defendants from publishing the details of the DMTU discount.)

Findings

Due to the services that they provide, PRAs are "publishers of journalism", triggering the consideration of issues around freedom of expression. These considerations needed to be balanced against the confidential nature of the DMTU discounts.

The Court found that the DMTU discount was confidential information under the long-term contracts. However, when balancing the public interest in the publication of the DMTU discounts and the public interest of respecting business confidentiality between counterparties, the Court favoured the former. The reasons for its decision included the following:

- The general importance of the iron ore market and the role of price transparency in the LTC market (unlike spot markets, where prices are readily accessible).
- PRAs do not publish the actual terms of the LTCs, but rather just the DMTU discounts. These are merely components of the price and the price for each buyer cannot be determined by the DMTU discounts alone. Rather, DMTU discounts are generic figures and are not negotiated.
- Publication would not be harmful to the claimants in their dealings. Long-term iron ore contracts comprise a "package of terms" (including quantities, delivery dates, the length of the contract term etc.) and simply offering a lower price would not necessarily undercut the claimants. As the DMTU discount changes monthly, future prices cannot be determined from their publication. Interestingly, the Court noted that the publication of pricing information could actually be beneficial for competition (and consumers) in these markets.
- A key consideration was that the claimants had allowed such publication for years and there was no evidence that this ever prevented the claimants from dealing with their counterparties.

HFW Comment

This case is interesting because price reporting is common to a number of commodities markets and we are not aware of a similar challenge ever having been brought. It highlights the tension between maintaining confidentiality over prices and encouraging competition through the publication of price information.

Re: A Company (Injunction to Restrain Presentation of Petition) [2020] EWHC 1406 (Ch)

Court High Court, (Chancery Division, Insolvency and Companies List)

Date 2 June 2020

Summary

An application by a company to restrain the presentation of a winding up petition was granted where the Court considered that the Corporate and Insolvency and Governance Bill 2020 (the "**CIG Bill**") was likely to be enacted. (The CIG Bill subsequently received Royal Assent and became law on 25 June 2020.)

Facts

The company was a High Street retailer and its creditor was the lessor of a retail unit of which the company was the lessee. The company traded from those premises until it was required to close in accordance with government instructions in response to the Covid-19 pandemic. It then failed to pay rent and service charges that fell due under the lease. The creditor filed a statutory demand on or about 15 April 2020 and then followed with a winding up petition. The petition had not yet been presented as the creditor had not paid the court fee when the company applied to restrain the presentation. One of the bases upon which the application was made was the significance of the provisions as to winding up contained in the CIG Bill. This became the focus of the judgment. The hearing was in private to protect the interests of the company and so the judgment was anonymised.

Findings

The Court allowed the application to restrain presentation of the petition on an interim basis (pending the hearing of the company's application for a final order). Despite the fact that the CIG Bill was not expected to receive Royal Assent until the end of June, the Court had a "high degree of confidence" that schedule 10 of the CIG Bill would be enacted in more or less its current form. If the petition were to be presented on the day of the application hearing or in the near future, it would be unlikely that it would be heard before the CIG Bill was enacted.

The Court considered the provisions of schedule 10 of the CIG Bill. These provisions, which apply retrospectively from 27 April 2020, prevent a creditor from applying for a winding up petition of a company where it can be shown that: (i) the coronavirus pandemic had a financial impact on the company; and (ii) if the company had not been impacted by the pandemic, the facts on which the petition is based would not have arisen.

The Court found that, on the evidence, both these elements would be satisfied. Therefore, in anticipation that the CIG Bill would govern this petition for winding up of the company, when law, that petition would fail.

Importantly, although the CIG Bill had not yet been enacted, the Court found it was able to consider the expected change of law in its assessment because the court was deciding whether to grant relief that would involve the court controlling or managing its own processes. This applied to circumstances were it was improbable that the court would make the winding up order and the existence of the petition would cause serious damage to the company. Notably, this outcome was supported by the clear policy objectives of the CIG Bill. However, the applicant was still required to provide a cross-undertaking in damages, despite submissions to the contrary.

The CIG Bill received Royal Assent and became law on 25 June 2020.

HFW Comment

This is a significant (and unusual) case as it confirms the court's power to grant an injunction or relief based on an anticipated change of the law, for example, as in this case, legislation which has not yet been enacted but where there is a strong chance that it will be. Insolvency is, unfortunately, likely to be a theme in the next months. Those hard-hit by the pandemic should take heart that effective protection will be available under the new CIG Act 2020. However, those wishing to present winding up petitions should be aware of the potentially expansive reach of the CIG Act's protection for debtors.

Scipion v Vallis [2020] EWHC 795 (Comm)

Court Commercial Court

Date 5 June 2020

Summary

In a contractual bailment, where the bailee attorns to a third party and agrees to hold goods on that party's behalf, the third party obtains possessory rights to the goods.

Facts

The claim brought by Scipion concerns the loss of around 1900MT copper scrap from a facility in Morocco. The copper was owned by Mac Z Group (**Mac Z**) and was being held as security for a loan made by Scipion to Mac Z. The copper was subject to a pledge granted by Mac Z to Scipion, which was governed by Moroccan law. Vallis was holding the copper as collateral manager pursuant to a collateral management agreement (**CMA)** between Vallis, Scipion and Mac Z.

During the trial, Vallis admitted there had been a physical loss of copper that had been delivered into its possession. It admitted that breaches of obligations owed to Scipion under the CMA caused the loss. Vallis argued that the pledge was invalid under Moroccan law and therefore Scipion did not have a right over the copper. As a result, it claimed, that its breaches of the CMA did not cause any loss to Scipion.

Findings

The Court agreed that the pledge was invalid under Moroccan law. However, it held that Scipion was entitled to recover the value of the lost goods because of its possessory rights, as bailor of the goods under the CMA.

The judgment included a number of findings of interest:

- The bailment relationship on the terms of the CMA arose because Mac Z (the owner of the goods) bailed the goods to Vallis and Vallis (as bailee) attorned to Scipion and agreed to hold the goods on Scipion's behalf.[6]
- The law governing the bailment governs the right to possession in a bailment. In a contractual bailment, this is the law of the contract (here, English law) not the law of the place where the goods are held.
- The relationship between the bailee and the bailor prevents the bailee from denying the title of the goods to the bailor, including the bailor's right to possession.
- The abolition of the rule in section 8 of the Torts (Interference with Goods) Act 1977, that a defendant in an action for wrongful interference is not entitled to show that a third party has a better right than the claimant, is confined to claims in tort and does not apply to claims in contract for breach of a contractual bailment.

In relation to the measure of loss, the Court accepted that Scipion was entitled to damages equal to the value of the lost goods on the date on which they were lost. In order to avoid any need for Scipion to account to Mac Z for a surplus, Scipion limited its claim to the amount outstanding under its loan to Mac Z, net of recoveries made to date, less the value of the remaining goods. The Court held that Scipion did not fail to mitigate its loss by delaying sale or failing to recover a proper value for the goods in another way.

HFW Comment

CMAs and the storage of goods with a party which does not have title to them are common in commodities trading. They can give rise to complex contractual and non-contractual rights and liabilities. This judgment is a reminder of the legal basis on which the relevant parties' rights arise. Here, where the security which Scipion should have had under the pledge agreement was not available because of invalidity, the success

[6] Following analysis of *Official Assignee of Madras v Mercantile Bank of India Ltd* [1953] AC 53, 58 and *Impala Warehousing* [2015] EWHC 811 (Comm) at [58]

of Scipion's claim depended on the fact that it could establish that a bailment existed on the terms of the CMA under which Vallis had attorned to Scipion and agreed to hold the goods on Scipion's behalf.

Lamesa Investments Ltd v Cynergy Bank Limited [2020] EWCA Civ 821

Court: Court of Appeal

Date: 30 June 2020

Summary

The Court of Appeal has upheld the first instance decision *in Lamesa v Cynergy* but for different reasons, confirming that US secondary sanctions can amount to a 'mandatory provision of law,' under wording commonly found in facility agreements.

Facts

Lamesa Investments Limited ("**LIL**") lent Cynergy Bank Limited ("**CBL**") £30 million under a Tier 2 capital facility agreement. When LIL's ultimate owner was added to the Specially Designated Nationals list under the US's Russia/Ukraine sanctions programme, CBL withheld interest payments under the facility agreement. Although CBL was an English retail bank with no connection to the US other than maintaining US correspondent banking relations, it could have been subject to US secondary sanctions if it had continued to make payments. This would have had the effect of prohibiting them from entering into or maintaining correspondence relationships with US banks, which would have been disastrous for their business.

CBL relied on Clause 9.1 facility agreement to withhold payments. This reads:

"In the event that any principal or interest in respect of the…loan has not been paid … [CBL] shall not be in default if … such sums were not paid in order to comply with any mandatory provision of law, regulation or order of any court of competent jurisdiction."

At first instance, the High Court held that "mandatory provision of law" included US secondary sanctions, justifying CBL's non-payment and finding the clause was suspensory in effect. Lamesa appealed.

Findings

The Court of Appeal confirmed that secondary US sanctions fell within the term "mandatory provision of law", though for different reasons. It found that the lower court had failed to take into account that the sanctions clause was a standard term in common usage and therefore, evidence of the particular factual background or matrix had a limited role. It may also have given more weight to the commercial interests of Cynergy over those of Lamesa. The Court of Appeal also confirmed the suspensory nature of the clause.

Despite the difference in reasoning, the Court of Appeal reached the same conclusion as the lower court. It found that that the phrase 'mandatory provision of law' could refer to binding statutes that directly require non-payment (as argued by Lamesa); or provisions of law that the parties cannot vary or disapply (as argued by Cynergy); or requirements or prohibitions.

It then identified three relevant contextual factors: first, the EU Blocking Regulation employs similar language to Clause 9.1 and describes US secondary sanctions as 'prohibitions'. Those drafting Clause 9.1 would have been aware of this. Second, Clause 9.1 is a standard clause in LFAs for the provision of Tier 2 capital to international banks. Third, US secondary sanctions are far more relevant to the provision of Tier 2 capital, which is an EU requirement, than US primary sanctions, which only apply to US persons or activities with a US nexus.

Those drafting Clause 9.1 would have been familiar with the wording of Article 5 of the EU Blocking Regulation, which prohibits EU persons from complying with US secondary sanctions. They knew that the Blocking Regulation regarded US secondary sanctions as imposing a 'requirement or prohibition' with which EU parties were otherwise required to 'comply'. (The Court of Appeal found that while the US cannot strictly speaking prohibit non-US persons from engaging in certain activities, US secondary sanctions are effectively prohibitions.) Overall, the balance between the interests of the parties to such a type of facility agreement favoured the application of the clause to US secondary sanctions.

HFW Comment

This judgment provides specific guidance on the wording of a clause commonly found in Tier 2 capital loan agreements. It is now clear that a borrower can rely on such a clause to avoid being in default where it withholds payment in order to comply with US secondary sanctions. It also confirms that such clauses are suspensory in effect. Lastly, it confirms that US secondary sanctions effectively amount to prohibitions on the conduct of non-US persons. In light of this decision, we recommend that parties make themselves aware of the allocation of risk in the sanctions clauses in their contracts, both for existing contracts and where negotiating new ones.

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