HFW

COMMODITIES CASE UPDATE

MARCH 2018

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HFW is delighted to present our fourth Commodities Case Update, which is being provided to a small group of clients quarterly. This edition has been prepared by Damian and Andrew.

The update provides a summary of ten of the key cases relevant to the commodities sector from the last few months.

HFW would be happy to present the update by way of a training session. We can speak about all ten cases, or about a smaller number which are of particular interest to you (and chosen by you).

If you are interested in having a training session, please contact your usual Commodity contact at HFW.

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 them by way of the training session. Please do contact us if this would be of interest.

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1. ***Dainford Navigation Inc. v PDVSA Petroleo S.A. (The "MOSCOW STARS")***

Court High Court (Queen's Bench Division)
Date 2 August 2017

Case Summary
A vessel with a cargo of crude oil on board was detained and a lien over the cargo exercised. An application was made to the court for an order of sale pursuant to s.44 of the Arbitration Act 1996 ("**AA96**"). The Court found that where a contractual lien is being exercised by a shipowner over a cargo as security against the cargo's owner and the cargo is the subject of the arbitral proceedings, the Court has the power to make an order for its sale. This was the first contested cargo sale application to come before the English Commercial Court.

Facts
Dainford Navigation Inc ("**Dainford**") as owners and PDVSA Petroleo S.A. ("**PDVSA**") as charterers entered into a time charter of the vessel "MOSCOW STARS". By October 2016, approximately USD 7.7 million of unpaid charter hire remained outstanding. Having loaded a cargo of crude oil (the "**Cargo**") on board the vessel, Dainford gave notice to PDVSA of its exercise of a contractual lien over the Cargo.

Dainford commenced arbitration proceedings against PDVSA for non-payment of hire and other outstanding sums. With the vessel sitting off Curaçao and fears growing over the general condition of both vessel and Cargo, Dainford made an application to the Court under s.44 AA96 for the sale of the Cargo.

PDVSA resisted the application on three grounds:

1. A power under s.44 AA96 only exists if the cargo is the subject of the arbitral proceedings.
2. A power under s.44 AA96 can only be exercised within the scope of CPR 25.1(c)(v) which requires the cargo to either be perishable or that another good reason for the sale exists.
3. The exercise of such power would be inappropriate.

Court's Findings
The Court rejected all of PDVSA's arguments. No previous English case law existed to provide guidance on the interpretation of the phrase, "*subject to the arbitral proceedings*". A similar provision is found in the Singapore International Arbitration Act 2002 and was considered by the Singapore court in *Five Ocean Corporation v Cingler Ship Pte Ltd.*[1] In summary, the Singapore court held that the cargo is the subject matter of the proceedings if a sufficiently close nexus exists between the cargo and the arbitral proceedings. In this instance, it was held that the nexus was sufficiently close in circumstances where a contractual lien was being exercised over a defendant's goods as security for a claim being advanced in arbitration. The Court therefore had the power to order the sale.

Addressing PDVSA's second and third defences, the Court found that it had the power to order the sale and that it should exercise this power. This was on account of the time that the Cargo had been on board the vessel and would continue to remain on board unless sold and the fact that both parties would benefit financially from the sale of Cargo.

HFW Commentary
HFW (Rory Butler and Louise Lazarou of HFW's London office) represented Dainford. A charterparty lien can be turned into cash through an order of sale pursuant to s.44 AA96 if a good reason for the sale of the cargo exists. However, it is important to ascertain the identity of the owner of the cargo. In this instance the order for sale was given in relation to cargo owned by the charterers and was therefore the subject of the arbitral proceedings. It is doubtful that the order for sale would have been given if the cargo was owned by any other party.

[1] [2015] SGHC 311

2. ***Ultrabulk A/S v Arun Kumar Jagatramka***

Court High Court (Queen's Bench Division)
Date 9 November 2017

Case Summary
Mr. Jagatramka gave Ultrabulk A/S ("**Ultrabulk**") a personal guarantee in relation to the repayment of debts owed by Gujarat NRE Coke Limited ("**Gujarat**"), under which he guaranteed that upon receipt of a first written demand, he would pay the sum due (at the time of his providing the personal guarantee) plus interest. The Court found that Mr. Jagatramka had in fact provided an on demand bond and that he was obliged to pay the full debt due.

Facts
Ultrabulk, a Danish company and Gujarat one of the largest producers of coke in India entered into two cooperation agreements dated 6 June 2007 and 5 July 2007 respectively. By early 2013 Gujarat had accrued a debt under the cooperation agreements totalling USD 4,259,397.

On 2 July 2013 Ultrabulk and Gujarat entered into a Deed of Agreement under which Gujarat undertook to pay the debt in instalments with a view to repaying it by 30 December 2013. Mr. Jagatramka, the Chairman and Managing Director of Gujarat, entered into a personal guarantee with Ultrabulk on the same day, in which he guaranteed that if Gujarat did not pay the amount due by 31 December 2013 he would, on receipt of a first written demand, pay the sum due plus interest. Gujarat failed to adhere to the repayment plan set out in the Deed of Agreement, so Ultrabulk sent a first written demand to Mr. Jagatramka requiring him to pay the sum due. He failed to do so and Ultrabulk brought a claim in the English High Court.

Court's Findings
Mr. Jagatramka ran a number of defences, including that the personal guarantee was in breach of Indian law; that it was given in reliance on Ultrabulk's lawyers; that it was merely a letter of comfort; and that he lacked the capacity to give it. These were all set aside by the Court.

A final line of partial defence run by Mr. Jagatramka was that his liability under the personal guarantee was a secondary liability to that of Gujarat's primary liability under the Deed of Agreement, so that he was only liable for USD 2.31 million plus interest because Gujarat had already paid USD 1.95 million to Ultrabulk. The Court found that this would depend upon whether the guarantee provided for a primary liability arising upon demand or whether it was a true guarantee which provided for a secondary liability in the sense that it mirrored the liability of the principal debtor. The Court acknowledged that there is recent authority for the proposition that there is a presumption against construing an instrument as an 'on demand bond' where it is not given by a bank or other financial institution. However, it was in no doubt that the instrument signed by Mr. Jagatramka was an on demand bond and that if a demand was validly made, he was obliged to pay the full debt of USD 4,259,395, rather than the USD 2.31 million that Gujarat was still liable to pay at the time of the request. Mr. Jagatramka's liability was held to be a primary liability rather than being coextensive with that of Gujarat. This was because of the wording in the guarantee. In particular, Mr. Jagatramka agreed to pay a sum equivalent to the "Gujarat Liabilities" (which were defined as being USD 4,259,395). He did not agree to pay a sum of money to be determined by reference to Gujarat's actual liability at the material time. He also "*unconditionally and irrevocably*" guaranteed to pay the sum on demand if Gujarat failed to pay on time; and he irrevocably confirmed that he would not contest and / or defend any application and / or proceedings to enforce the guarantee.

HFW Commentary
Even where you are not a bank or financial institution, the wording of a guarantee of this sort is crucial, particularly if you intend to take on a secondary obligation rather than a primary one.

3. ***Sino Channel Asia Ltd v Dana Shipping & Trading PTE Singapore***

Court Court of Appeal
Date 2 November 2017

Case Summary
This is the first of two cases in the update dealing with service of process and agency (see also 7 below). It considers whether a notice of arbitration sent to one party's agent can be effective if the agent is not expressly authorised to receive the notice. The Court of Appeal held that based on the unusual facts of this case, the agent had implied actual and ostensible authority to accept service.

Facts
Sino Channel Asia Ltd ("**Sino**") entered into a Contract of Affreightment ("**CoA**") with Dana Shipping & Trading PTE Singapore ("**Dana**"). A dispute arose and Dana sent notice to Sino that it had commenced arbitration proceedings and had appointed an arbitrator.

Sino did not respond to this notice and did not participate in the proceedings. The arbitrator appointed by Dana acted as sole arbitrator and made an award in Dana's favour in the sum of USD 1,680,404.15. This award was sent to Sino which claimed that it was the first time it had heard of the proceedings.

The issue arose because Dana had negotiated the CoA with Beijing XCty Trading Limited ("**BX**"), with BX acting on Sino's behalf. BX and Sino had agreed that BX would enter into contracts in Sino's name and take the bulk of the profit from them. As a result, Dana only ever communicated with either employees of BX or through the agreed broking channel. Sino's broker only ever communicated with employees of BX and the only involvement that Sino had was signing the CoA. Dana at all times believed that the employees of BX were representatives of Sino. The notice of arbitration had been passed to the BX employee with whom Dana had always communicated as well as through the broking channel.

Sino brought a successful claim in the High Court to set the award aside on the basis that it had not been served with notice of the arbitration. Dana appealed. The points in dispute were whether BX had implied actual or ostensible authority to receive the notice on behalf of Sino or whether Sino had ratified BX's receipt of the notice.

Court's Findings
The Court of Appeal held that because of the "*most unusual relationship*" between Sino and BX, BX did have implied actual authority to receive the notice of arbitration on behalf of Sino. BX also had ostensible authority to receive the notice because Sino was responsible for and had acquiesced in BX's ability to hold itself out as though it were Sino. In this context, it also carried great weight that Sino's broker, having received the notice of arbitration, passed it on to BX rather than Sino.

HFW Commentary
HFW (Dimitris Exarchou and Michael Harakis of HFW's Piraeus and London offices respectively) represented Dana. The Court of Appeal commented that arbitrating parties would be well advised to always serve any notice of arbitration by the methods in s.76(4) Arbitration Act 1996. It is also recommended that when service of notice of arbitration is met with no response, further investigation is carried out at an early stage to avoid challenge to the validity of an arbitration award at a later stage.

4. ***Taurus Petroleum Ltd v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq***

Court Supreme Court
Date 25 October 2017

Case Summary
The Supreme Court considered a number of issues in this case, including the identity of a beneficiary under a letter of credit ("**LC**"), the location of the debt owed under an LC, and the circumstances in which a receivership order ought to be made.

Facts
Taurus Petroleum Ltd ("**Taurus**") and State Oil Marketing Co of the Ministry of Oil Republic of Iraq ("**SOMO**") entered into a contract for the sale of crude oil and LNG. Disputes arose and in 2013 Taurus obtained an arbitration award in London against SOMO for around USD 8.7m, which SOMO failed to honour.

Taurus became aware of a separate transaction involving SOMO and Shell under which Shell was to provide payment in the form of two LCs issued by the London branch of Crédit Agricole ("**CA**"). These LCs named SOMO as beneficiary but were addressed to the Central Bank of Iraq ("**CBI**"). They provided for payment into the a CBI account in the Federal Reserve Bank of New York and included a promise to make payment in that way. Taurus made a successful application in the English High Court to (1) enforce the arbitration award against SOMO as a judgment; (2) issue a third party debt order over the LCs; and (3) appoint a receiver in respect of the funds to be received by SOMO under the LCs.

SOMO successfully challenged this in the Court of Appeal and Taurus appealed to the Supreme Court on a number of issues, including: (1) what is the correct construction of the LCs and to whom are the debts created owed for the purpose of a third party debt order; (2) what is the location of the debt in relation to the third party debt orders; and (3) is it appropriate to make a receivership order.

Court's Findings
Firstly, the Supreme Court held that a third party debt order can only be made if there is a debt due to the judgment debtor (here SOMO) from the third party (here CA). Taurus therefore had to show that the debt was owed to SOMO alone rather than jointly to the CBI and SOMO. It held that the sole beneficiary under the LC was SOMO. The requirement to pay the CBI was the channel by which the debt was to be discharged but did not give the CBI any proprietary right in respect of that debt. The most that the CBI could have was a claim in damages against CA for failing to comply with its undertaking (which would fail because of the overriding order of the Court which discharged the debt owed by CA). This was the case because the LCs identified SOMO throughout as the sole beneficiary; the credit was expressed to be issued "in favour of" SOMO and pursuant to Article 2 of UCP 600 the party in whose favour an LC is issued is the beneficiary; the commercial invoice was issued by SOMO in line with Article 18 of UCP 600; and consequently in the absence of a clear statement to the contrary, SOMO was the party to whom CA incurred the primary obligation to make payment.

Secondly, the English courts do not have jurisdiction to make a third party debt order in respect of debts situated outside their jurisdiction. The general rule is that a debt is located in the debtor's residence. Here, the debt under the LCs was owed by the London branch of CA, the debt was located in London and the English courts therefore had the power to make a third party debt order (pursuant to Article 3 of UCP 600, branches of a bank located in different countries are considered to be separate banks).

Thirdly, it was appropriate to make a receivership order, first because the debt was owed to SOMO and was located in London and second because it would be inconsistent to allow an international arbitration award to be turned into an English judgment but then limit the means available for enforcement.

HFW Commentary

HFW (Jeremy Davies and Sarah Hunt of HFW's Geneva office) represented Taurus. The English Supreme Court has clarified where funds payable under an LC can be arrested. Since many LCs in commercial transactions are issued in London, this decision will make it easier for creditors to enforce English arbitration awards and judgments. Singapore and other common law jurisdictions are likely to follow the Supreme Court's decision. It has also clarified the grounds on which applications for receivership orders can be made and the required connection with the English jurisdiction.

5. ***Trafigura Beheer BV v Renbrandt Ltd***

Court High Court (Queen's Bench Division)
Date 1 December 2017

Case Summary
A sale contract contained a poorly drafted law and jurisdiction clause. The Defendant filed a number of petitions in Nigeria concerning the quality of cargo delivered by the Claimant. The Claimant in turn made an application to the English High Court, seeking a declaration of non-liability in relation to the quality of the cargo.

Facts
In 2008, Trafigura Beheer BV ("**Trafigura**") and Renbrandt Ltd ("**Renbrandt**") entered into a contract for the sale and purchase of gasoil with delivery FOB by STS transfer (the "**Cargo**"). The contract contained a law and jurisdiction clause, providing for it to be governed by English law and for all disputes to be subject to the exclusive jurisdiction of the English High Court. However, it also contained a requirement that all disputes not settled by negotiation be referred to arbitration within 5 days from the bill of lading date. Trafigura delivered the contractual quantity of the Cargo within the prescribed delivery window. It was tested and found to be on-spec and a certificate of quality was issued.

Months later, on 10 June 2009, Renbrandt filed a petition with the Nigerian Economic and Financial Crimes Commission ("**EFCC**") contending that the Cargo was in fact off-spec and had been contaminated with cheaper cargoes. This petition was withdrawn on 4 June 2010. On 20 September 2016, Renbrandt filed a second petition with the EFCC in relation to the same matter. Trafigura commenced proceedings against Renbrandt in Nigeria, seeking a declaration that Renbrandt had acted maliciously in filing the petition and claiming damages. Renbrandt argued that the Nigerian courts lacked jurisdiction to hear the claim on the basis of the law and jurisdiction clause in the sale contract. In resisting Trafigura's claim in Nigeria, Renbrandt made express reference to the existence of proceedings in England, which had been commenced by Trafigura against Renbrandt.

This reference demonstrated that Renbrandt was aware of the English proceedings, even though it had failed to file an acknowledgement of service. Trafigura then submitted an application to the English court for summary judgment. The application was resisted by Renbrandt on the grounds that (1) there was no valid service of the documents in question; (2) pursuant to the law and jurisdiction clause in the underlying contract, the matter should be heard in arbitration; (3) Renbrandt had a real prospect of success; and (4) other compelling reasons existed for the matter proceeding to a full trial.

Court's Findings
The Court found against Renbrandt and awarded summary judgment to Trafigura. There was no evidence to suggest that documents had not been properly served on Renbrandt. Although the law and jurisdiction clause was a poorly drafted hybrid, the Court found that the paragraph on arbitration referred principally to quality and quantity claims by Renbrandt and was not intended to cover a claim for declaration of non-liability by Trafigura – which could only be brought after a claim had been made by Renbrandt. Otherwise, Trafigura would be left without a contractual remedy against Renbrandt's actions, which was "*commercially absurd*". Renbrandt had no real prospect of successfully defending the claim as the Cargo was on-spec, the certificate of quality was final and binding and its claim that the Cargo was off-spec was brought out of time.

HFW Commentary
This judgment is a reminder of the importance of clear contractual drafting, even for "boilerplate" clauses. Part of the difficulty in this case was the poorly drafted law and jurisdiction clause. Trafigura could have been left without a remedy against Renbrandt's attempts to bring a late claim. The strategic decision to seek summary judgment was a good one.

6. ***Estera Trust (Jersey) Limited, Herinder Singh v Jasminder Singh, Verite Trust Company Limited, Jemma Trust Company Limited, Edwardian Group Limited, Jasminder Singh and Herinder Singh (as trustees of the English Trusts)***

Court High Court (Chancery Division)
Date 10 November 2017

Case Summary
This case concerned legal advice privilege (privilege covering advice between lawyers and their clients). In an application for an order for inspection of documents, the Court was asked to consider the correct test to be applied to litigation funding documents to determine whether parts of those documents which had been withheld or redacted on the grounds of legal advice privilege were in fact privileged.

Facts
The case concerned a claim of unfair prejudice by some minority shareholders (the "**Petitioners**") in the Edwardian Group Ltd (the "**Company**") against the Company and its principal other shareholders (the "**Respondents**").

During disclosure, the Petitioners claimed legal advice privilege in relation to some of their negotiations with litigation funders. The Respondents applied for an order for inspection. The Petitioners contended that significant redaction and / or withholding of documents was necessary because legal advice given to them could be "*inferred*" from the documents. Allowing the Respondents to see the documents would give them a collateral advantage by providing an insight into the legal advice received on the merits of the dispute. The Respondents argued that inspection of the documents was necessary to allow them to test the argument run by the Petitioners that they had been actively but unsuccessfully seeking funding during a time lapse in pursuing their claim. The Respondents distinguished between communications which reveal the content of legal advice and are therefore privileged, and those which simply lead to speculation as to what that legal advice might be.

Court's Findings
The Court reaffirmed that legal advice privilege is not confined to the communications themselves but also extends to other material which "*evidences*" the substance of such communications. The question arose as to what is a sufficient reference to legal advice to attract privilege. The Court followed a previous Court of Appeal decision[2], that documents should be privileged where they gave the other party a clue as to the advice given, or where the selection of documents betrayed the trend of the advice. The Court also held that there was a distinction between cases where there is a definite and reasonable foundation in the contents of the document for the suggested inference as to the substance of the legal advice, and cases where the contents were merely something which would allow one to wonder or speculate whether legal advice had been obtained and as to its substance.

The Court also found that even if the Petitioners' solicitor had been too generous when applying the test for privilege, it would be disproportionate in terms of the costs involved and any likely benefit to be gained by the Respondents to repeat the redaction exercise.

HFW Commentary
This decision is likely to be increasingly relevant as the trend towards obtaining litigation funding grows. It confirms that legal advice privilege will extend to cover documents not directly between lawyer and client but which give a clue as to legal advice given, or betray the trend of that advice. However, there should be a definite and reasonable foundation for inference. It is not enough that the documents might allow for speculation as to the advice.

[2] Lyell v Kennedy (No 3) [1884] 27 Ch D 1.

7. ***Glencore Agriculture B.V. (formerly Glencore Grain B.V.) v Conqueror Holdings Limited***

Court High Court (Queen's Bench Division)
Date 16 November 2017

Case Summary
This is another decision considering the agency principle in relation to service of proceedings (see Sino Channel at Case 3 above). Sino Channel considered agency in relation to third parties; this case considers agency in relation to employees. In an effort to challenge enforcement of an arbitration award against it, Glencore successfully argued that the notice of arbitration was not validly served because it had been wrongly served on a junior employee with no actual or ostensible authority to accept service.

Facts
Conqueror Holdings Limited ("**Conqueror**") as owner and Glencore Agriculture B.V. ("**Glencore**") as charterer entered into a voyage charterparty for the carriage of corn in bulk. A dispute arose in relation to delays at the loadport and Conqueror filed a claim for damages for the time spent at anchorage.

Conqueror appointed a claims adjuster to pursue the claim and a letter before action was sent to the email address of Mr. Oosterman, the Glencore employee who had given the order by email for the vessel to remain at anchorage. All subsequent communications were sent to Mr. Oosterman in the same manner.

Emails from both the claims handler and later, the arbitrator, were all sent to Mr. Oosterman, who remained a Glencore employee for most of the relevant period.

An award was made against Glencore, which had taken no part in the proceedings and was unaware of their existence until it received the award in the post. Glencore argued that Mr. Oosterman was a "*junior back office employee*" and that none of the communications to his email address were passed on to, or seen by, Glencore's chartering or legal department. He had no actual (express or implied), or ostensible authority to accept service. Conqueror argued that agency rules were not applicable in this case as under the Arbitration Act 1996 ("**AA96**"), service on a Glencore email address was enough. Alternatively, they argued that he had actual and / or ostensible authority to accept service of proceedings.

Court's Findings
The Court held that even though the provisions for service under the AA96 are more permissive than under the Court's Civil Procedure Rules, nevertheless, service on a personal email address was not enough. There is a distinction between the personal business address of an individual and a generic business address. The question whether an email sent to a personal business email address is good service is the same as if the document were physically handed to that person. It must depend upon the particular role which the named individual plays or is held out as playing within the organisation.

The correct answer therefore lay in the application of the agency principles. The Court decided that on the facts provided, there was no evidence of express actual authority, implied actual authority or ostensible authority being given to Mr. Oosterman by Glencore to receive service on behalf of Glencore.

HFW Commentary
In arbitration proceedings, service by email is permitted but care must be taken about which email address is used, particularly when opting for a personal business rather than a generic business email address. Common sense might also have played a part here when no response was received to any of the communications sent. Further investigation as to Mr. Oosterman's role ought quickly to have brought to light the question of whether he had authority to accept service on Glencore's behalf. Serving proceedings via the registered business address as well would have been a more prudent approach.

8. ***First Abu Dhabi Bank PJSC (formerly National Bank of Abu Dhabi PJSC) v BP Oil International Ltd***

Court Court of Appeal
Date 18 January 2018

Case Summary
The Court of Appeal considered whether a receivable due could be assigned unilaterally despite an underlying agreement containing a provision that there could be no assignments of rights or obligations without prior written consent. It was held that on the facts, the receivable was not being assigned to a third party and therefore there had been no breach of the agreement.

Facts
Under a Purchase Letter dated 3 September 2014 between BP Oil International Ltd ("**BPOI**") and the National Bank of Abu Dhabi ("**NBAD**"), NBAD purchased 95% of a receivable due to BPOI under a crude oil sale contract between BPOI and Société Anonyme Marocaine de L'Industrie de Raffinage ("**SAMIR**").

The agreement between BPOI and SAMIR incorporated BPOI's 2007 general terms and conditions for sales and purchases of crude oil. These state at s.34: "*neither of the parties to the Agreement shall without the previous consent in writing of the other party (which shall not be unreasonably withheld or delayed) assign the Agreement or any rights or obligations thereunder*."

In clause 5(b) of the Purchase Letter between BPOI and NBAD, BPOI warranted to NBAD that it was, "*not prohibited by any security, loan or other agreement, to which it is a party, from **disposing of the Receivable** evidenced by the Invoice as contemplated herein and such sale does not conflict with any agreement binding on BPOI*" (emphasis added).

Relying on the warranty in clause 5(b), NBAD issued proceedings against BPOI seeking compensation for breach of warranty and representation. It claimed that s.34 limited BPOI's ability to assign its rights and obligations to NBAD. At first instance, the Court found in favour of NBAD. BPOI appealed.

Court's Findings
The Court of Appeal had to decide three issues: what BPOI was prevented from doing by s.34; what effect that had on its ability to dispose of the Receivable as contemplated in Clause 5(b); and whether BPOI was in breach of s.34 at the relevant date. It found in BPOI's favour.

The Court of Appeal's judgment turned on the wording of the contract. The prohibition in s.34 could not prevent the disposal to NBAD of any amounts actually received by BPOI from SAMIR since this money did not constitute "*rights or obligations*". For the same reason, the provision was not able to prevent the creation of a trust over the proceeds received by BPOI or the creation of any rights of subrogation.

The Purchase Letter had to be construed within the factual matrix of the whole arrangement between BPOI and NBAD – which expressly contemplated that there might be a contractual prohibition against, or restriction on, the assignment of rights under the agreement between BPOI and SAMIR so that an alternative means of transferring the economic benefit of the discount percent of the Receivable might be necessary.

HFW Commentary
This is an example of the Court applying the rules of contractual interpretation to resolve a dispute. The Court also noted that in commercial life, non-notification financing (such as invoice or block discounting where no notice of assignment is given to the debtor and the assignor is left to collect in the assigned debts and the assignment takes effect only in equity) is commonplace and it has never been suggested that the division between beneficial ownership and the right to enforce renders these arrangements ineffective.

9. ***SCF Tankers Limited (formerly known as Fiona Trust & Holding Corporation) and Others v Yuri Privalov and Others***

Court Court of Appeal
Date 21 November 2017

Case Summary
The Court of Appeal held that a worldwide freezing order (**"WFO"**) can cause loss even in circumstances where the respondent is provided with a means of accessing the funds which it has provided as security.

Facts
Fiona Trust & Holding Corporation (the "**Fiona parties**") made a variety of claims against Yuri Nikitin and seven companies controlled by him (the "**Standard Maritime parties**") for damages of over USD 577 million (the "**Claims**"). These Claims formed the basis for a successful application by the Fiona parties for a WFO over the assets of the Standard Maritime parties on 31 August 2005. The WFO expressly precluded the sale and purchase of ships. The Standard Maritime parties provided a security undertaking in order to discharge the WFO in the form of a payment of USD 208.5 million into their solicitor's account (the "**Lawrence Graham Account**") and the creation of a charge over Mr. Nikitin's house. The trial of the Claims began in 2009 and in December 2010, most of the Claims were dismissed.

The WFO contained the usual cross undertaking as to damages by the applicant (the Fiona parties) and following an application by the Standard Maritime parties, the Fiona parties were ordered to pay USD 59.8 million in damages and USD 11.04 million in interest as compensation for loss caused by the WFO. The Fiona parties appealed.

Court's Findings
The order for discharge of the WFO contained a "*mitigating provision*" stating that "*the Standard Maritime parties shall have liberty to apply to use funds in the Lawrence Graham Account in the normal course of business.*" The main issue before the Court of Appeal was whether the Standard Maritime parties' failure to apply to the court under the mitigating provision for secured funds to be released meant that legal causation had not been established. Based on the High Court's findings of fact, the Court of Appeal found in favour of the Standard Maritime parties.

It held that it is for the party seeking to enforce the cross undertaking (here, the Standard Maritime parties) to show that the damage would not have been sustained but for the WFO. In this case, it was enough for them to show both that the WFO prevented them from investing in new ships, and the difficulties of any application to the Court for the release of the security funds. Once a party has established a primary case that the damage was caused by the WFO then, in the absence of other material to displace that primary case, the Court can draw the inference that the damage would not have been sustained but for the WFO. The Standard Maritime parties clearly faced a "*practical dilemma*" in attempting to invest in new ships while stating at the same time that this would depend on the court releasing the secured funds, or in making an application to court without first having a concrete proposal for the court to consider. The previous position taken by the Fiona parties as regards any release of funds was also relevant.

HFW Commentary
Whilst WFOs are a valuable weapon in security and enforcement, and to apply pressure on a counterparty to resolve a dispute more quickly, applicants should not forget the undertaking they give when applying for a WFO. A WFO is a draconian order which can cause significant loss and the cross undertaking in damages is there to protect a party subject to a WFO which subsequently prevails at trial.

10. ***Various Claimants v Wm Morrisons Supermarket PLC***

Court High Court
Date 1 December 2017

Case Summary
This case raises the question of whether an employer is liable, directly or vicariously, for the criminal actions of a rogue employee in disclosing personal information of co-employees on the internet, whether under the Data Protection Act 1988, in an action for breach of confidence, or in an action for misuse of private information.

Facts
On 12 January 2014, personal details of around 100,000 employees of Wm Morrisons Supermarket PLC ("**Morrisons**"), including names, addresses, gender, dates of birth, phone numbers, national insurance numbers, bank details and salary details (the "**Data**"), were posted on a file sharing website, with a link to that website later being circulated around the internet. Following detailed police investigations, a Senior IT Auditor named Andrew Skelton ("**Skelton**"), an employee of Morrisons, was arrested and subsequently convicted.

A group of 5,518 employees of Morrisons claimed compensation both for breach of statutory duty under the Data Protection Act 1998 and at common law on the basis that Morrisons had a primary liability for its own acts or omissions, and secondary vicarious liability for the actions of one of its employees harming his fellow employees.

Court's Findings
The Court held that Morrisons was not directly liable as it did not directly misuse the Data and did not authorise its misuse or permit it by any carelessness on its part.

In relation to the facts, the applicable definition of vicarious liability was liability for an authorised or negligently permitted unlawful act of an employee in the course of employment. It was on this basis that the Court held that:

1. There was an unbroken thread that linked the employee's work to the disclosure. What happened was a seamless and continuous sequence of events from the unlawful act of downloading the Data during the course of employment through to the disclosure of such Data.
2. Morrisons deliberately entrusted Skelton with the Data. In doing so Morrisons accepted the risk that to place trust in Skelton was wrong.
3. Skelton's task in respect of the Data was to receive and store it and to then disclose it to a third party. The criminal act of unauthorised disclosure was closely related to that task.
4. When Skelton received the Data he was acting as an employee. The chain of events from then until disclosure was unbroken and the fact that the disclosure was made from his home, via personal equipment and outside of working hours did not disengage this from his employment.

The Court decided that the key question was upon whose shoulders it was just for the loss to fall – and concluded that it was just to find Morrisons vicariously liable. However, expressing concern that finding against Morrisons might "*seem to render the Court an accessory*" in furthering Skelton's criminal aims, the Court granted Morrisons leave to appeal in relation to vicarious liability.

HFW Commentary
This is the first successful class action for a data breach in the UK and has widespread relevance for businesses of all types. Morrisons escaped primary liability because it had good data protection procedures in place, but it was still not able to escape vicarious liability. The appeal will no doubt attract interest.

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