HFW

COMMODITIES CASE UPDATE

NOVEMBER 2018

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We are delighted to present the sixth Commodities Case Update which is being provided to a small group of clients quarterly. The update provides a summary of some of the key cases relevant to the commodities sector from the last few 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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1. **Perkins Engine Company Ltd v Ghaddar and another [2018] EWHC 1500 (Comm)**

Court Commercial Court

Date 8 June 2018

Summary

This case related to an application for an injunction against court proceedings in Lebanon. In *West Tankers Inc v Allianz SpA*[1] the Court of Justice of the European Union ruled that courts in EU countries could not award injunctions which prevent a court in another EU country deciding whether it has jurisdiction. However, in relation to countries outside the EU, this principle does not apply.

Facts

The parties had entered into a distribution agreement which included an arbitration clause. The arbitration clause provided that where a dispute could not be amicably resolved it should be settled in arbitration in London provided '*there is no reciprocal enforcement procedures between the United Kingdom and the country* [Lebanon] *in which the Distributor is located*'.

The defendants distributed products into Syria, allegedly in breach of the agreement. The claimants terminated the agreement and the defendants commenced proceedings in Lebanon for unlawful termination. The claimants applied to refer the dispute to arbitration in England claiming that commencing procedures in Lebanon was in breach of the arbitration clause in the agreement.

The claimant argued that as there was no treaty between the UK and Lebanon and therefore no *'reciprocal enforcement procedures',* the dispute should be referred to London arbitration. On the other hand, the defendants contended that English courts having the power to enforce Lebanese judgments was sufficient to amount to reciprocal procedures.

Findings

The court looked closely at the meaning of 'reciprocal' and held that enforcement procedures that equally bind the UK and Lebanon would be required. The fact the clause referred to the UK rather than England suggested it required a treaty between the two states. The common law was not enough to meet the test and the court granted the anti-suit injunction.

HFW Comment

Whilst emphasising the importance of the clarity of wording used in arbitration agreements, this case also demonstrates that the English courts are fully prepared to grant anti-suit injunctions against court proceedings outside the EU where appropriate. Post-Brexit, this approach may eventually extend to court proceedings within the EU. At present (and subject to the manner of the UK's departure), current rules will continue to apply to proceedings begun prior to the end of the transition period (31 December 2020).

[1] West Tankers Inc v Allianz SpA (Case C-185/07) [2009]

2. **Fehn Schiffahrts GmbH & Co KG v Romani SpA (The "Fehn Heaven") [2018] EWHC 1606 (Comm)**

Court Commercial Court

Date 27 June 2018

Summary

This decision deals with arbitration awards where the reasoning is so unclear that the court cannot determine whether there has been an error of law for the purposes of section 69 Arbitration Act 1996 (Arbitration Act). The court ruled that in these circumstances, the Arbitration Act would apply and the issue could be remitted to the tribunal.

Facts

The appellant owners of the MV Fehn Heaven (Owners) had chartered a vessel to the respondent (Charterers) for a voyage to carry a cargo of organic sunflower seeds and wheat. After loading, the cargo was fumigated. In arbitration the Charterers claimed that this meant the cargo could not be sold as organic and had to be sold at a discounted price. They sought to recover for losses incurred.

The Charterers claimed they had title to sue pursuant to an assignment from the consignee or pursuant to the Charterparty in their own right. The tribunal awarded damages to the Charterers.

The Owners brought a challenge under section 69 of the Arbitration Act that the tribunal had erred in law in finding that an assignee could claim substantial damages based on assignment from the assignor. The Owners argued that the assignor had not suffered any loss and an assignee cannot acquire rights more valuable than those of the assignor.

Findings

The Court of Appeal was required to determine whether the tribunal had applied all of the applicable statutes and common law, as well as the relevant parts of the contract. The Court held that it could not determine whether the tribunal had correctly answered the question of law. It was not clear whether the assignor had suffered loss. If the assignor had suffered no loss, the Court could not uphold the award. Therefore the Court was required to put the question to the tribunal again.

HFW Comment

This judgment confirms that even where the reasoning of an award may be unclear, a section 69 challenge is not excluded. It is also a reminder of identifying the correct cause of action when bringing a claim. In this case, the court made clear that the Charterers' claim under the assignment would fail if the assignor had suffered no loss.

3. **Tullow Ghana Ltd v Seadrill Ghana Operations Ltd [2018] EWHC 1640 (Comm)**

Court Commercial Court (HFW's Simon Blows and Vanessa Tattersall acted on behalf of Tullow)

Date 2 July 2018

Summary

This if the first of two force majeure decisions in this update. (See also number 11, *Classic Maritime v Limbungan*.) Here, a force majeure event was held not to be causative where other grounds contributed. Furthermore, a clause requiring the party relying on a force majeure event to exercise reasonable endeavours to avoid or mitigate that event was found to impose a significant burden.

Facts

The dispute concerned a long term contract for the use of Seadrill Ghana Operations Ltd's (Seadrill) West Leo semi-submersible drilling rig. Tullow Ghana Ltd (Tullow) intended to use the rig to carry out drilling and workovers in two fields offshore Ghana, named TEN and Jubilee. In September 2014, Ghana commenced a maritime border dispute with Côte d'Ivoire in arbitration. The tribunal prohibited 'new drilling' in the area, which included the TEN field. This was held to be a force majeure event.

Tullow had planned to drill and complete a well in TEN and then move the rig over to Jubilee. In October 2016 Tullow was unable to drill the TEN well because of the force majeure event and could not drill in Jubilee because the Ghanaian government had not yet approved its plans.

Tullow declared force majeure under the rig contract. It terminated the contract 60 days later saying it had discharged a contractual obligation to use reasonable endeavours to avoid, overcome or mitigate the force majeure.

Findings

The Commercial Court found there had been two causes of Tullow being unable to provide drilling programmes to Seadrill: the force majeure event and the lack of government approval of the Jubilee plans. The force majeure event was not causative because Tullow could not show it was delayed or prevented by force majeure despite the fact the approval of the Jubilee plan was never certain to exist.

The Court also found that Tullow had not exercised reasonable endeavours to avoid, overcome, or mitigate the force majeure. It said that Tullow should have used the rig to workover other wells in the Jubilee field. Although Tullow's decision was reasonable when taking into account its own commercial and safety interests (there would have been no return on investment from the workovers), it should also have taken into account Seadrill's interests.

HFW Comment

This judgment, in part, arose out of the ambiguous force majeure clause. It is worth spending time dealing with causation and defining what is meant by reasonable endeavours at the drafting stage. The judgment makes clear that there is a high bar on additional considerations to be taken into account where a reasonable endeavours clause of this sort applies to a force majeure event.

4. **Robert Bou-Simon v BGC Brokers LP [2018] EWCA Civ 1525**

Court Court of Appeal

Date 5 July 2018

Summary

BGC Brokers LP (BGC) claimed that a term should be implied into a loan agreement so that a term intended to apply to partners would apply to a non-partner in the circumstances. The Court of Appeal refused to imply the term because it was not necessary.

Facts

Mr Bou-Simon was employed by BGC. A loan agreement (the Agreement) was made between himself and BGC on the assumption that he would be made a partner and the loan would be repaid from partnership distributions. The Agreement also contained a clause which stipulated that if Mr Bou-Simon ceased to be a partner, any unpaid amount would be written off if he had worked for BGC for four years.

The Agreement was intended for partners; however Mr Bou-Simon did not, as it turned out, become a partner. He then left BGC before the four year period had elapsed and BGC wanted to recover the sums they claimed were therefore due under the Agreement. Since Mr Bou-Simon was not a partner, BGC claimed that a term should be implied to cover these circumstances.

The court at first instance, applying the test in *Marks & Spencer v BNP Paribas Securities* [2016] AC 742, allowed an implied term that the loan would be repayable in full because Mr Bou-Simon had not served four years. Mr Bou-Simon appealed.

Findings

The Court of Appeal disagreed, finding that the court had applied the correct test, but had done so incorrectly. It had been influenced by what it saw as the merits of the situation, rather than the objective intention of the parties at the time of entering into the contract.

The implied term was not required to remedy commercial or practical coherence. The circumstances in this case were outside the scope of the Agreement. Simply put, the Agreement was never meant to deal with a loan to someone who was not a partner. The fact that the Agreement would need re-drafting to include the implied term was held to be a good indicator that it was not necessary to include it for the Agreement to make commercial sense.

HFW Comment

In line with the current judicial reluctance to imply terms into commercial contracts, this judgment confirms that terms will not be implied into an agreement under a broader notion of reasonableness; rather, a term must be necessary for an agreement to make commercial sense.

5. **Orexim Trading Limited v Mahavir Port and Terminal Private Limited [2018] EWCA Civ 1660**

Court Court of Appeal (HFW's Andrew Williams and Michael Buffham acted for MPT)
Date 13 July 2018

Summary

The Court of Appeal has ruled that the English Court does have power to permit service of a claim under section 423 of the Insolvency Act 1986 ("section 423") outside England and Wales. However, in this case, the Court of Appeal declined to exercise its discretion to do so. HFW acted for the successful First Respondent, Mahavir Port and Terminal Private Limited (MPT).

Facts

The case concerned proceedings brought by Orexim Trading Limited (Orexim), a Maltese company, against MPT and Zen Shipping and Ports India Private Limited (Zen), both of which are Indian companies, and Singmalloyd Marine (S) Pte Limited, a Singaporean company. Orexim issued a claim for alleged breach of a settlement agreement. Orexim alleged that the sale of a vessel by MPT to Singmalloyd and an on-sale by Singmalloyd to Zen was intended to put the asset of MPT beyond reach of enforcement and claimed relief setting aside the sale under section 423 and/or declaring that the sale of the vessel was a sham (Declaration Claim).

MPT and Zen issued applications challenging the jurisdiction of the court to hear the section 423 claim and the Declaration Claim. At first instance the judge held that section 423 did not fall within the jurisdictional gateway which permits service of a claim with the permission of the court under PD6B Paragraph 3.1(20)(a). In order to fall within this paragraph the relevant enactment must indicate that it is expressly contemplating proceedings against persons who are not within the jurisdiction and section 423 did not do so.

Findings

The Court of Appeal held that the court does have power under PD6B to permit service of a section 423 claim outside England and Wales. A two-stage approach is to be used when a court considers whether to grant permission. It must consider whether the claim has a real prospect of success and whether England and Wales is "the proper place" to bring the claim. In the case of a claim under section 423 with a foreign element there must be a sufficient connection between the defendant and England and Wales. In this case the connection was insufficient for the court to give permission.

HFW Comment

This case provides clarity on the interpretation of PD6B paragraph 3.1(20)(a) and the circumstances in which a claim under section 423 can be brought against defendants located outside England and Wales. It is a useful tool for claimants pursuing a defendant who has hidden assets or has tried to put them out of the reach of its creditors

6. **BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises Inc [2018] EWHC 1857 (Comm)**

Court Commercial Court

Date 24 July 2018

Summary

This case involves a rejection of goods under a supply contract following a dramatic fall in market price. It also considers the options for recovery of a third party supplier, not a party to the contract, in those circumstances.

Facts

Rembrandt Enterprises Inc. (Rembrandt) was a US producer of egg based products. It agreed a contract with BV Nederlandse Industrie Van Eiprodukten (NIVE) whereby the latter would supply Rembrandt with dried eggs. The contract, agreed in May 2015, was conditional upon the US regulatory body approving procedures of the egg business in the Netherlands. The price was renegotiated in June 2015. Shortly thereafter, the market price of eggs fell dramatically. Rembrandt audited NIVE's processes and formed the view that they did not comply with US regulations. Rembrandt rejected the egg products and NIVE claimed damages for lost profit.

NIVE had arranged for another company, X, to supply some of the product but had not told Rembrandt about this before entering into the contract. X had no direct contractual rights against Rembrandt and NIVE claimed for X's lost profits under the principle of transferred loss.

Rembrandt denied liability, claiming that NIVE had fraudulently misrepresented the costs of complying with the US regulation procedures during the renegotiation of price. It also alleged that NIVE had breached one or more of its warranties with regard to its inspection procedures.

Findings

The court granted a rescission of the revised contract, holding that, had it not believed the price increase was a genuine estimate of additional costs of the regulation procedures, Rembrandt would not have agreed to renegotiate the price.

The effect of the rescission was to restore the original contract. The court awarded NIVE damages for Rembrandt's breach of the original contract. However, NIVE could not recover X's lost profits because Rembrandt had not contracted with NIVE for X to recover any benefit under the contract.

The usual test for misrepresentation was the 'but for' test, whereby the party must show but for the misrepresentation it would not have entered the contract. However, the court held that in the case of fraudulent misrepresentation, the claimant has to show that "but for" the misrepresentation, it might have acted differently and that the representation was a factor in its decision.

HFW Comment

Aside from demonstrating the importance of making accurate representations, this case identifies the correct, weaker test for fraudulent misrepresentation and highlights the importance of ensuring that all parties involved in a transaction have contractual rights to protect them in the event of a breach.

7. **Euro-Asian Oil SA v (1) Credit Suisse AG (2) Abilo (UK) LTD & Dan Igniska [2018] EWCA Civ 1720**

Court Court of Appeal (HFW's Olivier Bazin and Caroline West acted for Credit Suisse)
Date 25 July 2018

Case Summary
This appeal in a case with a complex set of facts involved three issues, relating to liability, damages and indemnity. Letters of credit are separate contracts, unrelated to the sale contract, but Credit Suisse had become involved in this sale contract dispute by virtue of counter signing letters of indemnity (LOIs).

Facts
Euro-Asian Oil SA (Euro-Asian) had entered into a series of four contracts to buy ultra low sulphur diesel oil CIF from Abilo (UK) Ltd (Abilo). Euro-Asian never took possession of the oil as the purchase was to satisfy a sub-sale to another buyer. The oil was held to order at the delivery port under a holding certificate. The purchases were financed by way of letters of credit, which provided for LOIs to be presented in lieu of bills of lading. Credit Suisse had financed Abilo's original purchase of the cargo and had agreed to be jointly and severally obligated with Abilo under the LOIs given under the sale to Euro-Asian.

When the cargo under the fourth transaction did not materialise, Euro-Asian claimed against Credit Suisse for breaches of warranty and undertaking in the LOI that it had signed. Unbeknownst to Credit Suisse, the previous transactions had also been irregular. Euro-Asian had termed them a carousel; Abilo presented documents under a letter of credit for cargo that had already been discharged. The warranties in the LOIs were therefore untrue. Euro-Asian was also receiving commission from Abilo under the transactions. Credit Suisse claimed that Abilo had been a willing participant in the arrangement and therefore the warranties did not apply.

The English Commercial Court found that by countersigning the relevant LOIs, Credit Suisse was "exposing itself to some risk" and that "in signing the letters of indemnity and acting in this way it was no longer a letter of credit bank." Credit Suisse was held liable for Euro-Asian's losses despite having no relevant knowledge of the convoluted underlying transactions. However, the Court also found that Abilo was responsible for a large proportion of Euro-Asian's losses and assessed Credit Suisse's contribution to be 20%.

There were three issues on appeal:

- Credit Suisse appealed on its liability under the fourth LOI, arguing that it did not bite because the agreement between Abilo and Euro-Asian under which the loss had arisen was not on the terms of the sale contract but was by way of "separate arrangements".
- Euro-Asian appealed on the measure of damages to which it was entitled. The court had awarded these based on its sub-sale; Euro-Asian argued that they should be based on market value.
- Credit Suisse appealed on the extent of its indemnity from Abilo.

Findings
The Court of Appeal held as follows:

- Credit Suisse's appeal on liability was dismissed, largely as a result of the findings of fact made by the court at first instance.
- Euro-Asian's appeal on the measure of damages was dismissed. The Court of Appeal held that the judge was entitled to award damages based on the sub-sale, which was on his view the measure of loss contemplated by the parties, and which therefore displaced the usual market value measure.

- In respect of the third issue, the Court of Appeal allowed Credit Suisse's appeal. Although Credit Suisse countersigned the LOIs, Abilo was in effect its primary obligor and it was implicit that Credit Suisse would have a full right of recovery from Abilo. Credit Suisse's contribution was reduced to zero.

HFW Comment

This decision is a salutary reminder for banks signing LOIs. It demonstrates that the line between the letter of credit and the sale contract can be crossed, involving financing banks in liabilities under the sale contract.

Credit Suisse was found liable despite being unaware of the underlying carousel and the warranties given in the LOIs being incorrect. Countersigning LOIs means that banks take on the risk of them being incorrect. Banks should conduct advanced due diligence of transactions to mitigate this. Alternatively, it may be possible for a bank to countersign a separate indemnity, affirming that it will only be jointly and severally obligated if the warranties in the LOI are all correct at the time of signature. Express indemnities should also be sought before agreeing to sign LOIs.

This decision is also interesting for its analysis of the appropriate measure of damages recoverable. Subsales can become a relevant measure, displacing the usual market value measure, in certain circumstances.

8. **Deutsche Bank AG v Comune di Savona [2018] EWCA Civ 1740**

Court Court of Appeal

Date 27 July 2018

Summary

This decision addressed the question of competing jurisdiction clauses in the context of an underlying relationship between two parties and associated ISDA swap agreements. The Court of Appeal overruled an unexpected decision of the Commercial Court.

Facts

Deutsche Bank AG (Deutsche Bank) entered into an agreement with an Italian local authority which was governed by Italian law and contained an Italian exclusive jurisdiction clause. The parties subsequently entered into two interest rate swap transactions that were subject to the terms of an ISDA master agreement, containing an English exclusive jurisdiction and an entire agreement clause. When the validity of the swap transactions was questioned, Deutsche Bank issued proceedings in the English court, seeking declarations. The Italian local authority challenged the English court's jurisdiction. The English Commercial Court held that the dispute fell within Deutsche Bank's role as an adviser under the first agreement, and therefore the Italian jurisdiction clause should apply. Deutsche Bank appealed.

Findings

The Court of Appeal upheld Deutsche Bank's appeal. Its approach was to determine the particular legal relationship to which the dispute related. Here, there were two separate agreements for different legal purposes. Where parties have agreed that a court is to have jurisdiction for a particular legal relationship, that court shall have jurisdiction. It distinguished between the wider relationship between the parties and the specific, interest rate swap relationship, holding that disputes relating to the swap transactions were governed by the jurisdiction clause in the ISDA Master Agreement. The entire agreement clause in the ISDA master agreement was further evidence that the swap contracts were distinct agreements.

HFW Comment

Given the unexpected first instance decision, this Court of Appeal clarification is welcome. It is also instructive in its approach to construing competing jurisdiction clauses where an advisory contract is followed by an ISDA master agreement. The decision offers reassurance and certainty to participants in the financial markets.

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

Court Court of Appeal

Date 5 September 2018

Case Summary

When an organisation is under, or anticipates, investigation by a regulatory body, can it conduct internal investigations and obtain advice whilst protecting privilege? This decision deals with litigation privilege (which protects documents created for the dominant purpose of preparing for litigation) and legal advice privilege (which protects confidential communications between lawyer and client created for, giving, or obtaining legal advice) in the context of an investigation by a regulatory body.

Facts

In 2011, Eurasian Natural Resources Corporation (ENRC) instructed external solicitors and forensic accountants to carry out an internal investigation into allegations of fraud, bribery and corruption. In 2013, the Serious Fraud Office (SFO) commenced a criminal investigation into these allegations. The SFO required ENRC to produce documents which had been generated prior to and during the internal investigation. ENRC refused, claiming both litigation and legal advice privilege over various categories of documents.

In relation to the claim for litigation privilege, the Commercial Court held that an SFO investigation is not adversarial litigation and the documents were therefore not created with the dominant purpose of litigation. It also held that most of the documents were not protected by legal advice privilege. Documents such as interview transcripts with employees and former employees, with no legal commentary, were held not to constitute legal advice. This was because the court followed the narrow approach taken by the Court of Appeal in Three Rivers (No.5)[2] as to the definition of "client". ENRC appealed.

Findings

The Court of Appeal allowed the appeal. It held that the documents created for the purpose of obtaining evidence and advice on a SFO investigation were protected by litigation privilege. The investigation, in the context of this case, was enough for ENRC to believe legal criminal proceedings were in reasonable contemplation. The Court of Appeal did not therefore go on to decide whether legal advice privilege also applied, but suggested it would have been bound to follow the Three Rivers (No.5) principle whereby legal advice privilege only applies where an employee has been authorised to take legal advice (using the narrow definition of "client"). It further indicated that this principle should be reviewed by the Supreme Court but the SFO has decided not to appeal.

HFW Comment

This decision is welcome in part, in that it confirms the circumstances in which organisations can conduct internal investigations in the knowledge that documents produced as a result will be protected from disclosure by litigation privilege. However, the issue on legal advice privilege remains problematic and unlikely to be resolved in the near future.

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[2] *Three Rivers District Council and others v The Governor and Company of the Bank of England* (*Three Rivers No 5*) *[2003] EWCA Civ 474*

10. **Classic Maritime Inc v. Limbungan Makmur SDN BHD & Anor [2018] EWHC 2389**

Court Commercial Court

Date 13 September 2018

Case Summary

In the second of two force majeure decisions in this update, the Commercial Court held that where a contract allows for two modes of performance and a force majeure event prevents one, the party relying on the clause has to show that it would have performed but for the event. The decision also demonstrates the difficulty of obtaining compensatory damages where there has been an intervening event which prevents a performance which might not have occurred notwithstanding the intervening event.

Facts

Under a contract of affreightment (COA), the charterers, Limbungan Makmur (Limbungan), had the option to load iron ore pellets on the vessels of Classic Maritime Inc (Classic) in one of two ports, Tubarao and Ponta Ubu. Limbungan had chosen to operate solely from Ponta Uba when in 2015, a damburst caused the nearby mine to collapse. Shipping from Ponta Uba was suspended.

Limbungan tried to source supplies from Vale SA (Vale), out of the alternative port, Tubarao. However, Limbungan alleged that Vale had prioritised its existing customers above newcomers. Ultimately, Limbungan could not ship iron pellets from Ponta Uba or Tubarao and relied on the force majeure clause.

Classic argued that Limbungan was under an absolute and non-delegable obligation to provide cargo. The bursting of the dam was of no relevance: the problem was that Vale would not supply Limbungan. It claimed that if Limbungan had pushed for a long-term supply contract things would have been different. Classic further argued that Limbungan would not have performed even if the dam had not burst as it had not provided the previous two shipments due to a weak market. This would have continued irrespective of the dam burst. On the latter ground, Classic claimed it was entitled to compensatory damages.

Findings

The Court rejected Classic's arguments. It ruled that Limbungan could not have sourced iron pellets from Vale. As to whether it could have sourced them from Ponta Uba, the court was required to assess Limbungan's intentions or arrangements, not whether it had legally binding supplies in place. However, Limbungan had to show that it would have performed but for the bursting of the dam and it could not do so. Nevertheless, Classic was not entitled to compensatory damages because the damburst would have intervened to prevent Limbungan's performance.

HFW Comment

This decision has gone against previous judgments in ruling that in order to recover under a force majeure clause, claimants must show that but for the force majeure event they would have performed. This gives rise to speculative examinations of parties' intentions which previous judgments have cautioned against. On the compensatory principle, if Limbungan had performed instead of breaching the COA, it would have performed out of Ponta Uba. But the dam burst would have intervened to prevent performance. Either way, Classic could not have benefitted from contractual performance, and therefore could not be put in a better position than if the breach had not occurred.

11. **Inter Export LLC v Jonathan Townley (1) and Yaroslavna Lasytysa (2)**

Court Court of Appeal

Date 21 September 2018

Case Summary

A company director may be held personally liable in damages for deceit where it makes a continuing representation that its company has sufficient funds to make a contract.

Facts

A company, NTL, entered a contract to purchase sunflower oil from the claimant company. During the pre-contractual negotiations a director of NTL made oral representations that NTL had sufficient funds available to pay for the sunflower oil. The cargo of sunflower oil was dispatched and the claimant lost title and control of it.

NTL went into liquidation. At the High Court the claimant successfully sought damages in deceit from the director of NTL on the basis that the oil had been delivered on reliance of the director's false representations. The director appealed.

Findings

The Court of Appeal held that the court had been correct in finding that the director's representations had been false and dishonestly made. This was a representation as to fact rather than a mere statement of intention. However it was confirmed that a statement of intention where the representor knew he did not have the ability to put that intention into practice may still be looked upon as a misrepresentation of existing fact. This representation was a continuing one that imposed a continuing responsibility on the director in respect of its accuracy.

In terms of the measure of damages, damages for deceit are intended to put the claimant in the position it would have been in had the deceit not been perpetrated. The claimant's loss was assessed at the point of reliance (when it allowed the oil to be dispatched), not when it acquired the sunflower seeds for processing.

HFW Comment

Contracting parties, including directors, need to exercise caution with regard to representations and continuing responsibilities. Where there is a period of time between a representation on which parties have relied and the concluding of a contract, the representor has a continuing responsibility in respect of the accuracy of the representation.

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