COMMODITIES CASE UPDATE

OCTOBER 2017

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We are delighted to present the third Commodities Case Update which is being provided to a small group of clients quarterly. The update provides a summary of ten of the key cases relevant to the commodities sector from the last few months.

Please contact us if you would be interested in receiving a bespoke training session.

HFW would also like to offer the opportunity to come in and 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).

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.

We hope you find this update useful.

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1. ***Globalia Business Travel S.A.U. (formerly TravelPlan S.A.U.) of Spain v Fulton Shipping Inc of Panama "The New Flamenco"***

Court Supreme Court
Date 28 June 2017

Case Summary
In a claim for early termination of a charterparty, the Supreme Court refuses to grant the charterer credit for profits realised by the shipowner as a result of selling the vessel earlier than anticipated in order to mitigate its losses. Whilst the facts of this case are related to shipping, the principles have wider application in relation to mitigation of losses.

Facts
In August 2005, Fulton Shipping Inc (the "Shipowner") entered into a two year charterparty agreement with Globalia Business Travel S.A.U. (the "Charterer"), with an option to extend the agreement for a further one year. Instead of exercising this option, the parties agreed in a meeting in June 2007 that the charterparty would be extended for a further two years. The Charterer denied that any agreement was ever made and indicated in October 2007 that it wanted to redeliver the vessel. Shortly before redelivery, the Shipowner entered into an agreement with another party to sell the vessel for US$23,765,000. Following the 2008 global financial crisis, the shipping market fell dramatically. If the vessel had been redelivered after the two year extension period (i.e. in November 2009), the Shipowner would only have been able to achieve a sale price of US$7,000,000. The Shipowner brought a claim against the Charterer for anticipatory repudiatory breach of the contract.

Court's Findings
The dispute was referred to arbitration. The arbitral tribunal concluded that the Charterer was entitled to credit for the realised profit. The Shipowner appealed to the High Court which held there was no requirement for the Shipowner to give credit for any benefit when realising the capital value of the asset, because the sale of the vessel was not "legally caused" by the breach of contract. The commercial decision of the Shipowner to sell the vessel could have been taken at any time.

The Charterers appealed to the Court of Appeal which agreed with the arbitrator, finding that the opportunity to sell the vessel would not have arisen had the Charterer not breached the contract. The Shipowner decided to release equity from the vessel, and therefore was "bringing into account the consequences of its decision to mitigate its losses."

The Shipowner appealed to the Supreme Court which found in favour of the Shipowner, as follows:

1. The fall in the value of the vessel was irrelevant. It was a separate interest, in the value of the charterparty agreement, which had been injured as a result of the Charterer's early termination.
2. The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation. The relevant link between benefit and loss is one of causation, not similarity.
3. The difference in the market price of the vessel in 2007 and in 2009 was not caused by the repudiation of the charterparty agreement. Therefore there was no reason for the Shipowner to have to bring the sum (of around US$17m) 'into account'.
4. The sale of the vessel could have happened at any time, not necessarily at the end of the extended charterparty period, and therefore the sale event was not an event of mitigation.

HFW Commentary
When assessing damages, in order for the party in breach to receive credit for gains made by the innocent party, it is important to follow the chain of causation in order to establish whether the benefits to the innocent party were caused by the breach or by the act of mitigation. If not, the gains will not be brought into account.

2. *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd.*

Court High Court (Queen's Bench Division)
Date 08 May 2017

Case Summary

Companies conducting internal investigations should be aware of the high threshold required to invoke the protection afforded by privilege against disclosure of documents in anticipated civil, and now, criminal proceedings. The court has ruled that investigations commenced by regulatory bodies such as the Serious Fraud Office ("SFO") do not constitute *'adversarial proceedings'* and therefore documents cannot be protected under litigation privilege.

Facts

Eurasian Natural Resources Corporation ("ENRC") conducted an internal review relating to potential fraud, bribery and corruption following two anonymous whistleblower reports in Kazakhstan and an unnamed African jurisdiction. ENRC appointed external solicitors and forensic accountants to investigate the allegations. After a bout of negative publicity (both in Parliament and in national newspapers), the SFO wrote to ENRC stating it was not yet carrying out a criminal investigation for failure to comply with the self-reporting requirement, but strongly encouraging cooperation. Under s.2 CJA 1987, the SFO required ENRC to produce four classes of documents generated prior to and during the internal investigation. ENRC claimed the documents were covered by legal advice privilege and / or litigation privilege. The SFO invited ENRC to disclose its internal report and supporting documents under a 'limited waiver of privilege' (meaning the SFO would not use the content for prosecution purposes). ENRC refused.

Court's Findings

1. The court determined that litigation privilege, which gives protection from disclosure of documents or communications between a lawyer, its client or a third party, created for the dominant purpose of preparing for existing or anticipated litigation, cannot protect documents if they were produced at a time when there was no more than a "*general apprehension of future litigation*". In any case, Mrs Justice Andrews stated that an SFO investigation is not classed as 'adversarial litigation' and therefore the dominant purpose of the documents was not for constructing a defence in future criminal proceedings. Therefore, the claim for litigation privilege failed.
2. Equally, it was difficult to claim legal advice privilege, which protects confidential communications between a lawyer and its client which come into existence for the purpose of giving or obtaining legal advice, as the majority of documents did not fall into this definition. Interview transcripts (i.e. a verbatim record of a conversation with no legal commentary) between the solicitors and employees, ex-employees, officers and third parties did not constitute 'legal advice'. The court upheld legal advice privilege only over presentation slides prepared by the lawyer for the client's Board of Directors.
3. In coming to this conclusion, the court upheld a narrow definition of 'client', meaning only employees who are authorised to communicate with the legal advisor. This may include a team specifically set up to manage an internal investigation. The court highlighted the distinction between civil proceedings, which can be brought in a commercial context where there is no substantive evidence to support a claim; and criminal proceedings, which cannot be started until the prosecutor is satisfied there is sufficient evidential basis to support prosecution, and it is in the public interest to pursue the claim.

ENRC has confirmed it will appeal this decision.

HFW Commentary

Our feeling is that ENRC may well be successful in its appeal.

However, whilst we wait for the Court of Appeal to provide clarity in this crucial area, our advice is that if you are undertaking any internal investigations, always consider whether a regulator may be interested in your findings. If this is likely, you should take steps to try and protect privilege in any documents produced in the course of the investigation and we suggest that the following measures are adopted:

1. Contact legal advisors early. Not only can they help with the investigation itself, but they can also provide advice on how to try to protect privilege from the outset.
2. The High Court's decision upheld a narrow definition of 'client' as meaning only those employees who are authorised to communicate with the legal advisor. Therefore, set up a clearly defined team to manage the internal investigations.
3. Given the uncertainty about what constitutes "legal advice", consider holding oral discussions only.
4. If reports do need to be drafted, ensure they are written by external counsel and are only shared with the investigations team.

3. ***Deutsche Bank AG (London Branch) v CIMB Bank Berhad***

Court High Court (Queen's Bench Division)
Date 25 May 2017

Case Summary

Letters of credit ("LCs") are very widely used as a secure means of financing international trade. In the last year, there have been several English court judgments about the role and responsibilities of issuing banks in an LC transaction, and in particular their obligation to pay against receipt of conforming documents. Now, the English High Court has ruled on an issuing bank's entitlement to require further information as to whether a confirming bank has made payment under an LC before reimbursing it.

Facts

HFW represents CIMB Bank Berhad ("CIMB") in an action brought against them by Deutsche Bank AG ("Deutsche") in the English High Court. CIMB was the issuing bank under 10 LCs to which Deutsche added its confirmation. The substantive hearing of this case is yet to take place, but an interesting point of principle arose to be decided by the court in relation to a Request for Further Information ("RFI"), which is of significant interest to issuing and confirming banks under LCs.

Deutsche argued that having made payment to the beneficiary, its client, under the LCs and having passed what it alleged to be compliant documents to CIMB, it was entitled to reimbursement from CIMB. CIMB disagreed. The issue between them related to the interpretation of Article 7(c) UCP 600, which states,

> *"An issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank [...]. An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary."*

In its pleadings, Deutsche asserted that it had made payment and CIMB made a formal RFI as to whether payment had actually been made. Deutsche refused to comply with this RFI, contending that as a matter of principle, an issuing bank must accept on its face a statement from a confirming bank that it has paid the beneficiary – there is no entitlement on the part of an issuing bank to enquire as to whether a confirming bank has actually made payment before reimbursing it. It argued that CIMB's undertaking to reimburse Deutsche arose once Deutsche had sent the allegedly confirming documents and stated that it had paid the beneficiary. To permit issuing banks a right of enquiry as to whether payment has in fact been made would be "uncommercial, unworkable and plainly not what the parties must be taken to have intended".

CIMB on the other hand argued that its undertaking to reimburse Deutsche under Article 7(c) UCP 600 is contingent on Deutsche having actually made payment to the beneficiary. The question as to whether or not a confirming bank has actually paid is therefore fundamental to this reimbursement undertaking, and an issuing bank must therefore be entitled to enquire as to whether payment has in fact taken place.

Court's Findings

The court found in favour of CIMB and allowed its RFI. The court agreed with CIMB that whether the presentation of documents has been honoured by payment is a relevant matter for investigation.

Deutsche had also argued that the words "states that" should be read in to Article 7(c) UCP 600, so that an issuing bank's reimbursement undertaking would arise when the confirming bank says that it has paid the beneficiary, rather than when it has actually done so. The court rejected this, holding that it is not correct in principle to construe Article 7(c) UCP 600 "by writing in words that materially change its sense." The court also pointed out that the "UCP is revised periodically, and this is the occasion for introducing changes if thought desirable."

HFW Commentary

HFW (*Paul Aston and Suzanne Meiklejohn of HFW's Singapore office*) represented CIMB. This decision clarifies the extent of an issuing bank's responsibilities under Article 7(c) UCP 600, which will stand unless and until the decision is overturned by a higher court, or the Article is amended during the periodical revision process.

Whilst it is unlikely in most cases that an issuing bank would have cause to question a confirming or negotiating bank's assertion that it has honoured presentations under LCs, this decision gives them scope to do so if they find it necessary. It may prove useful in the context of synthetic trades, or where standby LCs are being used as a form of security and where it is often difficult for issuing banks to resist demands for reimbursement from confirming banks. It will be of particular relevance in the heightened regulatory and compliance environment in which international banks operate, as it opens the possibility for issuing banks to acquire further information from confirming banks about the movement of funds in trade deals in which they are involved.

4. ***Persimmon Homes Ltd and others v Ove Arup & Partners Ltd and another***

Court Court of Appeal (Civil Division)
Date 25 May 2017

Case Summary

The Court of Appeal has handed down a judgment which confirms that exclusion clauses will be interpreted narrowly when negotiated between parties of equal bargaining power. The effect is to limit the role of one of the rules of interpretation on which commercial parties often rely– the *contra proferentum* rule – in which any ambiguity in a clause is interpreted against the party seeking to rely on it.

Facts

Ove Arup & Partners Ltd and another ("Arup") were engaged as civil engineers to the owners of a site in Wales in connection with a regeneration project. Arup provided a variety of services ranging from advisory to design and supervisory, one of which related to site contamination. Once the project had been completed the owners of the site invited tenders for its purchase. Persimmon Homes, Taylor Wimpey and BDW formed a consortium (the "Consortium") to put in a bid for the purchase. Arup was engaged to provide consultant engineering services to the Consortium in relation to the proposed bid, which was ultimately successful.

During the purchase negotiations, Arup was engaged by the Consortium to provide further ongoing services which included *"Geotechnical/Contamination investigation"*. The agreement between Arup and the Consortium contained the following clause within the *Professional Indemnity Insurance clauses*,

> *"The Consultant's aggregate liability…shall be limited to £12,000,000 (twelve million pounds) with the liability for pollution and contamination limited to £5,000,000 (five million pounds) in the aggregate. Liability for any claim in relation to asbestos is excluded."*

A similar limitation and exemption clause was found in each of the warranties provided by Arup to each member of the Consortium with the only difference being that Arup's liability in the warranties was said to be limited to £5,000,000 in the aggregate, rather than the £12,000,000 referred to in the Agreement.

Another contractor encountered asbestos on site and the Consortium maintained that the quantity present was substantially more than they had expected. It brought proceedings against Arup for negligence, claiming that Arup had failed to identify and report upon the presence and quantity of asbestos earlier.

Court's Findings

The Consortium claimed damages against Arup for breach of contract, negligence and breach of statutory duty. Arup denied liability and relied upon the exclusion clause set out above and within the warranties.

Following a trial of preliminary issues, the court found that there had been a shift in the approach of the courts to limitation and exclusion clauses and that in commercial contracts there was a growing recognition that parties should be free to allocate risks as they see fit. The court considered that the exemption clauses were clear in their meaning and represented an agreed allocation of risk between commercial parties.

The Consortium then appealed to the Court of Appeal on four grounds, one of them being that the rules governing the construction of exemption clauses remain in place and that the High Court had failed to apply those rules to the issue in question. The Court of Appeal dismissed the appeal, and confirmed that:

> *"In major construction contracts the parties commonly agree how they will allocate the risks between themselves and who will insure against what.* ***Exemption clauses are part of the contractual apparatus for distributing risk. There is no need to approach such clauses with horror or with a mindset determined to cut them down...*** *".* [Emphasis added]

HFW Commentary

The case makes clear that, where commercial parties have agreed to allocate risk in a certain way, the English courts are likely to approach the construction of exemption clauses robustly. It is important that exemption clauses are drafted clearly to exclude liability only in the circumstances intended by the parties.

5. ***Vitol SA v Beta Renewable Group SA***

Court Commercial Court (Queen's Bench Division)
Date 07 July 2017

Case Summary
A cargo of biofuel was purchased FOB from Beta Renewable Group SA ("Beta") by Vitol SA ("Vitol"). Beta was subsequently unable to deliver the contracted cargo. Vitol failed to nominate a vessel for delivery within the contractual deadline for doing so on the basis that Beta had already communicated its inability to deliver.

Facts
Vitol agreed to buy a cargo of 4,500 metric tonnes of biofuel FOB from Beta, a manufacturer of biofuel products. In early/mid June 2016, Beta indicated that it would be unable to satisfy its contractual obligation to provide the cargo. The contractual deadline for nomination of a vessel by Vitol was 27 June 2016. Vitol did not nominate a vessel and did not formally terminate the contract until 7 July 2016.

Vitol claimed that Beta had committed an anticipatory breach of the contract when it indicated in early to mid-June 2016 that it would be unable to satisfy its obligation under the contract to provide the requisite biofuel. However, Beta argued that the omission to nominate was not a clear and unequivocal act amounting to an acceptance of that breach.

There was a hedging element to Vitol's claim. Vitol had hedged the contract against the risk of price fluctuations in the UCOME market by selling gasoil futures contracts at a fixed price of US$434.50/mt. Since the contract was priced at €793.50/mt, the differential between the contract price and the gasoil futures contract price in November 2015 was US$413.85/mt. (Vitol entered into gasoil, rather than biofuels, futures contracts because there is no biofuels futures market.) Vitol argued that had Beta performed the contract, Vitol would have made a profit of US$651,240 on the resale and prompt repayment of the hedging contracts. Alternatively, based on market value, Vitol claimed US$351,830.25 in damages.

Court's Findings

1. Vitol's failure to nominate a vessel by 27 June 2016 was not an acceptance of Beta's renunciatory breach, but instead an omission on the part of Vitol, which was not intended to act as an 'acceptance' of breach. A "silent failure to nominate" was not a sufficiently clear and unequivocal act as to terminate the contract. Vitol's obligation to nominate was not a condition precedent to Beta's obligation to deliver.
2. The requirement for Vitol to nominate a vessel and time for delivery were not necessary in order for it to claim for non delivery of the goods.
3. The court rejected Vitol's claim for hedging losses as not foreseeable and too remote. Several factors were taken into account, including that:
   a) hedging is not standard practice in biofuels market; and
   b) it was not possible to link the hedges to the physical transaction sufficiently well (the court likened it to comparing apples with pears).

However, damages were awarded to Vitol on the difference between the contract price and market price.

HFW Commentary
This decision makes clear that the failure to nominate a vessel in the sale and purchase of a commodity is not sufficient to bring about the end of a contract. There must be a 'sufficiently clear and unequivocal act' to ensure both parties are aware the contracts have come to an end. However, the seller's nomination of a vessel is not a condition precedent for the buyer's obligation to deliver a cargo. Beta remained liable for non-delivery despite Vitol's failure to nominate.

In relation to quantum, given the limited number of court decisions in relation to the recoverability of hedging losses, the guidance in this judgment is helpful. The court will look at causation, remoteness and foreseeability in reaching its decision.
These proceedings were carried out under the Shorter Trials Scheme pilot. There was a 2 day hearing, with limited disclosure and witness evidence. A judgment was handed down within 10 days of the hearing.

6. ***Glencore International AG v MSC Mediterranean Shipping Co SA***

Court Court of Appeal (Civil Division)
Date 24 May 2017

Case Summary

A shipping company was in breach of contract under a bill of lading by providing electronic PIN codes to authorise collection of cargo, which allowed two containers to be stolen. A delivery order must contain an undertaking by the carrier to deliver the goods to the person identified.

Facts

MSC Mediterranean Shipping ("MSC") shipped three containers of cobalt briquettes on behalf of Glencore International AG ("Glencore") from Australia to Antwerp. Glencore had previously shipped 69 other consignments of cobalt briquettes under the same terms as this transaction. At the discharge port, as in all 69 previous shipments, the consignee was issued with a 'Release Note' containing an electronic PIN code in order to claim its goods. When the consignee went to collect the goods, two of the containers were missing. It is assumed that the PIN codes had been used by fraudsters to obtain them. Glencore brought a successful action for breach of contract and bailment. MSC appealed to the Court of Appeal.

Court's Findings

MSC appealed on four grounds, all of which failed, as follows:

1. **PIN codes as 'symbolic delivery'** (the codes were equivalent to the keys of the warehouse) – even though previous case law has established that delivery can be effected by documents other than the original bill of lading, the Court of Appeal rejected the argument that delivery of the PIN codes alone was the same as actual delivery of the goods. Delivery is a bilateral act requiring relinquishing of the goods by one party, and acquisition of the goods by the other.
2. **Release Note coupled with PIN codes constituted a 'delivery order'** – the term delivery order could have several meanings, but in this context meant a ship's delivery order, as defined in Section 1(4) of the Carriage of Goods by Sea Act 1992 ("COGSA"): in particular, the shipowner should provide an undertaking to deliver the goods to the party identified in the bill of lading. The Release Note did nothing more than instructing the port to allow delivery against the provision of PIN codes.
3. **Release Note as a ship's delivery order** – under s.1(4) COGSA, a delivery order requires an undertaking on the part of MSC to deliver the goods in favour of the shipper (Glencore) or the consignee. However, MSC's Release Note did not provide any such undertaking. The Release Note only gave a promise to deliver the goods to the first presenter of the correct PIN codes, which is not the same as an undertaking to deliver to the shipper or consignee.
4. **Estoppel** – MSC contended that Glencore would be estopped from arguing the provision of Release Notes and PIN codes was a breach of duty on the part of MSC, since they had not objected in any of the previous 69 shipments. The Court of Appeal dismissed this, stating that neither Glencore nor its agents had represented that the Release Notes and PIN codes constituted a delivery order on the previous 69 occasions. They had merely tolerated a breach of contract by the carriers on each occasion. Also, Glencore's agents did not have authority to vary (or waive) the terms of the contract.

HFW Commentary

This decision has three points of interest:

1. It highlights that a ship's delivery order must contain an undertaking to deliver goods to the correct party (usually the shipper or consignee).
2. It is a case in which the court applied the law in the context of use of an electronic system to obtain delivery of containers, which is increasingly common in ports. The rise of new technology in the shipping industry is designed to reduce fraud and production of counterfeit bills of lading. However, if a carrier allows an unauthorised third party to access the goods, it cannot be said to have complied with the undertaking in a ship's delivery order in accordance with the fundamental purpose of a bill of lading. This decision could be said to have transferred the risk of loss by theft in these circumstances from the receiver to the carrier.
3. It offers an insight into the role and authority of an agent – and the application of the law on estoppel – in the context of a series of contracts or shipments.

7. ***BHL v Leumi ABL Ltd***

Court Queen's Bench Division (Mercantile Court)
Date 28 July 2017

Case Summary

Cobra Beer Limited ("Cobra") was owed money by its customers and in turn owed money to Leumi ABL Limited ("Leumi") under a receivables financing agreement ("RFA"). Leumi stepped into the shoes of Cobra to organise the collection of monies due to Cobra and, pursuant to paragraph 2 of Schedule 6 to the RFA, applied a 15% collection fee to the monies collected. Under an indemnity agreement, BHL was obliged to indemnify Leumi for this collection fee. BHL claimed that Leumi was not entitled to claim the collection fee.

Facts

On 11 April 2008, Cobra entered into the RFA with Leumi. Having suffered serious financial difficulties and being unable to secure further financing, Cobra entered into administration on 29 May 2009. At the time a large number of customers owed Cobra money, whilst Cobra itself owed Leumi money under the RFA.

At the same time, Cobra Beer Partnership Ltd ("Cobra Partnership") was set up and acquired Cobra's business. BHL, a shareholder in the Cobra Partnership, entered into a written indemnity agreement with Leumi, Cobra and the administrators under which BHL agreed to indemnify Leumi in respect of sums due under the RFA.

Leumi sent a letter of demand to Cobra requiring the immediate payment of the monies due under the RFA or alternatively, the purchase of all the remaining collectables, within 7 days, failing which Leumi would proceed to collect the receivables itself and charge a collection fee pursuant to the RFA. Cobra failed to repay the monies due or purchase the remaining collectables and Leumi consequently took over the collection of the receivables and informed BHL that it would be charging a collection fee of 15% on all receivables collected.

The clause in question, paragraph 2 of Schedule 6 of the RFA (the "RFA Clause") stated:

> *"if Leumi requires the Client to repurchase any Receivables and the Client fails to do so within 7 days of such demand, Leumi will be entitled to charge the Client an additional collection fee at up to 15% of amounts collected by Leumi thereafter. This collection fee is in addition to any other fee payable by the Client to Leumi under this Agreement. The Client expressly acknowledges that such fee constitutes a fair and reasonable pre-estimate of Leumi's likely costs and expenses in providing such service to the Client."*

BHL paid £400,000 to Leumi on 11 November 2010 and a further £550,000 on 9 May 2011 but subsequently claimed those sums back on the basis that:

1. Leumi was not entitled to charge a collection fee at 15%.
2. BHL had paid the sums to Leumi by mistake of law.

Court's Findings

The claim focused on the meaning of the RFA Clause. BHL argued that Leumi was only entitled to recover its actual costs and expenses in making the collections, subject to a maximum of 15% of the receivables. It also argued that the RFA Clause was a penalty clause.

Leumi argued that it could charge any fee, without reference to anticipated or actual costs, subject only to a maximum of 15%.

The other alternative was that Leumi had a discretion to charge a fee based on estimated or actual costs but could not charge more than 15%.

The court considered the true construction of the RFA Clause and disagreed with BHL's argument that Leumi was only entitled to recover its actual costs and expenses, because it rendered the last sentence of the RFA Clause meaningless.

The court also rejected Leumi's argument that it could charge any fee. It found that Leumi had the right to charge a collection fee but could not have an "untrammelled discretionary power" to charge what it liked, up to a maximum of 15%. It must exercise its discretion in a qualified way; it could not be exercised "oppressively or abusively". The court referred to the "Braganza duty" in relying on the Supreme Court decision in *Braganza v BP Shipping Limited [2015] UKSC 17* to find that discretions such as this must be exercised “in a way which is not arbitrary, capricious or irrational in the public law sense”.

In particular, the fee had to have a target and Leumi had to identify:

1. the amount of receivables that were to be recovered;
2. the estimated likely cost of the collection of the receivables; and
3. the costs as a percentage of the total sum to be collected.

The court found that Leumi had exercised no discretion when charging the collection fee at 15% and that no actual attempt had been made to calculate the likely costs and expenses. A fee of 4% was the absolute maximum that Leumi could have charged.

The amount paid by BHL to Leumi was found to be not properly due. The payments were made on the basis of a mistake of law which caused the payments to be made. BHL was therefore entitled to recover the amount paid which exceeded the sums which Leumi was entitled to charge.

The court rejected the argument that the RFA Clause was a penalty clause.

HFW Commentary

The outcome of this case related in part to the wording of the RFA Clause but it is an important reminder to parties exercising discretionary contractual powers that the courts will apply high standards to the exercise of those discretions. Parties would be prudent to ensure that they can show that they have exercised their discretions in a lawful way, taking into account relevant factors and have not behaved arbitrarily or capriciously.

8. ***Goodlife Foods Ltd v Hall Fire Protection Ltd***

Court Technology & Construction Court (Queen's Bench Division)
Date 07 April 2017

Case Summary

The owner of a factory sought to blame the losses and damage caused by a fire on a faulty fire detection and suppression system. The suppliers of the system had contracted with the factory owner on the supplier's standard terms and conditions and these contained a general exclusion clause. The debate centred on whether this exclusion clause excluded the supplier's liability or whether it was unenforceable, either because it had not been incorporated into the contract or because it was onerous and unreasonable.

Facts

Goodlife Foods Ltd ("Goodlife") owned a factory in which a fire caused £6 million worth of property damage and business interruption losses. Hall Fire Protection Ltd ("Hall Fire") had supplied and installed a fire detection and suppression system in the factory and Goodlife blamed the fire on the failure of this system. Goodlife issued a claim against Hall Fire for the losses suffered.

Hall Fire and Goodlife had contracted on the standard terms and conditions of Hall Fire which contained a general exclusion clause purporting to exclude all liability, loss, damage or expense to property, goods or persons resulting from negligence or malfunction of the system.

Hall Fire argued that its standard terms and conditions had been incorporated into the contract and that they excluded any liability for the damage caused by the fire on the part of Hall Fire.

Goodlife claimed that the term excluding liability was unenforceable because it was unreasonable, that it had not been incorporated into the contract and that in any event it was onerous and therefore unenforceable.

Court's Findings

The court found that by sending a quote that stated that the terms and conditions would apply and by attaching the terms and conditions to the quote, the terms and conditions were validly incorporated into the contract.

The court also found that because the quote would have alerted any normal reader to the fact that the terms and conditions sought to significantly exclude redress against Hall Fire, the existence of the clause seeking to do so was deemed to have been fairly and reasonably drawn to Goodlife's attention. As a result the court found the clause was not too onerous overall.

It was noted that the standard terms and conditions sought to provide a sensible allocation of the risk of loss and damage between two commercial entities of equal size and bargaining power and even explicitly referred to the need for insurance protection against the risk of the system failing. Consequently, the clause was not held to be unreasonable.

HFW Commentary

The use of standard terms and conditions is common in commodities trading and parties should be aware when they are contracting on another party's standard terms and conditions. Parties should ensure that they have read and agreed to them – or not – when negotiating a contract. This case also highlights that a clause is less likely to be unreasonable if the parties are contracting on an equal footing and if an attempt has been made to allocate the risk proportionately between them.

9. *Wood v Sureterm Direct Ltd (also known as Capita Insurance Services Ltd)*

Court Supreme Court
Date 29 March 2017

Case Summary

A purchaser of an insurance brokerage company subsequently finds that the company has been mis-selling to its customers. The purchaser refers itself to the FSA and subsequently attempts to rely on an indemnity clause contained in the SPA. The courts are asked to interpret the meaning of the indemnity clause and a detailed and insightful discussion on contractual interpretation is provided.

Facts

Capita Insurance Services ("Capita") purchased the entire share capital in an insurance brokerage company (the "Company") from Mr. Wood who owned 94% of the share capital, Mr. Kightley (1%) and Mr. Collinge (5%). The agreement to buy the share capital contained the following indemnity clause,

> *"The Sellers undertake to pay to the Buyer an amount equal to the amount which would be required to indemnify the Buyer and each member of the Buyer's Group against all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred, and all fines, compensation or remedial action or payments imposed on or required to be made by the Company following or* ***arising out of claims or complaints registered with the FSA, the Financial Services Ombudsman or any other Authority against the Company, the Sellers or any Relevant Person*** *and which relate to the period prior to the Completion Date pertaining to any mis-selling or suspected mis-selling of any insurance or insurance related product or service."* [Emphasis added]

Following the purchase, Capita began receiving complaints from employees and carried out an internal review, the results of which showed that the Company had, in many cases, misled its customers. The Company was obliged to report its findings to the FSA and subsequently agreed to set up a scheme of compensation. Capita sought to rely on the indemnity clause to recover its losses.

At first instance it was held that the indemnity applied despite the Company referring itself to the FSA rather than there being a claim or complaint registered against it. This decision was appealed by the sellers and the Court of Appeal found that the relevant clause only covered loss caused by mis-selling where it followed or arose from a claim or complaint by a customer to the FSA. Capita appealed to the Supreme Court.

Court's Findings

The Supreme Court ruled that the Court of Appeal had come to the correct view in its interpretation of the clause. The indemnity was not triggered by a self-referral to the FSA. Because the language of the clause was "opaque", the court looked at the wider context in reaching its decision – for example the existence of warranties in relation to mis-selling elsewhere in the contract (which were unfortunately for the purchasers of the Company, subject to a time limit for notifying claims). The key discussion throughout these judgments centred on contractual interpretation. It was held that the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. However, this was not to be a literalist exercise. In particular, "the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning."

HFW Commentary

In this case, the Supreme Court took the opportunity to reiterate the key principles applied by the courts when called upon to interpret contracts, recognising the balancing act between a literal analysis, focused only on the language, and a contextual analysis, taking the wider context into account. It also reiterated that the court will not reject the natural meaning of a provision just because it will mean that one party has struck a bad bargain. The court must identify what the parties have agreed, not what it thinks they should have agreed. Several recent cases have demonstrated what is being seen as a shift in emphasis in the judicial approach to contract interpretation, away from the commercial context and towards a greater emphasis on the language itself. These include the *Persimmon* case (see no. 4 above).

10. *African Export-Import Bank v Shebah Exploration and Production Co Ltd*

Court Court of Appeal (Civil Division)
Date 28 June 2017

Case Summary

Shebah Exploration and Production Co Ltd ("Shebah"), a Nigerian oil exploration and production company, borrowed a total of US$150 million from three claimant banks under a facility agreement. Shebah defaulted and the entire sum payable under the facility became due and payable. Shebah sought to set off a counterclaim against the amounts due but was prevented from doing so by a no set-off clause in the facility agreement. Shebah claimed that this clause was unreasonable and unenforceable.

Facts

Three banks (the "Claimants") entered into a Loan Market Association recommended pre-export finance facility agreement with Shebah under which Shebah borrowed US$50 million from each of the three claimants (the "Facility Agreement").

The purpose of this Facility Agreement was to enable Shebah to refinance existing debt and to provide working capital. Allenne, a British Virgin Island company provided a guarantee for the performance by Shebah of its obligations under the Facility Agreement, whilst Dr. Orjiako, the President of Shebah, provided an individual personal guarantee.

Pursuant to the Facility Agreement, "*all payments to be made by an Obligor under the Finance Documents shall be calculated and be made without (and free and clear of any deduction for) set-off or counterclaim*."

After Shebah had repaid US$61 million, it defaulted and the entire sum became due and payable. As a result of non-payment of this, claims were made against Allenne and Dr. Orjiako and the Claimants sought summary judgment.

There were two key questions for the court to answer:

1. Was the no set-off clause set out above binding? Shebah wanted to set-off a counterclaim against its accepted liabilities and therefore argued that the clause prohibiting a set-off was unreasonable under the Unfair Contract Terms Act 1977 ("UCTA").
2. Did the proceedings constitute a breach of an oral agreement between the parties that proceedings would not be commenced until negotiations with another bank relating to refinancing were concluded?

In the first instance it was decided that Shebah had no realistic prospect of establishing that the parties were dealing on the Claimants' written standard terms of business and so UCTA did not apply. It was also held that, on the facts available, the second issue was not arguable. Shebah appealed.

Court's Findings

The appeal was dismissed and the Court of Appeal reaffirmed that the "no set-off clause" was binding.

Shebah relied on section 3(1) of UCTA, which states that the act applies in situations where a contracting party deals as a consumer or on the other's written standard terms of business. Under section 3(2)(a), where the act applies, liability cannot be excluded or restricted unless the term satisfies the requirement of reasonableness.

The Court of Appeal held that a party seeking to rely on UCTA had to establish that the 'unreasonable' term was:

- written;
- a term of business (both matters of fact);
- part of the counterparty's standard terms of business; and
- the counterparty is dealing on those written standard terms of business.

The main focus of the judgment lay on the meaning of, "*deals […] on the other's written standard terms of business*."

Crucially, in relation to the need to establish that the deal has been done on the written standard terms of business it must be shown that any negotiations that have taken place left the term 'effectively untouched.' If there have been substantial variations to the term in question, it is unlikely to be the case that the contracting parties contracted on written standard terms of business.

Shebah failed to establish that it was dealing on the Claimants' standard written terms of business – which was particularly difficult to achieve in circumstances where multiple claimants were involved. In addition, the terms had in any event been heavily negotiated. UCTA did not apply and Shebah's appeal failed.

HFW Commentary
It is important to be aware that standard terms can become tailored terms where they are heavily negotiated.

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