ALLEN & OVERY

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Litigation and Dispute Resolution

Review

EDITORIAL

In this month's Litigation Review we cover a number of cases on areas of contract law which commonly give rise to disputes. For example, we report on the Supreme Court's review of the law concerning the exercise of contractual discretion in *Braganza v BP Shipping Ltd.* We consider *Taberna Europe CDO II plc v Selskabet AF1* where the High Court looked at disclaimers in marketing materials, found them to be ineffective and concluded that the issuer of subordinated notes was liable to a secondary market professional investor for misrepresentations concerning non-performing loans. We also report on *Myers v Kestral Acquisitions Ltd & ors* where the High Court held good faith could not be implied into modification provisions of loan notes (see **Contract**).

We assess whether the CJEU's recent decision in *Gazprom OAO*, Case C-536/13 signals a green light to parties to seek a back door anti-suit injunction in the EU context simply by obtaining an arbitral injunction restraining foreign proceedings and then having that award recognised in the Member State court at the seat (see **Arbitration**).

Finally, we have published our 2015 Global Litigation Survey which assesses ten key indicators of the litigation process in 161 legal systems. This new and expanded edition includes contributions from an additional 25 jurisdictions, including Bahrain, Bangladesh, Cayman Islands, Cuba, Jamaica, Lebanon, Macau, Malawi, Paraguay, Rwanda and Senegal. Existing entries and analysis have also been extensively updated. The result is a truly global survey which, as far as we know, remains the only one of its kind. If you are a client and would like a copy of the survey, please contact us.

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Contents

Arbitration 3

CJEU potentially opens the back door to court ordered anti-suit injunctions in the EU: *Gazprom OAO*

Arbitration awards: when does an amendment amount to a new award?: *Union Marine Classification Services v The Government of the Union of Comoros*

Conflict of laws 7

Competing dispute resolution clauses between settlement agreement and underlying contract: *Monde Petroleum SA v WesternZagros Ltd*

Contract 10

Issuer liability to secondary market investor: disclaimers ineffective: *Taberna Europe CDO II plc v Selskabet (formerly Roksilde Bank A/S) (In Bankruptcy)*

Contractual discretion: how to get it right: *Braganza v BP Shipping Ltd & anr sub nom The British Unity (2015)*

Forced sale of security: court considers duties owed by bank: *Rosserlane Consultants Ltd & anr v Credit Suisse International*

Changes to loan notes: good faith not implied: *Dennis Edward Myers & anr v Kestrel Acquisitions Ltd & ors*

Disclosure 22

Application too late for disclosure of bank's regulatory benchmark documentation and training materials in mis-selling claim: *Peniuk & ors v Barclays Bank plc*

Limitation 24

Investor's knowledge bars mis-selling claim: *Susan Jacobs v Sesame Ltd*

Public procurement 25

Public procurement: automatic suspensions to the award of contracts: *Bristol Missing Link Ltd v Bristol City Council*

Regulatory 27

What due diligence should fund managers undertake before making an investment? *Alberto Micalizzi v The Financial Conduct Authority*

FCA fines retired accountant for committing market abuse: *Final Notice issued against Kenneth George Carver*

Settlement 32

Fraud will not always unravel a settlement agreement: *Hayward v Zurich Insurance Co plc*

Forthcoming client seminars 32

Litigation Review consolidated index 2015 33

Arbitration

CJEU POTENTIALLY OPENS THE BACK DOOR TO COURT ORDERED ANTI-SUIT INJUNCTIONS IN THE EU

Gazprom OAO [2015] EUCJEU C-536/13, 13 May 2015

The ability of the English courts to restrain court proceedings in another Member State in breach of an arbitration agreement was curtailed, following the infamous decision of the Court of Justice of the European Union (**CJEU**)[1] in *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v West Tankers Inc, (The Front Comor)* (Case C-185/07). Earlier this year, there were hopeful signs that this decision might be reviewed following the referral to the CJEU by the Lithuanian Supreme Court of similar questions arising in a dispute between Gazprom OAO and Lithuania. The CJEU's decision in that case was issued on 13 May 2015 and while it has declined to revisit *West Tankers*, the CJEU has potentially opened up the back-door to court ordered, intra-EU anti-suit injunctions.

In the *West Tankers* case, the CJEU found that it was incompatible with the Brussels Regulation 44/2001 (the **original Brussels Regulation**) for a court of a Member State to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that the proceedings would be in breach of an arbitration agreement, in circumstances where the proceedings brought in the other Member State were within the scope of the Brussels Regulation. This decision meant that an anti-suit injunction could not be granted to restrain proceedings within the scope of the original Brussels Regulation brought in another EU Member State in breach of an arbitration clause.

Since – and in part because of – the decision in *West Tankers*, the original Brussels Regulation has been replaced by Brussels Regulation 1215/2012 (the **recast Brussels Regulation**), which has applied since 10 January 2015.

It is against this background that a dispute arose between Gazprom OAO and Lithuania concerning the running of Lithuania's main natural gas provider, in which both parties were shareholders. The Lithuanian Ministry of Energy initiated court proceedings in Lithuania. Gazprom subsequently commenced arbitration under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (**SCC**) in Sweden. Gazprom argued that the Ministry's claims were in breach of an arbitration agreement contained in the shareholders' agreement to which they were both parties. The tribunal in the SCC arbitration issued an award ordering Lithuania to withdraw certain of its court claims (subsequently referred to by the Lithuanian court as an anti-suit injunction), which Gazprom then sought to have recognised and enforced in the Lithuanian Court of Appeal. The court refused and Gazprom appealed to the Supreme Court of Lithuania, where Lithuania argued that, in light of *West Tankers*, the anti-suit injunction issued by the arbitral tribunal was contrary to the original Brussels Regulation.

The Supreme Court of Lithuania referred the matter to the CJEU, asking whether the court of a Member State could refuse to recognise and enforce an award containing an arbitral anti-suit injunction as being incompatible with the original Brussels Regulation.

Advocate General opines that *West Tankers* should be reconsidered

On 4 December 2014, Advocate-General Wathelet concluded (a) that the original Brussels Regulation must be interpreted as not requiring the court of a Member State to refuse to recognise such an award (the **conclusion**); and (b) suggested, in the context of a discussion of the recast Brussels Regulation, that it is was possible that the CJEU might reconsider the

approach taken in *West Tankers*, both in relation to the original and the recast Brussels Regulation (the **suggestion**).

The decision of the CJEU

The CJEU declined to follow the Advocate-General's suggestion and has therefore avoided revisiting its earlier decision in *West Tankers*. Although it referred to *West Tankers*, the CJEU limited itself to considering the specific questions posed by the Lithuanian court. In this respect, the CJEU agreed with the Advocate General's conclusion that the original Brussels Regulation must be interpreted such that a Member State court is not required to refuse to recognise or enforce an arbitral award containing an anti-suit injunction.

In reaching this decision, the CJEU confirmed that arbitration is outside the scope of the original Brussels Regulation because the Regulation governs only conflicts of jurisdiction between courts of the Member States. The CJEU took the view that there was no such conflict in this case and no question of infringement of trust by the interference of the court of one Member State in the jurisdiction of the court of another Member State (the only court involved was the Lithuanian court). The arbitral award did not deny the party restrained from obtaining judicial protection because, in any proceedings for recognition and enforcement of the arbitral award, that party could contest recognition and enforcement and the Lithuanian court would have to determine, on the basis of national procedural law and international law, whether or not the award should be recognised and enforced.

The CJEU therefore concluded that the original Brussels Regulation did not "preclud[e] a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State".

COMMENT

The original Brussels Regulation is widely considered to have been a successful European instrument. However, there were concerns including in relation to the arbitration exception whose application in practice resulted in ambiguity about the boundaries between the jurisdiction of Member State courts to act in support of arbitration in accordance with national law and their jurisdiction to act under the Brussels Regulation.

The CJEU sought to address this ambiguity in the *West Tankers* case. Unfortunately, this decision has had the no doubt unintended but unfortunate consequence of opening the door for parties to act abusively by bringing substantive proceedings within the scope of the Brussels Regulation in the courts of the Member State most likely to find the arbitration clause invalid (so-called "Italian torpedo" tactics), and rendering the party wishing to uphold the arbitration agreement and other Member State courts, including the courts of the seat of the arbitration, powerless to prevent this. It also means that the courts of those other Member States will subsequently have to enforce any judgment on the merits given by the Member State court that heard the substantive claim in breach of the arbitration clause.

Recital 12 of the recast Brussels Regulation seeks to address this concern as it makes clear that the ruling by a court of one Member State on the effectiveness of an arbitration agreement is not subject to the rules of recognition and enforcement laid down in the recast Brussels Regulation. Following the Opinion of Advocate General Wathelet in *Gazprom OAO* in particular in respect of the recast Brussels Regulation, it was hoped that the CJEU might strengthen the effect of Recital 12 and revisit the approach taken in *West Tankers*. The CJEU has not done so.

While this might, at first glance, appear unsatisfactory for users of arbitration keen to quell the tide of the abusive Italian torpedo, the decision warrants closer review. The CJEU concluded that the original Brussels Regulation "*does not govern recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State*". This at least suggests that the decision in Gazprom should be the same where the courts of more than one Member State are involved in the analysis. In other words, it is at least open to debate following this decision whether a party to an arbitration seated in one Member State could now obtain an arbitral award

restraining a counterparty from continuing proceedings in another Member State which could then be recognised by the courts at the seat, effectively obtaining a court-ordered anti-suit injunction by the back door and circumventing the limitation imposed by *West Tankers*.

Alternatively and possibly avoiding the inevitable risks involved in recognition and enforcement proceedings (and the question whether such an injunction could ever be issued as an award), a party may seek the arbitral injunction in the form of an order. If the arbitration were London seated, at least, that order could then be converted into a peremptory court order under s42 Arbitration Act 1996. In either case, the party concerned would then have the benefit of a court order preventing their arbitral counter-party from pursuing proceedings in breach of the arbitration agreement in the court of another Member State with equivalent effect to a standard court-issued anti-suit injunction.

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[1] The Court of Justice of the European Union was formerly known as the European Court of Justice (ECJ).

ARBITRATION AWARDS: WHEN DOES AN AMENDMENT AMOUNT TO A NEW AWARD?

Union Marine Classification Services v The Government of the Union of Comoros [2015] EWHC 508 (Comm), 6 March 2015

An arbitration tribunal has jurisdiction to correct an arbitration award in certain limited circumstances. It does not have jurisdiction simply to change its mind and issue, in effect, a new award. A limit on the circumstances in which an arbitrator may correct an award is important for the finality of arbitration awards. In this case, the court ruled that an arbitrator's corrections to an arbitration award did not result in a new award being issued. The ruling explores the difference between an award that has been simply "corrected", and a new award being issued.

In 2007, the claimant (**UM**) and defendant (the **Government**), entered into a commercial outsourcing contract (the **Agreement**), in which UM was authorised to take, on the Government's behalf, all actions relating to the maritime administration of Comoros. In 2012, the Government purported to terminate the Agreement. UM claimed wrongful termination and the Government in turn raised a number of counterclaims. The matter was submitted to arbitration, which, under the terms of the arbitration agreement, was heard by a sole arbitrator in London and governed by the terms of the London Maritime Arbitrators Association. It was agreed that the merits and quantum phases be decided separately. An award on the merits was delivered in July 2014 (the **Award**) in favour of UM, and making a *prima facie* dismissal, in part of the Award, of all the Government's counterclaims.

The Government applied to the arbitrator for some corrections to be made to the Award.

When can an award be corrected?

Section 57(3) Arbitration Act 1996 Act permits a tribunal, subject to certain procedural requirements, to correct an arbitral award: (a) so as to remove any clerical errors arising from an accidental omission, or to remove any ambiguity; or (b) to make an additional award in respect of any claim which was presented to the tribunal but not "dealt with" in the award.

The Government requested correction/clarification of the Award in respect of two of its counterclaims: (a) for certain monthly payments under the Agreement; and (b) for an account. It relied on s57(3)(b) – namely that

the arbitrator had allegedly failed to deal with these counterclaims.

The arbitrator published an amended award in which he held, "*by way of addition and/or correction*", that the Government was entitled to certain damages for monthly payments, and for an account (the **Amended Award**). The arbitrator also published reasons in a separate document stated to form part of the Amended Award (the **Reasons**). In the Reasons, the Arbitrator explicitly stated: "*I am not making a further award or dealing with anything that was not pleaded and addressed at the hearing: I am making corrections and additions to my award to deal with points that were incorrect…or which had been raised but not dealt with there*."

UM then commenced proceedings in the Commercial Court to challenge the "*erroneous amendment*" of the Award. The application ultimately failed on procedural grounds (UM had failed to make the application under the correct section of the Act), but Eder J's *obiter* findings on the merits of the application are worthy of note.

Did the arbitrator have jurisdiction to amend the Award?

UM argued that the Award was final and binding, so the Arbitrator's mandate had ended; he thus had no jurisdictional power to change the Award under s57(3), and the Amended Award was consequentially a nullity. UM argued that the purpose of s57(3) was not to enable an arbitrator to change his mind on matters already decided.

UM also argued that the corrected counterclaims in the Amended Award had already been "*dealt with*". Just because the arbitrator might not have set out each step demonstrating how he reached his conclusions, or that he may have actually dealt with a claim incorrectly or without reasons, does not mean that such a claim has not been "dealt with" by the tribunal. UM relied on the Award, where the arbitrator stated expressly, *"…the Government's counterclaims referred to me all fail*", indicating that the counterclaims had been considered.

Eder J examined whether the arbitrator had merely corrected the Award or had in fact changed his decision (the former would fall within s57 of the Act, the latter would not).

First, Eder J observed that underlying the Act is a principle that the Act enables the "*arbitral process to correct itself where possible, without the intervention of the court*".[1] Where an arbitrator is entitled to correct an error under s57, he is then entitled to amend the "dispositive parts" of the original award to reflect that correction. The "dispositive parts" refer to the section of the award declaring whether the parties' claims and counterclaims succeed or fail.

Second, in considering whether matters such as the corrected counterclaims had been "dealt with" in the Award, it was imperative to look at the Award as a whole. Viewed in isolation, the Award apparently rejected the Government's counterclaims: the arbitrator had held that the Government failed to establish that UM had breached its payment obligations under the Agreement, and in the dispositive part of the award the arbitrator had declared *"…the Government's counterclaims referred to me all fail*". Yet in the Amended Award, the arbitrator held that the Government was entitled to two of its counterclaims. On the face of it, this could be a change of decision.

Had the counterclaims been "dealt with"? – No

Had the arbitrator "dealt with" the Government's counterclaims by dismissing any breach of payment obligations in the Award? In short, the arbitrator had not. Eder J held that, when reviewed in context, this dismissal in fact related to the arbitrator's assessment of the grounds on which the Government said it was entitled to terminate the Agreement. Thus, when the arbitrator rejected the Government's allegations that UM did not meet their payment obligations under the Agreement, this rejection was of the central allegation of repudiatory breach. The dismissal did not therefore amount to saying that there was no payment breach under the Agreement whatsoever. Eder J considered that, by looking at the dismissal in the Award as a whole, the arbitrator had in fact been focused on dealing with the central point of "liability" (ie the repudiatory breach), and not dealing with matters of "quantum" such as the two counterclaims. Eder J considered that this interpretation was consistent with both the Award and Reasons provided to the Amended Award.

Regarding the seemingly explicit dismissal of *all* counterclaims in the dispositive part of the award, Eder J conceded this was more problematic. Nevertheless, he reiterated the importance of interpreting the dispositive part of any award in its proper context, in particular in the context of the reasons stated. Accordingly, Eder J held there is perhaps an argument that the dispositive part of the original award should be read in light of "*the true objective intent of the earlier sections*" and that it should be read in a more limited way.

On this basis, after reviewing the Award and the Amended Award in its context, it was held that the arbitrator had made an accidental slip or omission, which he was entitled to correct under the Act.

COMMENT

The question of when a tribunal's correction of an arbitration award becomes, in effect, a new award is important in terms of the finality of arbitration awards. This decision suggests that the new award threshold can perhaps be inferred as only being met if a correction/clarification really goes to a "central allegation" that has been clearly dealt with in the original award. Amended awards will not be considered "new" where the amendment(s) deals with claims that have been presented to the tribunal by the parties, but overlooked by the tribunal in the original award. To assess whether an amended award is, in fact, a "new" award, and therefore outside the scope of s57, this decision suggests that the court is likely to consider the changes made alongside their context in the original award. Blanket statements such as "all counterclaims have been dismissed" will be considered in the context in which they were made – for example, is the context a claim for repudiation? Or is the context a claim for contractual damages?

It is certainly not the case that an arbitrator is permitted to change his/her mind under the guise of a correction. However, this decision does suggest that an English court may be slow to interpret even what, *prima facie*, might seem more than a mere correction/clarification, as a new award.

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[1] Citing Cooke J in *Torch Offshore LLC v Cable Shipping Inc* [2004] 2 Lloyd's Rep. 446.

Conflict of laws

COMPETING DISPUTE RESOLUTION CLAUSES BETWEEN SETTLEMENT AGREEMENT AND UNDERLYING CONTRACT

Monde Petroleum SA v WesternZagros Ltd [2015] EWHC 67 (Comm), 22 January 2015

There is a presumption that parties intend for all disputes arising out of a particular relationship to be resolved in a single forum, and, as this case shows, a particularly strong presumption where a settlement agreement's dispute resolution clause differs from the dispute resolution clause in the underlying contract. Where the parties intend differently, clear and express wording is needed to displace this presumption.

WesternZagros Ltd (**WZL**) entered into a consultancy services agreement with Monde Petroleum SA (**Monde**) with a dispute resolution clause stating that any dispute would be referred to arbitration in London under ICC rules.

WZL purported to terminate the consultancy services agreement and disputed that the unpaid amounts invoiced by Monde, which included a milestone payment, were due. No arbitral proceedings were started at this stage.

The parties entered into a settlement agreement under which WZL was to pay Monde's disputed invoices in full and for there to be a mutual release and waiver of all claims by each party in respect of the consultancy services agreement. The settlement agreement contained a clause conferring exclusive jurisdiction on the courts of England and Wales.

Monde commenced proceedings in the English commercial court claiming that it had been induced to enter the settlement agreement under misrepresentation and/or duress. Monde also started arbitration proceedings as a protective measure notwithstanding its primary case that the English court had jurisdiction. WZL made counterclaims for declaratory relief in the arbitration in respect of the consultancy services agreement, but the arbitral tribunal held that it had no jurisdiction to determine the counterclaims.

WZL applied to the English court, in part, seeking to overturn the arbitration award that the tribunal did not have jurisdiction over WZL's counterclaims.

WZL argued the arbitration clause in the consultancy services agreement remained valid and binding and that WZL's counterclaims fell within the scope of that arbitration agreement. The settlement agreement did not terminate, supersede or otherwise render the arbitration clause ineffective or inoperative. This was because the settlement agreement did not show express agreement between the parties that it would terminate or supersede the arbitration clause, contrary to the requirements of s7 Arbitration Act 1996 which requires such express wording.

Monde argued that on the true construction of the jurisdiction clause in the settlement agreement, it was intended to supersede the arbitration clause in the consultancy services agreement. Monde argued, in part, that this was the correct construction because of the presumption in favour of one-stop adjudication and the fragmentation which would otherwise arise between claims which would be required to be brought in separate fora.

Decision

Popplewell J held in favour of Monde that the settlement agreement's dispute resolution clause superseded the one contained in the consultancy services agreement, and the arbitration tribunal had not had jurisdiction.

Popplewell J referred to the House of Lords' decision in *Fiona Trust & Holdings v Privalov & ors* [2007] Bus LR 1917 that there is a strong presumption that rational businessmen who are parties to a contract intend all questions arising out of the relationship in question to be determined in the same forum and this would require clear words to the contrary if it was to be displaced.

It is possible for a dispute resolution clause in an underlying contract to remain valid and binding despite the underlying contract being terminated. This is because the termination affects the substantive rights in the underlying contract and, depending on the wording, not the agreement as to how disputes should be resolved. However, Popplewell J observed that there are a number of reasons why there is a particularly strong presumption in favour of one-stop adjudication where there are conflicting dispute resolution clauses in a settlement agreement and the underlying agreement:

- First, where parties to a dispute enter into a settlement agreement, the disputes often give rise to issues which relate both to the settlement agreement and to the underlying agreement. In such circumstances, it would be rational that the parties would intend that all aspects of such a dispute should be resolved in a single forum.
- Secondly, the settlement agreement comes "second in time" and has been agreed in light of the specific circumstances which have given rise to the dispute regarding the underlying contract.
- Thirdly, there is a risk of inconsistent findings if the disputes arising under the settlement agreement and underlying agreement are determined in different fora.

Popplewell J also noted that even if disputed issues can be separated neatly, it is unlikely that the parties intended the increased costs, inconvenience and delay in having to litigate separate aspects of the same dispute in two different fora.

However, Popplewell J noted that there are occasions where parties will favour fragmentation of issues, so that different disputes are resolved in different fora. Whether this applies depends on the circumstances and wording of the settlement agreement.

COMMENT

This case clarifies that where inconsistent dispute resolution clauses are contained in a settlement agreement which settles a dispute between two parties arising out of an underlying commercial contract that has been terminated, there is a strong presumption in favour of one-stop adjudication, ie that the parties intended for any disputes arising between them relating to the contract and the settlement of the relevant relationship to be heard in one place.

There are occasions where parties will require different dispute resolution clauses. It is possible for parties to have multiple relationships, each governed by multiple contracts. The drafting of the dispute resolution clauses in these contracts will depend on both the nature and purpose of the relevant relationship and contract, as confirmed in the Court of Appeal decision *Deutsche Bank AG London Branch v Petromena ASA* [2015] EWCA Civ 226 (discussed in the Litigation Review, April 2015).

Popplewell J noted Lord Hope's observation in *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co* [1993] QB 701 that dispute resolution clauses are often not focused on by parties during negotiations, so the court is wary of placing too much weight on particular forms of words so as to exclude certain disputes from its scope. However, as this case shows, dispute resolution clauses in subsequent agreements can have a significant impact on how disputes are resolved. In practice, parties need to pay close attention to the content and consistency of dispute resolution clauses in the main agreements, as well as in any settlement agreements, to ensure that any disputes that do arise are resolved in the forum and manner the parties intended.

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Contract

ISSUER LIABILITY TO SECONDARY MARKET INVESTOR – DISCLAIMERS INEFFECTIVE

Taberna Europe CDO II plc v Selskabet (formerly Roksilde Bank A/S) (In Bankruptcy) [2015] EWHC 871, 30 March 2015

The issuer of subordinated notes was liable to a secondary market professional investor for damages for misrepresentations concerning non-performing loans made in investor presentation/roadshow slides and a quarterly results announcement. Any failures by the investor to carry out sufficient due diligence, had they been proved, were insufficient to justify a finding of contributory negligence. Market standard disclaimer wording in the investor presentation slides did not protect the issuer.

The defendant, Roskilde, a Danish bank (now insolvent and known as Selskabet AF1) (**issuer**) issued subordinated notes (**notes**) under a Euro Medium Term Note (EMTN) Programme. They were originally issued to a bank in December 2006 and subsequently marketed to prospective investors on the terms of a prospectus dated 4 April 2007. Taberna, an Irish investment vehicle, purchased notes from another bank (the **Bank**) on the secondary market for just over EUR 26 million in February 2008.

The issuer suffered severe financial difficulties shortly after the purchase. In July 2008, it sought liquidity assistance from the Danish Central Bank and, in August 2008, its assets and liabilities (excluding subordinated liabilities such as the notes) were transferred to a new bank. Taberna recognised that it could not make a claim against the new bank for payment under the notes (as a subordinated liability, it had not been transferred to the new bank and remained with the insolvent issuer), so it made a claim for damages for misrepresentation on the (arguable) basis that claims for damages were not excluded by the transfer agreement establishing the new bank.

Taberna sued the issuer in England. It claimed damages under s2(1) Misrepresentation Act 1967 for misrepresentations made by the issuer in various documents, including a March 2007 Offering Circular (**OC**), the issuer's Q3 2007 Report (**Q3 Report**) and an "Investor Presentation/Roadshow" (**IP**). The IP comprised a series of coloured slides which were posted on the issuer's website and used to market the notes. The IP was published around the same time as the Q3 Report.

Taberna alleged that misrepresentations had been made concerning the issuer's non-performing loans (**NPL**), credit risk policy, loan write-downs and its project finance portfolio. It succeeded on one ground only – the NPL.

Does s2(1) Misrepresentation Act 1967 apply to a claim by a secondary market investor? – Yes

Section 2(1) provides that "Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof has suffered loss, then, if the person making the misrepresentation would be liable to damages…had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true".

Section 2(1) did apply in this case. This was not a "simple" case of only two parties (A and B) where a representation is made by A to B and, in reliance on that, B enters into a contract with A. Here it was more complicated, as pre-sale negotiations had taken place between the Bank and Taberna following which Taberna had entered into a contract with the Bank to acquire the notes. There was direct interaction between

the issuer and the investor, Taberna. Taberna had posed questions, which had been answered by the issuer, via the Bank. Emails from the issuer had been sent on to Taberna by the Bank, as known and intended by the issuer. There was at least one and possibly more direct conference calls where there was direct contact between Taberna and the issuer. The issuer knew that a small group of potential investors was being provided with the Q3 Report and directed to the IP. As the issuer had conceded, the effect of the acquisition was to bring Taberna and the issuer into a contractual relationship, although Eder J stated "the precise mechanism whereby such a contract came into existence is not entirely clear to me".

Had misrepresentations been made by the issuer that were relied on by the Taberna? – Yes

NPLs

The issuer had made false statements concerning NPLs in both the IP and the Q3 Report.

There was some debate about what a NPL is – what type of defaults does it apply to? How long does a loan have to be in default for it to be categorised as an NPL? Eder J concluded that the phrase was capable of different meanings – eg there is no statutory definition under Danish legislation. Taberna's interpretation of the phrase was wider than the issuer's, thus resulting in a higher figure for NPL than had been stated by the issuer. Eder J found that the wider meaning that Taberna had attributed to the expression was one that would be adopted by a reasonable person in the position of Taberna (even if it was not intended by the issuer). The overwhelming likelihood was that the total size of NPLs (in the sense found by Eder J, and as understood by Taberna) was vastly in excess of the DKK 57 million figure stated in the IP and Q3 Results (in October 2007).

On the question of reliance, Eder J accepted that a misrepresentation does not have to be the sole inducement for a representee to be able to rely on it; it is enough if the misrepresentation plays a real and substantial part in inducing the representee to act. It must be an effective cause; it does not have to be the sole cause. The fact that other reasons might have influenced Taberna towards its purchase of the notes was an important "backcloth" to the question of reliance. Taberna had relied on the NPL representations. The low level of NPL, as stated by the issuer, had been noted as a "key strength" in an internal credit report sent to Taberna's credit committee.

The issuer failed to prove that it had reasonable grounds for believing, and did believe, that the NPL representations were correct. Internal communications showing calculations just a few months after the IP and Q3 Results were inconsistent with such a belief having been held.

Credit policy – no reliance

Taberna alleged misrepresentations concerning the issuer's "conservative risk policy", "structured hierarchy of approval authority" and "rigorous system of monitoring" statement contained in the OC and IP. Eder J agreed that there was a strong argument that this set of "vague" representations were no more than "puff", not representations under s2(1). However, even on the assumption that they were representations, Taberna had not established that it had relied upon them.

The alleged misrepresentations relating to the write-downs and project financing were not successful as it was found that there was no falsity in the statements.

Investor presentation disclaimers not sufficient to protect issuer

The issuer had sought to rely on standard market disclaimer wording in the IP in order to negate the representations or to disentitle Taberna from relying on them. Please see the table (below) which summarises the different disclaimers and Eder J's findings. In short, the disclaimers were ineffective in this case.

Disclaimer A: The issuer argued that statements made in the IP were not "made" to Taberna and could not be relied upon. It relied on disclaimer wording that "*This presentation has been produced by* [the Bank] *solely for use by investors met during the non-deal roadshow made in…*". Eder J, however, found that the issuer had clearly intended the IP to be available for use by potential investors in the secondary market. Taberna was part of the target audience, and there were some pre-sale interactions between Taberna and issuer. The issuer knew that its advisory bank (which was

acting on behalf of the issuer) would approach a "very tight" group of potential investors and provide copies of the IP and Q3 Report. Hence the issuer could not rely on this disclaimer wording.

Eder J was at pains to stress that his finding did not introduce a general duty of care for published statements. It was simply a conclusion based on the particular facts of the case – that representations were made by the issuer to Taberna in the IP and Q3 Report.

Disclaimers B and E: These disclaimers were not part of the contract between Taberna and the issuer so could not give rise to a contractual estoppel. Further, a mere declaration of non-liability such as these cannot have the effect of preventing a representor from incurring liability under s2(1).

Disclaimers C and D: These were exclusion clauses but must be construed *contra preferentum*. They were not sufficiently clear to exclude liability under s2(1).

Disclaimer in IP	Eder J – sufficient?	
A: Presentation solely for investors met at roadshows	No	In abstract may work BUT here clearly intended to be available to potential investors in secondary market (and specific interactions with Taberna)
B: No representation as to, and no reliance should be placed on, information	No	Not part of issuer-investor contract so no contractual estoppel, and insufficient to prevent liability if simply a declaration
C: No liability re errors/omissions /misstatements	No	Could be exclusion clause but not sufficiently clear to exclude s2(1) liability
D: No liability from use of presentation	No	Could be exclusion clause but not sufficiently clear to exclude s2(1) liability
E: Reps should not be relied upon/act as inducement	No	Not part of issuer-investor contract so no contractual estoppel, and insufficient to prevent liability if simply a declaration

Disclaimers in Offering Circular and Q3 Report

There were also disclaimers in the OC and the Q3 Report.

Disclaimers in OC	Eder J – sufficient?	
A: OC not basis for credit evaluation	No	Given other statements in OC, this was not sufficient to negate duty
B: OC does not imply information correct subsequent to date of OC	Yes	No duty to update (BUT not a significant conclusion on facts)

Disclaimer A: Given the other terms of the OC, including a statement that the issuer accepted responsibility for information in the OC, this disclaimer was not sufficient to negate a duty.

Disclaimer B successfully defined the scope of the representations made – ie making clear that the representation applies at the date of the document only. However, this conclusion was not significant given Eder J's overall findings in the case.

There was additionally a separate language disclaimer in the Q3 Report that said that the Danish language of the Q3 Report would prevail if there were any discrepancies between the Danish and English versions of the report. The issuer sought to rely on this in relation to the meaning of NPL, as the Danish translation for this term was arguably narrower. However, Eder J said that the purpose of this disclaimer was to ensure that, if there were to be inadvertent discrepancies in translation, Danish would prevail.

There was, however, no question of an inadvertent use in English of NPL. The evidence showed that there was a conscious and deliberate use by the issuer of the NPL term in English, in consultation with Moody's, so the language disclaimer was irrelevant. In any event, it would not negate the statements made in the English documents (which were statements in their own right).

No contributory negligence

The issuer argued that Taberna, as a sophisticated investor, had failed to take specialist advice, relied on out-of-date information and had failed properly to assess the issuer's capital adequacy. The issuer's view was that, as manager of billions of dollars of funds, Taberna was a far more sophisticated operator than a regional Danish bank.

Having noted previous authority that a misrepresentor ought not to be able to escape liability by saying that the representee could have found out the true facts[1], and that there is no reported case where damages otherwise payable for misrepresentation under s2(1) have been reduced by reason of contributory negligence, Eder J found that this was not such a "very special case" (following *Gran Gelato Ltd v Richcliff (Group) Ltd*) to justify doing it here.

COMMENT

This decision must be put in its factual context. Although this was a secondary market purchase, there was direct interaction between the issuer and the investor, as detailed above. The reality of how the notes were marketed and sold meant that s2(1) came into play, and the disclaimers were ineffective. The facts of this case are unusual, but the issuer's position might have been improved if it had received an investor representation letter from Taberna before its information was passed on confirming, amongst other things, what information Taberna was relying on when making its investment decision and that it had sufficient knowledge and experience to independently evaluate the merits, risks and suitability of the notes. The case emphasises the importance of defining key terms which could reasonably have different meanings, such as NPL. The meaning of a concept as fundamental as NPL is unclear and generated intense debate and a divergence of expert views. Eder J judge found that the meaning of NPL adopted by Taberna was one that it was reasonably entitled to adopt (even if it was not the meaning that the issuer had intended).

Finally, the case is a stark reminder that disclaimers do not always work. A statement that the issuer did not accept "any liability whatsoever arising directly or indirectly from the use of this presentation for any purpose" was still not sufficient to exclude a claim for damages under the Misrepresentation Act in relation to the particular fact patterns in this case.

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[1] Eg *Strover v Harrington* [1988] Ch 390.

CONTRACTUAL DISCRETION: HOW TO GET IT RIGHT

Braganza v BP Shipping Ltd & anr [2015] UKSC 17, 18 March 2015

A party exercising a contractual discretion, for example to determine the value of something or to decide whether something is necessary, must make sure not only that a reasonable outcome is achieved, but also that the right matters have been taken into account in reaching the decision. In certain circumstances this may require "sufficiently cogent" evidence.

Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are common. This case considers what such a party must do to avoid having the decision challenged by the court.

The facts of this case are tragic. In the early hours of 11 May 2009, Mr Braganza, Chief Engineer on one of BP's oil tankers, then in the mid-North Atlantic, disappeared. No-one knows for certain what happened to him. However, his employer, BP, formed the opinion, based on an investigation involving two internal reports, that the most likely explanation for his disappearance was that he had committed suicide by throwing himself overboard. Under his contract of employment, this finding meant that his widow was not entitled to certain death benefits. The relevant clause stated:

> "*For the avoidance of doubt compensation for death, accidental injury or illness shall not be payable if, in the opinion of the Company or its insurers, the death, accidental injury or illness resulted from amongst other things, the Officer's wilful act, default or misconduct whether at sea or ashore ...*"
> (emphasis added)

Mrs Braganza brought a claim in contract against the employer for death benefits of USD 230,265.

The court had to decide whether BP was entitled to form the opinion that it had. At first instance, Teare J held BP was not. The Court of Appeal held that Teare J had erred in his analysis. The Supreme Court decided (3:2) that BP should have sought more cogent evidence of suicide than it had before finding that suicide had taken place.

No "sufficiently cogent" evidence

The majority decision was that of Lady Hale and Lord Hodge (with whom Lord Kerr agreed).

Lady Hale noted that the case raised two inter-linked questions of principle:

- What is the proper approach of a contractual fact-finder who is considering whether a person may have committed suicide?
- What makes the decision of a contractual fact-finder reasonable?

Lady Hale stressed that it is not for the courts to re-write the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions that affect the rights of both parties to the contract has, she thought, a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties - as there often will be in an employment contract.

Lady Hale acknowledged that the decided cases revealed an understandable reluctance to adopt the fully developed rigour of the principles of judicial review of administrative action in a contractual context, but at the same time they had struggled to articulate precisely what the difference might be.

She noted that the well-known test adopted by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 is often abbreviated to "irrationality", but in fact the test has two distinct limbs. The first limb focusses on the decision-making process – whether the right matters have been taken into account in reaching the decision.

The second focusses upon its outcome – whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The danger of talking about "irrationality" is that it focusses only on the second limb. Lady Hale's view (with which she understood Lord Neuberger agreed) was that both limbs should apply.

Whatever the test, Lady Hale stressed that it would be a mistake to expect of a lay person the same expert, professional and almost microscopic investigation of the problems, both factual and legal, that is demanded of a court.

Ultimately, Lady Hale found it unnecessary to reach a final conclusion on the standard required in all cases since the context would vary. The case before concerned employment, which she noted carries with it an implied obligation of trust and confidence.

Lady Hale concluded by finding that Teare J had been right that the investigation team's reports and conclusions could not be regarded as "sufficiently cogent" evidence to justify BP having formed the positive opinion that Mr Braganza had committed suicide. No-one, she stressed, would suggest that the decision was "arbitrary, capricious or perverse", but in her view it was unreasonable in the *Wednesbury* sense, having been formed without taking relevant matters into account.

Dissenting decision – *Wednesbury* test passed

The dissenting decision was given by Lord Neuberger (with whom Lord Wilson agreed). He considered that Mrs Braganza was disentitled from obtaining the death benefits. Like Lady Hale – and unusual perhaps for a Supreme Court decision – a significant part of Lord Neuberger's decision involved analysing the facts.

Lord Neuberger emphasised that, far from being the primary finder of fact, Teare J was carrying out a reviewing function of the primary finder of fact (which was BP). The mistakes in the investigation reports that were prepared did not justify interfering with BP's decision which had been taken on the basis of them.

Lord Neuberger looked at the standard which the court should expect of the decision-maker or opinion-former in such circumstances. Like Lady Hale, he thought that there was considerable force in the notion that the approach is, and at any rate should be, the same as for a decision of the executive in the public law sense (that is, by reference to the *Wednesbury* decision). However, he disagreed that the employment angle was relevant. In his view, once it was accepted that BP had to carry out the investigation with "honesty, good faith, and genuineness" and had to avoid "arbitrariness, capriciousness, perversity and irrationality", he did not see what trust and confidence could add.

In Lord Neuberger's view, what mattered was that this was a kind of "jury question" and should be treated with appropriate respect by an appellate court.

Finally, he considered the question of whether there was sufficient evidence to justify the conclusion of suicide; in other words, was the opinion that Mr Braganza committed suicide unreasonable? In short, he believed that that there was a combination of reasons which could fairly be said to be "sufficiently cogent" to justify the opinion, based on the two reports, that Mr Braganza had taken the unusual and tragic course of committing suicide. The opinion formed did not fall foul of the test laid down by Rix LJ in *Socimer International Bank Ltd v Standard Bank Ltd* [2008] EWCA Civ 116 and could not be characterised as arbitrary, capricious, perverse or irrational.

COMMENT

Clearly the full judgment of the court is the only authoritative document, but it is interesting to note that in the official Supreme Court YouTube broadcast, Lady Hale chose to highlight that the court was agreed that the test for whether a contractual discretion has been properly exercised comprises both limbs of *Wednesbury* reasonableness.

While the court was at pains to stress that it should not interfere with contractual decision-making, one cannot help but feel the tragic facts of this case had some bearing on the result. The detailed analysis of the facts by both the majority and the minority as well as the reference by the majority to the employment nature of the relationship may enable this case to be distinguished.

The case is also an example of the circumstances in which the court will imply terms into a contract: namely, to control the exercise of contractual discretion (since this is the mechanism by which the *Wednesbury* test takes effect in commercial contracts). It is very difficult to conceive of circumstances in which one can contract out of the test.

The important practical point for parties exercising a contractual discretion, for example to determine the value of something or to decide whether something is necessary, is that they need not just to make sure that they avoid reaching an unreasonable outcome but also to ensure that the right matters have been taken into account in reaching the decision. In certain circumstances this may require "sufficiently cogent" evidence.

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FORCED SALE OF SECURITY: COURT CONSIDERS DUTIES OWED BY BANK

Rosserlane Consultants Ltd & anr v Credit Suisse International [2015] EWHC 384 (Ch), 20 February 2015

The courts will be very cautious before accepting that one commercial party owes implicit contractual duties to another commercial party, unless the contract gives good grounds for doing so, or there is a special form of relationship between them. The claimant borrower failed to show that duties should be implied relating to the bank's forced sale of the claimant's share in an oil field. The claimant was unable to show that the share could have been sold at a higher price than that achieved by the bank.

Rosserlane and Swinbrook were companies owned by Dr Zaur Leshkasheli. Both companies were investors in CEG, a Scottish limited partnership. Credit Suisse International was a subsidiary of Credit Suisse Group AG.

CEG's only asset was its 51% interest in Shirvan, the operator of the Kurovdag oilfield. By December 2006, CEG needed finance in order to repay existing indebtedness. Accordingly, it borrowed USD 127 million from CS. The loan was intended to be short-term refinancing: "*a 12-month breathing space to enable CEG's interest to be sold*", and CS to be repaid. The loan was secured on the claimants' interests in CEG. Under a Security Agreement and a Participation Agreement, CS was given the power to force a sale of the claimants' interests if the claimants had failed to sell them by 14 August 2007.

The claimants' efforts to find a buyer were led by Dr Leshkasheli. He concentrated on potential Indian or Chinese buyers, and excluded Russian ones, as he did not feel they could be trusted or had as much money as Indian or Chinese bidders. This initial process attracted only four bidders, with bids ranging from USD 100 million to USD 1.2 billion.

In the end, Dr Leshkasheli's efforts failed and CS exercised its rights under the Participation Agreement. Ultimately, CS forced the sale of CEG on 15 February 2008 to Berghoff for USD 245 million. Since CEG did not consent to the sale, it was achieved by CS using a Power of Attorney that CEG had granted in exchange for the loan from CS.

The claimants argued that, but for CS's actions, the interests could have been sold to a Russian company, GazpromNeft, for USD 650 million.

The claimants' main arguments were:

(i) CS owed them a duty to achieve the best sale price possible, and failed to do so. This duty was said to arise because CS was their agent or because of some implied term, or by analogy with mortgagees.

(ii) CS failed "*properly to target potential bidders*".

(iii) A properly conducted bidding process would have resulted in a sale to GazpromNeft for USD 650 million. The claimants had lost the chance of such a sale. There had been a 65% likelihood that this sale would have taken place but for CS's failings, and CS therefore owed damages based on the difference between the actual sale price and 65% of USD 650 million.

Judgment

Peter Smith J found against the claimants.

He rejected the claim that CS was agent for, or owed a duty to, CEG in relation to price. He noted the Participation Agreement had been freely negotiated by the parties "*with the benefit of experienced lawyers*" and could see no basis on which CEG could have negotiated to impose such a duty, given its feeble bargaining position.

Peter Smith J applied the recognised tests for when a term, such as the alleged duty, might be implied. Thus, he noted that, where a term was not mentioned, "*The most usual inference… is that nothing is to happen*" (per Lord Hoffmann in *Attorney General of Belize v Belize Telecom* [2009] 1 WLR 1988). If, nonetheless, a term was to be implied, it must (a) be reasonable and equitable; (b) necessary to give business efficacy to a contract; (c) so obvious that it goes without saying; (d) be capable of clear expression; and (e) not contradict any express term of the contract.

As Peter Smith J accepted, in certain cases a term may be implied which does not satisfy such requirements, for example, where it is a legal incident of a particular type of relationship. Here there was no such relationship. It was merely an arm's-length commercial deal.

The claimants argued that CS was, by analogy, in the position of a mortgagee. Again, Peter Smith J saw no basis for such an argument: "*The Participation Agreement merely regulated the inevitable sales process that was contemplated by the short term nature of the monies advanced by the Bank.*"

In relation to agency: "*The Bank is not appointed agent… it was given the right to do certain things in the name of the Claimants for the purposes of protecting the Bank's own interests.*" Peter Smith J also did not accept that the law imposes an automatic obligation to take the owner's interests into account "*on anyone with a power… to sell property that does not belong to him*".

A particular difficulty with the claimants' case was their claim that a sale for USD 650 million could have been achieved with GazpromNeft, despite the fact that it had been Dr Leshkasheli himself who had refused to deal with Russian companies when he led the initial efforts to sell.

Peter Smith J did find that, if CS had have contacted GazpromNeft, "*there was a very good prospect that it might have purchased*" CEG's interest. Thus, "*the failures of the Defendant to approach GazpromNeft at all* [were] *are the cause of the Claimants' loss of the opportunity of selling Kurovdag to GazpromNeft.*" This was, however, not enough to make CS liable.

The claim was essentially for the "loss of a chance" and Peter Smith J noted that there is a "*difficulty of proof in all*" such cases. In particular, he examined the modern approach taken to the rule established in *Armory v Delamiries* (1722) 1 Stra 505. According to this rule, "*where the defendant has wrongfully deprived the claimant of property of value… the court will, save to the extent that it is persuaded otherwise by the defendant, assess the value of the missing property on a basis which is generous to the claimant*" (*Browning v Messrs Brachers* [2005] EWCA Civ 753). However, he found that, despite this tendency to give claimants a "fair wind" in such cases, it remained the case that it was for claimants to prove both the fact, and amount, of damage suffered.

Peter Smith J held that, if GazpromNeft had been contacted by CS, it would have been willing to acquire CEG's interest for up to USD 400 million. However, the actions of CS did not lead to the claimant's loss. This was because Dr Leshkasheli refused to allow bidders access to the Kurovdag site and there was no evidence that GazpromNeft would have been an exception. The judge accepted expert evidence to the effect that, without site access, GazpromNeft would have "*said goodbye*".

COMMENT

This was a lengthy, complex and curious case.

The judgment gives a clear and extensive account of the hurdles that must be crossed by anyone attempting to argue that a contract should be read as containing an implied term. Such arguments remain very difficult to sustain (with the possible exception of recent developments concerning where a duty of good faith arises). The starting point for any contractual dispute is always the contract itself. By definition, an implied term does not appear on the face of the relevant contract.

In this case, the duties the parties owed were solely the creation of the contractual terms, and Peter Smith J was robust in refusing to extend these beyond the ones which had been explicitly negotiated, with help from legal advisers, by commercial parties.

Ultimately, the claimants themselves were responsible for their failure to secure damages. It was they who imposed conditions on the sale which had essentially guaranteed that GazpromNeft would not have bought, even if it had been invited to bid, by refusing to let bidders make site visits. The claimants were authors of their own downfall, and CS was not liable for this.

Peter Smith did not find *Armory v Delamiries* valuable as a guide to how he should approach questions of the burden of proof. Though he did not say so explicitly, the facts in *Armory* were very far removed, since in that case, there was a very strong implication that the defendant had actually stolen the claimant's property, thus making it impossible for the claimant to demonstrate the value of what he had lost.

The clear general point emerging from the judgment is the continuing difficulty faced by parties arguing that terms should be implied. The courts assume contracts mean what they say. In particular, courts have shown themselves in recent years to be very reluctant to impose duties on commercial entities of the type the claimants have argued for unless there has been a contractual basis for doing so. If, therefore, party A enters an arrangement which can allow party B to dispose of A's property, A should take great care to make explicit what obligations B has when disposing of the property.

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CHANGES TO LOAN NOTES: GOOD FAITH NOT IMPLIED

Dennis Edward Myers & anr v Kestrel Acquisitions Ltd & ors [2015] EWHC 916 (Ch), 31 March 2015

The High Court refused to imply an obligation of good faith into a term allowing modifications of loan notes. The debtor had contractual rights to modify the notes and there was nothing to suggest that any modifications should be limited by such a good faith obligation. This was particularly true where the relevant documents were detailed and had been professionally prepared. If a contractual duty of good faith had been intended, it would have been set out in the contract. The court also found that modifications to the notes had not gone beyond what was permissible: they were not so fundamental as to alter the nature of the notes.

In 2004, the claimants sold shares in their sub-prime lending business (Swift Advances Plc) to the first defendant (**Kestrel**). Part of the consideration for the shares were vendor loan notes in Kestrel (the **VLNs**). Kestrel also issued discounted loan notes (**DLNs**) to fund the cash element needed to buy the shares.

Clause 9 of the Vendor Loan Note Instrument (**VLNI**) allowed Kestrel to "*make any modification to this instrument*" if certain conditions were met, including "*if the modification* [was] *consistent in all material respects with any modification being made to the Discounted Loan Note Instrument*".

Other provisions of the VLNI included, in summary, that the VLNs ranked equally with the DLNs, that Kestrel would treat the two classes of note "*as if they constituted a single class of securities*" and that the terms of the DLNs should not be amended by Kestrel without it making "*appropriate amendments*" to the terms and conditions of the VLNs at the same time. A further provision had the effect that it was only if holders of the DLNs declared them to be due and payable that holders of the VLNs could demand that their notes should be payable.

Kestrel made a number of unilateral amendments to the VLNs, subordinating them to further loan notes which it issued, and postponing the VLN's repayment date from 2010 to 2018. Similar amendments were made to the DLNs to allow Kestrel to raise more funding.
The claimants said that the effect of the deferral and subordination was to make the VLNs worthless, and sought declaratory relief as to the parties' rights and obligations.

Claimants' arguments

The claimants advanced three main arguments:

- That the power to modify the terms of the VLNs was subject to an implied term that any modifications had to be made in good faith and for the benefit of holders of the VLNs and DLNs as a whole (the **Invalidity Issue**). Without this, the claimants argued, there was nothing to prevent Kestrel from amending the terms of the loan notes in a way that would amount to a fraud on the holders. This was especially so where a majority of loan note holders had the power to bind a minority. The reasonable expectation of any lender under the VLN instrument was that its rights would not be eroded by the majority loan note holders except where the majority was acting in good faith.
- That the changes made to the VLNs went beyond the scope of modification allowed by clause 9. The claimants argued that changes which had the effect of diminishing the VLNs' prospect of repayment (and ultimately eliminating that prospect altogether) were beyond what was permissible, and so were invalid (the **Threshold Requirement**).
- That Kestrel was unable to pay its debts within the meaning of s123 Insolvency Act 1986. As a result, there was an event of default under the VLN instrument (the **Insolvency Issue**).

Invalidity issue

The judge, Sir William Blackburne, examined a number of cases discussing when a term might be implied into a contract.

Blackburne J agreed with Andrews J in *Greenclose Ltd v National Westminster Bank plc* [2014] EWHC 1156 (Ch) that there is no general doctrine of good faith in English contract law and that such a term is unlikely to arise by way of implication in a contract between two sophisticated commercial parties negotiating at arm's length.

Blackburne J repeated Lord Hoffmann's findings in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKSC 10 that a court has no power to introduce terms into an instrument to make it fairer or more reasonable. The court was being asked to conclude that the parties had omitted an important term concerning modifications to the terms of the VLNs. Such an omission would be striking since the drafters of the contractual documents had paid careful attention to the protection of the claimants' interests elsewhere in clauses that were extensive and detailed.

Blackburne J also quoted, with approval, comments by Rix LJ in *Socimer International Bank v Standard Bank London* [2008] EWCH Civ 116 that "*a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith and genuineness… The concern is that discretion should not be abused*".

Blackburne J concluded that where a detailed agreement carefully spelt out the parties' rights and duties, there was no scope for assuming that significant terms had been left to be inferred. "*Where a commercial party… has a discretion which impinges directly on its own commercial and economic interest, exceptional circumstances are needed to imply a term requiring that party to subject those interests to with whom it is dealing…*". It was wrong to argue by analogy with, for example, mortgagors and mortgagees, that the law would imply equitable obligations from lenders to borrowers: the contracts in this case were not mortgages.

It was also wrong to proceed, as the claimants had done in their argument, as if the holders of the VLNs and DLNs should be treated as members of the same class. They were not, and there was no reason why holders of the DLNs should have had regard for holders of the VLNs when exercising their rights as DLN holders. Under the VLNI, amendments to the DLNs automatically resulted in amendments to the VLNs, but that did not mean that holders of DLNs had to take any interest but their own into account.

Threshold requirement

The claimants submitted that the expression "modification" in clause 9.1.2 should be given its natural and ordinary meaning, being a change which did not alter the essential nature and characteristics of the VLNs, and that therefore no change which in effect altered the nature of the VLNs could constitute a valid modification – nor could changes which effectively eliminated the note holders' rights qualify as a modification. They relied, for example, on *Mercantile Investment and General Trust Company v International Company of Mexico* [1893] 1 Ch 578, in which Lindley LJ said that "*the power to modify the rights of the debenture-holders against the defendant company does not include the power to relinquish all their rights*".

Blackburne J reviewed a number of cases in which "*amendments providing for a subordination of the indebtedness to other indebtedness… or a postponement of its redemption have been held to be a permissible modification of rights*". In this case, there was nothing in the terms of the VLNs, which were unsecured, that restricted further borrowing by Kestrel. Each amendment postponing redemption and subordinating the VLNs was a modification within the scope of clause 9 and, for example, each individual deferment of the maturity date had been relatively modest. Blackburne J held that each modification had to be assessed independently against the circumstances at the time it had been made. However, even if there had been a single modification with the same cumulative effect, he would have found it to have been permissible.

It seemed to him that the power to modify had been included to deal with eventualities such as Kestrel needing to borrow more, and that is what had happened. Further, under the Sale and Purchase Agreement by which the claimants had sold their shares, they had a right

"*to invest further when Kestrel was looking for further financial support*". They had declined to exercise that right and, in the circumstances, it was inevitable that their original interest was at risk of dilution if Kestrel sought further funding.

The fact that modifications might affect the value of the claimants' VLNs did not mean that the essential nature of the notes changed or that the type of rights the claimants held had changed.

Insolvency Issue

Blackburn J noted that "*the defendants accept that, from 2012 onwards… Kestrel's liabilities have far exceeded its assets*" and that some form of restructuring of Kestrel had been necessary. The deficiency would have been likely to increase each month up to the 2018 maturity date of the VLNs. However, all that the defendants could offer the court was an outline of the sort of agreements they hoped they might be able to reach with their creditors as part of a possible restructuring. This was not enough to outweigh the evidence that Kestrel was insolvent, and Blackburne J did not accept that Kestrel's powers to modify the debt instruments would necessarily be sufficient to make a restructuring possible (eg by further write-downs of the value of the VLNs), even assuming that the necessary modifications would be permissible. Kestrel was, therefore, insolvent. Insolvency was an event of default, the result of which was to make the VLNs immediately repayable in full.

Comment

The High Court's refusal to imply an obligation of good faith is not surprising. It is often difficult to succeed with arguments about implied terms. In this case, the nature of the term argued for would have made it even more difficult. A court must be persuaded that the implied term contended for can be stated with precision. As noted, in English law there is no general contractual obligation of good faith, or a definition of its exact meaning. Thus, the possible results of implying a duty of good faith would be unclear.

What is perhaps more surprising is where this conclusion led the court in this case. A central part of the claimants' argument was that, if an obligation of good faith was not implied, Kestrel's right to modify the terms of the VLNs meant that they could, in effect, be modified to such an extent as to make them financially unviable. As the claimants suggested, this seems to open the possibility of borrowers fraudulently manipulating their ability to modify to render their debts worthless.

Blackburne J also found that each modification should be looked at in isolation, rather than, as the claimants suggested, in terms of their cumulative effect. On this basis, an unscrupulous party could, presumably, introduce incremental extension to the redemption date, each of which individually was minor, but which cumulatively meant that no redemption date would ever arrive. Having said that, it is difficult to see a court could properly imply – with the necessary precision – a term that would deal with such issues. Nor does a court start with the assumption that parties to contracts will behave fraudulently – there was no such suggestion here.

More generally, apart from the usual lesson for people contracting – that the contract must deal with required points expressly - the judgment stresses the need for care when introducing rights to modify debt instruments. In this case, given Kestrel's insolvency, the claimants had had all the economic value successfully stripped out of their notes and were left as unsecured creditors of a worthless company.

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Disclosure

APPLICATION TOO LATE FOR DISCLOSURE OF BANK'S REGULATORY BENCHMARK DOCUMENTATION AND TRAINING MATERIALS IN MIS-SELLING CLAIM

Peniuk & ors v Barclays Bank plc [2014] EWHC 2946 (QB), 8 August 2014

The High Court has rejected a late application for specific disclosure at a pre-trial review in order to maintain the trial date despite it being clear that the documents sought were very important to the claimants. The judgment sets out some useful guidance on what documents may, in principle, be disclosable in such mis-selling cases where a regulatory investigation has already been undertaken and highlights the importance of bringing an application for specific disclosure in good time. The decision is particularly important in light of the number of civil claims brought against the background of regulatory investigations.

The claimants, some of whom were individuals, alleged that that the defendant had mis-sold them certain swap transactions. They were all retail customers of the defendant and had been categorised as "non-sophisticated" customers. The claimants sued the bank against the backdrop of a Pilot Review conducted by the Financial Services Authority (now the Financial Conduct Authority) in or around June 2012 of sales by major banks, including the defendant, of interest rate hedging products. The principles applied in the Pilot Review were fine-tuned in or around January 2013 to arrive at a final set of principles to be applied by the banks in their own examination of all swaps within the scope of the regulatory review. In April 2014, the defendant made Offers of Redress to the claimants but, as at August 2014, the parties had not yet agreed on a final figure.

Bank's benchmark and training documents sought

The claimants sought disclosure of three categories of documents arguing that, without this evidence, they would be handicapped in cross-examining the defendant's expert who had experience of applying the benchmarks underpinning the regulatory review:

(1) **"Benchmark" documentation:** Documents evidencing the agreement reached between the regulator and the defendant regarding the regulatory review. This would include the defendant's own report to the regulator of how the bank had been able to conduct its part of the Pilot Review which had then informed the fine-tuning of the principles to be applied for the remainder of the review.

(2) **Training and compliance manuals:** Counsel for the claimants submitted that these documents demonstrated the standard of practice which the defendant used to guide training of its sales personnel in its Corporate Risk Management Divisions throughout the country.

(3) **Employees' records of training:** Such records were only sought for the two sales personnel involved in the transaction, one of whom was to be a witness at the trial.

Were the categories of documents disclosable?

"Benchmark" documentation: HHJ Havelock-Allan QC looked at the approach taken at the pre-trial review in *Graiseley Properties Limited & ors v Barclays Bank* [2013] EWHC 67 (**Graiseley**), a case which concerned alleged negligent mis-selling of interest rate hedging products, in which Flaux J was also faced with an application by the claimants for disclosure of Benchmark documentation. Flaux J found that the evidence of the Benchmark documentation was relevant to the issue of whether the bank's standard of conduct satisfied the requirements of the regulatory regime, although in *Graiseley* certain benchmark documentation had already

been voluntarily disclosed and the application related to the balance of the documents.

HHJ Havelock-Allan QC concluded that the Benchmark documentation would be informative and provide guidance as to the "*irreducible minimum standard of conduct*" which ought to have been observed in selling the swap transactions. The Benchmark documentation was therefore disclosable in principle, albeit the court accepted that the standards that had been applied in the regulatory review may not be the standards the court regards as appropriate to apply in a civil case.

Training and compliance manuals: The court regarded this category as demonstrative of the standard of practice which the defendant used to train its sales personnel. Such material would assist the court in understanding useful background and, although not determinative of what standard of conduct was sufficient to comply with the regulatory regime, the court decided it was, in principle, disclosable.

Employees' records of training: Although less convinced on this category of documents, HHJ Havelock-Allan QC still regarded them as disclosable in principle.

Despite finding that these categories of documents were disclosable, the court went on to reject the specific disclosure application.

Disclosure application rejected as being too late

Although the court accepted that it was sometimes very difficult to identify the need for further disclosure until very shortly before a pre-trial review hearing, in the vast majority of cases disclosure should be dealt with at an earlier point in the proceedings. An overarching concern for the court was the stage the proceedings had reached – the trial was due to commence six weeks after the application hearing. Allowing disclosure would inevitably lead to a further round of expert evidence in the form of supplemental reports. The court was keen to maintain the trial date and recognised that doing this and making an order for disclosure was incongruous. It was not persuaded by the submission of counsel for the claimants that the application could not have been made any earlier, and ultimately rejected the application for having been submitted too late. The court also noted that the disclosure would result in a considerable amount of further costs at a stage when parties should be preparing for trial.

Counsel for the defendant argued that the confidentiality of the agreements between the banks and the Financial Conduct Authority should be respected. The court highlighted that confidentiality is not a ground upon which disclosure should be refused. Any order made for disclosure would include relevant safeguards to ensure that confidentiality is respected. Indeed, this was the case in *Graiseley* where the disclosed Benchmark documentation was destroyed after settlement was reached.

COMMENT

The judgment is consistent with recent case law, showing the court's reluctance to grant an application where to do so would interfere with the trial timetable. In *Scriven v Scriven & ors* [2013] EWHC 4223 (Ch), for example, the judge refused an application from the defendants to vacate the trial date a few weeks before the trial to address the claimant's amendments to its particulars. Against the background of the Jackson Reforms and recent cases on relief from sanctions and time extensions, it is clear that parties wishing to make an application should do so in good time or risk having relief refused when it may otherwise in principle have been granted. Further, both this case and *Graiseley* highlight the increasing importance placed on regulatory communications in civil proceedings. In mis-selling cases, it seems likely that the courts will regard such communications as relevant to determining whether the bank has met the requisite standard of conduct in selling specific swap transactions, although such standards will not be determinative of the standard ultimately applied by the court in civil proceedings. *Judgment handed down in August 2014, but only published in March 2015.*

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Limitation

INVESTOR'S KNOWLEDGE BARS MIS-SELLING CLAIM

Susan Jacobs v Sesame Ltd [2014] EWCA Civ 1410, 30 October 2014

If an investor is deemed to have requisite constructive knowledge through observation of facts ascertainable to them, this will allow time to start running for limitation purposes in a mis-selling claim. Firms facing claims from investors should examine carefully when an investor could be said to have acquired such constructive knowledge with reference to the factors set out in the Court of Appeal's judgment in this case.

The defendant, Sesame Ltd, is a network of financial advisers. The claimant, Susan Jacobs, was an individual investor. In September 2005, the claimant was advised by a member of the defendant's network to invest GBP 65,000 in an investment bond (the **Bond**). After the Bond was surrendered, the claimant sued the defendant for negligent investment advice in November 2012. The claimant alleged that the Bond was unsuitable for her investment requirements.

"Primary" and "secondary" limitation periods

It was agreed that the claimant's claim was time-barred for the purpose of the primary limitation period of six years from the date on which the cause of action accrued, as per s14A Limitation Act 1980 (the **Act**).

However, under the Act the primary limitation period of six years may be extended to three years from the date upon which a party knew or reasonably ought to have known that it had a claim (known as the secondary limitation period). Under s14A(10) a person's knowledge includes knowledge that they might reasonably have been expected to acquire either:

- from facts observable or ascertainable by them; or
- from facts ascertainable by them with the help of appropriate expert advice that it is reasonable for them to seek.

The claimant sought to rely on the secondary limitation period in order to bring her claim against the defendant. She claimed that the secondary limitation period started to run in February 2012 when the Bond was surrendered and she realised the extent of the losses she had suffered as a result of investing in the Bond.

The defendant submitted that the secondary limitation period started to run from July 2009 because by then the claimant had received four annual account statements for the Bond (two of which showed a significant fall in value) and therefore had sufficient knowledge to bring a claim against the defendant at that point.

First instance – claim allowed to proceed

At first instance the court held that, until the Bond had been surrendered, the claimant only had a suspicion that something had gone wrong in relation to her investment in the Bond and that "*perhaps naively*" the claimant believed that she would get her initial investment of GBP 65,000 back. The court accepted that the claimant did not have sufficient knowledge to start a claim, take advice or

collect evidence in July 2009. As a result, it was held that the secondary limitation period started in February 2012 when the Bond was surrendered.

Appeal – investor had earlier "constructive knowledge" so claim is time-barred

The Court of Appeal stated that the starting point for assessing a person's knowledge for the purposes of s14A was "*knowledge of the material facts about the damage in respect of which damages are claimed*".

The claimant's belief that the full amount of her investment would be returned to her, regardless of the performance of the Bond, was "*hopelessly confused*". The Court of Appeal concluded that by July 2009 the claimant had acquired constructive knowledge that the Bond did not meet her requirements and that the sum of GBP 65,000 that she had invested was not guaranteed. In addition, in or around July 2009:

– the claimant should have asked the issuer of the Bond (who she had spoken to in or around July 2009 in relation to another issue relating to the Bond) whether, despite the fall in the value of the Bond, the return of her original capital was guaranteed; and
– the claimant should have consulted the documentation she received in relation to the Bond which confirmed that the claimant's original capital was not guaranteed.

The Court of Appeal held that the claimant's claim was time-barred and was dismissed.

COMMENT

The Court of Appeal's judgment outlines the factors that a court will consider when assessing when the secondary limitation period starts to run in a case where a claimant can acquire the requisite constructive knowledge through observation of facts ascertainable to them. Firms facing similar claims brought by third parties will want to examine when an investor could be said to have acquired such constructive knowledge.

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Public procurement

PUBLIC PROCUREMENT: AUTOMATIC SUSPENSIONS TO THE AWARD OF CONTRACTS

Bristol Missing Link Ltd v Bristol City Council [2015] EWHC 876 (TCC), 1 April 2015

In public procurement disputes, obtaining early disclosure and maintaining the automatic suspension of the award of a public contract are critical to protect a disappointed bidder's position. In a relatively rare example of the High Court maintaining an automatic suspension, the court has confirmed that the standard *American Cyanamid* test for interim injunctions applies when considering any application to lift the automatic suspension. In doing so, it has provided a useful guide as to how the court approaches the test in a procurement context, and the relevance of an authority's refusal to make early disclosure.

In 2014, the Council issued an invitation to tender for a contract for the provision of violence and abuse support services. Bristol Missing Link Ltd (**BMLL**), the incumbent provider, submitted a tender by the deadline but was informed that its tender had been unsuccessful.

Another provider, Refuge, was informed that its tender had been successful.

BMLL repeatedly asked to see the material relating to the evaluation of Refuge's tender, but this request was refused. BMLL commenced proceedings, claiming that its evaluation scores should have been higher and that it had been inexplicably marked down during the moderation process.

Because of BMLL's challenge, Regulation 47G(1) of the Public Contracts Regulations 2006 (the **Regulations**) imposed an automatic stay and prevented the Council from entering into the proposed contract with Refuge. The Council applied to lift that automatic stay under Regulation 47H.

High Court refuses to lift stay

Coulson J dismissed the Council's application and refused to lift the automatic stay.

Dealing with disclosure as a preliminary issue, it was potentially unfair that BMLL's request for disclosure of the successful tender documents had been refused, given that the Council had then sought to rely on those documents in its application.

Under the *American Cyanamid* criteria, the claim plainly raised a serious issue to be tried. On the balance of convenience, the application was refused. A significant factor was the fact that BMLL was a not-for-profit organisation, so damages were clearly an inadequate remedy.

Adjustment to the *American Cyanamid* test

The approach to be adopted when considering such an application was confirmed as essentially the same as the test for granting an interim injunction under *American Cyanamid*. The argument that, since the Regulations are based on EU law, which focusses on fairness, transparency and the importance of the remedy of review, a different set of principles are applicable, was rejected. However, there was clear authority for the proposition that the importance of the remedy of review to the unsuccessful tenderer should be taken into account when testing the balance of convenience.

Serious issue to be tried

Cases such as *Group M UK Ltd v Cabinet Office* [2014] EWHC 3659 have encouraged authorities to argue that there is no serious issue to be tried, requiring the judge to undertake a detailed analysis of the merits of the case. While there would be some cases where a brief analysis would show a case to be very weak or even impossible to sustain (such as in *Group M*), in ordinary procurement cases it would be unproductive for the parties to spend time arguing about the merits of the claim, particularly as the threshold for "serious issue to be tried" is a low one.

Balance of convenience

Coulson J summarised the three well-known elements of the balance of convenience that need to be considered on an application of this kind, ie the adequacy of damages, the importance of the remedy of review, and the advantages and disadvantages to each party if the suspension is either lifted or not lifted.

Damages in this case were considered an inadequate remedy for BMLL. It was emphasised that the difficulty of assessing damages based on a loss of chance or a speculative ascertainment has been a factor which the court has taken into account in procurement cases. The court must assess whether it is just, in all the circumstances, that the claimant be confined to damages as a remedy. BMLL stood to suffer significant reputational harm if the contract were not awarded to it, given that this would prevent it from carrying out its core work in its only market. Furthermore, given that BMLL included no amount of profit in its tender, it would have no claim for anything other than nominal damages.

The Council only stood to suffer six months' delay before a final judgment following an expedited trial could be handed down, and no real prejudice would be suffered by service users. The perceived advantages of the new proposed contract were not significantly greater than those currently being provided by BMLL. Furthermore, BMLL had offered a cross-undertaking in damages and its ability to honour it was supported by evidence.

COMMENT

This is a relatively unusual example of the court maintaining an automatic suspension in a procurement

case. Given that the award of public contracts by their very subject matter engages issues of public interest, defendant authorities can often successfully rely on the public interest in the grant of a contract as an argument in favour of lifting an automatic suspension. This particular case demonstrates how fact-sensitive the question of lifting an automatic suspension is: the critical (and relatively unusual) factors here were that the new proposed contract did not offer significant advantages over the current provision of services by the incumbent contractor, and the fact that BMLL had bid for the tender on a not-for-profit basis.

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Regulatory

WHAT DUE DILIGENCE SHOULD FUND MANAGERS UNDERTAKE BEFORE MAKING AN INVESTMENT?

Alberto Micalizzi v The Financial Conduct Authority [2014] UKUT 0335 (TCC), 31 March 2014

A judgment handed down by the Upper Tribunal (Tax and Chancery Chamber) (the **Upper Tribunal**) has set out some helpful guidance on the appropriate level of due diligence that a fund manager should undertake before making an investment. The Upper Tribunal found that a fund manager, Alberto Micalizzi, had acted without integrity on the basis that he had been reckless as to whether an investment he entered into on behalf of his fund was genuine or not.

Mr Micalizzi was the Chief Executive Officer of a hedge fund. In the final quarter of 2008, one of Mr Micalizzi's funds (the **Fund**) sustained significant losses which amounted to approximately 85% of its net asset value. At Mr Micalizzi's instigation, at the end of 2008 the Fund acquired units with a face value of USD 700 million in a convertible bond (the **Bond**).

It later transpired that the Bond was not a genuine financial instrument. The Bond was never converted into collateral or cash, and the Fund received no payments of interest or principal in respect of it. By the time this case reached the Upper Tribunal, the Fund was in liquidation.

The FCA's case against Mr Micalizzi

The FCA investigated and decided to take action against Mr Micalizzi for breaching Statement of Principle 1 of its Statements of Principle for Approved Persons (**APER**) which requires approved persons to act with integrity. The basis for the FCA's case against Mr Micalizzi was that, by acquiring units in the Bond, he had embarked on a fraudulent course of conduct which was intended to disguise the significant losses sustained by the Fund at the end of 2008. In particular, the FCA alleged that Mr Micalizzi had known from the outset that the Bond was not a genuine financial instrument, that he had acquired units in the Bond without the knowledge or consent of investors in the Fund and that Mr Micalizzi

had not carried out any proper due diligence in relation to the Bond.

While Mr Micalizzi accepted that he had committed certain "*technical*" breaches by acquiring units in the Bond (namely, investment restrictions agreed by the Fund with certain lenders), he contested the other elements of the FCA's case against him before the Upper Tribunal.

The Upper Tribunal's findings

Genuineness of the Bond

On the facts of this case, the Upper Tribunal found that Mr Micalizzi had been unaware that the Bond was not a genuine financial instrument when the Fund acquired the units in it. However, despite this, the Upper Tribunal was critical of the due diligence that he had undertaken in relation to the Bond, describing it as "*cursory*". In the Upper Tribunal's view, had Mr Micalizzi performed reasonable due diligence in relation to the Bond, this would have "*given rise to serious questions as to the genuineness of*" it.

The lack of adequate due diligence undertaken by Mr Micalizzi in relation to the Bond led the Upper Tribunal to conclude that he had breached APER Principle 1 on the basis that he had:

- been reckless as to whether the Bond was genuine or not and that he wilfully disregarded the doubts about the genuineness of the Bond that had been raised by third parties; and
- made various false statements before it and to the FCA during the course of its investigation.

What is the appropriate level of due diligence that a fund manager is expected to undertake?

When determining the adequacy of the due diligence that Mr Micalizzi undertook in relation to the Bond, the Upper Tribunal considered what would be an adequate or appropriate level of due diligence for a fund manager to undertake when considering making an investment relating to or acquiring a financial instrument. The Upper Tribunal heard and endorsed evidence given by a representative of KPMG as to what may constitute adequate due diligence in these circumstances.

The key points identified in the Upper Tribunal's judgment that may help a fund manager demonstrate that he or she undertook adequate due diligence in relation to a transaction may be summarised as follows:

- **Understanding the proposed investment:** A fund manager should understand the investment that he or she is proposing to enter into, not least so that they can avoid breaching investment guidelines that his/her fund(s) may be subject to.
- **Historical information:** To the extent that historical information about the liquidity, volatility and trading patterns of a financial instrument exists, a fund manager should review and consider this information. If this information is not available, a fund manager should consider whether it is appropriate for him or her to undertake further research and due diligence.
- **Valuation:** Any due diligence undertaken by a fund manager should include a detailed exercise in order to satisfy himself or herself as to the value of the financial instrument. If a fund manager does not have experience in relation to a particular type of financial instrument, he or she should consider seeking specialist advice before proceeding.
- **"Red flags":** Before proceeding with transactions, fund managers should be alive to and react appropriately in relation to any "red flags". What constitutes a "red flag" may vary from case to case but in this case included factors such as the involvement of counterparties and other parties from jurisdictions associated with higher corruption risks, the lack of available information about the Bond's liquidity and credit rating and the inclusion of non-market standard wording in the documentation relating to the Bond.

Sanctions

The Upper Tribunal agreed that Mr Micalizzi's conduct warranted a "*substantial financial penalty*" but reduced the FCA's proposed penalty by GBP 300,000 (from GBP 3 million to GBP 2.7 million) in light of the fact that the Upper Tribunal had found that Mr Micalizzi had been unaware that the Bond was not genuine.

The Upper Tribunal also agreed with the FCA that a prohibition order should be imposed on Mr Micalizzi as, by reason of his dishonesty and lack of integrity, he is not a fit and proper person.

COMMENT

The Upper Tribunal's judgment in this case is lengthy and, at times, heavily fact-specific. However, the guidance given by the Upper Tribunal as to what may help a fund manager to demonstrate that he or she undertook adequate due diligence in relation to a transaction is helpful. This guidance, as well as the Upper Tribunal's findings in respect of Mr Micalizzi, also reinforces the fact that undertaking brief or high-level due diligence in relation to a transaction may expose the person responsible for the transaction to the risk of FCA enforcement action, especially if the transaction later turns out to be unsuccessful. It also serves to highlight that a lack of due diligence on the part of a fund manager may leave him or her vulnerable to civil claims for negligence by aggrieved investors whose investments have underperformed or whose portfolio was negligently constructed or managed.

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FCA FINES RETIRED ACCOUNTANT FOR COMMITTING MARKET ABUSE

Final Notice issued against Kenneth George Carver, 30 March 2015

A retired accountant was fined for committing market abuse (insider trading) in breach of s118(2) Financial Services and Markets Act 2000 (**FSMA**). The FCA's action against Mr Carver demonstrates its continued willingness to give significant time and resources to taking action against individuals for market abuse, even when the sums of money involved are relatively small.

The trade

In April and May 2012, CGI Group Inc engaged in discussions to purchase Logica Plc (the **Target**), a company listed on the LSE and part of the FTSE 250 Index. Two days before the announcement, Mr Carver bought a number of shares in the Target after he was informed of the impending takeover by an employee of the Target, Ryan Wilmott. At the relevant time Mr Wilmott was part of the project team working on the acquisition of the Target by CGI Group Inc (the **Takeover**) and had been added to the official Insider List.

Mr Wilmott visited Mr Carver before the takeover was announced, informed him of the details of the acquisition and raised the opportunity for Mr Carver to make a profit. Although he was aware there was a risk of insider trading, Mr Carver took no reasonable steps to confirm whether the information provided to him was inside information and whether he was able to trade legitimately on that information. Mr Carver also agreed to use his own money to purchase shares in the Target to the value of GBP 10,000 on behalf of Mr Willmott, and to give Mr Willmott any profit made from those shares.

Before the announcement of the takeover, Mr Carver purchased shares, on his account, for himself and on behalf of Mr Wilmott. Once the takeover had been announced, Mr Carver sold the shares and made a total profit of GBP 24,206.70, paying GBP 6,000 to the benefit of Mr Wilmott on the basis of the inside information

provided and retaining the remaining profits of GBP 18,206.70.

FCA's findings against Mr Carver

The FCA found that Mr Carver had committed market abuse in breach of s118(2) FSMA. Section 118(2) prohibits an insider dealing or attempting to deal in a qualifying investment or related investment on the basis of inside information relating to the investment in question.

The FCA concluded that Mr Carver was an insider for the purposes of s118(2) (as defined in s118B(e) FSMA) as a result of him acquiring inside information from Mr Willmott. The FCA concluded that Mr Carver knew or could reasonably be expected to have known that the information he had received from Mr Willmott was inside information because, among other things, Mr Carver knew that Mr Willmott was an employee of the Target; Mr Willmott had asked Mr Carver to trade on his behalf and had not provided funds for Mr Carver to do so; and Mr Carver had immediately identified the risk of insider dealing but had not taken independent steps to confirm whether the information provided to him by Mr Willmott was inside information and whether he could legitimately trade on the basis of that information.

Sanction

The FCA fined Mr Carver GBP 35,212. However, had Mr Carver not been able to demonstrate that a higher financial penalty would have caused him serious financial hardship, the FCA would have imposed a financial penalty of GBP 122,212 on him. When calculating Mr Carver's financial penalty, the FCA took into account the fact that Mr Carver had provided significant co-operation for the FCA's investigation and had provided a full account of events at an early stage.

Action taken against Mr Willmott

Prior to the publication of the FCA's enforcement action against Mr Carver, Mr Willmott pleaded guilty to insider dealing under the Criminal Justice Act 1993 (the **CJA 1993**). In addition to disclosing information about the Takeover to Mr Carver, Mr Willmott had also set up an online trading account in the name of a former girlfriend to carry out additional trading for his own benefit in the Target's shares. On 27 March 2015 Mr Willmott was sentenced to ten months' imprisonment.

Comment

The FCA's commitment to take action against firms and individuals for market abuse was listed as one of the FCA's key priorities in its Business Plan for 2015/2016, and this action against Mr Carver is demonstrative of that commitment, given the relatively small amount of money involved.

The FCA's action against Mr Carver and Mr Willmott also highlights the interaction between the civil market abuse regime in FSMA and the criminal insider trading regime in the CJA 1993. The FCA has not announced its rationale for taking criminal action against Mr Willmott and civil action against Mr Carver. However, given the higher standard of proof for criminal actions, it is possible that the FCA decided that it may not be able to convince a jury beyond all reasonable doubt that Mr Carver committed insider trading under the CJA 1993. The FCA's Final Notice for Mr Carver emphasises the significant co-operation that he provided in relation to the FCA's investigation into him and Mr Willmott. It is possible that this co-operation also played a part in the FCA's decision to take civil, as opposed to criminal, action against Mr Carver.

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Settlement

FRAUD WILL NOT ALWAYS UNRAVEL A SETTLEMENT AGREEMENT

Hayward v Zurich Insurance Co plc [2015] EWCA Civ 327, 31 March 2015

An injury at work settlement was upheld despite later evidence emerging that the employee's claim had been fraudulent. It is likely to be difficult for parties to re-open settled proceedings on the basis of dishonesty or fraud unless there was no suspicion or knowledge of fraud or dishonesty at the time the settlement was reached. The Court of Appeal's decision in this case emphasises the fact that parties who settle cases with their eyes open should not be entitled to rescind a settlement and/or re-open a case when better evidence becomes available at a later date.

Mr Hayward injured his back at work. He sued his employer, Zurich Insurance Company plc (**Zurich**), claiming that his injury restricted his mobility and had caused him to develop depression which seriously impaired his ability to work. Mr Hayward's claim was supported by medical evidence.

Zurich admitted liability (subject to a 20% deduction for contributory negligence). Notwithstanding this admission, Zurich contended that Mr Hayward had exaggerated the consequences of his injury. In support of this allegation, Zurich relied on video-surveillance evidence relating to Mr Hayward which appeared to show him undertaking heavy work at home. However, before quantum was decided, Mr Hayward and Zurich agreed a settlement (the **Settlement**). Zurich paid Mr Hayward GBP 134,973.11 in full and final settlement of his claim.

Two years after the Settlement, Mr Hayward's neighbours approached Zurich. The neighbours informed Zurich that they believed that Mr Hayward's claim to have suffered a serious injury to his back was dishonest and that he had entirely recovered from his injury at least a year before the date of the Settlement.

Zurich thereafter sought:

- Damages for deceit on the basis that statements made by Mr Hayward about the extent of his injury and the information he provided to medical professionals constituted fraudulent misrepresentation.
- In the alternative, recession of the Settlement and repayment of the settlement sum.

At trial Mr Hayward was found to have dishonestly exaggerated the effects of his back injury. The Settlement was set aside and Mr Hayward's damages were reduced to GBP 14,720.

The Court of Appeal allowed Mr Hayward's appeal. Underhill LJ (who gave the leading judgment) emphasised the well-established principle that settlement of an ill-founded claim is nonetheless binding. However, if one party makes a statement made about a claim (which the other party believes is genuine) but this statement turns out to be fraudulent, that might be sufficient to rescind a settlement agreement. However, in this case Zurich had expressed doubts as to the truthfulness of Mr Hayward's statements regarding the consequences of his injury and had gathered video-surveillance evidence of him prior to the Settlement. While Mr Hayward had lied about the consequences of his injury, Zurich had alleged that Mr Hayward was dishonest from the outset. This meant that the Settlement could not be rescinded.

Underhill LJ acknowledged that the decision to allow Mr Hayward's appeal was unattractive as it meant that Mr Hayward would retain the benefit of a settlement far in excess of the value of his actual loss. However, Underhill LJ emphasised that there was a more

wide-reaching principle at stake in this case – namely, that parties who settle cases with their eyes open should not be entitled to rescind a settlement and/or re-open a case when better evidence becomes available at a later date.

COMMENT

The key practical implications of this decision is that parties who are alleging fraud or dishonesty in proceedings should take into account the impact this will have on their ability to rescind a settlement agreement and/or re-open proceedings at a later date. It is likely to be very difficult for parties to re-open settled proceedings unless it can be shown that there was no knowledge or suspicion of fraud or dishonesty at the time a settlement was reached.

Firms that face settling cases where they suspect fraud or dishonesty on the part of the other party may wish to consider including provisions in their settlement agreements which provide for sums to be repaid in the event that the suspected fraud or dishonesty is later established. For example, a warranty may be included in a settlement agreement that requires the other party to warrant that any representations it has made in connection with the matter prior to settlement have been truthful. Alternatively, provisions could be included in a settlement agreement that allow sums to be paid in instalments over a period of months or years. In the event that the party receiving those sums is proved to have acted fraudulently or dishonestly, any outstanding sums may be withheld.

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(All events are held in A&O's office at Bishops Square unless otherwise stated)

EXPRESS TERMINATION CLAUSES

Wednesday 17 June 2015, 12.30pm – 1.30pm

Presented by: Richard Hooley, Consultant (Allen & Overy LLP)

This talk will examine the interplay between common law and express contractual rights of termination of a contract. The English courts remain uncertain over the relationship between the two and, in particular, as to how far they should allow an express right of termination to override limitations built into the common law regime.

The talk will cover both 'termination for breach' clauses and 'termination for convenience' clauses. Particular attention will be given to *Comau UK Ltd v Lotus Lightweight Structures Ltd* (2014), where the court

considered whether loss of profit claimed by one party, which terminates a contract for breach by the other party, is limited by the fact that the breaching party has an option to terminate the contract at its convenience.

Registration and buffet lunch will take place from midday; the seminar commences at 12.30pm.

REGULATING BENCHMARKS – ONE SIZE FITS ALL?

Thursday 18 June 2015, 8.30am – 9.30am

Presented by: Andrew Sulston, Partner – ICM, DSF; Arnondo Chakrabarti, Partner – Litigation; Emma Dwyer, Partner – ICM; and Richard Tredgett, Partner – ICM

A panel discussion on the proposed EU Benchmark Regulation and its possible impact on the derivatives and structured products markets, including such issues as scope, grandfathering and other transitional provisions, extraterritoriality and proportionality, as well as implications for commodity and interest rate benchmarks. We will cover the possible effect of the Regulation on customised and proprietary indices and the nature of Benchmark governance.

Registration and buffet breakfast will take place from 8am; the seminar commences at 8.30am.

Litigation Review consolidated index 2015

Arbitration

CJEU potentially opens the back door to court ordered anti-suit injunctions in the EU: *Gazprom OAO* (May)

Arbitration awards: when does an amendment amount to a new award?: *Union Marine Classification Services v The Government of the Union of Comoros* (May)

GBP 200 million e-borders arbitration award set aside: *Home Department v Raytheon Systems Ltd* (**Raytheon I**) and (**Raytheon II**) (Apr)

Conflict of laws

Competing dispute resolution clauses between settlement agreement and underlying contract: *Monde Petroleum SA v WesternZagros Ltd* (May)

Jurisdiction battle lost and Fiona Trust considered: *Deutsche Bank AG London Branch v Petromena ASA* (Apr)

Applicable law for whether a contract has been validly executed by foreign company: *Integral Petroleum SA v SCU-Finanz AG* (Apr)

Resolving potentially inconsistent jurisdiction and arbitration provisions in commercial contracts: *Amtrust Europe Ltd v Trust Risk Group SPA* (Feb/Mar)

Third state jurisdiction clause respected – *Owusu* considered: *Plaza BV v Law Debenture Trust Corp plc* (Feb/Mar)

CJEU rules on jurisdiction in prospectus liability claim: Request for preliminary ruling: *Kolassa v Barclays Bank plc* (Feb/Mar)

Contract

Issuer liability to secondary market investor: disclaimers ineffective: *Taberna Europe CDO II plc v Selskabet (formerly Roksilde Bank A/S) (In Bankruptcy)* (May)

Contractual discretion: how to get it right: *Braganza v BP Shipping Ltd & anr sub nom The British Unity (2015)* (May)

Forced sale of security: court considers duties owed by bank: *Rosserlane Consultants Ltd & anr v Credit Suisse International* (May)

Changes to loan notes: good faith not implied: *Dennis Edward Myers & anr v Kestrel Acquisitions Ltd & ors* (May)

Meaning of "material" and "material adverse effect" in termination provision: *Decura IM Investments LLP & ors v UBS AG, London Branch* (Apr)

Netting and set-off under the 1992 ISDA Master Agreement: *MHB-Bank AG v Shanpark Ltd* (Apr)

Access to target's documents post-sale: *Alfa Finance Holding AD v Quarzwerke GmbH* (Apr)

Effect of agent's surreptitious dealing: *Tigris International NV v China Southern Airlines Co Ltd & anr* (Feb/Mar)

Standard of reasonableness in contract with public body: Wednesbury not applied: *David Krebs v NHS Commissioning Board (As successor body to Salford Primary Care Trust)* (Jan)

Costs

Part 36 offer taken into account on costs even though beaten at trial: *Sugar Hut Group Ltd & ors v AJ Insurance* (Jan)

Criminal

Money laundering offences apply to conduct occurring entirely outside the UK: *R v Rogers & ors* (Apr)

Disclosure

Application too late for disclosure of bank's regulatory benchmark documentation and training materials in mis-selling claim: *Peniuk & ors v Barclays Bank plc* (May)

Employment

Gender pay gap reporting (Apr)

Claim which was time-barred from continuing in the Employment Tribunal may still be pursued in the High Court: *Nayif v The High Commission of Brunei Darussalam* (Jan)

Injunctions

Full and frank disclosure obligation breached but injunction upheld: *JSC Mezhdunarodniy Promyshlenniy Bank & anr v Sergei Viktorovich Pugachev* (Feb/Mar)

Limitation

Investor's knowledge bars mis-selling claim: *Susan Jacobs v Sesame Ltd* (May)

Contractual warranty claims: when does time begin to run? *The Hut Group Ltd v Oliver Nobahar-Cookson & anr* (Jan)

Effect of cross-border insolvency on contractual time bar: *Bank of Tokyo-Mitsubishi UFJ Ltd v Owners of the MV Sanko Mineral* (Jan)

Procedure

Supreme Court confirms that merits of a party's case are generally irrelevant to enforcement of case management decisions: *Prince Abdulaziz v Apex Global Management Ltd & anr* (Jan)

Public procurement

Public procurement: automatic suspensions to the award of contracts: *Bristol Missing Link Ltd v Bristol City Council* (May)

Review of authority's decision to cancel tender process: *Croce Amica One Italia Srl v Azienda Regionale Emergenza Urgenza* (Jan)

Regulatory

What due diligence should fund managers undertake before making an investment? *Alberto Micalizzi v The Financial Conduct Authority* (May)

FCA fines retired accountant for committing market abuse: *Final Notice issued against Kenneth George Carver* (May)

FCA Business Plan 2015/16: Key messages for litigators (Apr)

FCA decision on market abuse overturned: *Tariq Carrimjee v the Financial Conduct Authority* (Apr)

FCA takes enforcement action against compliance officer for being knowingly concerned in a breach of regulatory requirements committed by the firms he worked for (Apr)

New Senior Insurance Managers Regime (Jan)

Service

Commercial Court clarifies test for retrospective alterative service of claim form: *Michael Norcross v Chrislos Georgallides* (Feb/Mar)

Settlement

Fraud will not always unravel a settlement agreement: *Hayward v Zurich Insurance Co plc* (May)

Inter-solicitor email exchange held to amount to a binding settlement of a complex litigation: *Raymond Bieber & ors v Teathers Ltd (in liquidation)* (FebMar)

State Aid

State aid recovery rates ordered against Irish airlines: *Case T-473/12 Aer Lingus Ltd v Commission and Case T-500/12 Ryanair Ltd v Commission* (Apr)

Tort

Disclaimer precludes third-party reliance on auditor reports: *Barclays Bank PLC v Grant Thornton UK LLP* (Apr)

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