2020 Year in Review - Civil Fraud

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Introduction

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Welcome to our 2020 round-up for civil fraud litigation, complex cross-border disputes and asset recovery. In this publication, we consider some of the key cases and developments in English law and practice from the past year that are of particular relevance to this field.

We summarise below a number of decisions grappling with a range of evolving and sometimes complex areas, including legally privileged communications, the standard of proof in civil fraud claims, exceptions to freezing injunctions, recovering cryptoassets, committal applications and jurisdiction battles.

1. Privileged but admissible: when can without prejudice communications become admissible?

Two notable cases in 2020 required the High Court to consider the limited circumstances in which without prejudice correspondence may nonetheless be admissible. *Motorola v Hytera* concerned a threat to remove assets from the jurisdiction allegedly in order to frustrate enforcement of a judgment, while *Berkeley v Lancer* involved an attempt to uphold a settlement agreement.

In this update, we set out the default position under English law as to without prejudice communications and the limited circumstances in which without prejudice communications may be admissible, before considering the recent judgments referred to above.

Status of without prejudice communications

The starting point under English law is that without prejudice communications cannot be referred to or relied on in ongoing litigation or arbitration. This is a fundamental principle of our legal system, designed to afford parties the opportunity to explore settlement frankly and without the concern that the content of their negotiations, including any concessions made during the course of such communications, will be deployed tactically against them later in the litigation should, for whatever reason, the settlement discussions fail.

There are a number of highly limited exceptions to this protection that have been carefully developed in English jurisprudence. For example, without prejudice material has been found to be admissible in the following circumstances (three of which were addressed in the cases examined below):[1]

- as evidence of perjury, blackmail or other unambiguous impropriety (the "unambiguous impropriety exception");
- where justice demands (the "*Muller* exception");
- as evidence that a settlement agreement had been reached, to assist in a dispute over the interpretation of a settlement agreement;
- as evidence that a settlement agreement should be rectified; and
- as evidence that an agreement should be set aside because of misrepresentation, fraud or undue influence.

Motorola v Hytera: the unambiguous impropriety exception

In *Motorola Solutions Inc and others v Hytera Communications Corporation Ltd and others*[2], Motorola alleged that during the course of without prejudice settlement discussions, Hytera had threatened that should Motorola be successful in ongoing U.S. proceedings, Hytera would, among other things, seek to remove assets from enforcement-friendly jurisdictions in order to frustrate enforcement. In light of this threat, Motorola applied to the Court for a freezing order over Hytera's assets in England and Wales. To establish the existence of a risk of dissipation of Hytera's assets, Motorola sought to rely on the oral statements made during two settlement meetings, which had been held on a without prejudice basis. Given that such statements would ordinarily be privileged and therefore inadmissible, in seeking to rely on them Motorola argued that they were admissible under the unambiguous impropriety exception to without prejudice communications. Hytera denied that the exception applied, or indeed that it had made any such threat.

The Court agreed with Motorola and admitted the evidence in support of Motorola's application for a freezing order. In doing so, Jacobs J referred to *Dora v Simper and others*[3], which he regarded as authority for the propositions that: (i) the unambiguous impropriety exception extended to threats to remove assets from specific jurisdictions by improper means with the intention of preventing enforcement of a judgment; and (ii) in the absence of a record of the without prejudice communications, Motorola was only required to establish a *"good arguable case"* or a *"plausible evidential basis"* that Hytera had made the statements as alleged.

Jacobs J found that there was a *"plausible evidential basis for Motorola's case as to what was said at the meeting"*. He considered that, viewed as a whole, the alleged statements *"amounted to a threat to move assets away from jurisdictions where enforcement could be accomplished without undue difficulty into countries which were 'murky', and to do so with a view to frustrating enforcement"*, which engaged the unambiguous impropriety exception. On this basis, the Court found there was a risk of dissipation and granted the injunction.

However, in a judgment dated 11 January 2021 the Court of Appeal (Lewison, Males and Rose LJJ) reversed Jacobs J's decision.

Notably, the Court of Appeal departed from its earlier decision in *Dora v Simper*. In particular, it concluded that in principle it would be wrong, and inconsistent with previous authority, to adopt an approach of taking the evidence of the applicant at face value and considering whether, if proved, it would amount to unambiguous impropriety; or to accept the proposition that an applicant is required only to establish a *"good arguable case"* that the improper statements were made. Instead, the judge should simply have asked himself whether the evidence before him established unambiguous impropriety.

In addition, while a threat to transfer assets in order to render a judgment unenforceable *could* amount to unambiguous impropriety (as was the case in *Dora v Simper*), this is fact-dependent. In this case, there were differences in the factual accounts of what had been said (each of which were plausible). In any case, the Court of Appeal considered Hytera's proposed strategy of *"retreating"* to its key markets as an alternative to appealing an unfavourable judgment on the claim to be *"perfectly proper"*, and that the specific courses of action comprising that strategy involved no impropriety.

The Court recognised that the unambiguous impropriety test is *"difficult to satisfy"*; but deliberately so. To apply a less rigorous test would run counter to the policy of promoting settlement and erode the confidentiality in genuine settlement negotiations. The fact that the exception may rarely be engaged (particularly in view of the necessary limits to the conclusions which a court can reach at an interim stage) was no reason to dilute the test.

Berkeley v Lancer: interests of justice

In *Berkeley Square Holdings & Ors v Lancer Property Asset Management Ltd & Ors*[4], Mr Justice Roth considered the application of the without prejudice rule at common law to the question of the admissibility of statements made in the context of an earlier mediation by one of the parties to the dispute.

By an agreement made in 2005, the claimants had appointed Lancer to act as asset manager of a portfolio of properties. By early 2012, a dispute had developed relating to certain management fees said to be due to Lancer. Following a mediation in September 2012, the parties entered into a settlement agreement. In its written mediation position papers, Lancer had disclosed that it had been making certain payments to a third party company owned by Berkeley's representative, a Dr Al Ahbabi.

In September 2018, the claimants brought proceedings against Lancer on the basis that Lancer and its directors had been complicit in a substantial fraud perpetrated on the claimants by Dr Al Ahbabi in dishonest breach of fiduciary duty. As a result, Berkeley contended that the settlement agreement and a side letter to the 2005 agreement were void, and claimed restitutionary and other remedies.

Before filing its Defence, Lancer served a Part 18 Request asking when the claimants first came to know of the payments in question, in response to which Berkeley asserted that it had become aware of these payments only in May 2017. In support of various estoppel defences pleaded in its Defence, Lancer sought to rely on the without prejudice statements it had made during the mediation, in order to prove that Berkeley did in fact have knowledge of

the payments as early as 2012. In doing so, Lancer submitted that the statements fell within one or more of the exceptions to the without prejudice rule.

The misrepresentation / fraud exception

Under the misrepresentation or fraud exception, without prejudice communications are admissible if they show that a settlement agreement should be set aside on the grounds of misrepresentation, fraud or undue influence. Berkeley argued that the exception did not apply because Lancer sought to uphold the settlement agreement rather than set it aside. At first instance, Roth J disagreed, concluding that if a party could rely upon without prejudice communications to prove misrepresentation and rescind a settlement agreement, it would be illogical to say that the other party cannot use those same without prejudice communications to disprove misrepresentation and uphold the settlement agreement.

The *Muller* exception

Pursuant to the *Muller*[5] exception, without prejudice communications may be admissible where an issue is raised that is only justiciable upon proof of the content of those communications. Given that Berkeley had relied heavily on its lack of knowledge of Lancer's payments, Lancer argued that the matter was fairly justiciable only if Lancer could rely on the only evidence that proved Berkeley's knowledge. Roth J agreed, and concluded that the without prejudice communications also fell within the *Muller* exception.

This decision is currently under appeal: the Court of Appeal heard the appeal on 17 December 2020 and its reserved judgment is awaited.

Conclusion

These decisions provide noteworthy examples of the careful balancing act the Court must undertake when considering the admissibility of without prejudice communications: protecting the confidentiality of without prejudice communications so as to encourage open dialogue between parties and – ultimately – settlement of disputes, while also allowing parties to use evidence that would otherwise be subject to the without prejudice rule where justice between the parties requires it. They serve as a pertinent reminder that the without prejudice rule is not an absolute shield for litigants, and the Court will be astute to prevent the protection from being abused. Therefore, while the without prejudice privilege remains a useful device to facilitate parties' genuine efforts to reach a settlement, parties should continue to exercise caution in their communications, so as not to risk crossing over the boundary between what is permissible and therefore inadmissible, and what may ultimately be improper and used against them later.

[1] See *Unilever Plc v Proctor & Gamble Co* [2000] 1 WLR 2436 and *Oceanbulk Shipping SA v TMT Ltd* [2010] UKSC 44

[2] [2020] EWHC 980 (Comm)

[3] [1999] EWCA Civ 982

[4] [2020] EWHC 1015 (Ch)

[5] *Muller v Linsley* [1994] EWCA Civ 39

2. Legal advice privilege and foreign lawyers

Continuing with the privilege theme, next we consider a recent judgment in one of our own cases on the application to legal advice privilege to communications involving foreign in-house lawyers, particularly in the context of non-"Advocate" Russian in-house lawyers.

Legal Advice Privilege

Under English law, legal advice privilege applies to confidential communications between a client and their lawyer for the purpose of giving or receiving legal advice or assistance in a relevant legal context.

It is settled law that legal advice privilege (and, indeed, litigation privilege) will extend to foreign lawyers provided the above conditions are met.

It is also settled law that the English courts will apply the *lex fori* (i.e., the law of the forum) to questions of privilege. This will be the case, for example, even if foreign law governs the claim or the relevant communications take place in a foreign jurisdiction. In other words, provided the English courts have jurisdiction over the claim, English law will govern questions of privilege.

PJSC Tatneft v Bogolyubov & others[1]: Background

The judgment arises from a claim brought by PJSC Tatneft ("Tatneft") against four high-net worth individuals for their alleged involvement in a fraudulent scheme. That claim is governed by Russian law.

The judgment arises out of an application by the Second Defendant in those proceedings challenging Tatneft's claim to privilege over certain of its internal communications. Tatneft gave standard disclosure and asserted, among other things, legal advice privilege over certain categories of documents, thus withholding those from inspection.

Tatneft confirmed in correspondence that its claim to legal advice privilege covered communications between its employees/officers and members of its internal legal department. Importantly in the context of this judgment, Tatneft also confirmed that the members of its internal legal department were qualified Russian lawyers but did not have the status of "Advocate" in Russia (explained further below).

The Second Defendant brought an application on the basis that legal advice privilege should not extend to communications with or documents generated by any in-house Russian legal advisors who are not Advocates.

The parties' submissions

The Second Defendant submitted that the Court should be concerned with the *status* of the lawyer, not just their function. In particular, it was submitted that, under English law, legal advice privilege only applies to:

- *"Professional lawyers"* i.e. legal advisers who are professionally qualified and members of professional bodies.
- In-house lawyers if the in-house lawyers are regulated and admitted to practice.
- Foreign lawyers if they are *"appropriately qualified"*.

The Second Defendant argued that Tatneft's in-house lawyers did not meet the above criteria on the basis that:

- An Advocate is an independent legal advisor admitted to the Russian legal bar, and there is a register of Advocates maintained by the Ministry of Justice of the Russian Federation.
- In-house lawyers are not Advocates.
- There is, under Russian law, a legal concept of *"advocate's secrecy"*, which is similar to legal professional privilege under English law and which does not apply to lawyers who are not Advocates.

Tatneft, on the other hand, submitted that the English courts have traditionally not enquired into the standards of regulation or training applied to a foreign lawyer and have recognised that legal advice privilege is not confined to barristers and solicitors, provided that the advice is sought from a *"variety of lawyer"*. Therefore, Tatneft submitted that, as a matter of English law, it was irrelevant to its claim for legal professional privilege that its in-house lawyers were not Advocates or that the Russian law of advocate's secrecy did not apply. The Court concurred.

Judgment

Mrs Justice Moulder, citing *Three Rivers (No 6)*[2], began by considering the rationale underpinning legal advice privilege, namely that it is in the public interest that clients can obtain legal advice and that those communications be kept confidential.

She explained that, consistent with this approach, the English Court had extended legal advice privilege to foreign lawyers. Moulder J placed particular emphasis on the judgment in *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax*[3], which acknowledged and endorsed a broad approach to legal advice privilege applying to foreign lawyers.

She noted that both the majority opinion and dissenting opinion (by Lords Neuberger and Sumption, respectively) had adopted a functional approach to the question. Indeed, in *Prudential* it was noted that the law of legal advice privilege had been extended to foreign lawyers without regard to foreign national standards or regulations or standards of training or discipline, and that such standards were not amenable to the supervision of English judges. Significantly, Moulder J cited Lord Neuberger's explanation of the extension of legal advice privilege to foreign lawyers being *"based on fairness, comity and convenience"*.

Moulder J concluded that the English courts are concerned rather with the *"function"* of the relationship between the client and foreign lawyer (i.e., protecting a party who wishes to take legal advice) and not the *"status"* of the foreign lawyer.

Moulder J also considered two decisions upon which the Second Defendant had sought to rely to advance an argument that legal advice privilege was limited to *"professional lawyers or qualified lawyers"*. One authority regarded a patent agent and the other a solicitor who had been struck off. Moulder J concluded that they had no bearing on the issue, noting that the cases were not concerned with foreign lawyers, which on the authorities have been *"treated as a separate category and justifying a different approach"*.

Moulder J further noted that the Second Defendant's interpretation of legal advice privilege would in practice be problematic for a number of reasons. First, if the English Court had to conduct an investigation into particular national standards or regulations in other countries in order to determine in each case whether legal advice privilege applied, this would lead to uncertainty and inconvenience. Second, it would raise issues of comity if the Court were obliged to express views on the qualifications and regulation of foreign lawyers. Third, it would have the effect of excluding all in-house lawyers and a large proportion of other lawyers working in Russia, which would be both unfair and inconvenient. Indeed, Tatneft adduced expert evidence to the effect that around half of the representatives in Russian civil disputes, including those in Arbitrazh courts, are not Advocates and that *"the workers of most international law firms operating in Russia are hired under employment contracts and do not hold advocate status"*. Moulder J noted that the problematic consequences of the application of the rule advanced by the Second Defendant illustrated precisely why the English Court preferred a functional approach to the issue.

The Second Defendant had also submitted that Tatneft's in-house lawyers should not be recognised because (a) English in-house lawyers have to be regulated and generally hold a practicing certificate and/or (b) in-house lawyers are paid employees and not independent. These points were also firmly rejected.

On the first point, Moulder J held that *"once one accepts that the court will not investigate whether a foreign lawyer is regulated or registered, the inclusion of foreign in-house lawyers seems to me to follow as a matter of both logic and principle".* She noted that it would be unfair if the Court were to refuse to extend legal advice privilege to in-house lawyers in Russia on the basis that they were not regulated or qualified. Given in-house lawyers in Russia cannot be Advocates, on that basis legal advice privilege could never extend to communications with in-house legal advisers in Russia.

On the second point, Moulder J held that the assertion that in-house lawyers were not independent and were paid employees had been firmly rejected by the English Court in relation to English in-house lawyers and that there is no reason to deny the application of the privilege to foreign in-house lawyers.

Moulder J concluded that:

1. Legal advice privilege extends to communications with foreign lawyers whether or not they are in-house (and thus employees).

2. The English Court will not as a general matter enquire into how or why the foreign lawyer is regulated or what standards apply to the foreign lawyer under the local law; the only requirement is that they *"should be acting in the capacity or function of a lawyer".*

3. There is no additional requirement that foreign lawyers be *"appropriately qualified"* or recognised or regulated as *"professional lawyers".*

Accordingly, the Second Defendant's application was dismissed.

This is an entirely welcome decision of the English High Court, which should reassure clients obtaining legal advice from their international legal advisors (whether in-house or external) that the English Court will continue to respect the confidential sanctity of their communications and documents and ensure a broad parity of treatment between communications with English and foreign legal advisors. It reaffirms and clarifies the English Court's functional approach to legal advice privilege where applied to foreign lawyers (and, by way of extension, to foreign in-house lawyers), guided by principles of fairness, comity and convenience.

[1] [2020] EWHC 2437 (Comm)
[2] [2005] 1 AC 610
[3] [2013] UKSC 1

3. Your privileged communications were referred to in open court…Are they no longer privileged?

In *SL Claimants v Tesco plc; MLB Claimants v Tesco plc*[1], a document which had been referred to in open court in parallel criminal proceedings nonetheless remained confidential for the purpose of the test for privilege.

Background

At a Case Management Conference, the SL Claimants sought disclosure of a solicitor's note of a client interview. The note had been created by an in house lawyer at Tesco during discussions with external legal advisers and, as such, attracted privilege. The SL Claimants accepted that the note was privileged, but claimed that confidentiality had been lost because the note had been deployed in open court in related criminal proceedings. It was not contended that the note had been deployed in such a way as to constitute waiver. Tesco resisted disclosure, taking the position that only parts of the nine-page note had been referred to in open court and that the document as a whole retained its confidential nature.

The specific circumstances in which the note came to be referred to in open court – and the extent to which it was so referred – were as follows:

- Tesco provided the note to the Serious Fraud Office (SFO) pursuant to a limited waiver of privilege. The SFO then applied in the criminal proceedings to compel production of a separate but related interview note.
- In the course of argument on that application, counsel for the respondent referred to the note, quoted the first paragraph of it and invited the judge to read the first three pages of the document to himself, which the judge did. Counsel then described or summarised, without quoting, what the note recorded as having been said by the interviewee about certain matters, drawing the judge's attention to what he described as *"the first three pages of the document"* and (for example) to paragraph 20 (again without indicating its content in court).
- Counsel attending for Tesco also referred to and read small extracts from the first three pages of the note describing the interviewee's first reactions to the revelation by a whistleblower of the wrongful practices subsequently investigated by Tesco.

The Case Management Conference came before Mr Justice Hildyard, who noted that the application raised *"an issue of some importance"* before going on to consider whether, as the SL Claimants contended, the note was *"summarised, partly read out and discussed extensively in legal argument"* in the criminal hearing, with the effect that confidentiality in it had been lost; or, as Tesco submitted, it remained confidential and privileged notwithstanding the reference to it in open court.

Decision

Hildyard J held that confidentiality in the note had not been lost and that it would remain privileged in the context of the civil proceedings. Confidentiality could be lost in one of only two ways:[2]

- First, where sufficient publicity is given to the contents of a document and the information in it that it can no longer be regarded as confidential. That is a matter of fact and degree.
- Second, where references made in public, though not of themselves sufficient to destroy confidentiality, engage the principle of open justice which gives right of access to the evidence placed before the court and referred to during the hearing

so that the way and basis on which the matter has been decided can properly be understood.

Hildyard J noted that the question is ultimately within the discretion of the court, as emphasised recently by the Supreme Court in *Dring v Cape*[3] and that *"the notion of unqualified right of access to a document which has been referred to… is misplaced, especially where the references have been sparing and unspecific, and/or where no specific or material reference has actually been made…"*. He went on to hold that in this case counsel's references to the note did not, either in terms of their detail or their extent, amount to a loss of confidentiality in the document itself. Nor was the open justice principle engaged: the references to and the judge's reading of the document did not require its disclosure to enable the public to understand the court's decision.

The case is an illustration of the careful analysis that is required to determine whether, in substance, confidentiality in a document has been lost. Reference to a document in criminal proceedings will not necessarily mean that the document ought to be made available in related civil proceedings. Even where part of a document is quoted aloud in open court, the remainder of the document may nonetheless remain privileged. This is a matter of fact and degree.

[1] [2019] EWHC 3315 (Ch)

[2] *Mohammed v Ministry of Defence* [2013] EWHC 4478 (QB)

[3] *Dring (on behalf of the Asbestos Victims Support Group) v Cape Intermediate Holdings Ltd* [2019] 3 WLR 429

4. A balance of probabilities: the standard of proof in fraud claims

In *Bank St Petersburg PJSC and another v Arkhangelsky and others*[1], the Court of Appeal ordered a re-trial of a High Court decision involving complex allegations of fraud, on the basis that the trial judge had applied too high a standard of proof. The decision serves as a reminder that the standard for making out a case of fraud or dishonesty is the balance of probabilities: no more, no less.

Background

The history of the case is now well-known. Bank St Petersburg PJSC (the "Bank"), brought a claim for approximately £16.5 million in England against Dr Vitaly Arkhangelsky, a Russian shipping tycoon, and his wife Mrs Julia Arkhangelskaya under a personal loan and a number of personal guarantees. The Bank claimed that their business, Oslo Marine Group LLC, had failed to repay a loan when it fell due. The Bank originally obtained judgment against the business in Russia and enforced that judgment. It subsequently brought proceedings in England against Dr Arkhangelsky and Mrs Arkhangelskaya, under the personal loan and personal guarantees, in order to recover a £16.5 million shortfall.

Dr Arkhangelsky and Mrs Arkhangelskaya, together with their company Oslo Marine Group Ports LLC (together, the "Appellants") counterclaimed for damages in respect of an alleged conspiracy to raid and seize the assets of two of the Appellants' main businesses in Russia. The counterclaims were made against the Bank and its chairman (together, the "Respondents" in the appeal) under art. 1064 of the Russian Civil Code, alleging unlawful harm as a consequence of the Bank selling assets pledged to it to connected parties at an undervalue. The Respondents asked the Court to make a number of negative declarations, both as to the absence of any dishonesty or deceit and the Appellants' bad faith in raising their counterclaims (the "Negative Declarations").

First instance decision

The trial before Hildyard J was a heavy one, lasting 46 days and resulting, some 22 months later, in a 390-page judgment; the result was that the Bank's debt claims were successful, and the Appellants' counterclaims were dismissed.

In determining the counterclaims, the trial judge listed 10 specific features of the case that he thought *"almost inevitably excited suspicion"* with regard to the Respondents' conduct. Ultimately, however, the trial judge rejected the counterclaims, noting that although he did not agree with the Respondents that the counterclaims were *"a fiction dishonestly contrived"*, the strength of the evidence did not meet the threshold necessary to discharge the burden of proof. He noted that the Appellants *"relied on proof of the inherently improbable, a burden of proof that could only be discharged by showing the facts to be incapable of innocent explanation such as to give rise to the inference of the conspiracy"*. Yet, despite finding that the threshold for the counterclaims had not been met, the trial judge declined to make the Negative Declarations requested by the Respondents.

Grounds for appeal

On appeal, the Appellants did not (save for one exception) seek to challenge the judge's findings of primary fact, but rather (a) submitted that the trial judge was mistaken on the standard of proof to be applied, setting too high a threshold for establishing dishonesty; and (b) had adopted a piecemeal approach that prevented him from standing back to see how his misgivings, when properly taken together, led to an irresistible inference of the fraud alleged.

The Respondents' primary submission was that, overall, the primary findings of fact that the judge had made were overwhelming and could not and should not be disturbed by the Court of Appeal.

The Court of Appeal's judgment: the requisite standard of proof

The Court of Appeal considered a number of issues in turn, including liability under Russian law and illegality. With regard to the requisite standard of proof, it held that the correct standard for allegations of dishonesty or fraud is the civil standard of proof, i.e. the balance of probabilities:

1. Males LJ stated that it is both fair and conventional to begin with the premise that *"fraud and dishonesty are inherently improbable"* and that *"cogent evidence is required for their proof"*, since it was predicated on the notion that *"people do not usually act dishonestly"*. However, this is only a starting point.

2. Sir Geoffrey Vos' and Males LJ's judgments both applied *Re B (Children)*[2], in which the House of Lords stated that *"there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not"* and that *"neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts"*.

3. The trial judge had then to determine, standing back from this allegation (and later looking at all the allegations together) whether fairly regarded, in all the circumstances of the case, and on the evidence before the court, the Respondents' explanation was more likely than not.

The Court of Appeal unanimously held that, in the circumstances, the trial judge had applied too high a standard of proof. The trial judge had made various findings that the Bank had acted reprehensibly and even dishonestly (Hildyard J had used strong words such as *"extraordinary"*, *"arresting"* and *"ruthless"*). Yet the trial judge's subsequent assessment of those findings of fact showed that he *"allowed himself to stray from the correct standard of proof"* in applying too high a standard. Hildyard J's comment that the burden of proving the counterclaims *"could only be discharged by showing the facts to be incapable of innocent explanation"* was, in the context of this case, plainly wrong.

The Court of Appeal also considered that the 22-month delay between the trial and the judgment was inexcusable and may have impacted the trial judge's ability to deal with all of the findings in the case. Sir Geoffrey Vos explained that parties are entitled to receive judgments within a reasonably short period of time and, in any event, no later than three months after the hearing.

The Court of Appeal also rejected the Respondents' attempt to rely on Lord Hope's comments in *Three Rivers District Council v. Bank of England (No 3)*[3] that where *"the facts referred to might have inferred dishonesty but were consistent with innocence, it was not to be presumed that the defendant had been dishonest"*. This was not the standard to be applied where, as in the Appellants' case, fraud was expressly pleaded or there had been findings of dishonesty. As such, the appeal was allowed and a re-trial was ordered.

The judgment serves as a marked reminder that, notwithstanding the nature and gravity of allegations of fraud or dishonesty, the requisite burden of proof is simply the balance of probabilities. Courts will be expected, in their assessment, to have regard to the evidence as a whole so as to properly assess the circumstances in which the alleged dishonesty or fraud may have arisen. The case also serves to highlight and reinforce the importance of judgments being delivered promptly, even for lengthy and complex trials; failure to do so can render the original decision less safe, thereby undermining the proper administration of justice and increasing the often already substantial costs incurred by the parties.

[1] [2020] EWCA Civ 408
[2] [2008] UKHL 35, [2009] 1 AC 11
[3] [2001] UKHL 16

5. Transactions permitted by freezing injunctions and the "ordinary and proper course of business": the Court of Appeal applies the principles in the context of a start-up

In *Organic Grape Spirit Ltd v Nueva IQT SL*[1], the Court of Appeal allowed an appeal against a provision in a worldwide freezing order which prohibited the defendant company from developing a new business. In doing so, the Court considered the circumstances in which transactions by businesses that are subject to a freezing injunction – particularly early-stage businesses – will be permissible.

Background

An English company ("OGSL") acting by its sole shareholder and director, had borrowed sums totalling €12 million from a Spanish company, Nueva IQT S.L ("Nueva") to pursue a business opportunity in flavored spirit production ("the New Enterprise"). Nueva had loaned the sums on the signature of one of its directors, the father of OGSL's director. The father was later removed by the Nueva board and Nueva issued proceedings in Spain challenging the validity of the loan agreement.

Nueva sought the ancillary assistance of the English Court, and obtained a worldwide freezing order against OGSL under section 25 of the Civil Jurisdiction and Judgments Act 1982. In granting the order, Nugee J explained that it was not intended to prevent the development of the New Enterprise. He noted that genuine efforts to develop a new business *"should not be regarded as dissipatory, even if the business may be imprudent, even if the business plan may be sketchy and somewhat shaky. Trying to develop a business is not the same as avoiding a judgment."*

The return date hearing came before Morgan J, who continued the order, including the exception for transactions conducted *"in the ordinary and proper course of business"* from the standard form freezing injunction. Unlike Nugee J, however, relying on *Harrison Partners Construction v Jevena* (a New South Wales case)[2] Morgan J included additional wording prohibiting OGSL from incurring expenditure in pursuance of the New Enterprise. Morgan J stated that while he was *"not in a position to assess its prospects of success"*, the New Enterprise was *"speculative"* and there was *"a real risk that the business may fail"*. Morgan J found that *"this is a case where expending what remains of the €12 million on developing this business runs a substantial risk that the assets will be significantly reduced between today's date and the time when there might be a judgment to enforce".*

The Court of Appeal's judgment: the principles governing freezing injunctions and business transactions

OGSL did not appeal Morgan J's decision to continue the injunction but did appeal the wording prohibiting expenditure on the New Enterprise.

Lord Justice Newey gave the leading judgment allowing OGSL's appeal. He explained that the Court would not restrain all conduct which could prejudice a defendant's ability to satisfy a judgment; the Court is concerned only with *unjustified* disposals. Lord Justice Newey noted – referring to *Ablyazov (No 3)*[3] – that business transactions may be permitted either under the standard form exception for dealings in the ordinary and proper course of business or, if that exception does not apply, on a case-by-case basis.

As regards OGSL, the Court of Appeal considered that it had no *"ordinary"* course of business. Though OGSL had acquired some equipment and warehouses, no production or distribution had begun. The most that could perhaps be discerned was a pattern of past *expenditure*, but in the Court's view this was not sufficient; a defendant which has not established a pattern of trading *"cannot simply rely on the 'ordinary and proper business' exception to a freezing order but must specifically ask the Court to authorise pursuit of its fledgling business"*.

As to whether expenses in pursuit of such a business should nonetheless be permitted, the Court of Appeal found that Morgan J had approached matters on an incorrect basis. Morgan J had not concluded (and indeed it had not been submitted) that OGSL was acting in bad faith, nor had he concluded that the business *"was doomed to fail"* (instead relying on the various risk factors). In those circumstances, he should have permitted the use of OGSL's assets in pursuit of the New Enterprise.

Citing *Perry v Princess International,*[4] Lord Justice Newey emphasised that the court would not permit dealings which are not part of the ordinary business of the defendant where it is not acting in good faith, or where the *"apparent purpose is to ensure that funds are not available to satisfy any judgment"*. A court should also decline to authorise a defendant to carry on a business which could be seen as having no reasonable prospect of success, or where there had been *"failure to meet acceptable standards of commercial behavior"*.

However, Lord Justice Newey noted that: *"[w]here something is in the ordinary course of a defendant's business, he is allowed to pursue it even if it carries substantial risk (Perry v Princess International Sales & Services Ltd), without consideration of whether it is reasonable (Halifax plc v Chandler) and without a balancing exercise being undertaken (Halifax plc v Chandler)"*. He went on to conclude that similar principles must apply where the Court is considering proposed business transactions *outside* the ordinary course of business.

The Court of Appeal's judgment in *Organic Grape Spirit* is an important reminder that the purpose of a freezing injunction is to maintain the status quo; it does not provide security for a claim, nor does it restrain any and all conduct of a defendant which may prejudice the satisfaction of a judgment.

In considering whether such conduct is permissible, the Court of Appeal determined that two questions must be asked:

1. First, does the transaction fall within an express exception in the injunction? (In this case, the Court was concerned primarily with the standard form exception for dealings and disposals in assets in *"the ordinary and proper course of business"*.)

2. Second, if it does not fall within an exception, should it nonetheless be permitted – having been scrutinised by the Court on its own merits – on the basis that it does not fall foul of the purpose of the freezing order?

The decision in *Organic Grape Spirit* is significant in two key respects, each relating to one of the two questions above.

As to the first question, in *Organic Grape Spirit* the Court of Appeal restated its focus in *Ablyazov (No 3)*[5] on whether the transactions were *"routine business transactions"* or *"usual purchases and disposals"*, and reaffirmed that the concept of the *"ordinary and proper course of business"* is to be given a *"narrower rather than a wide meaning"*. The policy which was clearly articulated in *Ablyazov (No 3)* was that while, to avoid freezing injunctions operating oppressively against respondents, the court generally construes the restrictions imposed by them narrowly (and thus the exceptions to them broadly), the court retains a supervisory jurisdiction over all non-routine payments before they are made. Arguably, the Court of Appeal had suggested a move away from this principle in *Michael Wilson v Emmott,*[6] in which Lewison LJ observed that it is not helpful to substitute for the phrase *"ordinary and proper course of business"* synonyms like *"routine"* or *"recurring"*, and that *"[a] transaction which is neither of those may well be properly regarded as being in the 'ordinary course of business'"*.

Notably in the context of start-up businesses, it follows from the decision in *Organic Grape Spirit* that any start-up business which has not yet established a pattern of *trading* (as opposed to a pattern merely of *expenditure*) could never avail itself of the standard form exception for transactions in the ordinary and

proper course of business. On this basis, every transaction of such a business – unless it falls within another exception – falls to be reviewed by the Court if it cannot be agreed with the claimant.

As to the second question, *Organic Grape Spirit* clarifies that, even when considering the permissibility of a transaction which falls *outside* the standard form *"ordinary and proper course of business"* exception, the Court will apply the usual principles that underpin freezing orders and their intended effect. In that context, the Court has no place in assessing the reasonableness of particular business ventures or in prohibiting transactions simply because they are speculative or carry substantial risk – unless they are *"doomed to fail"*.

Practical points arising from the judgment are as follows:

1. Lawyers acting for start-up or early-stage businesses subject to a freezing injunction should seek to negotiate (or, failing that, apply for) specific additional carve-outs covering transactions that are required to fulfil the business model. Such clients are unlikely to be able to rely on the standard form exception for transactions in the ordinary and proper course of business.

2. Claimants considering seeking a freezing injunction against a start-up, early-stage or otherwise high-risk business would be well-advised to consider in advance the utility of any such relief (if obtained), bearing in mind that the Court will (despite the existence of a freezing injunction) be slow to prohibit transactions in pursuance of a genuine business venture, even if that venture is highly risky or misguided and may deplete the defendant's assets to such a degree that the claimant's claim goes unsatisfied. Balanced against what may, therefore, be a limited benefit, the claimant may face exposure under the cross-undertaking in damages which it will be required to give in exchange for the injunction. A claimant may instead wish to seek to negotiate with the defendant some other form of security in place of a freezing injunction.

[1] [2020] EWCA Civ 999

[2] *Harrison Partners Construction Pty Ltd v Jevena Pty Ltd* [2005] NSWSC 1225, in which a defendant wished to pursue a new business venture in respect of which there was *"a bona fide, albeit undeveloped, business plan."* It was held, in dismissing the defendant's application, that *"[i]t will suffice to establish that there is a real risk that the defendant will deal with the assets in a manner calculated, or liable, to produce the result that a judgment in the favour of the plaintiff would not be satisfied."*

[3] *JSC BTA Bank v Ablyazov (No 3)* [2010] EWCA Civ 1141

[4] *Perry v Princess International Sales & Services Ltd* [2005] EWHC 2042 (Comm)

[5] *JSC BTA Bank v Ablyazov (No 3)* [2010] EWCA Civ 1141

[6] *Michael Wilson & Partners Ltd v Emmott* [2015] EWCA Civ 1028

6. Overhaul of contempt of court provisions

On 1 October 2020, a new Civil Procedure Rule (CPR) 81 came into effect, replacing the old CPR 81 entirely. There are no transitional provisions preserving aspects of the old CPR 81, meaning that all contempt proceedings, including those commenced prior to 1 October 2020, are now subject to the new rules. As such, practitioners will need to get up to speed with the new CPR 81 promptly. In this update, we examine the key changes to the contempt of court provisions and their effect.

The changes are the result of a Civil Procedure Rule Committee consultation, which reflected existing practitioner criticism of CPR 81. Among other things, CPR 81 was considered to be segmented, complex, difficult to navigate and repetitive. Notably, it had *"been examined and found wanting"* by the High Court on a number of occasions.[1] As a result, a new and thoroughly simplified CPR 81, described by Mr Justice Kerr as a *"one stop procedural code"*[2], has now been implemented. The number of rules has been reduced from 38 to 10, and the two Practice Directions (PDs) and Practice Guidance document dispensed with.

Key examples of what will undoubtedly be welcome changes to CPR 81 are as follows:

- Previously CPR 81 categorised contempt into four types; a different procedure being applicable to each. As a result, applications for contempt were said to be *"bedeviled with procedural requirements"* which could *"make the overall process complicated and overbearing"*.[3] By contrast, the new CPR 81 adopts a single uniform procedure which applies to all contempt applications.
- The new CPR 81.3 (*"How to make a contempt application"*) presents the application process as a step-by-step guide, designed to simplify and demystify the process.
- It is now the case that permission to bring committal proceedings is only required in two circumstances (CPR 81.3(5)):
    - where the allegation is of interference with the administration of justice (except in relation to existing High Court or county court proceedings); or
    - where it is alleged that a false statement has knowingly been made in any affidavit, affirmation or other document verified by a statement of truth or in a disclosure statement.
- The disparate and confusing provisions which previously set out how an application requiring permission will progress through the courts have been consolidated into a single linear explanation (CPR 81.3(6)-(8)).
- CPR 81.4 *("The requirements of a contempt application")* helpfully includes a checklist of matters which must be addressed in the evidence supporting a contempt application. It is described as the *"cornerstone of the new Part 81. It is intended to stand as the guarantor of procedural fairness"*[4]. Previously, the complex provisions had on occasion been improperly implemented, neglecting the core rights of contemnors (see, for example, *Andreewitch v Moutreuil*[5]). CPR 81.1(2)

acknowledges that the established body of case law on contempt will retain an important guiding role.

- The previous standard form for penal notices at Annex 3 of PD 81 had been found to be inconsistent with the right to remain silent *(McKay v All England Lawn Tennis Club (Championships) Ltd and another*[6]*).* The new rules omit PD 81 altogether, instead providing a definition of *"penal notice"* at CPR 81.2. The White Book commentary to new CPR 81.4 provides guidance on the form of the penal notice.
- Further streamlining is provided by the introduction of five new court forms (N600 – N604) which replace the 27 forms previously in use. Form N600 guides parties through the requirements of an application and is to be read alongside CPR 81.4 to ensure compliance with this key rule.
- CPR 81.6 introduces a procedure to be followed where the Court commences contempt proceedings on its own initiative. Clarification of the Court's powers in respect of directions, hearings, judgments and proceedings is provided in CPR 81.7-81.9. This includes a provision codifying the Court's power to issue a bench warrant to ensure the attendance of a defendant (CPR 81.7(2)). The changes make the provisions on the Court's powers more transparent and accessible to applicants and respondents (now referred to as *"claimants"* and *"defendants"* with the aim of furthering accessibility).
- An amendment to CPR 32.14 (made at the same time as the changes described above) reflects the decision in *Jet 2 Holidays Ltd v Hughes*[7] that contempt proceedings may be brought in respect of false statements of truth in documents prepared *in anticipation* of proceedings (as well as during proceedings).

The consultation acknowledged the widely-recognised inadequacies of the old CPR 81, noting that the procedural aspects of contempt proceedings frequently posed difficulties, particularly with respect to fairness and accessibility. The recent changes to CPR 81 are a welcome simplification of the contempt of court provisions, the effects of which (from a practitioner's perspective) are twofold:

First, applications are more straightforward, thereby reducing the scope for procedural error while promoting time and cost efficiency. There is now no need for practitioners to cross-reference the lengthy provisions of the former CPR 81 with the repetitive PD.

Second, it goes without saying that the procedural rules governing contempt of court are necessarily strict. Any departure from these rules may hinder the success of an application in contempt proceedings where non-compliance occurs. As such, parties to litigation should keep firmly in mind the requirements to be satisfied should it prove necessary to bring contempt proceedings. It is hoped that the streamlined procedural rules will ensure a fairer and more efficient application of the contempt of court jurisdiction.

[1] Dame Victoria Sharp (President of the Queen's Bench Division) in *Attorney General v Yaxley-Lennon* [2019] EWHC 1791

[2] Mr Justice Kerr, Chair of the Civil Procedure Rule Committee subcommittee, responsible for drafting the new rules. Law Society Seminar, 'Civil Procedure Rules relating to Contempt of Court' (8 October 2020)

[3] McGrath, Commercial Fraud in Civil Practice, 24.35

[4] Notes on the consultation exercise, 'Proposed rule changes relating to contempt of court; redraft of CPR Part 81.' https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/870273/cprc-rule-8.1-consultation.pdf

[5] [2020] EWCA Civ 382

[6] [2020] EWCA Civ 695

[7] [2019] EWCA Civ 1858

7. *Chernukhin v Deripaska*: Three key considerations for litigators and their clients when deciding whether to bring a committal application

In *Navigator Equities Ltd and another v Deripaska*[1], the Commercial Court struck out the claimants' civil contempt application as an abuse of process, holding that the application had not been brought objectively and dispassionately, and was motivated instead by the claimants' desire for revenge. The decision serves as a reminder to litigators and their clients to consider carefully whether bringing a committal application is appropriate in the circumstances, and raises three key questions that litigators and their clients may wish to ask themselves before doing so.

Facts

The parties were involved in a long-running dispute concerning valuable real property held by a joint venture vehicle, Navio Holdings Ltd. The main issue in dispute was whether Mr Chernukhin was party to a shareholder agreement, such that he had an interest in Navio. On 20 July 2017, an arbitral award was made in Mr Chernukhin's favour, which required Mr Deripaska to buy out Mr Chernukhin's interest in Navio for just over $95 million. The award was subsequently upheld by the Commercial Court, following a jurisdiction challenge made under section 67 of the Arbitration Act 1996.

On 11 May 2018, a worldwide freezing order (WFO) was granted against Mr Deripaska, although the parties subsequently agreed that the WFO would be replaced by undertakings by Mr Deripaska that shares in a Jersey company, namely En+ Plc would remain available for enforcement of the award.

In December 2018, En+'s shareholders approved the corporate re-domiciliation of En+ from Jersey to Russia for tax reasons, but this also meant that the shares in En+ would be outside the jurisdiction of the English Courts.

Against this background, the claimants sought an order that Mr Deripaska be committed to prison or otherwise sanctioned for contempt of court on the basis that Mr Deripaska, who indirectly held a majority of En+'s shares, procured the shareholder vote, which constituted a breach of the undertakings. The claimants also brought a damages claim, alleging that the undertakings had independent contractual effect.

In response, Mr Deripaska submitted that the committal application was an abuse of process, because: (i) Mr Chernukhin was not seeking to enforce compliance with any order as the award had already been paid in full by Mr Deripaska; (ii) there was an improper purpose behind the application, namely the personal animus of Mr Chernukhin towards Mr Deripaska; and (iii) the contempt application had not been prosecuted even-handedly by the claimants in their role as quasi-prosecutors – on the contrary, the claimants had suppressed documents and given false evidence as to their knowledge of the re-domiciliation.

Decision

In a judgment that should be a warning for litigants and litigators alike, Andrew Baker J struck out Mr Chernukhin's committal application as an abuse of process, based on four interconnected reasons:

1. Mr Chernukhin failed to explain to the Court why he had consented to the undertakings,

when at the time they were given, the Court found that Mr Chernukhin was aware that the re-domiciliation was in prospect.

2. Mr Chernukhin's evidence in support of the contempt charge was either not the whole truth, or misleading in material respects, including that the evidence presented by Mr Chernukhin's legal advisors failed to mention that Mr Chernukhin and his advisors had knowledge of the re-domiciliation before the undertakings were given.

3. The contempt application was an act of revenge, motivated by personal animosity towards Mr Deripaska rather than any public-minded desire to bring the matter to the Court's attention. Although Mr Chernukhin's legal advisors were found to be honest in their belief that this was not the motivation, the Court did not consider their assessment of the situation to be objective or reliable.

4. The contempt application was presented to the Court in a heavy-handed, aggressively partisan fashion, which was inappropriate, vexatious and unfair to Mr Deripaska.

The Court also dismissed Mr Chernukhin's damages claim, on the basis that there had been no contractually enforceable agreement between the parties. The Court held that under ordinary principles of contractual formation, the undertakings given to the Court pursuant to the parties' agreement did not, in itself, indicate that the parties intended to create private contractual relations between themselves.

Key considerations for both litigants and litigators

Andrew Baker J's decision is an important one for not only clients, but for their legal advisors prosecuting their claims. Litigators considering whether to bring a contempt application on behalf of their client may wish to consider the following three points:

1. Civil contempt proceedings have a quasi-criminal character, meaning that the role of the applicant's legal advisor, as a quasi-prosecutor, is *"to act generally dispassionately, to present the facts fairly and with balance, and then let those facts speak for themselves"*. Baker J remarked that while the hostile and aggressive approach taken in many ordinary commercial disputes today may not necessarily lead to injustice, in the context of a contempt application, where an applicant's civil liberty is at stake, a better standard of conduct is not merely desirable but essential to the fairness [and the appearance of fairness] of the process.

2. It may be appropriate for an applicant's legal advisor to seek a second opinion or to set up separate representation before bringing an application for contempt. While not a legal or procedural requirement, this approach may help to mitigate against the possibility of a contempt application being clouded by the prior conduct of the dispute or any potential animosity between clients.

3. In bringing such an application, litigators should consider and where appropriate test the evidence being presented by their client. On the facts, the claimants' legal advisors were criticised for relying alone on Mr Chernukhin's instructions that he was unaware of the re-domiciliation at the relevant time, without making efforts to check the veracity of such an assertion, notwithstanding that Mr Chernukhin had some history in the litigation of being untrustworthy in relation to disclosure.

[1] [2020] EWHC 1798 (Comm)

8. Application of sentencing for contempt of court

Super-Max Offshore Holdings, Actis Consumer Grooming Products Limited v Rakesh Malhotra[1] serves as an illustration of how, having found an individual to be in contempt of Court, the Court approaches sentencing.

In March 2020, the Commercial Court heard four consolidated contempt applications brought against the defendant, Mr Rakesh "Rocky" Malhotra, relating to a long-running shareholder dispute, for (among other things) breaches of injunctions, taking steps to prevent witnesses from giving evidence, and making false statements in a witness statement. Sir Michael Burton, sitting in the Commercial Court, found that Mr Malhotra was in contempt of Court in respect of no fewer than 30 particularised grounds, and accordingly sentenced Mr Malhotra to an 18-month custodial sentence. In doing so, Burton J set out a number of key considerations which should be taken into account when deciding on the appropriate sentence for a finding of contempt of Court.

Background to the committal applications

The contempt proceedings arose out of a long-running dispute relating to the management and ownership of the first claimant, Super-Max Offshore Holdings ("Super-Max"), of which Mr Malhotra was executive chairman. In 2016, in what the claimants alleged was a breach of a shareholder agreement entered into between the parties, Mr Malhotra purported to suspend the CEO and other key employees of the Super-Max group, and instead appoint himself as CEO. The claimants obtained injunctive relief preventing Mr Malhotra from doing so and from otherwise unduly interfering with the management of the group. In October 2017, the English proceedings came to an end, following an eight-day trial in which Popplewell J concluded that Mr Malhotra's position as executive chairman of the Super-Max group had been validly terminated for breach of his employment contract. As part of his order, Popplewell J made further permanent injunctive orders in favour of the claimants.

During the course of the proceedings and following the Popplewell J order, the claimants made four contempt applications, which were heard together in a consolidated hearing in March 2020. The claimants alleged that in the period between December 2016 and March 2018, Mr Malhotra committed a number of acts in contempt of Court including breach of the various Court injunctions, making of false statements in a witness statement, and taking steps to prevent witnesses from giving evidence at trial. In the first of two judgments made by Burton J, on 6 May 2020[2], the Court upheld the vast majority of the contempt applications, amounting to a total of 30 separate grounds. Accordingly, in a second judgment[3], also handed down on 6 May 2020, Burton J sentenced Mr Malhotra to 15 months' imprisonment, to be stayed pending appeal to the Court of Appeal (the outcome of which was ultimately unsuccessful[4]). The Court also ordered Mr Malhotra to pay costs on the indemnity basis, but with a discount of 10 percent to reflect the fact that the claimants' application was not successful in its entirety. The court also held that an interim payment into Court in the sum of £1.3 million should be made pending the Court of Appeal decision.

The Courts have the power to deprive individuals of their liberty by issuing custodial sentences in circumstances where committal applications are upheld. Therefore, it is especially important to be aware of the considerations that judges may take into account when deciding on the appropriate sentence for a finding of contempt. In this regard, Burton J's decision on sentencing raises five key considerations which may be useful to bear in mind.

First, the Court acknowledged that a custodial sentence is a *"last resort"* for contempt of Court, reserved for the most serious of acts. On the facts, the Court held that the fact that there were 30 particularised findings of contempt did not, in itself, exponentially increase their gravity, and that it was necessary instead to consider the substance of the acts. In particular, the Court found that the premeditated and intentional breach of seven continuing Court orders was especially serious.

Second, Burton J set out a number of factors which the courts will take into account when deciding the seriousness of an act of contempt. Among others, these included (i) whether the claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy; (ii) whether the breach of the order was deliberate or unintentional; (iii) whether the defendant has been placed in breach of the order by reason of the conduct of others; (iv) whether the defendant has co-operated; and (v) whether the defendant has made a sincere apology for his contempt.

Third, the Court held that the most important of these factors is whether the defendant has accepted responsibility, expressed remorse or put forward any reasonable excuse for his conduct. On the facts, the Court held that there had been *"no appreciation at all by the Defendant of the seriousness of his deliberate breaches, no co-operation, and no apology or acceptance of responsibility"*. In coming to this conclusion, the Court considered that Mr Malhotra's defence indicated that he was resistant to the entirety of the claimants' claims, including withdrawing a limited number of admissions that he had previously made. Notably, the Court did not, however, find it appropriate to accord any weight to Mr Malhotra's non-attendance of the contempt hearing as evidence of lack of remorse. In his substantive judgment, the judge noted that *"This is a contempt application, and the Defendant is entitled to elect, as he has done, not to give evidence and hence not to be cross-examined, and the Claimants must prove their case beyond reasonable doubt, and if an innocent explanation remains a reasonable possibility, the Defendant is entitled to the benefit of the doubt"*.

Fourth, the Court will take the principle of totality into consideration when deciding upon sentencing in a committal application, meaning that the Courts should pass a total sentence which reflects all the offending behavior as a whole, rather than simply adding consecutive sentences together. On the particular facts before him, Burton J divided up the 30 offences into 5 broad categories and applied a series of custodial consecutive sentences. He then reduced Mr Malhotra's sentence from 18 to 15 months to take into account both the totality principle, and the maximum sentence of 24 months under the Contempt of Court Act 1981.

Finally, the Court did not accept Mr Malhotra's submission that the COVID-19 pandemic should be taken into account as part of the sentencing decision.

Conclusion

Burton J's findings reiterate the seriousness with which the courts approach intentional breaches of Court orders and other acts of contempt; and that they will not shy away from applying custodial sentences, where appropriate. When defending a committal application, potential defendants and their legal advisors should also keep in mind that, during sentencing, the courts are likely to give weight to recognition of wrongdoing by a defendant and, where required, an appropriate expression of remorse. Defendants should, therefore, be advised not to blindly pursue every point, regardless of its merits, when preparing a defence to a committal application.

[1] [2020] EWHC 1130 (Comm)
[2] [2020] EWHC 1023 (Comm)
[3] [2020] EWHC 1130 (Comm)
[4] [2020] EWCA Civ 641

9. How to get back the bitcoin you paid as ransom after a cyber attack

A pivotal English Court case granting a proprietary injunction over cryptoassets

In *AA v (1) Persons unknown who demanded bitcoin on 10th and 11th October 2019; (2) Persons unknown who own/control specified bitcoin; (3) iFINEX trading as BITFINEX; (4) BFXWW INC trading as BITFINEX*[1], reported on 17 January 2020, Bryan J in the English Commercial Court granted a proprietary injunction in respect of 96 bitcoin which were paid to hackers following a ransomware attack. The Claimant's other applications for Norwich Pharmacal/Bankers Trust orders and a worldwide freezing injunction were adjourned. The pivotal case adopted the legal analysis set out in the landmark Legal Statement on Cryptoassets and Smart Contracts by the UK Jurisdiction Taskforce that cryptoassets are property (see more on the Legal Statement here). The judgment provides further certainty for investors in (and users and developers of) cryptoassets, reaffirming the currency's legal status, and raises interesting legal questions in cases of fraud involving digital assets.

Facts

As is nearly inevitable nowadays, a company suffered a cyber-attack, whereby a hacker penetrated its systems and encrypted all of its computers, thereby locking the company out of its operations and records. In the usual way, the hacker then sent a message to the company demanding a ransom amount in exchange for a decryption key to regain access.

The company (a Canadian insurer) had presciently obtained cyber-insurance from an English insurer, which it was able to invoke in the circumstances. The English insurer paid the ransom, the cyber-attack victim received the decryption key and after around 10 days, during which 20 servers and 1,000 computers were decrypted, normal business operations could resume.

The English insurer, however, wanted to pursue the perpetrators. The ransom it had paid was in the amount of $950,000, which the hacker had requested in bitcoin. The insurer had purchased and transferred 109.25 bitcoin to an address provided by the hackers, and employed a blockchain investigation firm to trace the bitcoin. While some of the cryptoassets had been transferred into "fiat currency" and hence dissipated by the time the firm had managed to trace them, 96 bitcoin were identified as having been sent to an address linked to Bitfinex, a cryptocurrency exchange.

Claims

The English insurer brought proprietary claims against the unknown hackers (First and Second Defendants) and the cryptocurrency exchange operators that were based in the BVI (Third and Fourth Defendants) in restitution and/or as constructive trustee or for the tort of intimidation and/or fraud and/or conversion. At least some of those causes of action appeared to be those of the insured customer, with possibly a subrogated claim being brought as well as a claim under an express assignment of the insured's rights.

The ancillary relief sought was:

(a) an application for a Bankers Trust order (BTO) and/or a Norwich Pharmacal order (NPO) requiring the cryptocurrency exchange operators to provide specified information in relation to an account owned or controlled by the hackers;

(b) a proprietary injunction in respect of the bitcoin held at the account of one of the cryptocurrency exchange operators;

(c) a worldwide freezing injunction in respect of bitcoin held at the specified account of the cryptocurrency exchange operators; and

(d) an application for an anonymity order and to have the hearing heard in private.

Judgment

The Court found that the underlying claims brought against the Defendants were not sufficiently precisely formulated, and an amendment to the claim form would be required. The Claimant gave an undertaking that the amended claims would be against all four Defendants for restitution and/or as constructive trustee to recover and take a proprietary claim over the monies, including delivery up of the bitcoin.

As to the Claimant's application for a BTO or NPO, the Court queried whether it had jurisdiction to require an institution outside of the jurisdiction to provide information pursuant to an English Court order. The Court was concerned with an argument that a BTO or a NPO was not an interim remedy, but rather a final one (with reference to the gateway in paragraph 3.1(5) of Practice Direction 6B); and on that argument, no jurisdictional gateways would apply, which meant a BTO or NPO could not be served on a party out of the jurisdiction. The Claimant's counsel invited the Court to adjourn the application for a BTO or NPO, as well as that for a worldwide freezing injunction (as the risk of dissipation in relation to the hackers might well have been proven, though not so much in relation to the cryptocurrency exchange operators). The Court agreed to adjourn those applications.

The Claimant's main application therefore became an application for a proprietary injunction against all four Defendants in relation to the 96 bitcoin that were held in the hackers' account with the cryptocurrency exchange operators. The first and fundamental question on that application, as Bryan J stated, was the issue of whether bitcoin were indeed property at all. The Court adopted the same approach taken in the Legal Statement on Cryptoassets and Smart Contracts by the UK Jurisdiction Taskforce: cryptoassets are not physical things (i.e., *"choses"* or "things" in possession) and not legal rights (i.e., *"choses"* or "things" in action), which are the two traditional types of personal property recognised under English law. The Legal Statement concluded that, nevertheless, cryptoassets are property (for the detailed analysis explained there, see a summary here). Bryan J found that this analysis should be adopted by the Court. In further support of his conclusion that bitcoin are property, he referred to two other cases where cryptoassets had been treated as property, although the issue had not been considered in those cases in depth: Birss J granting a worldwide freezing order in respect of a substantial quantity of bitcoin and Ethereum in *Vorotyntseva v Money-4 Limited, t/a as Nebeus.com*[2], and Moulder J granting an asset preservation order over cryptocurrencies in *Liam David Robertson v Persons Unknown* (unreported 15 July 2019).

As to the other requirements for granting a proprietary injunction, the Court was satisfied that they were all met: there was a serious issue to be tried, and the balance of convenience lay firmly in favour of granting the relief sought. The Court noted, however, that the claims against the hackers appeared very strong, whereas the position was less clear as against the cryptocurrency exchange operators: they might have simply got mixed up in the hackers' wrongdoing. Nevertheless, as bitcoin had come into their possession in furtherance of a fraud, and they would have no entitlement to retain the bitcoin if the Claimant succeeded in its claim, Bryan J felt that overall the requirements for a proprietary injunction were satisfied. Bryan J also granted a related application for the provision of information; specifically for the disclosure of the identities and addresses of all Defendants. The order required both the cryptocurrency exchange operators to identify the hackers, and the hackers to identify themselves.

The Court also granted permission to serve the claim (as and when amended) out of the jurisdiction; and permission to serve by alternative means, even on the cryptocurrency exchange

operators; as well as to have the hearing heard in private and to anonymise the judgment.

Three take-away points

First, the endorsement by the English Court of the UK Jurisdiction Taskforce's Legal Statement that recognised cryptoassets as property is a valuable one, reinforcing the robust approach being developed by the English Court. The Legal Statement was not binding, but it was hoped that it would have persuasive force, and impact other common law jurisdictions. *AA v Persons unknown & others* case helps achieve those objectives.

Second, the case is a further testament to the flexibility of the English judge-made common law system, which is capable of adapting to technological changes rapidly, without necessarily requiring legislative intervention. In proper applications for proprietary injunctions, provided that the other requirements are satisfied, it is likely that the English Court will grant such injunctions over certain cryptoassets. Equally, in cases where the requirements are not met, injunctions over cryptoassets will be discharged (like in *Toma, True v Murray*[3]).

Third, for companies that become victims of a cyber-attack, it is good news that the Claimant's application for a private hearing, restricted access to the court files and anonymisation was granted, by reference to other similar cases where similar relief was obtained. Thus, there exists the opportunity to safeguard confidential materials and sensitive information, in order to minimise the risk of revenge attacks by hackers-turned-losing-defendants or copycat cyber-attacks by others.

[1] [2019] EWHC 3556 (Comm)
[2] [2018] EWHC 2598 (Ch)
[3] [2020] EWHC 2295 (Ch), 29 July 2020

10. Jurisdiction: a turning tide against predominantly foreign disputes?

Two cases in 2020 were notable for their application of the principles on jurisdiction. In both *Public Institution for Social Security v Al Rajaan*[1] and *Nigeria v Royal Dutch Shell Plc*[2], the Commercial Court dismissed the claims on the basis that it lacked jurisdiction to determine them.

While, as is to be expected in the context of arguments on jurisdiction, the findings of the Commercial Court were heavily fact-dependent, arguably they indicate a move away from the Court's readiness to assume jurisdiction over disputes with only trivial connections to England and Wales.

Public Institution for Social Security v Al Rajaan: Mr Justice Henshaw considers the interaction between Article 23 (exclusive jurisdiction clause) of the Lugano Convention with Article 6 (co-defendants)

The claimant, Kuwait's pensions authority, was bound by an exclusive jurisdiction clause to sue some of the defendants in Geneva (Article 23 of the Lugano Convention ("Lugano")). The claimant sought, however, to pursue related claims against the same defendant, or related claims against another defendant, in England and Wales on the basis that one of the defendants was domiciled in England and Wales (Article 6 of Lugano).

Article 6(1) of Lugano allows co-defendants to be sued in the courts of the place where any one of them is domiciled, provided the claims are so closely connected as to render it expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from parallel proceedings. The claimant submitted, relying on *Aeroflot v Berezovsky and others*[3], that the Court should first assess the applicability of Article 6(1) and, if that jurisdiction is engaged, only then should it consider whether any party is entitled to derogate from that jurisdiction pursuant to Article 23. The claimant's position was, in essence, that if the criteria of Article 6 are fulfilled, there should be no reconsideration of the position in light of (successful) reliance by one or more parties (in whole or part) on Article 23.

Henshaw J disagreed, finding that it was logical to consider Article 23 first because *"it operates at a higher stage in the jurisdictional hierarchy than Article 6"*. If and to the extent that there is an Article 23 jurisdiction agreement in favour of another forum, the court cannot assume jurisdiction under Article 6(1).

Adopting this approach, and having considered the possibility that the English and Swiss courts might reach irreconcilable judgments on closely connected factual issues (including on evidence which could be expected to be adduced as to the relevant defendants' knowledge of the bribery claims and their honesty), Henshaw J ultimately decided that it would be *"wholly inconsistent with the policy objectives pursued by Article 6 and the Lugano Convention as a whole"* for the English court to assume jurisdiction over the claims.

In so deciding, Henshaw J distinguished the facts from those in *Aeroflot* because, in this case: (i) the risk was of inconsistent findings against the same defendants (rather than between different defendants); and (ii) the courts chosen in the exclusive jurisdiction clause were also the courts of the relevant defendants'

places of domicile. Therefore, all claims against any given defendant could be pursued in a single forum.

Nigeria v Royal Dutch Shell Plc: Mr Justice Butcher considers the application of Article 29 of Brussels (Recast) to civil claims brought as an adjunct to criminal proceedings

In his decision dated 22 May 2020, Butcher J considered several defendants' applications challenging the jurisdiction of the court (Mrs Justice Cockerill having granted permission to serve the proceedings out of the jurisdiction at the *ex parte* stage).

The Claimant (the "FRN") had brought proceedings in December 2018, claiming that certain Nigerian oil rights ("OPL 245") were procured by a fraudulent and corrupt scheme in which the defendants had participated, and that the defendants were liable to it for bribery, dishonest assistance and unlawful means conspiracy.

The principal basis on which the relevant defendants (being mainly companies in the Shell and Eni groups) disputed the jurisdiction of the court was Article 29 of the Brussels Regulation (Recast) ("the Regulation"):

" … where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established."

In February 2017, the Public Prosecutor of Milan had charged a number of individuals (including current or former officers/employees of companies in the Shell and Eni groups) with the offence of international bribery in relation to OPL 245. The FRN joined the Italian criminal proceedings as a civil claimant, and the first, second, fourth and eighth defendants were joined to those proceedings (the first and eighth defendants on the basis of vicariously liability). The aim of the civil action was stated to be, among other things, *"compensation"* for *"damages suffered as a result of the alleged crimes"*. The trial began in March 2018 and was expected to conclude by autumn 2020.

The primary position taken in the applications was: (i) that the court was required to decline jurisdiction in light of the FRN's ongoing claims in Italy to obtain financial relief against many of the defendants; and (ii) that, if the court declined jurisdiction under Article 29 of the Regulation over the claims against the first and eighth defendants, the entire proceedings should be dismissed because the first defendant was the *"anchor defendant"* (in that it was domiciled in England).

In the alternative to the application under Article 29, the defendants sought a stay of the proceedings under Article 30 of the Regulation or as a matter of case management, pending a final determination of the Italian proceedings.

The Court explained that on the basis of the authorities Article 29 of the Regulation has three requirements: the same parties, the same *cause* and the same *objet*.

Same parties – There was *"no doubt"* that the Italian civil claim had been brought by the FRN against the first and eighth defendants to the English claim. The fact that there were additional parties to the English action did not prevent the claims being *"between the same parties" (Owners of Cargo Lately Laden on Board the Tatry v Owners of the Maciej Rataj[4])*.

Same cause – The test was as set out in *JP Morgan Europe Ltd v Primacom*[5]: it is necessary to look at the basic facts (whether in dispute or not) and the basic claimed rights and obligations of the parties to see if there is coincidence between them in the actions in different countries, making due allowance for the specific form that proceedings may take in different national courts. Applying that test, the basic facts were *"clearly"* the same in each case. So too were the basic claimed rights, being the right not to be adversely affected by conduct of the first defendant which involved or facilitated the bribery and corruption of the FRN's ministers and agents, and the right to redress if there was such bribery and corruption.

Same objet – The question to be answered was whether the two proceedings had the *"same end in view"*, which was to be *"interpreted broadly" (Aannemingsbedrijf Aertssen v VSB Machineverhuur[6])*. On that basis, Butcher J considered that the two claims against the first defendant did have the same end in view, namely to obtain redress for the first defendant's alleged responsibility for bribery and corruption in relation to OPL 245. While, in the English action, claims were also made for rescission of the relevant agreements, declaratory relief, an account

of profits and tracing remedies, a *"key part"* of the redress sought was monetary compensation (which was the only relief claimed in the Italian proceedings).

In light of his findings, Butcher J considered that he was required to decline jurisdiction over the action against the first defendant pursuant to Article 29 (and therefore the claims against the other defendants).

However, Butcher J added that, if he was wrong in saying that the claims had the same *objet*, the effect would be the need to recognise that there was more than one *objet* of the English proceedings. In those circumstances, a *"claim by claim approach"* should be adopted, and Article 29 would apply insofar as there was a claim with the same cause and objet in each set of proceedings. Butcher J noted that "*difficulties which might otherwise arise from the fragmentation of proceedings can usually be addressed by reference to Article 30 or, in this jurisdiction, by a case management stay*".

This decision confirms that Article 29 of the Regulation applies even when the foreign proceedings are brought as an adjunct to a criminal process (notwithstanding Lord Bingham's obiter comments in *Haji-Ioannou v Frangos*[7] that it would be wholly inappropriate for there to be a stay under the equivalent of Article 30 of the Regulation where the Greek claim in question was *"tacked on as an appendage to criminal proceedings"*). It also suggests (*obiter*) that Article 29 can still apply if one set of proceedings has more than one *objet*.

[1] [2020] EWHC 2979 (Comm)
[2] [2020] EWHC 1315 (Comm)
[3] [2013] EWCA Civ 784
[4] C-406/92; EU:C:1994:400; [1999] Q.B. 515
[5] [2005] EWHC 508 (Comm)
[6] C-523/14; EU:C:2015:722; [2015] 10 WLUK 603
[7] [1999] 2 Lloyd's Rep 337

11. The role of litigation funders

In a recent episode in the case of *Akhmedova v. Akhmedov*[1], concerning the long-running and bitter matrimonial dispute between Farkhad Akhmedov and his former wife Tatiana Akhmedova, the Court was asked to consider an application by the couple's son, Temur, who sought an injunction preventing his mother, Ms Akhmedova, from instructing lawyers funded by a third-party litigation funder.

Background

The English High Court handed down the original judgment in the ancillary relief proceedings between Mr Akhmedov and Ms Akhmedova in December 2016. The Court ordered that Mr Akhmedov pay Ms Akhmedova £453,576,152 (the largest U.K. award in divorce proceedings).

Ms Akhmedova instructed Burford Capital, a litigation funder, to help enforce the judgment through providing funding for the enforcement proceedings and by assisting with locating Mr Akhmedov's assets. Ms Akhmedova had claimed that Mr Akhmedov and the couple's son, Temur, were working together to move the father's assets beyond the reach of Ms Akhmedova in order to frustrate enforcement of the divorce judgment. In the enforcement proceedings, Temur challenged the legality of the funding arrangement, alleging that the arrangement would be contrary to the public policy against champerty (an illegal agreement involving a third party with no connection to the proceedings who is hoping to share the award if successful).

The basics of litigation funding

Despite the increasingly common use of litigation funding in English proceedings, several obstacles and restrictions still remain. Litigation funders must be mindful of champerty, confidentiality and conflicts of interest as they might still constrain their involvement in cases. In particular, champerty used to limit the involvement of third party funders on the public policy ground that they might "sully" the purity of justice. Recent decisions have highlighted that litigation funding will not amount to champerty as long as the arrangement does not offer a disproportionate share of the control or profit, or a tendency to corrupt justice.

The challenge put forward by Temur

Ms Akhmedova entered into a funding agreement with Burford in 2018, some time after the original award in the divorce had been granted. The funding agreement stipulated that Ms Akhmedova would retain control and discretion over the proceedings save for if she were to default in paying Burford. In his challenge to the legality of the agreement, Temur argued that it required Burford to consent to any settlement reached during the enforcement proceedings. Temur alleged that the control which Ms Akhmedova was able to exercise would have been severely limited by this provision, which raised public policy concerns of litigation funders exerting too much influence on proceedings.

Further, and importantly in this case, Temur contended that the use of a litigation funder in the context of a family matter was contrary to public policy. He stated that conditional fee agreements, a similar form of agreement to the one used by Burford and other litigation funders, were expressly prohibited by statute[2] from applying in family litigation. The reason behind this prohibition was to protect the integrity of public civil justice in family proceedings. It was argued that family cases had inherently different character, in that they were concerned with reaching a fair and

just conclusion, not with winning and losing. Temur's position was that litigation funding was contrary to this fundamental principle, as it simply sought to maximise the award. It was submitted that, by extension of the purpose behind legislating against conditional fee agreements in family proceedings, third party funding should be prohibited on the same grounds.

Ms Akhmedova's response

Ms Akhmedova applied to strike out Temur's counter-claim on the basis that there is no argument in fact or law that her funding arrangements were unlawful or contrary to public policy. Ms Akhmedova contended that even where champerty was at issue, the court did not intervene by granting injunctions. It was argued that champerty played a much more limited role than it once had done.

In addition, Ms Akhmedova submitted that Temur had no standing to seek relief in respect of her funding arrangements. She requested that the Court strike out Temur's claim because there were no reasonable grounds for bringing or defending his application; the facts pleaded did not disclose any legally recognisable application against Ms Akhmedova.

The Court's decision

In deciding the matter, Mrs Justice Knowles considered the extent of the control that Burford could exert under the agreement and the potential implications. The judge noted that, following *Davey v Money*[3], the degree of control that would tend to undermine or corrupt the process of justice would have to be such that a litigation funder would be able to *"supress evidence, influence witnesses, or procure an improper settlement"*. In light of the first objection raised by Temur, requiring Burford's consent to a settlement would fall short of the high bar set in *Davey v Money*. The judge found that the requirement for Burford's consent to any final settlement was a *"perfectly proper protection"* for Burford and did not hinder justice.

In her judgment, Knowles J focused on the public policy role played by litigation funders. She stressed how they provide an *"invaluable service in the right case"* providing the opportunity to many who would otherwise be unable to pursue justice, especially in light of recent legal aid cuts. The judge was not attracted to the submission made by counsel for Temur that there was an analogous link between conditional fee agreements and third party funding arrangements, and that therefore, since conditional fee arrangements were not allowed in family proceedings, public policy should also prohibit third party funding in family proceedings.

In her view, in the case of a conditional fee arrangement, there was a concern about a person's lawyer having a financial interest in the outcome of proceedings which might improperly influence both the advice and the representation given; whereas those concerns did not arise in third party funding arrangements where the lawyers conducting the proceedings have no financial interest in the outcome. The judge also concluded that the form of funding used would not be champertous because the degree of control that Burford could exercise was not significant enough.

Knowles J stated that, in addition, Temur did not have standing to seek injunctive relief on the grounds he had advanced (namely *"to protect the integrity of public civil justice"*). In circumstances where Temur had pleaded no cause of action against Ms Akhmedova in respect of her funding arrangements which prejudiced him, with the tort of champerty having been abolished, the judge could not see any injustice which would render appropriate the grant of injunctive relief. The judge highlighted that it appeared *"unjustifiable to argue that equity should now start to intervene by the grant of injunctive relief"*.

The judgment provides a welcome affirmation of the important (and expanding) role being played by litigation funders in civil proceedings.

Certain concerns over the extent of the control and financial pressures that funders could exercise or exert may remain. However, where a funding arrangement strikes the right balance, litigation funders can offer effective support to the judicial system and the pursuit of fair and just outcomes. They provide parties with significant opportunities in challenging or defending themselves against much larger and more financially powerful individuals or entities. Ultimately, as noted by Knowles J, they can provide *"a necessary and invaluable service in the right case"*.

[1] [2020] EWHC 1526 (Fam)
[2] s.58A of the Courts and Legal Services Act 1990
[3] [2019] EWHC 997 (Ch)

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