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COMMODITIES CASE UPDATE

JANUARY 2021

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January 2021

Happy New Year! We are delighted to present the tenth Commodities Case Update. The update provides a summary of some of the key cases relevant to the commodities sector from the last six months.

With a market leading commodities team we have over 100 lawyers that provide a full service internationally. The group is led by a team of over 25 partners, who are based in all our offices around the world, including in the major trading hubs of London, Paris, Geneva, Dubai, Singapore, Hong Kong, and Sydney.

If you would be interested in receiving a bespoke training session and presentation about the cases referred to in this update or any other cases of interest, please contact your usual contact at HFW, or the authors of this update Andrew Williams and Damian Honey.

As well as being of general interest for those working in commodities, our intention is that for lawyers working in-house, a bespoke training session tailored to your specific needs will allow you to meet the change in CPD requirements introduced by the SRA. It will allow you to demonstrate that you have reflected on and identified your L&D needs and met these. Please do contact us if this would be of interest.

We hope that you find this update useful.

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Totsa Total Oil Trading SA v New Stream Trading AG [2020] EWHC 855 (Comm)

Court: Commercial Court

Date: 27 March 2020 (transcript only recently available)

Summary

This was a claim for summary judgment, heard remotely due to the Covid 19 pandemic. The claimant sought repayment of its advance payment to the defendant for a consignment of naphtha. The defendant argued that a force majeure (FM) event had occurred so that under the terms of the contract, it did not have to repay the payment. The Court found that the correct construction of the relevant clause in the sale contract required the advance payment to be repaid in the event of non-delivery for any reason whatsoever.

Facts

In March 2019 the claimant buyer (Totsa) had made an advance payment of almost US$14m to the defendant seller (New Stream) for the purchase of a consignment of naphtha. The sale contract contained a reimbursement clause which provided that, "save for clause 16.6", if the product was not delivered "for any reason whatsoever," New Stream would reimburse Totsa the advance payment plus accrued interest and pay any late interest on the outstanding advance amount, within five working days of Totsa's written demand. Clause 16 was a FM provision under which where a FM event occurred, the time for delivery would be extended but if delivery was delayed for more than 30 days, either party was entitled to terminate.

In April 2019, New Stream gave notice of an alleged FM event and delivery was not made. Totsa disputed that a FM event had occurred and in May 2019, served a written demand on New Stream under the reimbursement clause for repayment of its advance payment plus interest. New Stream argued that the reimbursement clause did not apply as a FM event had occurred which prevented delivery of the cargo. Totsa terminated the contract in October 2019 and re-issued its demand for repayment of the advance payment, arguing that there was no FM event and New Stream was in default but even if there had been an FM event, the reimbursement clause was clear that the advance payment was to be repaid if there was a non-delivery for any reason whatsoever.

Findings

The Court held that Totsa was entitled to repayment. This was because Totsa's construction of the reimbursement clause was correct: taken with the FM clause, the reimbursement clause was the agreed provision between the parties for the repayment of the advance sum in circumstances where there had not been delivery of the cargo, either by reason of a FM event or for any other reason whatsoever. The purpose of the reimbursement clause cross-referring to the FM clause was to reinforce that if a FM event arose, it was open to the parties to agree a different arrangement from the one that would otherwise apply under the reimbursement clause. However, where the failure to deliver was due to FM that had triggered an extension to the delivery timeframe, it could not be said that product had not been delivered "in accordance with the contract and any agreed extension" until the contract was actually terminated in accordance with its terms. If there was an FM event extending the delivery period, this would affect the amount of interest for late payment payable.

HFW Comment

Given the focus on FM claims as a result of the pandemic, this decision will be of wide interest. Even a vaild FM claim will not necessarily relieve a party of its contractual obligations permanently. That will depend on the circumstances, the FM clause and the construction of the contract. It is worth noting again the importance of contractual notices: here, the Court upheld Totsa's notice of termination in October 2019, in which Totsa terminated first on the basis of repudiatory breach (assuming no FM event) but also on the basis that if there had been a FM event, 30 days had passed, thus allowing Totsa to terminate under the FM clause. The Court noted that analysis of the notice was straightforward because it had been "drafted by those with an awareness of the niceties of different bases upon which a contract can be terminated."

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Hamblin v World First Ltd and Moorwand NL Ltd [2020] EWHC 2383 (Comm)

Court: Commercial

Date: 23 June 2020

Summary

Even where the "victim" is a shell company with no directors, the Court is prepared to find that a bank owes a duty of care to it in the event of fraud.

Facts

The *Quincecare* duty was first established in *Barclays Bank plc v Quincecare Ltd,*[1] where the Court held that the relationship between a bank and its customer was one of agent and principal and therefore, the bank owed fiduciary duties to the customer. Consequently, *"it was an implied term of the contract between the bank and the customer that the bank would observe reasonable skill and care"* when executing the customer's instructions. It would be a breach of this implied duty if the bank executed the customer's instructions knowing that they were dishonestly given, or shut its eyes to the obvious fact that the customer's instructions were being dishonestly given; or acted recklessly in failing to make the inquiries into the customer's instructions that an honest and reasonable person would make; or executed the customer's instructions whilst it had reasonable grounds for believing that the instructions were an attempt to misappropriate funds.

In this case, the second defendant, D2 was used as a vehicle for fraud by unknown individuals. There was no suggestion of fraud by the first defendant D1, which is a payment service provider. The fraudsters set up an account with D1 in the name of D2, on the application of a Mr Carter, whose identity had been stolen by them. Mr Carter was not a director of D2. In fact, D2 had no registered directors at all. The fraudsters then persuaded the claimants to open an investment account and transfer money to D2's account. D1 later paid out this money, apparently on D2's instructions. The money paid out was stolen and the claimants commenced proceedings against both D1 and D2 to recover it. The claim against D1 was brought on the grounds that D2 was a trustee of the claimants' funds and that the claimants (as beneficiaries of the trust) were able to bring representative proceedings. The claim was based in part on an alleged breach by D1 of its *Quincecare* duty to the claimants. D1 applied for reverse summary judgment to strike out the claims on the basis that they were bound to fail as a matter of law. They argued the claim for breach of the *Quincecare* duty was flawed:

(i) There could be no loss where the breach was in the knowledge of those in control of the customer (ie the fraudsters). The claim would fail for circuity of action as D1 could then sue D2 for fraudulent misrepresentation.

(ii) The only claim available to the claimants was a claim for dishonest assistance (which was not available on the facts of this case).

Findings

The Court followed the decision in *Singularis Holdings Ltd v Daiwa Capital Markets* [2], and held that the claimants had a reasonably arguable case that D1 had breached its Quincecare duty to them. The Court emphasised that the *Quincecare* duty is owed to the company, not to those in control of it, so that it was possible for even a shelf company to be a "victim" of the fraud. Part of the purpose of the duty is to protect the legally distinct company against the misappropriation of its assets. In *Singularis*, the Supreme Court had confirmed that there is no principle of law that the fraudulent conduct of a director is to be attributed to the company if it is a one-man company. The Court applied this principle here, even though D2 was not even a "one-man company" because it had no directors at all. The Court also rejected D1's second argument.

HFW Comment

This was the first decision to follow the Supreme Court's ruling in *Singularis* on the *Quincecare* duty of care. It demonstrates the courts' willingness to uphold this duty against financial institutions, which will be a concern to them but which may present an opportunity for recovery for those who fall victim to fraudsters.

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[1] [1992] 4 All ER 363

[2] [2019] UKSC 50

Alegrow S.A v Yayla Agro Gida Ve Nak A.S. [2020] EWCH 1845 (Comm)

Court: Commercial Court

Date: 10 July 2020

Summary

In a claim involving termination of a sale contract for non-delivery, the Court varied and remitted an arbitration award back to the GAFTA Appeal Board (the 'Board'). It held that the Board had made an error of law in finding the claimant in repudiatory breach of contract. The Court found that, in fact, the defendant had renounced the contract.

Facts

The claimant ('Alegrow') entered into a contract with the defendant ('Yayla') for the sale and purchase of rice out of Turkey. Shipment was to be between 1 September and 15 December 2016. After a series of delays and unanswered emails, on 29 March 2017 Yayla emailed Alegrow asking them to provide a shipment schedule for the remaining rice, to be shipped by 15 April 2017. Yayla stipulated that if the schedule was not sent by the following day, Alegrow would be in breach of contract as of 31 March 2017, entitling Yayla to terminate. Alegrow did not respond.

Yayla sent a notice of arbitration to GAFTA on 7 April 2017. The First Tier Tribunal ('FTT') concluded that Yayla made time of the essence by its email on 29 March 2017 and held that the notice of arbitration dated 7 April 2017 marked Alegrow's date of default. Alegrow appealed to the Board, which upheld the FTT's award but concluded the date of default was 31 March 2017. It held that Yayla's email of 29 March 2017 made time of the essence and Alegrow's failure to respond amounted to a repudiatory breach of contract. Alegrow appealed to the English Commercial Court on two questions of law:

- Was Yayla contractually entitled to demand a shipment schedule on 29 March 2017?
- Was Alegrow in repudiatory breach in failing to provide a shipment schedule by 30 March 2017?

Findings

The Court found that the Board had made no findings as to where any obligation to provide a shipment schedule was to be found in the contract, or why one should be implied. Consequently, Yayla was not contractually entitled to demand a shipment schedule on 29 March 2017.

The Court held that it was the failure to respond to the request for a shipment schedule that led the Board to find Alegrow in default by 31 March. However, since there was no finding of a contractual obligation to provide the shipment schedule, Alegrow was not in repudiatory breach of the contract by failing to provide it.

The Court held that the Board might have considered Alegrow's failure to provide a schedule to be a renunciation of the contract. The correct legal test for renunciation required the Board to find that Alegrow had indicated clearly and unequivocally that it refused to or could not perform. There was no such finding in the award and the Board did not explicitly make any reference to renunciation. Therefore the Court could not uphold the Board's award on that basis.

Therefore, the Court varied and remitted the Board's award. It held that Yayla had in fact renounced the contract by its notice of arbitration and was thus in breach, allowing Alegrow to claim for damages.

HFW Comment

This case is a reminder of the importance of identifying correctly whether, when and why a contractual counterparty is in repudiatory breach of contract. The inadvertent premature termination of a contract could amount to renunciation and repudiatory breach, giving rise to potential liability for wasted expenditure.

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Marex Financial Limited v Sevilleja [2020] UKSC 31

Court Supreme Court

Date 15 July 2020

Summary

The Supreme Court held that the reflective loss principle did not prevent a creditor of companies from bringing a claim against the owner of the companies who had acted in breach of duty and caused the creditor to suffer loss. In doing so, the Supreme Court significantly narrowed the scope of the reflective loss principle so that it only applies to shareholder claims for diminution in the value of their shares or distributions as shareholders.

Facts

Mr Sevilleja was the owner and controller of two companies which he used as vehicles for trading in foreign exchange (the **Companies**). In 2013, Marex obtained a judgment against the Companies for sums due under contracts. Mr Sevilleja began to strip the Companies of their assets in order to frustrate enforcement of Marex's judgment. The Companies were placed into insolvent liquidation. Marex sought damages against Mr Sevilleja for (i) inducing or procuring the violation of its rights under the judgment and (ii) intentionally causing it to suffer loss by unlawful means. Mr Sevilleja argued that the claim could not proceed as Marex was restricted by the reflective loss principle. The Court of Appeal agreed and Marex appealed to the Supreme Court.

The reflective loss principle was established in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*[3] in which it was held that where a company had suffered an actionable loss resulting in a fall in the value of its shares or distributions to shareholders, a shareholder could not bring a personal action against the wrongdoer. Any loss was merely a reflection of the loss suffered by the company. This principle was based on *Foss v Harbottle*[4] (which held that only the company has a cause of action in respect of its loss). A further rationale was the avoidance of a double recovery scenario, whereby by both claimant and company were claiming the same loss. The principle was expanded in *Johnson v Gore Wood*[5] to apply to any loss of a shareholder, beyond value of the shares and dividends. Thus it applied to employees and creditors who were also shareholders. *Marex* was the first case in which the principle was applied to a pure creditor.

The main issues before the Supreme Court were (a) whether the rule against recovery for reflective loss applied to unsecured creditors who are not shareholders of the company; and (b) whether proceedings for such losses should be permitted when there would otherwise be injustice to the claimant as a result of its inability to sue.

Findings

The Supreme Court unanimously overturned the Court of Appeal's decision, holding that Marex's claim was not prevented by the reflective loss principle. However, the Court was split as to the reasons. Lord Reed, giving the majority judgment, supported the original formulation of the principle in *Prudential*, namely that a shareholder's loss in the form of the diminution of the value of its shares was not separate and distinct from the company's loss. However, he confined the principle to that circumstance alone, so that it did not apply to creditors or employees, even if they were also shareholders. A creditor's relationship with the company was not analogous to the shareholder-company relationship and the creditor's loss was not the same loss as the company's. While there might be a risk of double recovery, the Courts had ways of preventing this, depending on the circumstances of the case. Lord Sales, in the minority judgment, found that the shareholder's and company's losses were distinct and thought the principle should be done away with entirely.

HFW Comment

This judgment has brought welcome clarification and recalibration of the reflective loss principle. From a practical perspective, this is a significant win for creditors who now may pursue their claim against defendant wrongdoers in their capacity as creditor, even if also a shareholder.

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[3] [1982] 1 Ch 204.

[4] (1843) 2 Hare 461.

[5] [2002] 2 AC 1.

K Line Pte Ltd v Priminds Shipping (HK) Co Ltd "Eternal Bliss" [2020] EWHC 2373 (Comm)

Court: Commercial Court

Date: 7 September 2020

Summary

In a claim for demurrage where other loss has been suffered as a result of delay, it is not necessary to identify a separate breach, in addition to delay, in order to claim damages for that loss.

Facts

The parties had entered into a voyage charter for the carriage of soybeans from Brazil to China. After tendering NOR at the discharge port, the vessel was delayed for 31 days due to congestion. On discharge, the cargo was found to be damaged. The vessel owner provided an LOI to the receivers in relation to the damage and later settled the receivers' claim. It then commenced arbitration against the charterer to recover the cost of settling the cargo claim, based on the charterer's failure to unload the cargo within laytime. The charterer argued that the only remedy available to the owner for the breach was demurrage, which was an exclusive remedy. The owner argued that demurrage represented liquidated damages for the detention of the vessel only. Liability for cargo claims was a different type of loss and could be recovered in addition to demurrage. The parties agreed to ask the Court to determine this issue as a preliminary point of law, based on agreed facts. The Court noted that it was well-established that demurrage is a form of liquidated damage. The question was therefore what damage does demurrage cover?

Findings

In reaching its decision, the Court considered previous authorities in detail, including in particular a decision by the Court of Appeal, in *Reidar v Arcos*.[6] There has been legal debate since that decision about whether it mattered if there had been one breach by the charterers: delay, or two: delay and a failure to load a full cargo. There was a difference of approach between the judges in that case but in the end, the Court in this case found that it did not matter. The debate over how to read the judgments in *Reidar v Arcos* had distracted attention from the underlying principle as to the nature of demurrage.

On that principle, the Court held that "*Agreeing a demurrage rate gives an agreed quantification of the owner's loss of use of the ship to earn freight by further employment in respect of delay to the ship after the expiry of laytime, nothing more. Where such delay occurs, the demurrage rate provides an agreed measure by which the parties are bound for the owner's claim for damages for detention, but it does not seek to measure or therefore touch any claim for different kinds of loss, whatever the basis for any such claim*."

In reaching its conclusion, the Court also found that the first instance decision in *The Bonde*[7] - that in order to recover damages in addition to demurrage it is a requirement that the owner demonstrates that the additional loss arose from breach of an additional and/or independent obligation - was wrongly decided and should not be followed.

HFW Comment

This decision resolves what the Court described as a "*long-standing uncertainty on a point of law of significance,"* namely whether it is possible to claim damages in addition to demurrage for loss suffered as a result of delay. It is now clear that a vessel owner does not need to establish a separate breach of contract in order to recover damages for different types of loss. Those chartering vessels in the course of their business should be aware of this potential exposure to damages claims.

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[6] [1927] 1 K.B. 352

[7] [1991] 1 Lloyd's Rep. 136,

Palmali Shipping SA v Litasco SA [2020] EWHC 2581 (Comm)

Court: Commercial Court

Date: 1 October 2020

Summary

In a successful summary judgment application, the defendant persuaded the Court to reject the claimant's loss of profit calculation. An application by the claimant to bring a claim under the transferred loss principle also failed because there was no common intention and/or known object of the parties to the contract to confer a benefit on the third party. The applications related to a dispute arising out of a long term contract of affreightment (COA), with a claim value of US$1.9 billion. Many facts were disputed by the parties and the litigation is complex. This summary focuses only on the defendant Litasco's rather unusual application for summary judgment concerning the way the claimant Palmali had calculated its loss of profit claim.

Facts

Palmali contended that the parties had agreed a COA which gave it the exclusive right to carry oil products to be shipped by Litasco. Litasco denied that the COA was enforceable. Litasco brought an application for summary judgment in relation to the way Palmali had calculated its claim for loss of profits. Palmali claimed an average percentage profitability (APP) of just over 70%, which it applied to its alleged loss of revenue to arrive at the loss of profit claim. In calculating the APP, it distinguished between "third party vessels" and so-called "own fleet" vessels. For the former, the expenses deducted included the chartering costs, demurrage payable, bunkers and port charges. For the latter, only bunkers and port charges were deducted, but not freight, hire or demurrage

Litasco argued that since Palmali did not own its "own fleet" vessels outright, under the terms of the ship management agreements (SMAs) it had entered into, it would in fact incur chartering and other expenses for these vessels, making its losses considerably smaller. Palmali argued that the terms of the SMAs did not reflect the basis on which the vessels were actually operated. It claimed that whenever a COA voyage was completed by one of these vessels, Palmali would invoice the charterers for freight, and the relevant vessel owning company (VOC) would in turn invoice Palmali for freight but that in practice, Palmali would not be required to settle the intra group debt represented by the freight invoice.

Litasco applied for summary judgment dismissing Palmali's loss calculation in relation to these vessels. In the event that Litasco's application succeeded, Palmali applied to amend its claim to pursue recovery of any losses incurred by the VOCs under the principle of transferred loss.

Findings

Litasco's application succeeded. The Court concluded that Palmali had no realistic prospect at trial of establishing entitlement to claim damages calculated on a basis which did not reflect the liabilities the voyages under the COA would have generated.

Palmali's application to amend its claim to include a claim for losses suffered by the VOCs failed. The transferred loss principle required that a common intention and/or known object of the parties to the COA would be to confer a benefit on the VOCs. No benefits would be conferred on them by Litasco under the COA; any benefits would arise solely from Palmali's decision to contract with them. Further, the Court noted that the transferred loss principle requires that the VOCs had no direct remedy to recover their losses. Here, they had a direct action against Palmali under the SMAs.

HFW Comment

This decision is a reminder that the calculation of loss of profits in a claim must be based on clear evidence in order to make it good. In addition, it offers some guidance on the requirements for bringing a claim for transferred loss.

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Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38

Court: UK Supreme Court

Date: 9 October 2020

Summary

Absent an express choice of governing law in an arbitration agreement, the UK Supreme Court has confirmed the correct approach to deciding which law should govern. Where the main contract contains an express or implied choice of governing law, this will usually also apply to the arbitration agreement, unless there are reasons to negate this. In the absence of a governing law clause in both the main contract and the arbitration agreement, the governing law in the arbitration agreement will be deemed to be the law most closely connected to the agreement, usually the parties' choice of seat.

Facts

Following a fire at a Russian power plant in 2016, a dispute arose between the subcontractor Enka, whose faulty work was alleged to have caused the fire, and the property insurer Chubb, which had paid out US$400 million in relation to the fire, and which consequently pursued a claim as the subrogated insurer against Enka. The relevant contract between the Russian power plant and Enka contained an arbitration agreement with London as the seat of arbitration. Both the main contract and the arbitration agreement were silent as to governing law. Chubb started proceedings against Enka in Russia.

Enka applied to the English Commercial Court for interim relief but ultimately, the Court refused to grant an anti-suit injunction restraining Chubb from pursuing the Russian claim, on grounds of *forum conveniens*. The Court also held that the scope and the governing law of the arbitration agreement should be determined by the Russian court. Enka appealed.

The Court of Appeal agreed with Enka and allowed its appeal. It held that the issue of *forum conveniens* did not apply but that because the parties had chosen London as the seat of the arbitration, the English Court was an appropriate court to grant an anti-suit injunction. It held that the arbitration agreement was governed by English law and commented that it was time for some clarity on the question of the significance of the main contract law and the law of the seat for the purpose of determining the law of the arbitration agreement.

Chubb appealed to the Supreme Court. The two questions for the Supreme Court were: (i) the correct approach to determining the proper law of an arbitration agreement; and (ii) the role of the court of the seat of arbitration in determining whether foreign proceedings give rise to a breach of an agreement to arbitrate.

Findings

The Supreme Court held that where an arbitration agreement is silent as to governing law, the correct approach is to look at any express or implied choice of governing law in the substantive contract. This will usually govern the arbitration agreement too, unless there are good reasons for it not to do so. Absent a choice of law, the next step is to consider which law has the closest and most real connection to the arbitration agreement. This will usually be the law of the seat, here English law.

The Supreme Court unanimously confirmed the Court of Appeal's decision to grant injunctive relief restraining proceedings in Russia. However, there were different reasons for reaching that decision. The majority agreed with the Court of Appeal that on a proper construction of the contract, there had been no express or implied choice of Russian law to govern the contract itself and that the closest and most real connection of the arbitration agreement was with the law of the seat, which was English law.

HFW Comment

The Supreme Court's decision has provided clarity on the question of which law governs an arbitration agreement which will be very welcome.

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Aramco Trading Fujairah FZE v Gulf Petrochem FZC [2020] EWHC 3075 (Comm)

Court: Commercial Court

Date: 29 October 2020

Summary

The English Court will robustly support the enforcement of letters of indemnity (LOIs) by means of a mandatory order. However, where a defendant is in financial difficulty, the Court will allow it an opportunity to apply to discharge the order if the defendant can meet the (high) burden of showing that it is impossible for it to comply. The Court will also adopt a practical case management approach, aimed at deciding very similar cases involving the same party in an efficient, consistent and cost effective manner

Facts

The claimant purchaser agreed to buy a cargo of fuel oil from the defendant seller on an FOB basis. The sale contract required the defendant to provide original bills of lading.

The defendant offered an LOI to the claimant in lieu of the original bills. The claimant then entered into a voyage charter with the vessel. Its disponent owner was a time charterer from the ultimate owner. The cargo was discharged on the claimant's instructions against a LOI provided by it to the charterer and with LOIs provided up the shipping chain to the ultimate owner. The claimant did so on the basis that it was itself the beneficiary of the LOI issued by the defendant. Some weeks after discharge, a Swiss bank indicated that it was the holder of the original bills and that its interest had not been discharged. The bank called upon the owner to either deliver the cargo to its order or pay its value and arrested the vessel in Singapore. That claim was passed down by the owner to the claimant and the claimant provided security for the vessel's release. The defendant accepted that the LOI was engaged but maintained that it was unable to put up security because it was in financial difficulty following a slump in the oil price. The LOI contained an exclusive jurisdiction clause in favour of the English Commercial Court and the claimant applied to the Court for a declaration and mandatory order to enforce the terms of the LOI.

Findings

The Court confirmed that "*case law now recognises very clearly that the primary means by which letters of indemnity of this sort should be enforced is by mandatory order…an indemnity requires that the party to be indemnified shall never be called upon to pay, and that equity comes to the aid of the common law by ensuring that mandatory orders can be made in order to give effect to indemnities that have been provided by a commercial counterparty."*

There was no evidence before the Court dealing with the defendant's claim of impossibility and so the Court made a mandatory order but allowed a 28 day period for the defendant to provide the security. This enabled the defendant to apply to vary or discharge the order on impossibility grounds – and clear evidence would be required to establish this.

The Court directed that three "functionally similar" cases involving the defendant raising the same issue should be case managed together so that the issue of impossibility could be determined at a single hearing. This was so that it would be necessary for the defendant to deploy its full case on impossibility only once, therefore resulting in a significant saving of both the court time and ultimately of costs for all involved.

HFW Comment

The turbulence of 2020 has seen issues arising for a number of clients seeking to rely on LOIs where the indemnifying party is experiencing financial difficulties. This case is an example of the system working, in that the indemnity passed up and down the chain, but it is a reminder of the risk inherent in accepting an indemnity in the first place. It also demonstrates the robust support given by the English courts for the enforcement of LOIs, as well as their sensible, commercial approach in relation to hearing similar claims in as efficient and cost effective manner as possible. That may be scant consolation if a defendant is without means to satisfy its obligations.

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Joanne Properties Limited v (1) Moneything Capital Limited (2) Moneything (Security Trustee) Limited [2020] EWCA Civ 1541

Court: Court of Appeal

Date: 19 November 2020

Summary

The Court of Appeal has reversed a Commercial Court decision that a binding settlement agreement was reached in inter-partes communications notwithstanding the use of the "subject to contract" heading.

Facts

By means of a formal settlement agreement, the parties decided to settle legal proceedings in relation to a loan from Moneything ("Defendant") to Joanne Properties ("Claimant"), secured by a legal charge over the Claimant's property. Under the settlement agreement, the parties agreed to sell the property and to ring-fence what was left after deducting the costs of sale and the capital advanced under the loan agreement - £140,000 - until it was decided how it would be divided between them.

In May and June 2019, the Defendant's solicitor put forward offers made "subject to contract" via email and telephone. On 19 June, he made a more formal written offer headed "without prejudice save as to costs" but without the "subject to contract" label, which was not accepted. Both parties' solicitors interpreted this as an offer under CPR Part 36 but later accepted that it did not comply with Part 36. The Claimant's solicitor made two offers by email headed “without prejudice and subject to contract". On 11 July, the Claimant's solicitor made an offer of which the Defendant's solicitor's attendance note recorded: "this was a firm offer with instructions from [the Claimant] to make to [the Defendant] and if accepted, that was the matter concluded…". On the same day in an email headed "without prejudice and subject to contract" the Defendant's solicitor offered to accept £75,000 from the ring-fenced sum, "mechanics and terms to be agreed." The Claimant's solicitor replied later in the day in an email also headed “without prejudice and subject to contract”. The opening word of the reply was "Agreed." He said he would liaise with counsel and "put a proposal to you to achieve the desired end". On 24 July in a letter headed "subject to contract," the Defendant's solicitor wrote to the Claimant's solicitor with a draft consent order with further terms not previously discussed. The parties could not agree the draft order and the Defendant applied to court for an order in those terms. The Claimant maintained that no binding agreement had been agreed. The High Court held that there was a binding agreement. The Claimant appealed.

Findings

The Court of Appeal allowed the appeal. It noted that whether parties intend to enter into a legally binding contract is to be determined objectively, but the context is all important. In this case the most important context was the use of the phrase “subject to contract”: “*The meaning of that phrase is well-known. What it means is that (a) neither party intends to be bound either in law or in equity unless and until a formal contract is made; and (b) that each party reserves the right to withdraw until such time as a binding contract is made.*” Once negotiations have begun, the condition “subject to contract” is carried all the way through the negotiations unless the parties agree to get rid of it either expressly or where it can be implied of necessity.

Here, there was no express agreement that the “subject to contract” qualification should be expunged, nor was agreement to be necessarily implied. In the context of negotiations to settle litigation which are expressly made “subject to contract,” the consent order is the equivalent of the formal contract. The Court rejected the Defendant's submission that the purported Part 36 offer on 19 June had “recalibrated” the parties' discussions, which thereafter proceeded based on offers and counter-offers capable of acceptance. A Part 36 offer is not subject to the ordinary law of contract, in that it remains intact following rejections and may be accepted even in counter-offers. It is therefore not legitimate to deduce that a Part 36 offer recalibrates negotiations taking place in parallel. Even if the Part 36 offer lowers the "subject to contract umbrella," the putative offer and the putative acceptance were each headed “subject to contract” and so had raised it again. The High Court's decision had “*seriously undervalued*” the force of the “subject to contract” label on the legal effect of the negotiations.

HFW Comment

This case is a useful reminder of the importance, impact and duration of the use of "subject to contract" in negotiations.

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Halliburton Company v Chubb Bermuda Insurance Ltd (formerly Ace Bermuda Insurance Ltd) [2020] UKSC 48 27 Nov 2020

Court Supreme Court

Date 27 November 2020

Summary

The Supreme Court has confirmed that arbitrators have a duty to make disclosure where there are multiple appointments concerning overlapping subject matter with only one common party. Whilst this judgment is in respect of a specific situation, it is expected that this case will result in greater disclosure of appointments by arbitrators. The Supreme Court distinguished arbitrations in certain sectors, including commodities, where the test for disclosure should be applied as is appropriate to the arbitration practice in such sectors.

Facts

This case arose from an arbitration between Halliburton Company (**Halliburton**) and Chubb Bermuda Insurance Ltd (**Chubb**) in relation to Halliburton's Bermuda Form liability insurance policy (**Policy**) with the insurer. Following the Deepwater Horizon disaster in 2010, Halliburton settled claims against it by paying around US$1.1 billion and subsequently claimed against Chubb under the Policy. Chubb refused to pay on the basis that the settlement was not reasonable.

Halliburton commenced arbitration against Chubb and the High Court of London appointed Mr. Kenneth Rokison as the third arbitrator. Mr Rokison later accepted two other appointments in relation to Deepwater Horizon, one of which as Chubb's party-appointed arbitrator, but did not disclose these appointments to Halliburton. Halliburton learnt of Mr Rokison's appointments, referred to his duty to disclose potential conflicts of interest and asked for an explanation for his failure to disclose. Mr Rokison confirmed his commitment to remain impartial however offered to resign if both parties agreed. Chubb refused to consent.

Halliburton later sought Mr Rokison's removal as arbitrator and the Commercial Court ruled in Chubb's favour, finding that that the fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that the Mr Rokison was biased. Given that there were not proper concerns regarding Mr Rokison's impartiality, disclosure had not been required. Halliburton appealed.

The Court of Appeal agreed in that the fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that Mr Rokison was biased. However, it held that he ought to have disclosed his subsequent appointments to Halliburton as it was an arbitrator's obligation to disclose facts and circumstances which would or might give rise to justifiable doubts as to their impartiality. Halliburton appealed.

Findings

The Supreme Court considered two questions: (a) whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias; and (b) whether and to what extent the arbitrator may do so without disclosure.

Regarding impartiality, under the objective test for apparent bias (whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased) which is to be considered at the time of the application for an arbitrator's removal, the Supreme Court held that there may be circumstances in which multiple overlapping appointments might result in the conclusion of a real possibility of bias. In order to determine whether an arbitrator is impartial, it is necessary to consider the facts and circumstances of the references.

Regarding disclosure, the Supreme Court held that arbitrators have a legal duty to disclose facts and circumstances which would or might reasonably give rise to the appearance of bias. This test is to be applied at the time when the decision whether to disclose is or should have been made. The failure of an arbitrator to disclose appointments in overlapping references may give rise to the appearance of bias.

The Supreme Court found that Mr Rokison breached his duty of disclosure however they ruled that Mr Rokison should not be removed as the law regarding disclosure was unclear, the time sequence in the references could explain the failure to disclose in that there would have been greater concern of repeat findings for the

later arbitrations, overlap between the three references was unlikely, there was no question of Mr Rokison obtaining a secret financial benefit and there was no basis for inferring unconscious bias.

It was noted that the legal duty of disclosure does not override the duty of privacy and confidentiality under English law, however any required disclosure should be made without obtaining express consent of the parties to the relevant arbitration, absent a contract or binding rules restricting disclosure.

The International Court of Arbitration of the International Chamber of Commerce (**ICC**); London Court of International Arbitration (**LCIA**); and Chartered Institute of Arbitrators (**CIArb**) intervened in the proceedings. They supported the appeal and called for more disclosure obligations on arbitrators.

The London Maritime Arbitrators Association (**LMAA**), represented by HFW, and GAFTA also intervened. However they sought to distinguish the specialised characteristics of arbitrations in their sectors which result in an accepted need for arbitrators to accept repeat appointments from one party without disclosure. Based on their submissions, the Supreme Court emphasised that what is appropriate in institutional arbitration differs to what is appropriate in these sectors where multiple overlapping appointments do not cast doubt on an arbitrator's impartiality and consequently do not require disclosure.

HFW Comment

This case provides important clarification on the arbitrator's duty of disclosure where there are multiple appointments concerning overlapping subject matter with only one common party. This is a specific situation and the nature of arbitrators' duties in other potential conflict situations remains uncertain. However, it is expected that this judgment will result in increased disclosure by arbitrators in order to avoid the risk of potential challenges to appointments and awards. Arbitrators in the distinguished sectors, such as commodities, should apply their legal duty to make disclosure as they consider appropriate to the arbitration practice in their sectors.

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