English Banking Litigation:
Top 10 Cases of 2018

January 29, 2019

Litigation

Welcome to our round up of what we consider to be the top 10 judgments of the English Court in banking and financial markets litigation in 2018.

There remain a high number of cases relating to the financial markets before the English Court, even if those relating to the financial crisis are now tailing off.

It is clear from our review of the prominent decisions of 2018 that where banks and other financial institutions take matters to trial, they tend to win. This is largely down to clear contractual drafting on their part, which is typically upheld by the English Court. The majority of the attempted claims within or around the confines of these contractual structures relate to arguments that enhanced duties were in fact accepted by the banks, or that extra-contractual representations were made and can be relied upon.

Another recurring theme is that of jurisdiction and attempts by counterparties to argue that the English Court does not have jurisdiction over a particular dispute. The English Court is rigorous in its analysis and application of competing jurisdiction clauses and has shown itself to be quite prepared to accept that the parties have submitted themselves to more than one jurisdiction in relation to related subject matters.

We hope you enjoy our selection of the top 10 cases and would welcome any comments.

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Were Implied Representations As To LIBOR Made By Entering Into Swaps?

Property Alliance Group v Royal Bank of Scotland [2018] EWCA Civ 355

Property Alliance Group ("PAG") sought to avoid the millions of pounds of losses otherwise arising from hedges it entered into by arguing that it would not have entered into an interest rate swap transaction with a bank if it had known the bank had been engaged in the manipulation of interest rates as part of the LIBOR scandal. The resulting case provides guidance on the viability of LIBOR claims, and more generally the extent of the duties on banks to explain the nature of their products.

Background

PAG is a property investment and development business, whose primary financing facilities were provided until 2015 by The Royal Bank of Scotland ("RBS"). Between 2004 and 2008, PAG entered into four interest rate swap agreements with RBS, indexed to the sterling London Interbank Offer Rates ("LIBOR") (the "Swaps"). Under these, PAG would be liable to increased payments if interest rates declined but could make money if interest rates went up.

As a result of the credit crunch, interest rates then fell to historic lows. PAG therefore incurred significant break costs when in 2011 it elected to terminate the Swaps early. By this time, PAG had also been placed in RBS' controversial Global Restructuring Group ("GRG").

PAG brought proceedings against RBS in 2013, arguing that RBS had mis-sold the Swaps and abused its contractual rights, including because of its involvement in the LIBOR-fixing scandal during the same period and because of alleged misconduct by GRG.

The case was immediately recognised by the Courts as a "test or lead case" involving "important issues of general market significance". PAG lost on all counts at first instance and appealed to the Court of Appeal, who repeated the hope that this case would be "a useful vehicle for determining what are likely to be central issues in most similar cases". Judgment was handed down in March 2018. PAG was again unsuccessful on each of its claims.

Judgment

The Mis-selling Claims

The Court of Appeal rejected PAG's claim that when selling the Swaps, RBS had been under a duty not only to ensure the information provided was accurate, but also fit for the purpose for which it was intended - the so-called "mezzanine" duty. The Court recommended that this term be avoided, as there was no general duty on banks to bring relevant information to the attention of their counterparties. It could not be concluded from the facts that RBS had assumed such an obligation, nor was it fair, just and reasonable for this to be imposed. The information in fact presented was neither inaccurate nor incomplete, and no breach therefore arose from the failure to share with PAG the content of RBS's internal models, or worked break cost scenarios.

The LIBOR Claims

The Court of Appeal agreed that by offering the Swaps to PAG, RBS was making an implied representation that RBS was not itself seeking to manipulate LIBOR and did not intend to do so in the future. However, this representation extended only to sterling LIBOR, which was the currency by which the parties' financial liabilities under the Swaps would be determined. Although RBS had admitted to manipulation of Swiss Franc and Japanese Yen LIBOR, it denied that it had engaged in manipulation of sterling LIBOR and PAG was not able to establish

otherwise on the evidence. As a result, there was no false representation on which PAG could base its claim for damages.

The GRG Claims

Finally, the Claimant argued that GRG had abused its right under the PAG facility agreement by demanding unnecessary valuations of PAG's property portfolio. The Court of Appeal noted that, in the exercise of its contractual rights, RBS was under no obligation to balance its own interests against those of PAG. However, there was nonetheless an implied qualification that RBS could only exercise this right in pursuit of legitimate commercial aims. On the facts, it had done so.

Comment

The Supreme Court has since declined to hear PAG's appeal of this judgment, which is therefore authoritative for future bank mis-selling claims, including but not limited to LIBOR and GRG claims.

RBS has successfully slammed the door shut on PAG's claim. Banks will take comfort that they will not lightly be held to have assumed responsibility for the commercial decisions of their customers - albeit continued challenges based on implied LIBOR representations seem likely (where limitation permits).

Eddy Eccles

Does A Banker's Reference Give Rise To A Duty Of Care?

Re Banca Nazionale del Lavoro SPA v Playboy Club London Ltd [2018] UKSC 43

This case confirms that a bank giving a reference as to credit-worthiness only owes a duty of care in negligence to a relatively confined class of persons: the recipient and, possibly, a third party reasonably known by the bank to be someone who will rely on the reference.

Background

Mr Bakarat wished to gamble at a casino operated by Playboy Club London Ltd (the "Club"). As per its policy, the Club required a reference as to Mr Bakarat's credit-worthiness from his bank, Banca Nazionale Del Lavoro (the "Bank"). To avoid alerting the Bank to the purpose of the reference, the Club had an intermediary, Burlington Street Services Ltd ("Burlington"), ask for the reference. Burlington did not disclose to the Bank that it sought the reference on behalf of the Club or indeed any other party, or that the purpose of the reference was to facilitate Mr Bakarat's gambling activities at the Club. The reference provided by the Bank to Burlington as to Mr Barakat's credit-worthiness was inaccurate and, when cheques provided by Mr Barakat to the Club were not honoured, the Club was unable to recover around £800,000 owed by Mr Barakat. The Club brought a negligent misstatement claim against the Bank. The Club succeeded at trial, but the judgment was overturned by the Court of Appeal, which held that the Bank did not owe a duty of care to the Club.

Judgment

The Bank won again in the Supreme Court. The Supreme Court held that the Bank did not owe a duty of care to the Club, because: (1) the Bank did not know the reference would be communicated to, and relied upon by, the Club; and (2) that was not the purpose of the reference. The Court distinguished the landmark case of Hedley Byrne & Co Ltd v Heller & Partners Ltd (1964) AC 495 (HL), in which the House of Lords held that a bank which gave a reference to another bank, which was relied on by the customer of the second bank, owed a duty of care to the customer. The Court held that Hedley Byrne was distinguishable, as in that case the bank appreciated that the client would rely on the statement, while on the evidence the Bank was not aware, and could not reasonably have been aware, of anyone beyond Burlington.

Comment

This decision provides guidance for banks when giving credit references. There is no risk of liability in negligence to a third party recipient like the Club, as long as the bank is not and should not reasonably be aware of the existence of the third party, and the purpose of the reference is not that it should be communicated to and relied upon by the third party. As a matter of practicality, a request for a credit reference should specify that it is being provided only to the recipient.

Matthew Davie

Can The Court Decline To Strike Out A Claim That Is Bound To Fail Because It Is Based On A Developing Area Of Law?

Standish v Royal Bank of Scotland plc and another [2018] EWHC 1829 (Ch)

Background

The defendants successfully applied to strike out a claim by former shareholders in Bowlplex Ltd, an owner and operator of bowling sites in the UK. The claimants alleged that share transfers to the defendants, pursuant to two restructuring agreements, were part of an unlawful means conspiracy between RBS and a director of Bowlplex to build an 80% shareholding in the company, and to reduce the claimants to a 20% shareholding. Bowlplex was ultimately sold in December 2015 achieving a net return for shareholders of £22,629,642.

In summary, the claimants claimed unlawful means consisting of: 1) breaches of implied equitable duties not to act unconscionably or with improper motive, 2) a breach of fiduciary duties by Mr S, who had been sent by one of the defendants to observe Bowlplex's board meetings, and who it was claimed was a shadow director, and 3) notwithstanding the written facility agreement between the parties, the relationship was governed by an implied overarching customer agreement, which contained a duty to act in good faith and to treat customers fairly, and such duties were breached.

Judgment

Chief Master Marsh, whilst noting that CPR 3.4(2)(a) imposes a "demanding test", ordered that the claim be struck out. He found that there was no implied overarching agreement taken from an implied customer agreement. Not only was this not sufficiently particularised, but it failed the test of "obviousness" for the implication of a contract or a contractual term. In light of the detailed facility agreement between the parties, the customer agreement argument was a "completely artificial construct that was divorced from the commercial realities of the dealings between the parties". He determined that, while Mr S was arguably a shadow director, there was no reason to believe that his instructions or directions to the board amounted to a breach of fiduciary duty. The claimants agreed to the restructuring terms of their own free will, and were not directed or instructed by Mr S or the defendants to do so.

The Chief Master also held that the Court could permit a claim to proceed to trial that was based on a developing area of law -- even if it was otherwise liable to be struck out. However, he held that the alleged developing area of law in this case (that the duty owed by mortgagees -- of good faith and to act fairly when they are not exercising their security interest -- should be extended to receivers and to managers of property) was not in fact a developing area of law. The case on which this was based, Medforth v Blake [1999] 5 WLUK 421, which had extended this duty to receivers in possession of property, had not been debated in Court or academia over the 19 years since that judgment.

Comment

Standish is a reminder of the challenges faced by claimants who seek to assert breaches of implied duties contained within an alleged implied overarching banking/customer agreement. It also demonstrates that the court will carefully scrutinise any attempt by a respondent to use the "developing area of law" exception as a shield to a strike out application. As ever, it remains to be seen whether Standish and its progeny will discourage creative claimants, or show them how to cure and strengthen their claims.

Ramon Luque

How Do Basis Clauses Interact With The Consumer Credit Act?

Michael Carney and others v. N M Rothschild & Sons Limited [2018] EWHC 958 (Comm)

This case concerns the efficacy of so-called 'basis clauses' (i.e., contractual estoppels setting out the basis on which parties are contracting) in the context of an unfair relationship claim under the Consumer Credit Act 1974 (the "CCA").

Background

The claimants borrowed funds from the defendant bank (the "Bank") pursuant to two loan agreements (the "Loans"). The claimants used the funds to make investments, and the Loans were secured against those investments and certain of the claimants' other properties. At the time they entered into the Loans, the claimants had engaged an independent financial advisor.

As a consequence of the global financial crisis, the investments underperformed. The claimants were therefore unable to discharge the Loans, and the properties over which the Bank held security were placed at risk. The claimants alleged that the obligations arising under the Loans constituted an unfair relationship between them and the Bank, contrary to sections 140A and 140B of the CCA, and requested that the court remove their indebtedness and discharge the security. The claimants also alleged that the Bank had acted as their advisor and, in that capacity, had provided wrongful advice and made misrepresentations.

In its defence, the Bank sought to rely on various clauses in the Loans, which confirmed (among other things) that the Bank had made no recommendation as to the suitability, quality or future performance of the collateral; the claimants had been advised to seek independent legal and tax advice; and the Loans constituted the parties' entire agreement, so no reliance could be placed on any representations not expressly recorded in the written documentation.

A question arose as to how those clauses should be treated in the context of the CCA claims. The Bank asserted that the relevant provisions constituted "basis clauses", which merely confirmed the basis of the parties' relationship, whereas the claimants argued that the provisions gave rise to or contributed to the purportedly unfair relationship and therefore could not be relied upon.

Judgment

With respect to the basis clauses, the High Court accepted the Bank's submissions regarding the purpose and effect of the relevant provisions. In summary, HHJ Waksman QC found that:

- basis clauses are distinct from exclusion clauses, as they do not exclude an existing liability, but "are merely defining the parties' obligations or duties towards each other in the first place";
- "the modern way of looking at such clauses is to say that they are contractual estoppels" (i.e. "the parties have agreed that no representations have been given or relied upon, or that no advice has been given");
- the general rule (particularly in the commercial, non-consumer context) is that "there can be nothing wrong with the parties agreeing the basis on which they deal with each other as set out in such clauses";
- in determining whether a basis clause is in fact an exclusion clause, a court must have regard to (among other things) the natural meaning of the language of the clauses in their commercial context, the particular factual context in which the agreement was made, and the format and location of the clause within the agreement (for example,

"whether it was simply one of a myriad of standard terms may point to it being exclusionary, especially if alongside express exclusions of liability");
- as a factual matter, the Bank did not provide any material advice or assume an advisory role, several clauses made plain that there was no advisory role, and those clauses should properly be construed as basis clauses rather than exclusion clauses;
- likewise, there were in fact no actionable representations, and several clauses expressly reflected that there were no representations, so they were clearly basis clauses that establish a contractual estoppel; and
- the basis clauses were not unreasonable or unfair because (among other things) the claimants had ample time to read the documentation without time pressure, there was no inequality of bargaining power as the claimants had access to their independent financial advisor and did not need to enter into the Loans, two of the claimants took legal advice regarding the Loans, the claimants had in fact read the terms, and the Bank was not required to issue risk warnings as it was not performing an advisory role.

Accordingly, the Bank could rely on the basis clauses, and was found to have no liability to the claimants under the CCA.

Comment

The High Court's judgment provides welcome confirmation to financial institutions that they may well be able to rely on basis clauses in their defence of CCA claims. The judgment highlights that there is often a fine distinction between a basis clause and an exclusion clause, but illustrates how such clauses may be more likely to be effective if they (i) accurately reflect the parties' actual relationship rather than modify that relationship by excluding liabilities that would otherwise exist, (ii) are expressed in plain language, and (iii) are not buried in detailed standard terms alongside exclusions.

Hannah Berry

Ian Redfearn

Does An ISDA Jurisdiction Clause Override A Competing Jurisdiction Clause In A Financing Agreement?

BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA [2018] EWHC 1670 (Comm)

Where there were competing jurisdiction clauses in a finance agreement and a hedging agreement, it was held that the English court had jurisdiction. The court was persuaded by the use of standard ISDA documentation by the parties, which indicated a desire for consistency and certainty in their dealings.

Background

In 2008, BNP Paribas SA ("BNP") entered into a financing agreement (the "Financing Agreement") with Trattamento Rifiuti Metropolitani SPA ("TRM") to fund the development of a waste-to-energy plant on a project financing basis. The Financing Agreement imposed an obligation on TRM to hedge with the bank against the interest rate fluctuation risks associated with the syndicated loan funding the plant. In 2010, TRM and BNP entered into a 1992 ISDA Master Agreement and an interest rate swap.

The Financing Agreement was expressed to be governed by Italian law, and gave exclusive jurisdiction to the Court of Turin. The ISDA Master Agreement, however, was expressed to be governed by English law, and gave jurisdiction to the English courts. A clause in the Schedule to the ISDA Master Agreement stated that 'in the case of conflict between the provisions of this Agreement and the [Financing Agreement] and the [Intercreditor agreement], the provisions of the [Financing Agreement] and the [Intercreditor agreement] as appropriate shall prevail.'

In 2016, BNP issued proceedings in England to seek declarations of non-liability from the court in connection with the interest rate swaps agreed by the parties. TRM argued that the English courts had no jurisdiction in relation to proceedings brought by BNP and applied to dismiss the claim as a result.

TRM submitted that there was no dispute regarding the ISDA Master Agreement and the swap transaction and that there was therefore 'no serious issue to be tried'. TRM did not argue that the ISDA Master Agreement or the associated swap transaction was not valid.

Judgment

The court held that there was a serious issue to be tried: there was a disagreement between the parties, and simply affirming the validity of the agreements between them would not avoid this.

The court dismissed TRM's application that BNP's claim had no jurisdiction in England. It was held that the jurisdiction clauses in the Financing Agreement and ISDA Master Agreement were subject to separate application. TRM's obligation under the Financing Agreement to carry out its hedging strategy under the ISDA Master Agreement was not enough to bring the dispute under the jurisdiction clause of the Financing Agreement.

The court dismissed TRM's argument that the applicability of the ISDA jurisdiction clause should be viewed in light of the Financing Agreement, on the basis that this would result in an inconsistency where two different jurisdiction clauses would be read together.

An appeal from the High Court is currently ongoing.

Comment

Allowing TRM's argument in this case would have allowed the jurisdiction of the ISDA Master Agreement to be overridden, despite its express submission to the English Courts. This case is a clear example of the Court's recognition of the need for certainty in respect of the use and interpretation of standard form documentation that is used internationally. The decision is another reminder that, when using standard form ISDA documentation, parties must always be careful to ensure that the standard clauses and those agreed in the Schedule reflect the true commercial intentions between them. Additionally, the case confirms the Court's willingness to give meaning, whenever possible, to competing jurisdiction clauses, giving rise to potential parallel proceedings.

John McNally

Matthew Beech

How Will The Court Reconcile Apparently Competing Jurisdiction Clauses?

Deutsche Bank AG v Comune Di Savona [2018] EWCA Civ 1740

This case concerned potentially competing jurisdiction clauses under two separate contracts and clarified that, in a European law context, this is a question of construction. This means that the outcome depends on the terms of the contracts and reinforces the need for clear and precise drafting in each contract.

Background

In March 2007, Deutsche Bank AG (the "Bank") and an Italian local authority, Comune di Savona ("Savona"), entered into an agreement whereby the Bank would provide financial advisory services to Savona, including recommending financial instruments which would be dealt with by separate agreements (the "Advisory Agreement"). This Advisory Agreement was governed by Italian Law and the Court of Milan had exclusive jurisdiction.

In June 2007, the Bank and Savona entered into two interest rate swaps under a 1992 ISDA Master Agreement and amended Schedule (the "ISDA Master Agreement"). The ISDA Master Agreement was governed by English Law and the English Courts had exclusive jurisdiction. The ISDA Master Agreement also provided that it constituted the entire agreement and understanding of the parties.

In June 2016, Savona threatened potential legal action against the Bank in Italy in relation to the validity of Savona's entry into the swaps. In response, the Bank issued a claim against Savona in the English Commercial Court. The Bank sought various declarations in relation to the knowledge and understanding of the parties in relation to the swaps. Savona challenged the English Court's jurisdiction.

At first instance, HHJ Waksman QC found that, in the "particular contractual context", the Bank was acting as advisor in accordance with the Advisory Agreement and only as a counterparty pursuant to the ISDA Master Agreement. As the dispute related to the Bank's role as advisor it should be governed by the Advisory Agreement and, therefore, be subject to Italian jurisdiction. HHJ Waksman QC rejected an argument that the entire agreement clause under the ISDA Master Agreement prevented Savona from relying on the Italian jurisdiction clause.

Judgment

Overturning HHJ Waksman QC's decision, the Court of Appeal held that the English Courts had jurisdiction pursuant to the ISDA Master Agreement.

Article 25 of the Brussels Recast Regulation[1] permits parties to agree that an EU Member State shall have jurisdiction over disputes in connection with a "particular legal relationship". As the Advisory Agreement provided that separate agreements would deal with financial instruments, there was "a natural and reasonable distinction" between the generic wider relationship under the Advisory Agreement and the specific relationship governing the swaps.

The entire agreement clause under the ISDA Master Agreement was a strong confirmation that the swap contracts were separate and self-contained and that any dispute relating to them

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[1] Regulation (EU) No. 1215/2012 on jurisdiction and enforcement of judgments

came within the jurisdiction clause of the ISDA Master Agreement and not of the Advisory Agreement.

As such, any dispute relating to those contracts was to be determined by the jurisdiction clause in the ISDA Master Agreement.

Comment

This is another warning to be careful when drafting related agreements, as a Court will seek to give discrete application to each competing jurisdiction clause, and parties may find themselves in an unexpected Court, or even in multiple Courts at the same time.

Rosie Klement

When Will The English Court Take Jurisdiction In The Presence Of Competing Jurisdiction Clauses?

Citibank NA, London Branch v. Oceanwood Opportunities Master Fund and others [2018] EWHC 305 (Ch)

Background

In 2015, a paper industry group of companies, Norske Skog (the "Group"), entered into a complex financing transaction with Oceanwood Opportunities Master Fund, Foxhill Capital Partners LLC and Foxhill Opportunity Fund, L.P., and other creditors. The London branch of Citibank N.A. was the security trustee and agent for the transaction. The terms of the transaction were governed by three contracts. For the purposes of this case, the two most important contracts were:

1. an indenture between the Group and Citibank (the "Indenture"), which was the principal document governing the terms of the debt. As holders of secured notes under the Indenture, Oceanwood and Foxhill were bound by its terms in that capacity. The Indenture was governed by New York law and subject to a New York jurisdiction clause; and
2. an inter-creditor agreement governing the relationship between the creditors and Citibank (the "ICA"). The ICA was governed by English law and subject to an English jurisdiction clause.

The Group experienced financial difficulties and defaulted under the financing transaction. When a refinancing proposal was not successful, the Group's parent companies filed for insolvency. In its capacity as security trustee, Citibank sought to commence a public sale process for the shares in Norske Skog AS, which represented the real value in the Group.

Oceanwood, as holder of 51% of the debt, intended to participate in the public bid, but Foxhill was concerned that Oceanwood would use its position to influence the sales process to purchase the shares on favourable terms. Foxhill therefore sought to exclude Oceanwood from the creditors' decision-making process under a clause in the Indenture which removed voting rights for those who "control" the debtor companies — which, according to Foxhill, included Oceanwood. In contrast, Oceanwood sought to rely on provisions in the ICA which would allow Citibank to seek and act on the majority directions or consents of the secured creditors.

Citibank made an application for directions as to who made up the directing group of creditors. In the context of that substantive dispute, a preliminary jurisdictional dispute arose between the parties. Foxhill argued that the application ought to be heard before the New York courts because it was an issue relating to the Indenture, while Oceanwood and Citibank argued that the English courts had jurisdiction under the terms of the ICA.

Judgment

The High Court held that the English courts had jurisdiction to hear the dispute because the substantive issues between the parties -- instructions given under the ICA -- arose out of or in connection with the ICA. This was despite the dispute being about an entitlement to sell that arose out of the Indenture and the Indenture's jurisdiction provision being exclusive. Without the context of the Indenture, the Court held that the dispute would plainly fall within the scope of the ICA jurisdiction clause. The Court tackled the issue by deciding that the Indenture's exclusive jurisdiction clause was in fact permissive rather than absolute, so that the parties had not in fact promised not to bring proceedings elsewhere.

Among other things, the Court held that there were several factors pointing towards the parties' intention that the choice of English jurisdiction should be given effect in circumstances such as these: the ICA and Indenture were entered into on the same day and formed part of one package transaction; the ICA was expressly cross-referred to in the Indenture (therefore it would have been contemplated that proceedings could be brought in England under the ICA); and the ICA captured creditors who were not party to the Indenture, and had a separate interest in relation to the jurisdiction provision.

Comment

This was a difficult case. The decision seems to have been driven, in part, by case management considerations, as a decision was needed urgently to preserve value in the Group, and also by common-sense considerations, because Oceanwood had "control" only as a result of being a creditor, rather than as an original shareholder. It confirms the Court's position that exclusive and non-exclusive descriptors are "convenient labels" and the Court is really interested in what the parties promised not to do. It also confirms a permissive attitude from the English courts on jurisdiction.

The case illustrates the need for parties to consider the interaction of jurisdiction clauses in complex financing transactions involving multiple contracts. Where related contracts have one or more different jurisdiction clauses, the interplay of the clauses may cause preliminary jurisdictional disputes, and lead to unpredictable litigation outcomes. Parties should be mindful of this risk when negotiating multiple contracts in relation to a single transaction, and ensure that the jurisdiction clauses in the relevant documents are compatible. In some circumstances, it may also be prudent for the parties to consider entering into an umbrella agreement regarding their choice of law and jurisdiction, so that those choices apply consistently to all substantive agreements relating to the transaction.

Franka Felsner

Ian Redfearn

Are Assignments Of Rights Valid Even Where Made Without The Consent Of The Original Parties?

First Abu Dhabi Bank PJSC (formerly National Bank of Abu Dhabi PJSC) v BP Oil International Ltd [2018] EWCA Civ 14

Background

BP entered into a $68 million contract with Societe Anonyme Marocaine de L'Industrie de Raffinage ("SAMIR") for BP to deliver oil to SAMIR. The contract prohibited either party from assigning any of their rights or obligations without the consent of the other.

Subsequently, BP and First Abu Dhabi Bank ("FAB") entered into a purchase letter, under which the bank would advance to BP the sums due from SAMIR. In return, BP would pay to FAB 95% of the amounts due from SAMIR. The purchase letter obligated BP to assign its rights under the SAMIR contract to FAB or, in the event that this was not possible, to grant certain rights to FAB (such as holding monies on trust for FAB, sub-participation and subrogation rights for FAB). However, BP did not obtain SAMIR's consent to assign.

The purchase letter also contained a representation and warranty stating that BP, "is not prohibited by any security, loan or other agreement, to which it is a party, from disposing of the Receivable evidenced by the Invoice as contemplated herein and such sale does not conflict with any agreement binding on [BP]".

SAMIR filed for insolvency in November 2015 and, as a result, the bank did not receive payment. The bank issued proceedings against BP in the Commercial Court and obtained judgment on the basis that the prohibition on BP's assignment of its rights under the Contract meant that it was in breach of its representation and warranty in the purchase letter. BP appealed the decision.

Judgment

The court allowed BP's appeal. It held that although BP was prohibited from assigning its rights under the SAMIR contract, this did not prevent BP from using any of the fallback methods of transferring the 'fruits' or the economic benefit of the receivable as contemplated in the purchase letter.

The Court of Appeal acknowledged that it was bound by the House of Lords' decision in Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd in which the court held that an assignment in breach of a no-assignment clause was ineffective. It nevertheless suggested that it agreed with commentators who had expressed the view that the Court of Appeal had gone too far in Linden Gardens, as there was no particular policy reason for an assignment to be void as between assignor and assignee if made in breach of a no-assignment provision. This was because the beneficiary of the contractual prohibition on assignment could ignore the assignment and, as such, would ordinarily be adequately protected.

When evaluating whether there had been a breach of warranty, the Court of Appeal considered the contract as a whole. It determined that it was plainly contemplated in the purchase letter that an assignment may not be possible hence the other fallback methods for ensuring the benefits of the receivable were received by the bank were included in the contract. The court held that, on this basis, BP was not in breach of the warranty.

Comment

The Court of Appeal's decision is significant because it suggests that the Courts are prepared to relax the prior position that breaches of non-assignment clauses render the assignment of no effect.

Laura Richardson

Matthew Beech

Is Fraud Alone Enough For A Court To Stop A Bank Paying Out Under A Guarantee?

Tetronics (International) Limited v HSBC Bank Plc and Blue Oak Arkansas LLC [2018] EWHC 201 (TCC)

Background

Under a supply agreement, Tetronics had contracted to provide the engineering design and supply of a plasma system for Blue Oak's untreated electronic waste plant (a system which extracts small quantities of precious metals from electronic waste). The contract was governed by the laws of the state of New York and was subject to an ICC arbitration clause. As part of the contractual arrangements, Tetronics had its bank, HSBC, provide an advance payment guarantee of just over £3 million, governed by the laws of England and Wales, to Blue Oak in relation to the underlying contract.

The supply agreement allowed for termination by Blue Oak in the event Tetronics was in breach of its material obligations under the agreement (i.e., to deliver the plasma system). Prior to exercising its rights, Blue Oak had to give 30 days' notice for Tetronics to remedy the breach before termination could occur. In the event the agreement was terminated, Blue Oak was entitled, upon notice, to draw down, from the advance payment guarantee, the full amount of any outstanding damages due to the termination.

In January 2018, Blue Oak sought to call on the guarantee on the basis of material breach by Tetronics without asserting termination. The day after the call on the guarantee was received by the Bank, Tetronics obtained an injunction on an ex parte basis.

Blue Oak was subsequently joined to the proceeding as an intervener and made an application for the injunction to be discharged. Separate to the Court proceeding, an emergency ICC arbitration had commenced between Tetronics and Blue Oak.

Judgment

The general rule is that a Court will not intervene to prevent a bank from making payment under a guarantee following a compliant presentation of documents, except in the event of fraud. Even if a prima facie case of fraud is established, the Court must be satisfied that the balance of convenience favours intervention.

Having determined Blue Oak's demand was valid on its face, Mr Justice Fraser applied the test for determining a prima facie case of fraud in a pre-trial context. Applying the test, the Court found that it was seriously arguable that the only realistic inference was that:

1. Blue Oak could not honestly have believed in the validity of its demands under the Guarantee; and
2. The Bank was aware of Blue Oak's fraud.

Having established a prima facie finding of fraud by Blue Oak, the Court had to determine whether there were "extraordinary facts" meaning the balance of convenience favoured the continuation or discharge of the injunction; in effect, whether or not the Bank should pay out under the call.

When the injunction was granted, the Court had relied heavily upon the evidence of Tetronics that it would face insolvency should the Bank pay out under the guarantee.

Separate to the Court proceeding, evidence in the emergency arbitration showed, and counsel in the arbitration conceded, that this was not correct. It was shown that shareholders would be

able to source additional funds, so that Tetronics would not become insolvent. When this was brought to the attention of the Court (without objection from any party as to its confidential nature) it was held that in the absence of impending insolvency, the balance of convenience did not support the continuation of the injunction. Accordingly, the injunction was discharged. In consequence, the Bank became obliged to make payment under the guarantee.

Comment

The case confirms the position that it will require extraordinary facts before the balance of convenience favours a Court preventing a bank paying out under a guarantee. It also serves as a reminder that confidential dispute resolution processes won't always remain confidential.

Jonathan Heath

When Will The English Court Grant An Application For Examination In Aid Of Foreign Proceedings?

Aureus Currency Fund L P and ors v Credit Suisse Group AG & ors, Mitesh Parikh [2018] EWHC 2255 (QB)

When exercising its discretion on an application to examine a witness in the UK in aid of foreign proceedings, the Court, save in exceptional circumstance, will not conduct its own enquiries as to the relevance of the questions sought to be answered by the requesting court, relying instead on the requesting court's assessment of the relevance of the evidence to the civil proceedings before it. Even so, applicants should tailor the topics for examination to the witness.

Background

This was an application by Aureus under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the "1975 Act"), to examine Mr Parikh in aid of Aureus' class action in New York against 16 international banks claiming consequential damages for alleged manipulation of foreign exchange ("FOREX") markets. By the time of the application, Aureus had settled its claim against all of the defendant banks except Credit Suisse. Mr Parikh was a former employee of one of the defendant banks against whom the claim had been settled, Goldman Sachs.

The application was made pursuant to a Letter of Request from a District Judge of the United States Southern District of New York. The application was challenged on the basis that it was: (1) investigatory in nature and/or a fishing expedition; and (2) oppressive. Alternatively, Mr Parikh asked the Court to add further restrictions to the examination orders sought.

Judgment

The Court began by confirming its jurisdiction to make orders of the type sought if satisfied that the application was made pursuant to a request issued by and on behalf of the requesting court, and that the evidence was being sought for the purpose of civil proceedings instituted before the requesting court.

Once those jurisdictional thresholds are met, the Court confirmed that for reasons of judicial comity, letters of request should be given effect to as far as possible. However, the Court's powers cannot be used in aid of a fishing expedition, giving rise to the question of relevance. Here, the authorities provide that the Court should rely on the requesting court's relevance determination, save in exceptional circumstances such as where questions of national security arise. Beyond this, if the topics for questioning are too wide, uncertain or vague, the application might be refused on the grounds that it is oppressive.

On the relevance of Mr Parikh's evidence

It was accepted on behalf of Mr Parikh that he had relevant evidence to give, so the question was whether the topics for examination had been sufficiently tailored to the issues before the requesting court. The Court accepted Aureus' submissions that respect and deference should be given to the views of the requesting judge, who had over four years' experience in dealing with the case, and was in a far better position to consider the issue of relevance to the claim in her court; it was apparent on the evidence that she had done so.

On whether the Letter of Request was oppressive

Mr Parikh's submissions were that the topics for examination went beyond chatroom discussions that he participated in or observed, and related to banks other than Credit Suisse

(the only defendant left in the proceedings before the requesting court), and that therefore, the evidence sought was impermissibly investigatory such as to constitute oppression. The Court rejected this submission on the following facts:

- It was accepted by Mr Parikh that there were oral communications outside of the chatroom discussions that he participated in or observed.
- The Letter of Request expressly stated that the evidence sought will be required at trial.
- The topics of examination were clearly expressed, together with an explanation of how each topic was relevant to the issues in the action before the requesting court.
- Aureus offered additional protections to Mr Parikh, including to provide him with copies of documents that were to be referred to in the examination 14 days beforehand, limited to 50 documents and 1,200 pages. The examination itself was to be limited to 7 hours, and Mr Parikh's English lawyers could be present.
- The Letter of Request was drafted after consultation with English counsel and with the requirements of English law very much in mind.
- The fact that the Letter of Request had been drafted by the Applicants was not a reason to refuse the request on that ground alone, otherwise, all letters of request coming from the United States would likely be refused (that being, in the Court's experience, the procedure adopted).

Oppression was also alleged on the basis of ongoing Department of Justice investigations into fraudulent FOREX activity. However, the Court noted that Mr Parikh had various safeguards available to him, including: the right to invoke his Fifth Amendment rights under the US Constitution and refuse to answer certain questions out of fear of self-incrimination; a release from the prospect of civil proceedings being brought against him built into the settlement between Aureus and Goldman Sachs; and a protective confidentiality order.

Comment

This is a helpful judgment for both sides dealing with a Letter of Request. For applicants, it demonstrates the robust application required by the Court. If the topics are drafted too broadly, the request may be deemed oppressive. For respondents, this judgment helpfully highlights the areas where an application may be challenged, and also points to the additional safeguards that a witness might want to seek.

Martin del Gallego

Does One Need A Direct Cause Of Action To Bring An Action For Unlawful Conspiracy?

JSC BTA Bank v Khrapunov [2018] UKSC 19

Background

After JSC BTA Bank was nationalised in Kazakhstan in February 2009, its former chairman and controlling shareholder, Mr Ablyazov, fled to the UK. The bank brought multiple claims against Mr Ablyazov alleging embezzlement of US $6 billion of its funds, and obtained default judgments against him for more than US $4.6 billion. Despite a worldwide freezing order and disclosure orders against him, the Court subsequently found that Mr Ablyazov had not disclosed certain assets, but had sought to move them out of reach by using a network of undisclosed companies. When Mr Ablyazov was found in contempt of court and sentenced to 22 months in prison for breaching the disclosure, freezing and receivership orders, giving false evidence, and forging documents, he fled the UK. His present location is unknown.

In July 2015, the bank brought a successful action against Mr Ablyazov (who was still on the run) and his son-in-law, Mr Khrapunov, for the tort of conspiracy to cause financial loss by unlawful means. The bank alleged that Mr Khrapunov, a Swiss domiciliary, entered into a combination or understanding with Mr Ablyazov, while he was living in England, to assist in concealing or dissipating his assets in breach of the orders. Mr Khrapunov was ordered to pay US $500 million in damages.

Mr Khrapunov appealed the judgment against him on two bases. First, an unlawful means conspiracy claim requires unlawful means, and that requires something that is actionable by a private party. However, he argued, contempt of court is not separately actionable by a private party, and therefore it cannot constitute the relevant unlawful means. Second, he argued that England, where the conspiratorial agreement was made, was not the appropriate jurisdiction for these claims under the Lugano Convention, because the harmful acts themselves took place outside England, in Switzerland, Belgium and Russia.

Judgment

The Supreme Court ruled that the tort of unlawful means conspiracy did not require an act that gives rise to an independent cause of action, but only conduct that represented criminal conduct. A combination between Mr Khrapunov and Mr Ablyazov to conceal assets, in the knowledge that a freezing order (and a receivership order) had been made, constituted such conduct, and that was enough.

On jurisdiction, the court ruled that Article 5(3) of the Lugano Convention gave jurisdiction to “the place where the harmful event occurred” so, despite all other elements taking place elsewhere, the conspiracy was agreed to in England, and therefore England had jurisdiction.

Comment

In addition to clarifying the jurisdictional and underlying requirements of the tort of conspiracy by unlawful means, this decision reinforces the current trend of deliberate enforcement by the English courts against those who conceal the proceeds of corrupt activities, signalling that it has support within the Supreme Court.

Julia Steinhardt

The more eagle-eyed among you may have noticed that this round up contains 11, not 10 case summaries. There were just too many interesting cases in 2018. The first person to email our marketing department pointing this out will win a prize.