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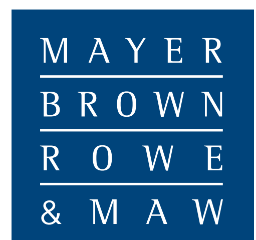
Litigation & Dispute Resolution Legal Update

Welcome to the Litigation & Dispute Resolution Legal Update February 2007. In this publication you will find summaries of key cases, information about recent legislation, consultation papers and other relevant news. A full table of contents appears on the inside of the front cover.



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PRACTICE AND PROCEDURE

Costs

Guidance as to the principles behind prospective assessment of costs for costs capping purposes

- ***Tierney v News Group Newspapers Ltd, QBD (Eady J sitting with Senior Costs Judge Hurst) 20.12.06***

In its ruling in this case (a libel action) the court set out the following principles regarding the assessment of costs for a costs capping order: (1) Although the likely level of financial compensation is important for costs capping, it is only one factor. A case involving serious allegations on both sides had to be tried fairly. (2) It is "inherent in the task of prospective costs capping that a good deal of informed guess work will come into play." This is more difficult in a libel action than in a standard personal injury or clinical negligence case "because no one case is like another and there are generally hidden traps around every corner." (3) Although it is often said that everything can be left to the experience of the costs judge, in reality costs judges are unlikely to have any experience of running libel litigation (as opposed to carrying out retrospective assessments). (4) The costs of the costs capping application should not have any impact on the capped figure but should be treated separately. (5) It should be borne in mind that it is easy for an unscrupulous and wealthy opponent, or an opponent who is overly zealous, to engage the capped party in correspondence or applications which will cause the budget to be used up in responding to them. This is particularly so in libel actions which can change shape as they head towards trial and that then requires money to be spent which could not have been predicted at the time of the capping. Although it is possible to appeal or come back and apply for an increase in the budget because of changed circumstances, such procedural steps are risky and incur extra costs. (6) This was a case in which the costs capping order was against the claimant but it is important to ensure as far as possible that there is "equality of arms" and not apply two different standards of what is "reasonable" expenditure – what is reasonable for one side can hardly be unreasonable for the other. Mutual costs capping can be considered but not necessarily by reference to the same figures since each side will inevitably have different tasks to perform. (7) A costs capping order does not limit the expenditure of the capped party, it merely limits what can be recovered from the other side in the event of success. (8) It is important to always have regard to the court's case management powers and in particular the power to obtain estimates on both sides and to limit costs to what is proportionate. (8) It is necessary to have in mind the provisions of section 11.9[1] of the costs practice direction and the "seven pillars of wisdom" set out in rule 44.5 (factors to be taken into account in deciding the amount of costs) which are relevant in both a prospective and retrospective assessment. (9) These principles have to be reconciled with the court's understandable desire to cut down expenditure in CFA funded litigation, and especially in libel litigation, where financial compensation has been significantly restricted for public policy reasons[2]. **Judgment on Lawtel**

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1 11.9 was inserted to prevent a judge who has assessed reasonable or proportionate base costs and separately an additional liability/success fee from then considering the combined total and deciding that it is so disproportionate as to justify further reductions.

2 The judge also said that the courts have to balance the general rule behind the CFA regime that an unsuccessful paying party might have to pay costs to a CFA funded litigant at a level that might ordinarily not be regarded as reasonable and proportionate, with the human rights legislation applicable to defamation. There should be an exception to the general rule for defamation cases because of the special value attached to freedom of speech.

Costs on an indemnity basis

- ***A v AJ & Others, QBD (Comm Ct) (Colman J) 23.1.07***

In July 2006 the court ordered that proceedings brought by A against AJ should be stayed and that an order previously made giving permission to issue and serve proceedings outside the jurisdiction on three companies be set aside. The order was made on the basis that the proceedings were brought in breach of an arbitration agreement. The defendants applied for costs on an indemnity basis on the ground that "where proceedings are brought in the English courts in breach of an arbitration agreement costs should be awarded on an indemnity basis...because the damages which flow from the breach of that agreement are normally all the costs reasonably incurred by the party entitled to a stay of the proceedings." (This was as opposed to calculating the damages by reference to the principles of costs assessment under rule 44.4(2) which involved recovery only of costs as were proportionate to the matters in issue and subject to a rule that any doubt which the court might have as to whether costs were reasonably incurred or reasonable and proportionate should be resolved in favour of the paying party.)

The court held that provided it could be established, by a successful application for a stay or an anti-suit injunction, as a remedy for breach of an arbitration or jurisdiction clause, that the breach had caused the innocent party reasonably to incur legal costs, those costs should normally be recoverable on an indemnity basis. If a costs order in favour of a successful applicant for a stay or an anti-suit injunction directed to giving effect to an arbitration agreement or an English jurisdiction clause had to, save in exceptional circumstances, be confined to costs on the standard basis, "there would necessarily be a part of the successful applicant's costs of the application which it had properly incurred but could not recover by such an order because of the restrictive process of assessment. This unindemnified portion of costs would then be loss which could only be recovered as damages for breach of the jurisdiction or arbitration agreement if such a damages claim were permissible...This would give rise to a fundamentally unjust situation." On the facts of this case, costs were awarded on an indemnity basis.

Judgment on www.lexisnexis.com

Evidence

Rule 35.12 and its interrelation with an order staying proceedings for mediation

- ***Aird & Another v Prime Meridian Ltd, CA (May LJ, Smith LJ, Sir Martin Nourse) 21.12.06***

CPR rule 35.12 provides that "(1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to – (a) identify and discuss the expert issues in the proceedings; and (b) where possible, reach agreed opinion on those issues. (2) The court may specify the issues which the experts must discuss. (3) The court may direct that following a discussion between the experts they must prepare a statement for the court showing – (a) those issues on which they agree; and (b) those issues on which they disagree and a summary of their reasons for disagreeing. (4) The content of the discussion between the experts shall not be referred to at the trial unless the parties agree. (5) Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement."

In this case the parties had agreed to mediate. The judge ordered that prior to the mediation the parties' experts were to meet and produce a joint statement. On its face, the order was in the usual form under 35.12(3) which contemplated that the statement would be put before the court. In his subsequent written ruling, the judge said that he had mediation in mind when he made the order. The experts produced a joint statement which, in its draft form, was marked "WP" but that was removed before it was signed. Before the mediation, the parties entered into a written mediation agreement which included a term that they would keep confidential all documents that were produced for or at the mediation. The mediation failed and the claimants then sought to amend their pleadings in ways which differed significantly from matters that had been agreed by the experts in the joint statement. The defendant argued that the joint statement was discloseable; the claimants argued that it was privileged.

At first instance it was held, on the specific facts, that a joint experts' statement ordered to be prepared in advance of mediation but in the usual form under rule 35.12(3) was subsequently privileged in the litigation. In reaching that decision the judge took account of the fact that the case management orders were made to facilitate the mediation (although pursuant to the terms of rule 35.12(3)) and that therefore it would have been unfair to have found that the statement could be used other than in the mediation. The CA overturned this decision. It held that joint statements that were ordered to be produced under rule 35.12(3) were discloseable; the court did not have the power to order parties to mediate or produce a privileged statement for the purpose of mediation; it was not correct to look behind the case management order – on the face of it, it was a standard order under the rule. Accordingly the joint statement did not become privileged because it was used in the mediation.

Judgment on Lawtel

Expert valuation and recourse to the courts

- ***Bruce & Others v Carpenter & Others, ChD (Mr J Jarvis QC) 29.11.06***

The defendants applied to strike out the claim form and particulars of claim of the claimant (B) who sought a declaration relating to the valuation of his shareholding in TTAM, the fourth defendant. The parties had entered into a compromise agreement whereby TTAM would pay B for his shares, the value to be determined by an arbitrator. The basis of the valuation was set out in the valuer's letter of engagement. The valuer started her valuation and a problem arose as to whether TTAM was entitled to be paid certain income. She decided that resolving that issue involved the interpretation of a clause in the compromise agreement which she concluded was outside her area of expertise. She suggested that the parties resolve that point in another forum and then come back to her so that she could complete the valuation exercise. B then issued proceedings for a declaration that for the purposes of valuing the shares in TTAM, in accordance with the compromise agreement, the valuer had to take that income into account. The defendants submitted that the court did not have the jurisdiction to interfere with an expert valuation by imposing its own view on a particular aspect of the valuation.

The court held that "When an expert took on the task of valuation, it was his role to form his own view and...to make difficult decisions, even if they are outside that expert's area of expertise...It is open to the expert to indicate to the parties the difficulty which the expert faces, and it is then for the parties to reach some resolution as to whether... they wish that expert either to continue at all with the valuation or whether they wish to introduce some other element which will assist the expert." In this case, in entering into the compromise agreement, the claimants agreed to a method of valuation which was to be a private valuation by one expert. What they sought via this application was that part of that process should be carried out by the court in a way which was the total antithesis of a private expert valuation. "Where a court interferes in cases where an expert has been appointed, it does so on the principle that it is giving effect to the agreement of the parties. If the court were to interfere [here] it would be doing the complete opposite of the agreement of the parties." Where parties have chosen to select the expert method then recourse to the courts is virtually non-existent except where there has been a true breakdown in the machinery or frustration of the contract. It was not open to the court to give B the relief sought and the claim was struck out.

Judgment on Lawtel

Without prejudice correspondence

- ***English and American Insurance Co Ltd v Axa Re SA, QBD (Comm Ct) (Gloster J) 20.12.06***

This case serves as a reminder that not all correspondence written with a view to settlement is necessarily going to be found to have been written without prejudice; that will depend on the parties' intentions and be determined on a case by case basis.

The claimant (which was subject to a scheme of arrangement) had provided insurance cover to a company which produced implants. The company was faced with a number of personal injury claims and claimed against the claimant under its insurance contracts. The claimant, in turn, claimed against the defendant, which had re-insured it under those contracts. A number of other insurers had settled similar claims but the claimant was not party to the settlement. The claimant and defendant met to discuss why the claimant had not participated in the settlement agreement. It was common ground that the meeting was without prejudice. Following the meeting, the defendant wrote to the claimant confirming its position regarding settlement terms; the letter was not marked without prejudice. In one paragraph of the letter the defendant said that without prejudice to its right to deny liability it supported a settlement up to a certain value. A further letter was written and it also was not marked without prejudice. The claimant issued proceedings for summary judgment. The defendant applied to have certain paragraphs of the claimant's evidence struck out on the basis that they referred to without prejudice correspondence and were accordingly inadmissible. They submitted that although the letters had not been marked without prejudice, they should, in any case, have attracted privilege and that if a letter was sent in reply to a letter written without prejudice, or as part of a continuing series of negotiations, whether conducted by correspondence or orally, it could be treated as without prejudice notwithstanding that it was not expressly marked that way. As these letters were part of the continuing settlement negotiation they should have been treated without prejudice.

Gloster J held that the key issue was whether it was clear from the surrounding circumstances that the parties sought to compromise the claim: was the relevant correspondence or discussion part of negotiations genuinely aimed at settlement? Looking at the evidence objectively, she found that it was not appropriate to characterise either of the letters as without prejudice. The letters were properly to be viewed as open offers, albeit hedged with conditions and constraints.

Judgment on Lawtel

Service

Service out of the jurisdiction

- ***Albon (trading as N A Carriage Co) v Naza Motor Trading SDN BHD & Another, ChD (Lightman J) 23.1.07***

CPR rule 6.20 provides that "(5) a claim is made in respect of a contract where the contract – (a) was made within the jurisdiction;...(c) is governed by English law; (6) a claim is made in respect of a breach of contract committed within the jurisdiction;...(15) a claim is made for restitution where the defendant's alleged liability arises out of acts committed within the jurisdiction."

The claimant, a car dealer, was resident in England. The first defendant was a Malaysian company involved in the motor car business and the second defendant was the principal shareholder and director in the first defendant company. He was resident in Malaysia and had a residence and other property in London. In this action the claimant made four heads of claim. The first claim was in respect of alleged overpayments made in the course of performance/intended performance of an oral agreement (the UK agreement). The repayment was claimed on the grounds that the payments were made without consideration and under the mistake of fact that the monies paid were due and owing and accordingly, the claim was made in restitution. The second claim was for recovery of the same sum as was claimed against the first defendant. The third claim arose under what was termed the South African agreement and was for just over £1m. The fourth claim arose from the claimant's alleged payments of the second defendant's personal expenses. On a without notice application on paper by the claimant (supported by a witness statement) the master granted permission for service on the defendants in Malaysia. On a further without notice application, the master ordered service on the defendants in Malaysia by alternative means and the service took place. The defendants then applied to set aside the orders permitting service outside the jurisdiction. One of the issues before the court was whether, for the purposes of CPR rule 6.20(5) a claim "in respect of a contract" had to be a contractual claim.

The court held that claims under 6.20(5) are not confined to claims arising under a contract. It extends to claims made "in respect of a contract"; the formula "in respect of" is wider than "under a contract". The requirement is that the claim relates to or is connected with the contract. The claim in restitution in the instant case satisfied that requirement. Claims in contract and restitution to repayment were overlapping alternatives which meant that the necessary relation and connection between the claim and the UK agreement was established. Further, there was no doubt that English law was the law with which the UK Agreement was most closely connected; there was a serious issue to be tried and the appropriate forum for resolution of the dispute relating to the agreement was England. The master was therefore correct to have granted permission for service out of the jurisdiction[3].

Judgment on Lawtel

3 Lightman J found that in the circumstances permission should not have been granted in respect of the South African agreement and expenses agreement and those orders were set aside

FREEZING ORDERS

- ***Fourie v Le Roux & Others, HL (Lord Bingham, Lord Hope, Lord Scott, Lord Rodger, Lord Carswell) 24.1.07***

Freezing injunctions are granted for the purpose of preventing a defendant from dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary remedy and they are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves but a supplementary remedy, granted to protect the efficacy of court proceedings, both domestic and foreign.

In this case, Park J, on a without notice application made by the appellant (F), made a freezing order against two individuals and a number of companies only two of which were still actively involved in the proceedings (Le Roux and Fintrade, an English company owned and controlled by him). F made the application in his capacity as liquidator of two South African companies. He took the view that Le Roux and Fintrade had by fraud and deception stripped one of the companies of which he was the liquidator of its assets and removed the assets or their proceeds to England. Le Roux applied for the freezing order to be set aside on the ground that there was no jurisdiction to make the order because at the time it was made there had been no subsisting proceedings to which the freezing order could be ancillary and no undertaking to commence any such proceedings had been offered by F. The deputy judge held that in order to support the grant of a freezing order the applicant needed proceedings to enforce an existing cause of action that had either already been instituted or that would, pursuant to an undertaking given to the court, be instituted within a short timeframe. That was not the case and he therefore discharged the freezing order[4]. F appealed to the CA, which dismissed the appeal and he then appealed to the HL. Lord Scott said that although the main issue, as expressed by the parties, was whether Park J had jurisdiction to make the freezing order, in his opinion the issue could not be confined to jurisdiction in its strict sense. Even if Park J did have power to make the freezing order, the question was whether, in the absence of any proceedings for substantive relief or any undertaking to commence such proceedings, it was proper for him to have made the order[5].

The HL held that the effect of s 25 Civil Jurisdiction and Judgments Act 1982, as extended by the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 is to enable the High Court to grant interim relief in relation to proceedings that have been or are about to be commenced in a foreign state. Although there was jurisdiction in the strict sense for the order to have been made, without substantive proceedings or an undertaking to do so, the propriety of the grant of an interlocutory injunction would be difficult to defend. An interlocutory injunction is intended to be of temporary duration, dependent on the institution and progress of some proceedings for substantive relief. It was not in dispute that in suitable circumstances a freezing order may be granted and served on the respondent before substantive proceedings

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4 F was also ordered to pay costs on an indemnity basis and the judge gave directions for the immediate enforcement of the cross-undertaking in damages. As regards indemnity costs, the HL held (Lord Hope dissenting) that costs awards were primarily the responsibility of the first instance judges with the CA available to correct obvious errors. In this case the CA had not discerned an error of principle and the HL did not interfere with that decision.

5 Lord Scott said that the line of authority on the power of the court to grant an injunction under s37 Supreme Court Act 1981 starts from the *Siskina* [1979] and ends with *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334

have been instituted and that such an order is not a nullity. In the circumstances, the protection for the defendant that ought to have been associated with the grant of a without notice freezing order was absent and therefore a challenge to the propriety of the making of the order was entitled to succeed. The decision of the CA was affirmed.

Judgment on Lawtel

JUDICIAL REVIEW

Suitability of remedy

- ***R (on the application of England) v Tower Hamlets London Borough Council & Others, CA (Carnwath LJ, Neuberger LJ) 20.12.06***

This was an application for permission to appeal against a decision of Collins J. The case began as an application for an interim injunction to prevent the demolition of a warehouse on a site in East London. An interim injunction was granted to preserve the position pending a hearing of a judicial review application. Collins J granted permission to apply for judicial review but declined to continue the injunction. By the time of the hearing of the instant application, the relevant parts of the building had been demolished. One of the questions that the CA asked, therefore, was what interest the appellant had in litigating as the building he sought to protect was gone. "Although judicial review proceedings may often serve to clarify issues of wider importance than the particular concerns of the parties, it is important not to forget the interest of the person or group in whose name the case is being brought. The court decides issues between interested parties, not issues in the abstract" (per Carnwath LJ).

As the main practical purpose of the litigation had gone, there was a question as to how the appellant proposed to finance the proceedings. "This may not normally be an issue for the court when granting permission for what is an otherwise arguable case...However, it is a factor we are entitled to take into account in the exercise of our discretion to allow a case to continue, once its main practical purpose has gone, and having regard to the other interests involved." The appellant submitted that the court could make a protective costs order under the jurisdiction explained in R (*on the application of Corner House Research) v Secretary of State for Trade & Industry*)[6] . However, he had not applied and the CA held that it would therefore have been wrong to have granted such an order without have given the affected parties an opportunity to comment. Carnwath LJ said that in a recent report of a group chaired by Lord Justice Kay ("Litigating the Public Interest") there was valuable discussion of the issues arising from the *Cornerhouse* case. The report questioned the requirement in the criteria laid down there that an applicant for judicial review seeking a protective costs order should not have any private interest in the outcome of the case. The CA shared the doubts expressed by Sir Mark Potter as to the appropriateness or workability of that criterion.

Judgment on Lawtel

6 [2005] 1 WLR 2600. See the summary of this case in the LDR Legal Update, May 2005. The court took the opportunity there to give guidance on the making of protective costs orders.

CONTRACT

Determining the scope of a contract

- ***Somerfield Stores Ltd v Skanska Rashleigh Weatherfoil Ltd, CA (Neuberger LJ, Richards LJ, Leveson LJ) 22.11.06***

This was an appeal from the decision of Ramsey J on a preliminary point of interpretation of a contract between Skanska and Somerfield. Somerfield had invited Skanska to tender for the provision of maintenance services and minor works to its properties. Between June and August discussion took place as to the scope and terms of the ultimate agreement (FMA) the parties would enter into. By mid-August there was an incomplete draft of the FMA which, if finalised, would govern the relationship between the parties for three years. Skanska submitted its tender but further negotiation was still required before there was a final FMA. Somerfield wanted provision of the maintenance service immediately and to that end wrote a letter to Skanska which was headed "subject to contract". Paragraph 2 of the letter stated that it wished to appoint Skanska to provide services which were more particularly described in the draft contract enclosed. Paragraph 5 provided for the provision and payment for the services for two months, by which time they anticipated the FMA would be concluded (that proved not to be the case). It stated in paragraph 5 that services would be provided "under the terms of the contract". Skanska returned a copy of the letter, countersigned, "agreeing to the terms set out above". Although the temporary agreement was intended to be for two months, because of extensions it lasted much longer than that. A dispute arose between the parties and Somerfield sought to enforce certain clauses of the FMA. The issue, which was the subject of the appeal, was whether the temporary agreement included most the of terms of the FMA referred to as the "contract" in paragraph 2 or whether it only incorporated very few of them. Ramsey J considered the words of the August letter and the surrounding circumstances and he thought that it was highly unlikely that the parties would have intended to have been bound by the FMA.

The CA held that the interpretation of a provision in a commercial contract is not to be assessed purely by reference to the words the parties have used within the contract but must be construed also by reference to the factual circumstances of commercial common sense. However, the surrounding circumstances and commercial common sense do not represent a licence to the court to re-write a contract merely because its terms seem somewhat unexpected, a little unreasonable, or not commercially very wise. "...the court must be careful before departing from the natural meaning of the provision in the contract merely because it may conflict with its notions of commercial common sense of what the parties may, must or should have thought or intended." In this case, the natural meaning of "you will provide the services under the terms of the contract" was that the FMA would govern the terms upon which the services were to be provided under the temporary agreement whilst negotiations continued. The fact that the parties were not prepared to be bound by the FMA for a period of three years did not mean that they were not prepared to be bound by it for a much shorter period while they sorted out their longer term agreement. That was reinforced by the fact that it was clear from the negotiations that the parties thought the FMA provided a good basis for negotiation as to the terms which would apply for three years and they were content with the general thrust of those terms. The matter was to be remitted back to the judge for him to decide, if the parties could not agree, which terms of the FMA did not apply to the temporary agreement. **Judgment on Lawtel**

DAMAGES

Entitlement to recover the cost of staff time

- ***Aerospace Publishing Ltd & Another v Thames Water Utilities, CA (Pill LJ, Longmore LJ, Wilson LJ) 11.1.07***

This was an appeal on quantum. The question was how one should value a private archive which had been damaged or destroyed, in this case as a result of a flood. It was common ground that it was the diminution in value of the archive that constituted the amount of the claimants' loss but the issue was whether that diminution, on the facts of the case, should have been measured by reference to the difference in the sale value of the archive before and after the loss or by reference to the cost of reinstatement. The CA concluded that Aerospace was entitled to recover damages on a reinstatement basis.

As part of the claim for special damages, the judge upheld the claim for a sum allegedly referable to payments made to staff for work necessarily done by them in relation to, and consequent upon, the flood. The defendant submitted that any claim by a claimant that its employees had been diverted from revenue-generating activities in order to attend to the consequences of a tortious or otherwise wrongful act had to be strictly proved; the claimants in the instant case failed to prove such loss of revenue; and it was not open to the judge in law to infer diversion from revenue-generating activities[7]. The CA considered that the authorities established that: (1) the fact and extent of the diversion of staff time have to be properly established and if there is evidence in that regard which it would have been reasonable for the claimant to have adduced that he has not, he is at risk of a finding that they have not been established; (2) the claimant also has to establish that the diversion caused significant disruption to its business; (3) even though it may well be that strictly the claim should be put in terms of a loss of revenue attributable to the diversion of staff time, in the ordinary case and unless the defendant can establish otherwise, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would have, directly or indirectly, generated revenue for the claimant in an amount at least equal to the costs of employing them during that time. Here the judge had been entitled to draw the inference that the employees had been diverted from revenue-generating activities and it was correct for him to have made an allowance for that within the damages awarded.

Judgment on Lawtel

7 Longmore LJ referred to the following five authorities: *Tate and Lyle Food and Distribution Ltd v Greater London Council* [1982] 1 WLR 149; *Standard Chartered Bank v Pakistan National Shipping Corporation* [2001] EWCA Civ 55, [2001] CLC 825; *Horace Holman Group Ltd v Sherwood International Group Ltd* [2001] All ER (D) 83 (Nov); *Admiral Management Services Ltd v Para-Protect Europe Ltd* [2002] EWHC 233 (Ch), [2002] 1 WLR 2722; *R + V Versicherung AG v Risk Insurance and Reinsurance Solutions SA* [2006] EWHC 42 [COMM], [2006] All ER (D) 209 (Jan).

LIMITATION

Application of the Limitation Act to dishonest assistance

■ ***Cattley & Another v Pollard, ChD (Richard Sheldon QC) 7.12.06***

The court determined preliminary issues concerning limitation in proceedings brought by the claimants against the defendants.

S 21(1) Limitation Act 1980 prevents fraudulent trustees from raising a defence of limitation. It provides that "No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use." Under s 38 of the Act, the references to "trust" and trustee" are extended to cover implied and constructive trusts. The two types of constructive trusts, identified by Lord Millett in *Paragon Finance plc v Thakerar*[8] are where the defendant had not been formally appointed as a trustee but lawfully assumed that role before the breach of trust occurred (Category 1 cases) and where the trust obligation itself arose from the transaction complained of (Category 2 cases). In *Dubai Aluminium co Ltd v Salaam*[9] Lord Millett said that a Category 2 constructive trustee could plead limitation as a defence to a claim.

S 21(3) of the Act imposes a six year limitation period on breach of trust claims for which no provision has been made elsewhere in the Act and postpones the limitation period in favour of certain categories of beneficiary. S 32 postpones the limitation period in certain cases involving fraud or deliberate concealment. The equitable doctrine of laches applies to claims not covered by a statutory limitation period. Where it applies the court must ascertain whether, in all the circumstances and in light of the lapse of time, it would be fair for the claimant to bring a claim.

In this case P, a solicitor, was a trustee of his uncle's will trust and an executor of the will. The other partners in his former law firm were also trustees. The defendant (LJP) was P's wife. Between 1987-1996 P stole substantial sums of money from the trust and was convicted of fraud. In 1998 two new trustees commenced proceedings against him, his former partners (who were innocent) and LJP. Summary judgment was entered against P and all of the other defendants except LJP agreed terms. In November 2005 the trustees started a new claim against LJP alleging dishonest assistance in P's fraudulent breaches of trust and liability as a constructive trustee. LJP submitted that the dishonest assistance claims were either statute barred or barred by the equitable doctrine of laches.

The court determined the preliminary issues as follows: (1) s 21(1) of the Act did not apply to claims against Category 2 constructive trustees. That meant that a limitation defence was available to Category 2 constructive trustees and the limitation period was six years; (2) s 21(3) of the Act, which postponed the limitation period in favour of certain categories of beneficiary in respect of claims brought by them, applied equally to claims brought by trustees; (3) when deciding whether to allow a defendant to invoke the doctrine of laches to defeat a claim, the court will adopt a broad approach

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8 [1999] 1 All ER 400
9 [2003] 2 AC 366

to assess whether, in all the circumstances, it would be fair to allow the claimant to proceed. Delay alone is unlikely to bar a claim. **Judgment on Lawtel**

Application of statutory limitation period to equitable doctrine of laches

- ***P&O Nedlloyd BV v Arab Metals Co & Others, CA (Buxton LJ, Jonathan Parker LJ, Moore-Bick LJ) 13.12.06***

This was an appeal by the claimant against part of an order by which the judge refused its application for an order for specific performance by the third defendant of a contract of carriage of containers of scrap metal. The CA held that the six year limitation period did not apply by analogy to specific performance claims. The claimant's summary judgment application failed because there was a triable issue on laches.

The CA made some interesting remarks (obiter) regarding the existence of a statutory limitation period being no bar to a laches claim. Moore-Bick LJ said that in cases where there was more than mere delay (e.g. some form of prejudice to the defendant caused by the lapse of time) the existence of a statutory limitation period did not, of itself, operate to completely exclude the doctrine of laches. Therefore, in theory, in certain cases the doctrine of laches could be pleaded where a statutory limitation period applied and before it had expired. Previously, many practitioners may have been of the view that where a statutory limitation period applies, laches does not apply[10]. It remains to be seen how this will be treated in subsequent cases. **Judgment on Lawtel**

CONFLICT OF LAWS/JURISDICTION/ENFORCEMENT

Place of delivery determines jurisdiction

- ***Scottish & Newcastle International Ltd v Othon Ghalanos Ltd, CA (Waller LJ V-P, Rix LJ) 20.12.06***

The claimants sold cider to the defendants. It was loaded into containers in Hereford and shipped at Liverpool for Limassol. The contract of sale, governed by English law, was for "cost and freight Limassol" (CFR). There were additional references in the invoices for "place of delivery Limassol". The claimants subsequently issued proceedings for the price of the cider and a dispute arose as to jurisdiction. They argued that they could found jurisdiction in England on the ground that that was where the cider was delivered. The defendants, who were a Cypriot company, argued that they had to be sued in Cyprus. The issue had to be decided under Article 5.1 Council Regulation (EC) 44/2001 which provides that "A person domiciled in a Member State may, in another Member State, be sued: (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question; (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:-in the case of sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered..." The defendants submitted that the CFR provision amounted to a specific delivery term at Limassol or, alternatively, that even if there was no specific delivery term, the application of Article 5.1(b) to a standard CFR contract under English law should, as a general rule,

10 This is the position as held at first instance in *Re Pauling's Settlement Trusts* [1964] Ch 303 and approved in that case by the CA.

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have meant that goods were delivered when they arrived at their destination which, in this case, was Limassol. The claimants submitted that this was a classic CFR contract under which they had performed all of their obligations on shipment of the goods. England, therefore, was the place where all the obligations connected to delivery were performed. The judge at first instance held that the English court had jurisdiction and the defendant appealed.

The CA dismissed the appeal. Rix LJ said that Article 5.1(b) is an example of the selection of the "place of performance of the obligation in question" as constituting that close connecting factor which justifies an alternative jurisdiction in that place. Therefore, the "place…where, under the contract, the goods were delivered or should have been delivered" ought to reflect a matter of obligatory performance under the contract. In a CFR contract the seller had no obligation to deliver to destination, only to procure the shipment of goods for carriage to destination. The place of delivery, therefore, was not the place of physical delivery to the buyer at the destination.

Judgment on Lawtel

Enforcement of foreign judgments in England

- ***Tasarruff Mevduato Sigorta Fonu v Yahya Murat Demirel & Another, ChD (Lawrence Collins J) 21.12.06***

The claimant (TMSF) was a Turkish public legal entity with authority to restructure and administer banks and banking institutions in Turkey. The action in England was brought to enforce at common law three judgments entered in favour of TMSF by the Turkish courts[11] against the first defendant (D). D was outside the jurisdiction and accordingly TMSF's application was granted for permission to serve the claim form outside the jurisdiction under rule 6.20(9) (6.20 "In any proceedings to which rule 6.19 does not apply, a claim form may be served out of the jurisdiction with the permission of the court if (9) a claim is made to enforce any judgment or arbitral award"). D applied to set aside the grant of permission to serve outside the jurisdiction in relation to the claim and in relation to a worldwide freezing injunction granted in support of proceedings against him abroad. The grounds for the application included that he had no assets within the jurisdiction and that it was a pre-condition of the court exercising its jurisdiction under 6.20(9) that there should be assets within the jurisdiction. TMSF argued that there was no requirement that the defendant had to have presently identifiable assets.

Collins J held that the presence of assets was not a pre-condition to the exercise of jurisdiction under rule 6.20(9)[12]. He said that he saw "no reason for applying a requirement that there be assets within the jurisdiction. There is nothing in the CPR Part 74 procedure for registration [enforcement of judgments in different jurisdictions] which requires the presence of assets within the jurisdiction and it would be odd if CPR 6.20(9) were so interpreted." **Judgment on Lawtel**

11 Turkey is not one of the countries to which the statutory methods of enforcement or registration apply and therefore the action for enforcement was at common law.

12 Collins J said that it was added as a ground for jurisdiction in 1983 (as RSC Ord.11, r 1(1)(m)) to fill a gap revealed in cases where judgment creditors sought to enforce at common law judgments emanating from countries whose judgments were not capable of registration in England. Prior to the amendment, where the judgment creditor wished to proceed against assets in England, and the judgment debtor was not present or domiciled in England, there was no basis for service out of the jurisdiction even though the judgment debtor had assets in England which could be attached to satisfy the judgment. See *Perry v Zissis* [1977] 1 Lloyd's Rep 607.

CONSULTATIONS

Draft UK Supreme Court Rules

■ The Senior Law Lord, Lord Bingham, is seeking comments on the draft UK Supreme Court Rules. In consultation with the Law Lords, the DCA are delivering the rules for the court, developing an organisation structure and defining a distinctive identity for the court. The court will be a statutory body in its own right, headed by a Chief Executive who will be the Chief Accounting Officer and responsible for all non-judicial functions of the court. The draft rules cover interpretation and scope; application for permission to appeal; commencement and preparation of appeal; hearing and decision of appeal; general provisions; particular types of appeals and references; fees and costs. The consultation document can be found on Parliament's website: www.parliament.uk/judicial_work/judicial_work.cfm. Interested parties are invited to submit comments and suggestions on the draft rules and practice directions. The consultation ends on 10 April 2007.

Auditor liability

■ On 18 January 2007 the Commission published a consultation paper seeking views on whether there is a need to reform the law on auditors' liability for negligence in the EU. It seeks views on four possible options for reform: the introduction of a fixed monetary cap at European level; the introduction of a cap based on the size of the audited company as measured by its market capitalisation; the introduction of a cap based on a multiple of the audit fees charged by the auditor to its client; and the introduction of proportionate liability under which the auditor and audited company would be liable only for a portion of loss corresponding to the auditor's degree of fault, or by allowing the company and its auditors to agree proportion solutions, which must be approved by shareholders and may be overridden by a national court if what has been agreed is not fair and reasonable. For further information see http://ec.europa.eu/internal_market/auditing/liability/index_en.htm#consultation. The consultation closes on 15 March 2007.

LEGISLATION

Serious Crime Bill

■ On 17 January 2007 the Government published the Serious Crime Bill. The Bill includes proposals for new civil Serious Crime Prevention Orders which are intended to prevent serious crime, including money laundering, by imposing conditions on individuals or organisations involved in serious crime. The Bill also amends the Proceeds of Crime Act 2002 (POCA) in relation to the transfer of functions of the Assets Recovery Agency to the Serious Organised Crime Agency and with regard to certain investigation powers, financial investigators and search warrants. The Bill can be found on http://www.publications.parliament.uk/pa/ld200607/ldbills/027/07027.i-v.html.

Claims Management Services Tribunal Rules 2007

■ On 23 January 2007 the provisions necessary to establish and operate the Claims Management Services Tribunal came into force in the form of ss 12 and 13(1), (3) and (4) of the Compensation Act 2006. These provisions are part of the regulatory framework which the government is introducing with the aim of regulating the claims management industry and protecting consumers. The purpose of the Claims Management Services Tribunal is to hear appeals by those who are not happy with the regulator's decision in relation to authorisation and references by the regulator in relation to the professional conduct of an authorised person. S 12 of the Compensation Act specifies who will be on the Tribunal. S 13(1) describes the situations in which a person can make an appeal to the Tribunal. S 13(3) sets out the powers which the Tribunal has when a reference or an appeal is made and s 13(4) specifies that an authorised person can appeal to the CA against the decision of the Tribunal.

NEWS

Courts charters for courts users published

■ Courts charters outlining the standard of service court users can expect have been published by HM Court Service. The charters set a consistent standard across all Crown, County, Magistrates' Courts, the Probate Service and the RCJ and provide information on what users can expect when attending as a claimant, juror, victim, witness, defendant or member of the public. Charters will be available from www.hmcourts-service.gov.uk.

New Solicitors Code of Conduct finalised

■ It was reported in the *Gazette* (1.2.07) that the new Solicitors Code of Conduct has been finalised for submission to the Secretary of State for Constitutional Affairs, Lord Falconer, and the Master of the Rolls. The code will take effect three months after it has been approved. The new code, which is now the responsibility of the Solicitors Regulations Authority, required the approval of the Law Society Council. It has been through a protracted drafting process, in consultation with Lord Falconer's officials.

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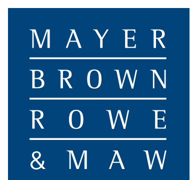

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