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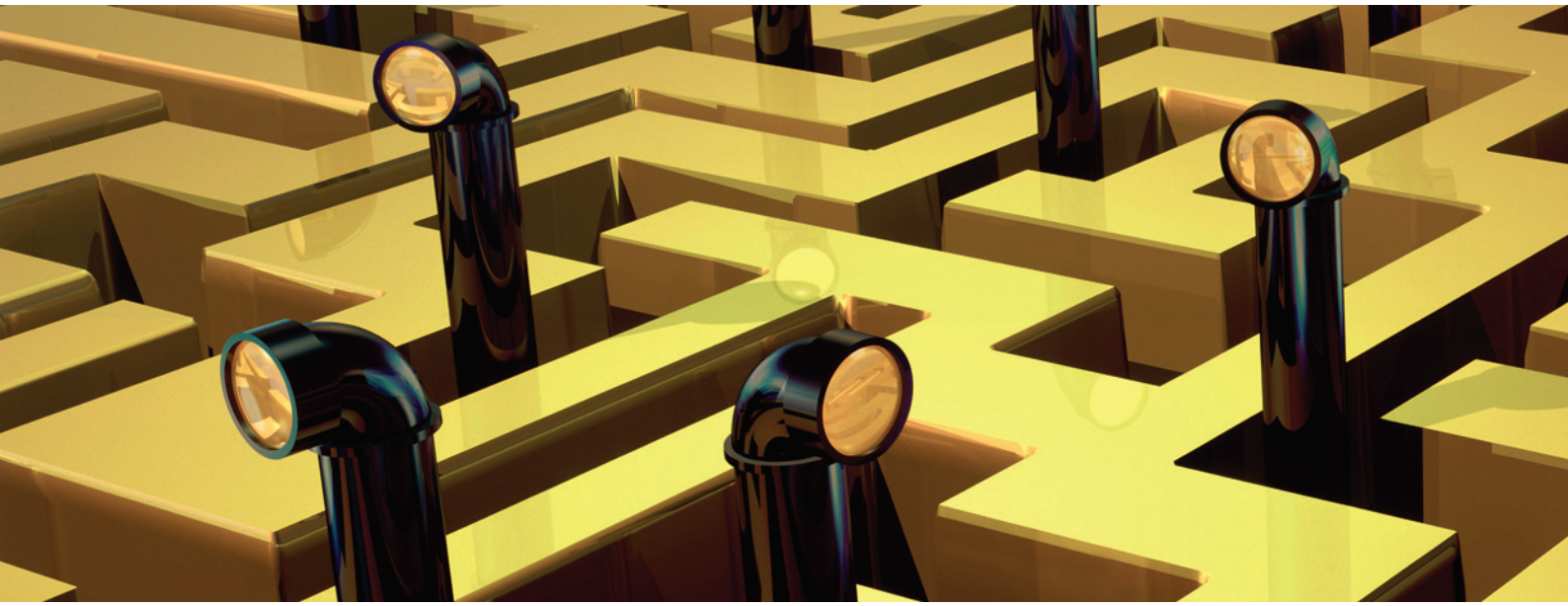
Litigation & Dispute Resolution
Legal Update



Welcome to Mayer Brown's Litigation & Dispute Resolution Legal Update October/November 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

Importance of giving a realistic costs estimate and updating costs estimates

- ***Tribe v Southdown Gliding Club Ltd & Others, Sup Ct Costs Office (Master Gordon-Saker) 4.6.07***

Section 6 of the Practice Direction to Part 43 sets out the provisions regarding estimates of costs. 6.5A provides that if, on assessment, there is a difference of 20% or more between the costs claimed by the receiving party and the costs shown in its estimate, the receiving party must provide a statement of the reasons for the difference. 6.6 provides that costs estimates previously filed may be taken into account as a factor when assessing the reasonableness or proportionality of any costs claimed and where there is a difference of 20% or more between the costs claimed and the costs shown in an estimate and "it appears to the court that – (i) the receiving party has not provided a satisfactory explanation for that difference; or (ii) the paying party reasonably relied on the estimate of costs; the court may regard the difference between the costs claimed and the costs shown in the estimate as evidence that the costs claimed are unreasonable or disproportionate" (6.6(2)).

In the instant case, the bill of costs submitted by the first and third defendants was nearly five times the amount estimated in the allocation questionnaire. The court had to decide whether to limit their costs to the sums estimated in the allocation questionnaire and what effect, if any, the estimate should have had on the claim for costs. When giving judgment, Master Gordon-Saker cited *Leigh v Michelin Tyre plc*[1]. In that case the CA considered the possible effect on detailed assessment of unrealistic estimates given by a receiving party during the course of the proceedings. Dyson LJ held that a costs estimate may be taken into account in determining the reasonableness of the costs claimed where the other party shows that it relied on the estimate in a certain way or where the court decides that it would probably have given different case management directions if a realistic estimate had been given (note that this is not an exhaustive list). He held that the claimant had relied on the estimate of costs given by the defendants in their allocation questionnaire, that they were aware of the importance of the estimate and that "Clearly it was intended that it be relied on." Further, the defendants had not given a satisfactory explanation for the difference between the estimate and the costs claimed. Therefore, it was appropriate to reduce the recoverable costs. This case is a clear reminder of the need to provide realistic costs estimates in the allocation questionnaire and to update them regularly – updating at the listing stage will be too late if the other party has relied on an earlier estimate.

1 [2004] 1 WLR 846; [2003] EWCA Civ 1766

Apportioning common costs of an action

- ***Dyson Technology Ltd v Ben Strutt, ChD (Patten J) 24.7.07***

The central issue before the costs judge and on appeal was how to divide the common costs of the action. Common costs include non-specific costs (e.g. travelling expenses) which are general to the action and would have been incurred whatever issues were involved and specific common costs (e.g. preparation of witness statements, research, brief fees) which relate to work done on more than one issue in the case but which are not separated for the purposes of charging out time or as disbursements. The CPR make no special provision for dealing with costs of this type and difficulties assessing them arise from "a common failure by judges to appreciate the complexities which can be created by orders which seek to split the responsibility for costs between the parties other than by an order for the payment of a simple percentage or proportion of the total costs" (per Patten J).

In this case the claimant sought an injunction restraining the defendant from breaching a restraint of trade covenant contained in his employment contract and from misuse of confidential information. The confidential information claim was discontinued; an injunction was granted enforcing the restrictive covenant. The defendant was ordered to pay the claimant's costs of the action save for three specific items concerning the confidential information claim. The costs judge split the common costs into general costs (costs not specific in any way which would have been incurred even if only one of the two claims had been brought) and costs covering both issues. He divided the general costs in half and costs which covered both issues in proportion to time spent on each, with the claimant bearing the costs of the work done in relation to confidential information. The claimant contended that the defendant was entitled to the costs solely attributable to the confidential information claim but not to costs which were equally attributable to both the claims. That could only be achieved by apportioning the common costs[2]. The claimant accepted that some items (e.g. brief fees) could be split so as to isolate the part of the costs attributable to the confidential information claim but that was dependant on being able to identify a portion of the fee which was solely attributable to the work done on that claim.

The appeal was allowed. The court held that the costs judge was wrong to have divided the general costs. The fact that those costs would have been incurred even if only the restrictive covenant claim had been brought required them to be treated as costs of the action and not costs referable to the confidential information issue. The decision in *Medway* (see footnote for reference) established that on an assessment of common costs of the kind described as specific common costs, "it is appropriate to attribute part of a composite fee to the items of work which the fee was intended to cover. In the present case that exercise can be carried out to isolate the proportion of the brief fees paid on both sides to cover work done solely on the [confidential information] claim. The same goes for time spent on preparing parts of witness statements which deal separately and exclusively with that issue. But what the decision…does not do is to authorise the taxing master [costs judge] in a case like the present, to apportion the costs of work all of which is relevant to both claims." The judge commented *per curiam* that "There is much to be said for the application of the general rule that costs should follow the event and for

2 The claimant relied on *Cinema Press Ltd v Pictures & Pleasures Ltd* [1945] KB 356 which in turn applied the earlier decision of the HL in *Medway Oil & Storage Co v Continental Contractors Ltd* [1929] AC 88.

keeping to the simple formula of orders for a stated proportion of the costs or a stated amount of costs in cases where recognition of a limited degree of success by one or other party is called for."

Affidavit fee

■ There appears to be some confusion about the correct fee for taking an affidavit. The Commissioners for Oaths (Fees) Order 1993 provides at section 2 that "The following fees (inclusive of value added tax where payable) shall be charged by commissioners for oaths:- For taking an affidavit, declaration or affirmation, for each person making the same £5.00 and in addition, for each exhibit therein referred to and required to be marked or for each schedule required to be marked £2.00." According to the Civil Proceedings Fees (Amendment) (No 2) Order 2007, the fee on taking an affidavit, affirmation or attestation is £10 (Schedule 1, Article 2, 12.1). The two Orders do not cross refer. This has generated confusion as to which fee actually applies! According to the Law Society Practice Advice Department, the fee is still £5.00 for solicitors for an ordinary affidavit. The £10 fee only applies to court officials in the High Court or Court of Appeal. To date, no written statement has been issued.

Cost budgeting

■ In a talk at the Legal Week Litigation Forum on 19 September, Master Whitaker, who has taken over as Senior Master at the Queen's Bench Division, warned law firms that, as part of a clampdown on escalating fees, they may soon have to set out their costs at the outset of cases (see *Legal Week* 27.9.07). The Civil Procedure Rules Committee has set up a working group to tackle the problem and Master Whitaker said that they would seek "radical" measures to control costs and that there was "no doubt that cost budgeting will be coming up the agenda very soon." Costs budgeting would mean that firms would be expected to provide binding costs estimates at the start of a case and they would risk sanctions for failing to stick to the budgets. Lord Woolf's overhaul of the CPR raised the possibility of costs budgeting but it was dropped because of strong opposition and it remains a contentious issue.

Judgment

Refusal to revisit a judgment

■ ***Seventh Earl of Malmesbury & Others v Strutt & Parker, QBD (Jack J) 9.10.07***

In May 2007, Jack J handed down judgment in an action for professional negligence brought by the claimants against their advisers in connection with leasing of land to an airport to be used as a car park. He found that negligence was established, although not to the extent alleged by the claimants. The decision as to what the claimants were entitled to by way of damages was, at the request of the parties, left to be determined subsequently but he made some findings in that regard. An order was agreed between counsel and in accordance with rule 40.2 was submitted to the court office and sealed on 30 May. The preamble of the order referred to the trial and the handing down of the judgment. Paragraph 1 provided that "There be a trial on the outstanding aspects of quantum needed to assess the damages to be paid by the first defendants to the claimants, such trial to be reserved to Mr Justice Jack." In July, Jack J was asked to reconsider an aspect of his findings which would have doubled the claimants' damages

(by increasing the turnover rent which he held should have been negotiated from the 10% in the judgment to 20%). As an alternative, he was asked to revisit his refusal of permission to appeal on that issue. The defendant, relying on paragraph 1, submitted that the stamped order was an absolute bar to any reconsideration of the judgment. The claimants submitted that, in order for paragraph 1 to have been a bar, it would have had to have contained a declaration to the effect that the defendant was liable to the claimants on the basis that, if it had acted without negligence, leases with 10% turnover rents would have been obtained.

Jack J held that the order was to be treated as a bar for the purpose of the court's jurisdiction to reconsider any matter determined by the judgment. Further, if it was wrong to hold that the order was a bar, the question would have been whether, in the circumstances, it was appropriate to exercise the jurisdiction. He held that it was not. When read in the context of the reference at the start of the order to the judgment handed down, paragraph 1 provided that aspects of the amount of damages not determined by the judgment would be determined by a subsequent trial, thereby providing by implication that the issues as to liability and some issues as to damages had been determined by the judgment and were binding. The order was intended to draw a line under the proceedings and provide for the future. "...where a judgment has been delivered, either orally or by handing down, the judge may in appropriate circumstances alter it at any time prior to an order giving effect to the judgment. Once there is such an order the judge is *functus officio* and the only way forward for a dissatisfied party is to appeal...The need for some stringent limitation is that the parties to litigation should ordinarily be able to treat a delivered judgment as final, and be free from the risk that a dissatisfied party may re-open his arguments before the judge. As a matter of policy it is also appropriate for the same reason that there should be a bar to the exercise of the jurisdiction, which...takes the form of an order giving effect to the judgment..." As Jack J had no jurisdiction to consider a fresh application, permission to appeal had to be granted by the CA.

Court guides

Revised court guide for the TCC

■ A revised version of the second edition of the TCC Court Guide came into effect on 1 October 2007. It contains some minor amendments to the Guide including updated contact details for TCC judges and courts; correction of minor inconsistencies in provisions on time limits; revisions to reflect amendments to the Pre-action Protocol; reference to the new Protocol on Provisional Bookings; deletion of old paragraph 4.5.5 on email communications with the court and filing documents by email and addition of paragraph 4.8.1 in relation to lodging of documents (it states that, in general, documents should be lodged in hard copy and not sent by email or fax).

Case management

Power of the court to rectify procedural errors

- ***Firth v Everitt, ChD (Ian Croxford QC) 21.9.07***

CPR rule 3.10 provides that "Where there has been an error of procedure such as a failure to comply with a rule or practice direction – (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error." This power is in addition to the court's power to strike out a claim if it is an abuse of the court's process or there has been a failure to comply with a rule, practice direction or court order (rule 3.4)[3]. Before striking out a claim, the question that must be asked is what is the just order to make, having regard to all the circumstances of the case[4].

The instant case was an appeal against an order striking out three claims which had been brought by the claimant against the respondent. Amongst the grounds put forward were that it was misconceived and that the district judge had struggled to understand the claim that was being made. The claimant commenced three new actions which mirrored the substance of the original claim. Although there was irregularity in the form of proceedings and inaccuracies of language, the general descriptions of the claims were reasonably clear. The defendant then issued a bankruptcy petition against the claimant. The judge struck out the three claims and made a bankruptcy order. The claimant submitted that the court should have permitted him to amend his claims in order to correct inappropriate language and procedural errors rather than striking them out.

The court held that the district judge erred in his approach to strike out. It did not appear that he "was directed to or adverted at all to his powers under CPR 3.10". In the circumstances, the provisions of 3.10 should have been considered and it was a material error for the judge not to have done so. The court should have permitted the claimant the opportunity to amend his claims in order to correct inappropriate language and should have used the powers of 3.10 to ensure that, where some other form of proceedings was required, then appropriate orders designed to "save" the existing proceedings and make provision for the future were required[5]. It was wrong to have treated a failure to use the correct procedure as a sufficient reason to prevent adjudication on the matters raised by the claimant. Judgment accordingly.

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3 The court also has the power to order a party to pay a sum of money into court (3.1(5)), where such an order would be appropriate, where there is some failure to comply with a rule or practice direction, or non-compliance with a pre-action protocol. (See the commentary in *Civil Procedure* v 1 (The White Book Service 2007) p 118.)

4 See *Asiansky Television plc v Bayer Rosin* [2001] EWCA Civ 1792

5 The judge also found that the district judge had erred in respect of the bankruptcy petition because he had not considered the requirements of the Insolvency Rule 6.25(1) which required the court to conduct positive inquiry into the state of the debt relied upon.

DAMAGES

Recovery of damages

- ***Transfield Shipping Inc of Panama v Mercator Shipping Inc of Monrovia, CA (Ward LJ, Tuckey LJ, Rix LJ) 6.9.07***

This appeal concerned damages for late redelivery of a time-chartered vessel. The issue was: if a charterer is liable to pay damages to an owner for late redelivery of the chartered vessel, are those damages limited by the principles of remoteness to the difference between the charter rate and the market rate at the time of redelivery (if the latter is higher than the charter rate) from the due redelivery date until actual redelivery, or can the owner claim damages based on the loss of his next fixture? In this case that meant the difference between damages in the sum of $158,301 (damages for the overrun period) versus damages of $1,364,584 (damages in relation to the loss of fixture).

The rule in *Hadley v Baxendale*[6] is that "the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it". The second limb requires the claimant to prove special knowledge of the loss claimed. A loss is not considered to be too remote a consequence of the breach if at the time of contracting (assuming the parties foresaw the breach) it was within reasonable contemplation "as a not unlikely result of that breach"[7]. Where there is an available market, damages under the first limb of the rule will be measured by the market rate. In the context of late redelivery (as in the instant case) the usual measure of recovery has been the difference between the market rate and the chartered rate for the period of the overrun.

The CA (upholding the decision of the tribunal and the first instance decision) found that the arbitrators had not misapplied the doctrine of remoteness. "The re-fixing of the vessel at the end of the charterers' charter was not merely 'not unlikely', it was in truth highly probable...The nature of the chartering market was at all times an open book to the charterers: it was their own business, in which they were experienced...Against that background of knowledge...the charterers should have been cautious about the danger of late redelivery...If...a delay on the last voyage put them into breach, they knew, or ought to have known, what the risks were for themselves and their owners...the risk of that loss should fairly fall on themselves rather than the owners." The claimant could recover damages for late redelivery on the basis of its disadvantageous renegotiation of a subsequent charter. Damages were not limited to the difference between the charter rate and the market rate at the time of redelivery. Rix LJ's judgment includes a detailed and useful analysis of the authorities which deal with remoteness of damage.

6 (1854) 9 Exch 341

7 *Chitty on Contracts*, 29th edition, 2004, para 26-047

NEGLIGENCE

Auditors' duty of care

- ***Man Nutzfahrzeuge AG & Another(Claimants/Respondents) v Freightliner Ltd (Defendant/Part 20 Claimant/Appellant) & Ernst & Young (Part 20 Defendant/Respondent), CA (Chadwick LJ, Dyson LJ, Thomas LJ) 12.9.07***

By a share purchase agreement dated 30 January 2000 the claimant (MN) purchased the shares in ERF (Holdings) Plc (ERF) from Western Star Trucks Holdings Ltd (Western Star). Western Star held the shares for two years, during which period Ernst & Young (E&Y) audited the statutory accounts of ERF for the years ending 30 June 1998 and 1999. It subsequently became apparent that the financial controller of ERF (Mr Ellis) had manipulated the accounts and had falsified financial information for several years prior to the acquisition by MN. Mr Ellis had taken part in the acquisition negotiations, had represented that the accounts had been honestly prepared and, that as far as he knew, gave a true and fair view of ERF's financial position. E&Y accepted, however, that if the audits had been carried out with proper skill and care the defects would have been identified. After the acquisition of ERF by MN, Western Star was taken over by Freightliner Ltd (F) and F became responsible for any liabilities incurred by Western Star. MN succeeded in a claim against F for the losses incurred as a result of the purchase of ERF; F's claim against E&Y was for an indemnity in respect of its liability to MN. The judge at first instance held that E&Y was not liable for the loss sustained by F because of a breach of its duty in carrying out the audits and F appealed the decision.

The issue for the CA was whether F could establish that there was a "special audit duty" above and beyond the general audit duty as described by Lord Oliver in *Caparo Industries plc v Dickman*[8]. It was within the scope of E&Y's general audit duty to protect ERF from the consequences of decisions they had taken on the basis that the accounts were free from material misstatement, including misstatement caused by fraud. But, had E&Y undertaken a special audit duty to Western Star in respect of the representations made by Mr Ellis as to the accuracy of ERF's accounts? Chadwick LJ referred to the dicta of Lord Hoffmann in *Customs & Excise Commissioners v Barclays Bank plc*[9] in saying that "in these cases in which the loss has been caused by the claimant's reliance on information provided by the defendant, it is critical to decide whether the defendant (rather than someone else) assumed responsibility for the accuracy of the information to the claimant (rather than to someone else) or for its use by the claimant for one purpose (rather than another). The answer does not depend upon what the defendant intended but, as in the case of contractual liability, upon what would be reasonably inferred from his conduct against the background of all the circumstances of the case."

The CA held that it was not foreseeable by E&Y that Western Star would make any representations as to the accuracy of ERF's accounts which went beyond those in the share purchase agreement; Mr Ellis was not an employee of Western Star. There was no reason for E&Y to think that Western Star would allow a position to arise in which it was exposed to liability for extra-contractual representations made by Mr Ellis. Even if it had been foreseeable, mere foresight was not enough and "something more" was required. It was impossible to conclude that E&Y, rather than Western Star, had assumed

8 [1990] 2 AC 605

9 [2006] UKHL 28

responsibility for the use by Mr Ellis, on behalf of Western Star, of the information which E&Y had provided to Western Star. The decision leaves the possibility of a risk for auditors of a subsidiary where the auditors know that the parents of the subsidiary will rely on the accuracy of the accounts for the purposes of a third party sale, and will provide representations and warranties to the third party in respect of the same. In such circumstances an auditor will be wise to make a disclaimer of responsibility to the third party.

CONTRACT

Failure to invoke dispute resolution mechanism

- ***Harper v Interchange Group Ltd, QBD (Comm) (Aikens J) 27.7.07***

This action arose out of an Asset Sale Agreement (ASA) between the claimant (the sellers) and the defendant. The consideration for the acquisition of the assets included a payment of £300,000 and provided for certain payments to be made by way of commission on earnings from various contracts (clause 3.3). Clause 3.4 of the ASA set out the procedure for payment and finalisation of the commission. Clause 3.5 was a provision for expert determination. The claimant queried commission statements that had been sent to him (he claimed that he had not been paid all of the commission due to him under the ASA) but he did so outside the time period of 28 days provided for in the contract. Two of the preliminary issues that the court was asked to determine were the proper construction of the clause relating to commission payable to the claimant and whether, even if the commission was payable at the rate that he claimed, the claimant was precluded from recovering it because of his failure to invoke the dispute resolution mechanism in the agreement.

The judge found against the claimant on the construction of the clause relating to commissions and said that, as a result, he did not, strictly speaking, need to decide the issue concerning the dispute resolution mechanism. However, because the issue had been argued fully, he chose to give judgment. He held that clauses 3.4 and 3.5 set out the steps that the parties were to follow and that those steps constituted a comprehensive agreement between the parties of a contractual mechanism for resolving disputes about payments to be made under clause 3.3. The dispute resolution mechanism was intended to cover all types of dispute that might have arisen out of the operation of 3.3. As the claimant had failed to invoke the contractual mechanism for dispute resolution, he was not entitled to pursue his claims for commission. Even if Aikens J had concluded that the claimant was correct as to the proper construction of the ASA, he would still have held that the claimant was nevertheless precluded from recovering against the defendant by reason of a failure to operate the contractual machinery set out in clauses 3.4 and 3.5. The message to keep in mind is that parties must adhere to contractual provisions governing the method of dispute resolution and timing of claims.

How effective is a non-reliance clause?

- ***Quest 4 Finance Ltd v Maxfield & Others, QBD (Teare J) 12.10.07***

In July 2006, Hilmax Engineering Ltd (H) entered into an agreement with the claimant (C) for the provision by C to H of short term finance. The agreement contained representations and warranties by H that the company was not subject to a winding up order, voluntary arrangement or other insolvency proceedings, and the representations and warranties were expressed to be true at the time of signing and for the duration of the agreement. On the same day the defendants (D) who were the directors of H, signed a separate document (the warranty) by which they agreed to indemnify C for any loss which it suffered as a consequence of a breach by H of the representations and warranties in the agreement. The warranty contained a non-reliance clause which stated that in signing the document the signatory had placed no reliance on any advice or opinion of any person representing the interests of C. In September 2006, H went into administration and C claimed the outstanding debt from D under the terms of the warranty.

Prior to entering into the agreement, the first defendant had been given a brochure explaining the service offered by H. The first defendant had explained that neither he nor any of the other defendants was willing to give personal guarantees in relation to any funds provided by C and had been told that no personal guarantees would be required. The brochure stated that "Wageroller does not require Personal Guarantees from your Directors. All that is required is a Warranty which is put in place to cover the event of any fraudulent acts being knowingly committed." There was no suggestion that any fraudulent acts had been committed. D argued that they had been induced to sign the warranty by C's misrepresentation that it would only apply to such acts. C argued that the non-reliance clause prevented D from relying on any earlier representations made by C. In order to succeed, C would have had to have shown that it believed the declaration of non-compliance and relied upon it.

The court held that C had made clear and unequivocal statements in the brochure which were calculated to be relied upon by directors of companies seeking finance; that C would expect those directors to find the statements attractive; and that the statements would cause them to enter into a contract for finance and sign the warranty. C was unable to show that it believed that D were not relying upon the representations in the brochure, and was consequently estopped from alleging that D were liable upon the warranty in the absence of fraud. This case is a clear warning that a non-reliance clause will be looked at in the context of a case as a whole and will not necessarily protect a party from an earlier misrepresentation.

TRUSTS

Constructive trusts

- ***London Allied Holdings Ltd v Lee & Others, ChD (Etherton J) 5.9.07***

The claimant (LAH) claimed for various heads of relief arising out of a payment of £1m to the first defendant pursuant to what was alleged to have been a fraudulent scheme. The contentions were that misrepresentations made by the defendants were intended to and did induce LAH to rely upon them and to pay the £1m to the defendant; the £1m, having been procured dishonestly by the defendants and under a mistake on the part of LAH, was received by the defendant as a constructive trustee; LAH, therefore, was entitled to trace the money. One of LAH's submissions was that the fraudulent misrepresentations of the defendant made the transfer of the £1m voidable.

There can be a right to trace at common law and in equity. At common law there can be no tracing if the claimant's money has been mixed with money belonging to others[10]. In the instant case, the money was paid to the defendant through the bank clearing system and so had inevitably been mixed with the funds of others. A prerequisite of the right to trace in equity is that there must be a fiduciary relationship which calls the equitable jurisdiction into being. "In such a case, the victim of a fraud can trace his money into an account where it has been mixed with other money because equity treats the money in such an account as charged with the repayment of the victim's money. Equity's power to charge a mixed fund with the repayment of the trust money enables the claimant to follow the money not because it is the claimant's, but because it is derived from a fund which is treated as if it were subject to a charge in the claimant's favour."

Etherton J held that a transaction induced by fraud is voidable and, subject to equitable considerations, may be rescinded. The effect is to restore retrospectively to the claimant the equitable title to the property, at least to the extent necessary to support an equitable tracing claim. Etherton J also discussed the difference between a "remedial" constructive trust and an "institutional" constructive trust, as described by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington*[11]. He said that there is considerable debate and uncertainty in English law as to whether the court will ever hold, and if so when, that a remedial constructive trust has arisen. The conventional view is that English law only recognises an institutional constructive trust[12] and it would be slow to adopt a different model.

10 See *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717

11 [1996] AC 669

12 Lord Browne-Wilkinson described the difference between a remedial and institutional constructive trust as follows: under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it. The court's function is to declare that such trust has arisen in the past and the consequences that flow from such a trust having arisen are determined by rules of law, not under a discretion. A remedial constructive trust is a judicial remedy giving rise to an enforceable equitable obligation. The extent to which it operates retrospectively to the prejudice of third parties is in the discretion of the court.

ARBITRATION

The purposive approach to the construction of arbitration agreements is upheld

- ***Fiona Trust & Holding Corporation & Others v Yuri Privalov & Others under the name Premium Nafta Products Ltd & Others v Fili Shipping Co Ltd & Others, HL (Lord Hoffmann, Lord Hope, Lord Scott, Lord Walker, Lord Brown) 17.10.07***[13]

This case concerned a charterparty containing a "law and litigation" clause which provided that any dispute "arising under" the charter should be decided by the English courts, but in addition either party had the right to elect to have the dispute referred to arbitration in accordance with the rules of the London Maritime Arbitrators' Association. The claimants commenced proceedings in the High Court seeking to rescind the contract on the basis that it had been obtained by bribery. The defendants appointed an arbitrator and the claimants made an application under s72 Arbitration Act 1996 to restrain the arbitration proceedings, contending that they had rescinded the contract and therefore the arbitration agreement contained in it as well. The defendants sought a stay of the court proceedings under s9 of the Act on the grounds that the parties had agreed to arbitration and arguments revolved around differences in meaning between a dispute "arising under" the charter and a dispute that had arisen "out of" the charter. The judge at first instance declined to stay the claim for rescission and restrained the arbitration proceedings; the CA overturned the judgment.

The HL had to consider the construction of the arbitration clause. Lord Hoffmann applauded the opinion expressed by Longmore LJ in the CA to the effect that the time had come to draw a line under the semantic distinctions of the past in construing arbitration agreements and to make a fresh start. In his opinion the construction of an arbitration agreement should start from the assumption that the parties, as rational businessmen, were likely to have intended that any dispute arising out of the relationship into which they had entered should be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language made clear that certain questions were to be excluded from the arbitrator's jurisdiction.

The second issue was whether by rescinding the contracts the claimants had also rescinded the arbitration clause, as they contended. Under s7 of the Act an arbitration clause is treated as an agreement separate from the contract in which it is contained. Lord Hoffmann held that this principle of separability means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. That agreement can be void or voidable only on grounds which relate directly to it, such as whether any such agreement was ever reached at all. As a consequence, the arbitration clause survived any rescission and the arbitrators would have jurisdiction to decide whether the rescission was lawful or not.

The wider consequence of this judgment is the support which it gives to the commercial purpose of arbitration agreements and the arbitral process itself.

13 See the summary of the decision in the Court of Appeal in the Litigation & Dispute Resolution Legal Update March 2007.

CONFLICT OF LAWS

Contributory negligence

- ***Dawson & Another v Broughton, CC (Manchester) (Holman J) 31.7.07***

This decision gives some insight into whether contributory negligence is considered to be substantive or procedural law. The parties were involved in a road traffic accident while driving in France. The claimants claimed damages for personal injury and the first claimant claimed on behalf of the estate of his partner (R) under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976. There was an issue as to contributory negligence on the part of R (she was not wearing a seat belt)[14]. This resulted in the trial of a preliminary issue, namely whether English or French law was to be applied to an issue of contributory negligence. The relevant legislation that had to be considered was the Private International Law (Miscellaneous Provisions) Act 1995. S 11 of the Act provides that "(1)The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur". S 12 gives the court the discretion to displace the general rule after having taken into account various factors set out in the rule. The effect of s 14(3)(b) is that matters of evidence, pleading, practice or procedure are to be determined in accordance with the law of the forum.

The judge's starting point was that French law applied – that was the effect of s 11. But, as matters of evidence and procedure were to be determined by English law (14(3)(b)), the question was whether contributory negligence was to be treated as substantive or procedural law. If the latter, English law applied. If the former, s 12 came into play and the court had to consider whether to displace the general rule and direct that English law applied.

Holman J held that in this case the issue of causation was inextricably bound up with the issue of contributory negligence and it was inappropriate to regard it simply as a matter of quantification. He concluded that the question of contributory negligence was substantive rather than procedural and on that basis the general rule operated and French law applied. The next question was whether to displace the general rule. He held that R's contributory negligence (not wearing a seat belt) was plainly a relevant circumstance particularly when it was "closely intertwined with issues of causation and injury". It was inherent in the wording of s 12 - "any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events." On balance it was substantially more appropriate that damages were assessed in accordance with English law.

14 Under the *Loi Badinter* in France failure to wear a seat belt does not result in any reduction in damages.

EU/COMPETITION

Third party access to the European Commission's pleadings in cases before the CFI or the ECJ

- ***Case T-36/04 – Association de la Presse Internationale ASBL (API) v Commission of the European Communities, CFI (Grand Chamber) 12.9.07***

This was an application for the annulment of a decision by the Commission rejecting the applicant's application for access to pleadings lodged by the Commission. Under Article 255 EC "1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents…" This is subject to general principles and limits on grounds of public or private interest determined by the Council. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 lays down the principles, conditions and limits of the right of access provided for by Article 255. Article 4 of the Regulation provides "2. The institutions shall refuse access to a document where disclosure would undermine the protection of: -…- court proceedings and legal advice, - the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure…6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released. 7. The exceptions as laid down [above] shall only apply for the period during which protection is justified on the basis of the content of the document…"

The API, a non–profit organisation of foreign journalists based in Belgium, applied to the Commission for access to all written submissions made by the Commission in the course of proceedings before the ECJ and the CFI. The request was granted in relation to some but not all of the cases. Reasons for refusing access included that the cases were still pending at the time of the request and disclosure of the Commission's submissions would adversely affect its position as the defending party in the proceedings[15]; the judgment of the CFI was followed by an action for damages against the Commission which was pending and disclosure of the submissions requested by the applicant would adversely affect proceedings in the pending case[16]; Member States had not yet complied with judgments (in an infringement action), negotiations were in progress and the Commission was of the view that disclosure of its proceedings would undermine the investigation into the failure to implement the judgments[17].

The Court set out the principles relating to the application of Article 4 and said that exceptions were to be interpreted and applied strictly. The principles include: (1) the examination required for the purpose of processing a request for access to documents must be specific. The institution must have previously assessed whether access to the document would specifically and actually undermine the protected interest and whether there was an overriding public interest in disclosure. (2) The risk of a protected interest being undermined must be reasonably foreseeable. (3) A concrete examination must be carried out in respect of each document covered by the request. An assessment of documents by reference to categories rather than on the basis of the actual information

15 The cases referred to were Case T-209/01 *Honeywell v Commission* and Case T-210/01 *General Electric v Commission*

16 Case T-342/99 *Airtours v Commission*, Case T-212/03 *My Travel v Commission*

17 The cases referred to were known as the *Open Skies* cases.

contained in those documents is in principle insufficient. Such a concrete examination may not be necessary where, owing to the particular circumstances of the case, it is obvious that access must be refused or on the contrary granted.

As regards the protection of court proceedings, the Court said that the Regulation did not intend to exclude the institutions' litigious activities from the public's rights of access. Institutions are to refuse to disclose documents relating to court proceedings "where such disclosure would undermine the proceedings to which the documents relate". Court proceedings cover the pleadings or other documents lodged, internal documents regarding the investigation of the case and correspondence about the case between the Directorate-General concerned and the Legal Service or a lawyer's office.

The CFI held that the Commission had been entitled to deny access to its pleadings in cases which had not yet been heard by the courts. Where, however, the case had been decided, the Commission could not deny access on the basis of a connected damages action or where there was a follow up infringement action in relation to non-compliance with the judgment of the ECJ.

CFI declines to extend rules on privilege to cover in-house lawyers

- ***Akzo Nobel Chemicals Ltd & Another v Commission of the European Communities, CFI (First Chamber: Extended Composition) 17.9.07***

The rules on legal professional privilege in EC competition law were clarified – but not fundamentally changed when the CFI handed down its eagerly awaited judgment in the instant case. The CFI rejected Akzo's arguments that legal professional privilege should be extended to cover communications with in-house counsel. The result is a continuing disparity between EU and national laws. In the UK, for example, communications between in-house counsel and their clients are privileged, in the same way as communications with external lawyers. The CFI also ruled that an undertaking is entitled to refuse the Commission even a cursory look at a document which it claims is covered by legal professional privilege, where this would result in disclosure of the contents of the document. Where legal professional privilege is disputed, Commission officials should put a copy of the document in a sealed envelope and remove it from the premises. It must then adopt a decision rejecting the application for legal professional privilege, thus allowing the undertaking concerned to appeal the decision to the CFI. Only when the dispute is resolved in the Commission's favour may it look at the document. For a more detailed summary of this case see the Mayer Brown EU and UK Antitrust/Competition Group Legal Alert 21 September 2007 http://www.mayerbrown.com/publications/article.asp?id=3773&nid=6.

Cartel claims – remedies

- ***Devenish Nutrition Ltd & Others v Sanofi-Aventis SA (France) & Others, ChD (Lewison J) 19.10.07***

This judgment was handed down in a trial held to determine as preliminary issues of law on assumed facts the availability of three novel types of remedy in private law cartel claims. The claims for tortious breaches of statutory duty were brought by indirect and direct purchasers of vitamins used in the manufacture of chicken feed against members

of vitamins cartels found guilty in 2001 of multiple breaches of competition law. The European Commission awarded fines totalling billions of Euros against the members of the cartel.

The claimants alleged that notwithstanding the fines awarded and the availability of compensatory damages, exemplary damages, an account of profits made by the cartelists from the cartels and restitutionary damages should be available. A claim for aggravated damages was dropped before the trial.

The judge found, applying the principle of double jeopardy, that exemplary damages could not be awarded in circumstances where a punitive fine had already been paid. He held that an account of profits and/or restitutionary damages would not be available in circumstances where compensatory damages (the existing approach) were an adequate remedy.

The decision reaffirms the principle that under English law damages for tortious claims are compensatory. Alternative measures of damages will not be permitted simply because calculating compensatory damages may be difficult.

The European Commission and national competition authorities have stressed the importance of encouraging private damages actions in the enforcement of competition law. This decision is an important indicator of how the courts will approach such claims going forward. The decision may be a disappointment to some who were hoping that the availability of punitive damages would stimulate private damages claims in England. **This summary was prepared as a Mayer Brown Litigation & Dispute Resolution Legal Alert on 19 October 2007.**

Court of First Instance – rules of procedure

■ In the interests of the efficient conduct of court proceedings before the Court of First Instance, practice directions have been adopted for the lawyers and agents of parties which deal with the manner in which pleadings and other procedural documents relating to the written procedure are to be submitted and how best to prepare for a hearing before the Court. The directions "reflect, explain and complement the provisions in the Court's Rules of Procedure and are designed to enable lawyers and agents to allow for the constraints under which the Court operates, and particularly those attributable to translations requirements and the electronic processing of procedural documentation." The directions deal with both written and oral procedure and entered into force on 5 September 2007. The full text can be accessed on http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_232/l_23220070904en00070016.pdf.

Fundamental rights and justice

■ Decision no 1149/2007/EC of the European Parliament and of the Council of 25 September 2007 has established for the period 2007 – 2013 the Specific Programme 'Civil Justice' as part of the General Programme 'Fundamental Rights and Justice' in order to contribute to the progressive establishment of the area of freedom, security and justice. The Programme covers the period from 1 January 2007 – 31 December 2013. The Decision should provide for the possibility to co-finance the activities of certain European networks to the extent that the expenditure is incurred in pursuing an

objective of general European interest. The general objectives of the Programme include the promotion of judicial cooperation with the aim of contributing to the creation of a genuine European area of justice in civil matters based on mutual recognition and mutual confidence and the improvement of contacts, exchange of information and networking between legal, judicial and administrative authorities and the legal professions. Specific objectives include: ensuring legal certainty; promoting mutual recognition of decisions in civil and commercial cases; eliminating obstacles to cross-border litigation created by disparities in civil law and civil procedures; avoiding conflicts of jurisdiction; improving mutual knowledge of Member States' legal and judicial systems; promoting the training of legal practitioners in Union and Community law; facilitating the operation of the European Judicial Network in civil and commercial matters. Community financing may be in the form of grants and/or public procurement contracts. The UK and Ireland have notified their wish to take part in the adoption and application of this Decision. Denmark has not adopted the Decision and is not bound by it or subject to its application. http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_257/l_25720071003en00160022.pdf

LEGISLATION

Administrative Justice and Tribunals Council (Listed Tribunals) Order 2007 (SI 2007/2951)

■ Tribunals for which the Lord Chancellor is the responsible authority were brought under the oversight of the Administrative Justice and Tribunals Council (AJTC) from 1 November. The AJTC will keep under review, consider and report on matters relating to the "listed tribunals", their constitution and working. Listed tribunals are the new first-tier and upper tribunals to be established under the Tribunals, Courts and Enforcement Act 2007 and any other tribunals that are designated as such by the "responsible authority". They are set out at paragraph 2 of the Order and are broadly the same as those that are currently under the oversight of the Council on Tribunals. The SI can be found on: http://www.opsi.gov.uk/si/si2007/20072951.htm.

Court Funds (Amendment No 2) Rules 2007 (SI 2007/2617)

■ This SI contains amendments to the Court Funds Rules 1987, consequential on the coming into force of the Mental Capacity Act 2005. It also makes a number of other amendments to the Rules. No impact on the private or voluntary sectors is foreseen. The SI can be found on http://www.opsi.gov.uk/SI/si2007/20072617.htm.

CONSULTATIONS

Debt claim process

■ The Ministry of Justice is consulting on options for encouraging debtor engagement and consequential possible streamlining of procedures for dealing with non-defended debt claims. Copies of the consultation are available from www.justice.gov.uk/docs/cp2207.pdf. Comments should be submitted by 5 December 2007.

The Governance of Britain: Judicial Appointments

■ This consultation considers the arrangements for making judicial appointments which have been the subject of recent change following the Constitutional Reform Act 2005. The paper sets out for consultation the role of the executive, legislature and judiciary in making judicial appointments, following on from the Government's Green Paper, The Governance of Britain. The paper considers the role of the three arms of the state and the principle of separation of powers; a number of fundamental principles that should govern judicial appointments; current practice. It also poses a number of questions about whether and how the existing arrangements could be improved. The consultation ends on 17 January 2008. http://www.justice.gov.uk/docs/cp2607a.pdf

NEWS

New appointments process for justices of the UK Supreme Court adopted with immediate effect

■ Jack Straw, the Lord Chancellor and Secretary of State for Justice, announced on 8 October that he would adopt the new appointments process for justices of the new UK Supreme Court with immediate effect (www.justice.gov.uk/news/announcement_081007c.htm). The aim of the new arrangements is to increase public confidence in the appointments process by creating greater transparency and improving competition for the positions. A selection commission will be formed when vacancies arise and will consist of the President and Deputy President of the Supreme Court and members of the appointment bodies for England, Wales, Scotland and Northern Ireland. All new judges appointed to the Supreme Court after its creation will not be members of the House of Lords; they will be Justices of the Supreme Court. This decision does not impact on other provisions of the Act that will come into force when the Supreme Court opens in October 2009.

Judges need e-disclosure training

■ It was reported in an article in the *Gazette* (18.10.07) that research has revealed that litigators believe judges and masters "are ill-equipped to make effective e-disclosure case management orders and should be given greater training on dealing with routine problems". The survey also uncovered concern about ambiguity in the e-disclosure rules in the CPR. Lawyers want more clarity and guidance on the types of information that needed to be disclosed and the cases in which the rules apply "but this was hampered by lack of training among the judiciary whose task it was to interpret the broadly drafted rules". A Judicial Communications Office spokesman said that there was ongoing dialogue between judges and the Commercial Court users' committee and that from next year the Judicial Studies Board will include e-disclosure on its national training programme.

Review of civil justice in Scotland – Scottish "Woolf"

Lord Gill has been given the remit to carry out a comprehensive review of the civil courts in Scotland. The terms of the remit are to review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods. The review will have particular regard to costs, the role of mediation and other methods of dispute resolution in relation to court process, the development of modern methods of communication and case management and the issue of specialisation of courts or procedures. A report is due within two years "making recommendations for changes with a view to improving access to civil justice in Scotland, promoting early resolution of disputes, making the best use of resources, and ensuring that cases are dealt with in ways which are proportionate to the value, importance and complexity of the issues raised."

Sherry Begner

Kate Elsmore

Mayer Brown offices

Berlin Brussels Charlotte Chicago Cologne Frankfurt
Hong Kong Houston London Los Angeles New York
Palo Alto Paris São Paulo Washington DC

11 Pilgrim Street
London EC4V 6RW
T +44 (0)20 7248 4282

31st Floor, 30 St Mary Axe
London EC3A 8EP
T +44 (0)20 7398 4600

mayerbrown.com
E london@mayerbrown.com

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0230ldr
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