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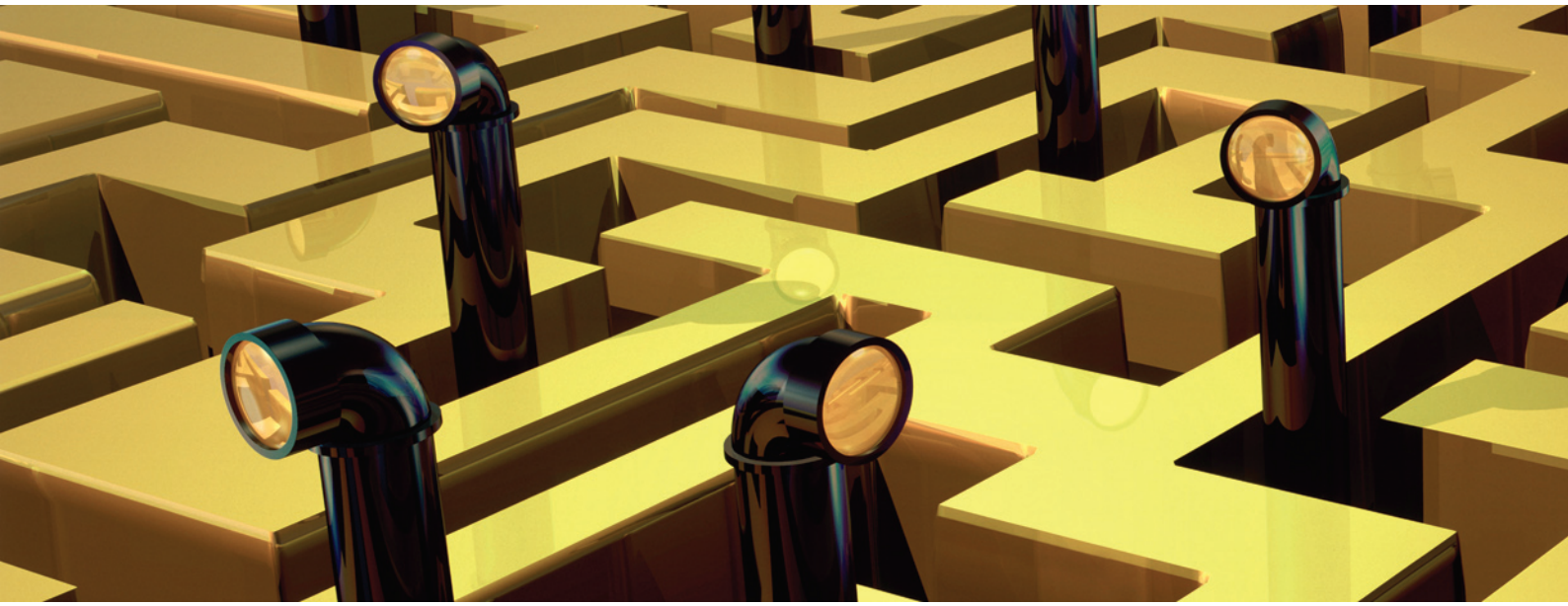
Litigation & Dispute Resolution
Legal Update



Welcome to Mayer Brown's Litigation & Dispute Resolution Legal Update February 2008. 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

Detailed assessment

- ***Ruttle Plant Hire Ltd v Secretary of State for the Environment, SCCO (Master Campbell) 4.12.07***

Ruttle was granted an order allowing it to recover all of its internal costs proportionately and reasonably incurred, including the costs of its own quantity surveying team. It then applied for an order that the defendant (DEFRA) disclose its invoices and accounts detailing the costs it had incurred in respect of the provision of accountancy, building and quantity surveying services provided to it in the course of the litigation between the parties, "Such disclosure to identify the time charged by the individuals who provided those services because the provision of such information is likely to assist the court in [deciding] whether [Ruttle's] internal costs were proportionately and reasonably incurred." Master Campbell had to consider whether the court had any power to order DEFRA to provide the information sought by Ruttle within the detailed assessment proceedings and, if there was such a power, whether the court should exercise it.

Master Campbell dismissed the application. He did not consider that there was any power available to the court in detailed assessment proceedings to compel a party to produce invoices or accounts (whether by letter, witness statement or otherwise) in relation to professional services they had used during the course of litigation. "On detailed assessment, there is no requirement upon a receiving party to lodge with the court every scrap of paper that the case in question has ever generated. On the contrary, it is a matter for a receiving party to choose those papers which he wishes to deploy and those which he does not." Even if the receiving party is directed by the court (exercising its powers under CPR rule 40.14) to produce a particular document, it can decline to do so on the grounds that it will no longer pursue the claim for the particular item in question. "...if the court cannot compel a receiving party to produce material when CPR 40.14 is engaged, *a fortiori* it cannot do so against a paying party whose papers are not, in any event, the subject of the detailed assessment." Although it might often be useful to know what costs the paying party has incurred, the court cannot compel the disclosure of that information.

Master Campbell went on to say that even if the above conclusion was incorrect, a receiving party that declines to put material before the court in support of his own claim (either because there is none or because he chooses not to) "should not be permitted to bolster his own inadequate records by reference to information that an opponent may have to plug the gaps...Detailed assessment is adversarial; if Ruttle kept inadequate records, then...it cannot expect to look to DEFRA for information to make good the gaps."

Should there be costs consequences of consenting to mediate late in the litigation process?

- ***Nigel Witham Ltd v Smith & Another (No. 2), TCC (Judge Peter Coulson QC) 4.1.08***

Where a successful party has acted unreasonably in refusing to agree to mediate, there may be a justification for departing from the general rule on costs that the unsuccessful party pay the costs of the successful party (rule 44.3(2)). The premise is that if the winner failed to mediate or engage in some other form of ADR, he should not be rewarded by the court for his failure to explore ways in which the costs of the case might have been significantly reduced The leading case is *Halsey v Milton Keynes General NHS Trust*[1]. In his judgment in that case, Dyson LJ stressed that a departure from the general rule on costs would not be justified unless it had been shown that the successful party had acted unreasonably in refusing to agree to ADR. In deciding whether a party acted unreasonably, the court will have regard to all the circumstances of the case, including whether ADR had a reasonable prospect of success. In *Halsey* and other cases that dealt with this issue[2] the successful party failed to engage in mediation altogether. In the instant case the parties did attempt ADR. However, the claimant (who had to pay costs to the defendant) submitted that although there was a mediation, the defendants only agreed to mediate very late in the litigation process, when the vast majority of the costs had already been incurred. That raised the question as to the extent to which, as a matter of principle, the court should have taken that into account when it dealt with costs.

Coulson J found that the defendants had consistently said that they were prepared to consider mediation, but only once the claimant had properly set out its claim, and in the circumstances that was not an unreasonable position for them to have taken. He said that it was a common difficulty in this sort of case to try and work out when would be the best time to attempt mediation. "A premature mediation simply wastes time and can sometimes lead to a hardening of the positions on both sides which make any subsequent attempt [at] settlement doomed to fail. Conversely, a delay in any mediation until after full particulars and documents have been exchanged can mean that the costs which have been incurred to get to that point themselves become the principal obstacle to a successful mediation." The trick is to find the point when the detail of the claim and the response are known to both sides but costs incurred in reaching that stage are not yet so great that settlement becomes impossible. In the instant case, that "critical moment" was missed by both sides and blame could not attach to either party. Coulson J was not persuaded that, even if the defendants had agreed an early mediation, it would have led to a settlement; in his opinion it would have had little or no chance of success. He held that the principles in *Halsey* might, in an exceptional case, be applicable to the situation where there was a mediation very late in the litigation process, when its chances of success were very poor, if it could be shown that the successful party unreasonably delayed in consenting to the mediation and that might lead to an adverse costs order. Those considerations did not arise here on the facts because there was nothing to demonstrate that the defendants unreasonably delayed in consenting to the judicial settlement conference and, even if there had been an earlier mediation, the claimant's uncompromising attitude meant that it would not have had a reasonable prospect

1 [2004] EWCA Civ 576, [2004] 4 All ER 920.

2 See *Dunnett v Railtrack plc* (Practice Note) [2002] 1 WLR 2434

of success. Accordingly, he concluded that a reduction in costs was appropriate to reflect the defendants' abandonment of part of its counterclaim but that there was no other reason to reduce the costs that they could recover.

Abuse of process

Was a second action an abuse of process?

- ***Stuart v Goldberg & Linde & Another, CA (Sir Anthony Clarke MR, Sedley LJ, Lloyd LJ) 17.1.08***

The claimant (S) appealed against an order which prevented him from suing the defendant solicitors (L) in respect of two causes of action, on the grounds that he should have asserted the claims in earlier proceedings which he brought against them.

S and V negotiated heads of agreement with a view to their acting together in relation to possible commercial enterprises in Mongolia. L acted for V. During the negotiations, when S had signed the heads of agreement but V had not yet done so, S went to Mongolia to prepare the ground for the venture. S anticipated that he would have to incur substantial expenditure in the course of the visit and wanted to be sure he would be indemnified come what may. At the trial of the first claim, the judge found that L had given an undertaking to S that $350,000 would be transferred to S's account to cover the expenses of his trip. V signed the heads of agreement but soon afterwards thought better of the project and did nothing towards it. Only £11,500 of the $350,000 was paid to S and he brought proceedings against L for breach of the undertaking (2000 Action).

Subsequently, S issued a claim against L (2005 Action) alleging misrepresentation (that L made statements to S about V and himself which were untrue; S was influenced by those statements to enter into the contract with V; S did not know the true facts until after the trial of the 2000 Action) and inducement of breach of contract (that L made untrue statements about S to V and thereby induced V to breach his contract; S became aware of this from a witness statement which L served in the 2000 Action three months before the trial). L applied successfully to strike out the claim on the basis that it was an abuse of process. S appealed and the appeal was dismissed but he was then granted leave to appeal to the CA. L submitted that the 2005 action was an abuse of process because it lacked merit, there was a delay in bringing it, and S's reliance on the fact that he did not know the falsity of some of the statements relied upon as misrepresentations was irrelevant because he could have found out the correct position before the first trial. By failing to do so he was not exercising reasonable diligence and his lack of knowledge should therefore have been disregarded.

The CA allowed the appeal (with the Master of the Rolls giving somewhat different reasons on some of the points). It held that it was not incumbent on S to have sought to add the inducement claim to the 2000 Action because the facts came to his attention so late before the trial of that action and to do so would have delayed the trial, and because of the disparity between the different claims (the undertaking claim being essentially summary, relatively simple and speedy while the others were complex in terms of issues and evidence thus likely to take more time to come to trial and at trial). In particular: (1) The mere fact that the claimant brought his second claim late, but in time, was not relevant to the question of whether bringing the new claim in a second set of proceedings was an abuse of process. (2) If, as in this case, the prospects of success are uncertain but

the case is not suitable for summary judgment, it is inappropriate to attempt to weigh the prospect of success in the balance in deciding whether it is an abuse of the process to bring the claim in later proceedings rather than as part of the earlier proceedings. (3) There is no general principle that a potential claimant is under a duty to exercise reasonable diligence, not yet having brought proceedings asserting a particular claim, to find out the facts relevant to whether he has or may have such a claim. Lloyd LJ also said that S should have put L on notice that he was considering bringing an inducement claim – to give notice of a possible claim might make all the difference if it is said, later, that a second claim is an abuse of the process. However, to hold that this made the 2005 Action an abuse of process "would be a substantial and unjustified extension of the law…Different facts might lead to a different conclusion."

The Master of the Rolls added by way of postscript that the approach of the CPR is to require cards to be put on the table in cases of this kind or run the risk of a second action being held to be an abuse of the process[3].

Appeals

Can a party appeal if it has not been a party to the proceedings in the court below?

- ***MA Holdings Ltd v (1) R (on the application of George Wimpey UK Ltd) (2) Tewkesbury Borough Council, CA (Dyson LJ, Lloyd LJ) 24.1.08***

The CA had to consider whether MA could appeal against a decision although it had not been a party to the proceedings in the court below. This is an issue on which there was no previous authority post the introduction of the CPR. Rule 52.1(3)(d) provides that in this Part "appellant means a person who brings or seeks to bring an appeal". 52.1(3)(e) provides that "respondent means – (i) a person other than the appellant who was a party to the proceedings in the lower court and who is affected by the appeal; and (ii) a person who is permitted by the appeal court to be a party to the appeal;…"

MA owned land which was shown in the local plan adopted by the second defendant (TBC) as allocated for residential development. George Wimpey (W) issued proceedings as a party aggrieved by the allocation. MA was not served and did not apply to be joined as a party. The judge ordered the parts of the local plan which pertained to the site to be quashed. TBC decided not to appeal but MA chose to and served a notice of appeal. W objected on the grounds that the court did not have jurisdiction to allow the appeal because MA had not been a party to and had taken no part in the earlier proceedings. Alternatively, W submitted that if there was jurisdiction to allow MA to appeal, it should only be exercised in exceptional circumstances and no such circumstances existed in this case. MA submitted that the court had power to grant permission to appeal, although it was not a party in the court below, because it was an "appellant" within the meaning of rule 52.1(3)(d) or alternatively, it had the power under its inherent jurisdiction.

Dyson LJ observed that it would be surprising if the effect of the CPR was that a person affected by a decision could not in any circumstances seek permission to appeal unless he was a party to the proceedings below because it could lead to real

3 *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260, *Times* December 4 2007 applied (for a summary of this case see the Litigation & Dispute Resolution Legal Update January 2008); *Johnson v Gore Wood & Co* (No 1) [2002] 2 AC 1 applied.

injustice and in the pre-CPR era the court had jurisdiction to grant leave to appeal to a person adversely affected by a first instance decision. Any person could appeal by leave if he could by any possibility have been made a party to the action by service[4]. He held that the word "person" in rule 52.1(3)(d) is not qualified by the words "who was a party to the proceedings in the lower court". If it had been intended to restrict an "appellant" in that way, that could have been expressly provided for as it was in relation to a "respondent" in 52.1(3)(e). Giving the language its plain and ordinary interpretation, paragraph (d) when interpreted in light of paragraph (e) does not require an appellant to have been a party to the proceedings in the court below. "It would be surprising if the position were otherwise. First, it would mean that the CPR rules as to who may be an appellant would be more restrictive than the corresponding rules in the pre-CPR era." That was inherently unlikely in light of the overriding objective of enabling courts to deal with cases justly. Further, a person may be a respondent even if he was not a party to the proceedings in the lower court. "It would be surprising if the rules provided that a respondent could seek permission to appeal even if he had not been a party to the proceedings in the court below, but that the appellant could not do so." In this case, it was reasonable for MA to have assumed that TBC would have appealed and when TBC did not do so for MA to have sought to appeal. The judge's decision affected MA's property interests, the appeal had real prospects of success and it would therefore have been a real injustice to have denied MA the right of appeal. Accordingly, permission to appeal was granted.

Evidence

Pre action disclosure

- ***Hutchinson 3G UK Ltd v O2 (UK) Ltd & Others, QBD (Comm) (David Steel J) 18.1.08***

The applicant (H3G) sought an order for pre-action disclosure pursuant to s33 Supreme Court Act 1981 and CPR rule 31.16. S33 provides "(1) On the application of any person in accordance with rules of court, the High Court shall, in such circumstances as may be specified in the rules, have power to make an order providing for any one or more of the following matters, that is to say – (a) the inspection, photographing, preservation, custody and detention of property which appears to the court to be property which may become the subject-matter of subsequent proceedings in the High Court, or as to which any question may arise in any such proceedings;..." Rule 31.16 deals with disclosure before proceedings start. It provides that "(3) The court may make an order under this rule only where - ...(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and (d) disclosure before proceedings have started is desirable in order to – (i) dispose fairly of the anticipated proceedings; (ii) assist the dispute to be resolved without proceedings; or (iii) save costs." Although rule 31.16 extends to both documents and classes of documents, it is well established that all documents within a class or category must be subject to/satisfy the test for standard disclosure.

4 The position at the time was summarised at paragraph 59/3/3 of the 1999 edition of the Supreme Court Practice.

In the instant case, as the claim had not yet been pleaded, H3G was required to identify correctly which documents would, in due course, be relied upon by the respondents or which would adversely affect the respondents' case. The judge held that an application for pre-action disclosure must be "a highly focussed application which clearly does not encompass categories of documents which will simply prove to be relevant (if at all) as part of the background (let alone of course documents which might merely lead to a train of inquiry)." In order to succeed, applicants have to show that it is more probable than not that the documents are within the scope of standard disclosure in regard to the issues that are likely to arise. In this case H3G had fallen well short of the jurisdictional threshold on standard disclosure. The request was so lacking in specificity that it was not possible to accept that the entirety of the classes of documents were likely or might well have fallen within standard disclosure. In short, the disclosure sought was well beyond any probable scope of standard disclosure.

As regards 31.16(d), the applicant must make good the proposition that the pre-action disclosure is "desirable" in one or more of the specified respects. "Desirable" is taken to mean "to be wished for as reasonably necessary or at least useful". The judge said that it must be that a case could be made out in almost every dispute that pre-action disclosure would be useful in achieving a settlement or otherwise saving costs. He held that it followed, therefore, that in order to obtain pre-action disclosure, the circumstances must be outside "the usual run" to allow the hurdle to be surmounted. "The absence of any convincing grounds for distinguishing the case from the normal run would be telling grounds for not exercising the court's discretion." In the instant case, the jurisdictional requirement of "desirability" had not been surmounted. Accordingly, the application was dismissed.

Consequences of failing to produce relevant electronically stored information during litigation

- ***Qualcomm Inc v Broadcom Corp, Case No 05cv1958-B (BLM) (S.D. Cal.)***

A court in California has fired a warning shot across the bow of corporate litigants everywhere: if you fail to produce relevant electronically stored information during litigation, there will be consequences. The opinion, issued on 7 January 2008, establishes "a baseline for other cases" regarding what steps must be taken to ensure compliance with ethical and discovery (disclosure) obligations related to electronic discovery.

The case arose when Qualcomm filed a suit against Broadcom. Broadcom prevailed in the suit, but during the trial, it became apparent that Qualcomm had not produced "tens of thousands of documents that Broadcom had requested in discovery." Complicating the situation further, the court found that Qualcomm ignored warning signs that its production was deficient and instead fought efforts by Broadcom to investigate the production issues. In characterising these failures, the court wrote that: "For the current 'good faith' discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents…" Qualcomm was ordered to pay all of the costs Broadcom incurred during the litigation – approximately $8.5m. In addition, the court ordered Qualcomm to create a comprehensive electronic discovery programme, including (1) identification of the factors that contributed to the discovery violation;

(2) creation and evaluation of proposals, procedures and processes that will correct the deficiencies, (3) development and finalisation of a comprehensive protocol that will prevent future discovery violations; (4) application of the protocol to other factual situations; (5) identification and evaluation of data tracking systems, software or procedures that corporations could implement to better enable inside and outside counsel to identify potential sources of discoverable documents; and (6) any other information or suggestions that will help prevent discovery violations. This programme is intended "to provide a road map to assist counsel and corporate clients in complying with their ethical and discovery obligations and conducting the requisite 'reasonable inquiry'" in connection with electronic discovery. Corporate litigants take note! **This is a shortened version of a client alert written by Jason Fliegel, an associate in the Chicago office. The alert can be accessed on *http://www.mayerbrown.com/litigation/practice/article.asp?pnid=2717&id=4077&nid=2719*.**

Summary judgment

Summary judgment in deceit claim

- ***Cheshire Building Society v Dunlop Haywards (DHL) Ltd & Another : DHL Ltd v McGarry, QBD (Comm) (David Steel J) 18.1.08***

Two applications for summary judgment were before Steel J in proceedings in deceit arising from loans made by the claimant (CBS) to Goldgrade Properties Ltd. CBS was asked to loan £10.5m to Goldgrade for the purchase of a property priced at £14.5m. It was led to understand that following purchase the property was to be occupied by three business tenants taking new leases at favourable rents. CBS instructed DHL to value the property. M, a director of DHL, valued it at £16m with the benefit of the new leases and £10.5m with vacant possession. In reliance, CBS advanced £10.5m to Goldgrade. A few months later, CBS was asked to advance a further £1m to Goldgrade against the security of the property. CBS asked DHL to confirm whether its valuation figure still applied and DHL, through M, confirmed that it did. The further advance was then made. In due course CBS discovered that it had been the victim of a mortgage fraud. The proposed new leases were bogus and the true value of the property with vacant possession was only £1.5m. CBS suffered substantial losses when Goldgrade defaulted on the loan.

Steel J said that, given M's involvement, the two claims stood or fell together. To be entitled to summary judgment, the burden was on the claimant in both actions to establish that the defendant had no real prospect of successfully defending the claim in deceit and that there was no other compelling reason why the case should have been disposed of at trial. Steel J noted that the need for caution is greater in cases involving fraud and dishonesty and referred to the judgment of Dyson LJ in *Wrexham Association Football Club Ltd v Crucial Move*[5] where he said that "Experience teaches us that on occasion apparently overwhelming cases of fraud and dishonesty somehow inexplicably disintegrate. In short, oral testimony may show that some such cases are only tissue paper strong." Some of the features of this case which were material in considering the appropriateness of summary judgment included: (1) far from vigorously denying the allegation of fraudulent misrepresentation, DHL merely made "no admission"; (2) M was unwilling to file a defence or otherwise give any particulars of its nature; (3) DHL

5 [2006] EWCA Civ 237

had sought to give full disclosure of the relevant documents in their files; (4) there was little if any issue of primary fact in the witness evidence; (5) CBS's expert report had not been challenged in any material respect by DHL and it was common ground that the discrepancies between the true values and those provided by M were "massive" and rental levels adopted were well in excess of the market.

Steel J considered the elements of the tort of deceit[6] and said that in the present case the only one that was in issue was whether the representations made by M had been made dishonestly in the sense that he had no real belief in the truth of what he stated or whether at trial a court might find that M had been duped by the fraudsters who were behind Goldgrade and was merely a negligent tool to their scheme. He held that in his judgment that outcome could be safely dismissed for a number of reasons including that M was an experienced and fully qualified surveyor, the large discrepancy between the true values and M's valuations, the onerous terms of the leases which rendered it inconceivable that three unrelated tenants would accept them. These features of the valuation were only consistent with dishonesty; incompetence could not account for them. One further consideration was that in 2006 there was an application for summary judgement in proceedings against DHL where damages of £27m were claimed on the ground that M had given dishonest valuations. In June 2007 Simon J handed down a judgment stating that absent the settlement of the action he would have granted the application. There M had been involved in three frauds with very similar features to the instant case. Steel J said that Simon J's judgment showed, among other things, that summary judgment can be entirely appropriate in this type of case (where there is a claim for deceit). He held that CBS and DHL were entitled to summary judgment on their claims in deceit.

Service

English court could exercise its powers to rectify procedural errors so as to declare that they were first seised

- ***Phillips & Another (suing as administrators of the estate of Christo Michailidis) v Symes & Others, HL (Lord Bingham, Lord Rodger, Baroness Hale, Lord Mance) 23.1.08***

The appellants were the administrators of the estate of CM who, before his death, was in partnership with Robin Symes (one of the respondents). The second respondent (GN) was a Swiss company whose sole proprietor and officer was the first respondent (N), also a Swiss national. The present proceedings were begun in December 2004. In issuing the claim form, the staff at the Court Registry erroneously stamped it "Not for service out of the jurisdiction"[7]. The proceedings had to be served on N and GN in Switzerland in accordance with the provisions of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965). On 31 December, the claim form and translations of all necessary documents were presented to

6 The elements of deceit are well established: *Derry v Peek* [1889] 14 AC 337, *Angus v Clifford* [1891] 2 Ch 449, *Armstrong v Strain* [1951] 1 TLR 856, *The Kriti Palm* [2007] 1 All ER (Comm) 667.

7 This was a clear mistake because the claim form had expressly been rendered eligible for service out of the jurisdiction by a statement on it that the High Court had power under the 1982 Act to hear the claim and that no proceedings concerning it were pending in any other relevant country.

the Foreign Process Section and were then forwarded to the authorities in Switzerland. On 19 January the Swiss judge served N with the documents but, unknown to anyone else, he or his clerk had removed the English language claim form because of the words erroneously stamped on it. On 3 February N and GN issued proceedings in the Swiss court claiming negative declaratory relief in respect of the same facts. It was only on receipt of a letter from the respondents' Swiss lawyers that the appellants became aware that the claim form had been removed from the documents served on N and that N and GN had commenced proceedings in Switzerland. They then learned that no documents had been served on GN because of an error on the part of the Swiss post office. The appellants sought orders designed to ensure that the English proceedings had priority over the Swiss proceedings under Article 21 Lugano Convention[8]. Peter Smith J allowed their application to dispense with service of the claim form pursuant to rule 6.9 and declared that the High Court had become seised of the proceedings before the Swiss court. The CA set aside the order and stayed the proceedings pursuant to Article 21 on the basis that the Swiss court was the court first seised. The argument centred around rules 3.10 ("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") and 6.9.

The HL held that the English courts were first seised. Lord Brown said that it was clear that but for the error made by the Swiss judge or his clerk in removing the claim form from the package of documents, it would have been served; the documents that were served included both the German translation of the claim form and the particulars of claim; accordingly, the respondents suffered no prejudice from the omission of the English language claim form. The questions to be considered were whether the court had power by virtue of rules 3.10 and 6.9 to determine that the service of documents actually effected on 19 January constituted sufficient service for the court then to be seised of the proceedings as definitively pending before it under the *Dresser* rule[9] and, if so, whether it should exercise that power. Lord Brown said it was arguable that even without resort to 6.9 the court could order under 3.10(b) that the respondents were to be regarded as properly served, certainly for the purposes of seisin. The "error of procedure" was the omission of the English language claim form but under 3.10(a) that "does not invalidate any step taken in the proceedings unless the court so orders". The relevant step was service out of the jurisdiction[10]. By making an order pursuant to 6.9, Peter Smith J had not declared valid and effective service which had previously been ineffective; he was holding the previous service to have been valid and declaring that it was unnecessary to have served the English language claim form to make it so. It was in that sense that he was dispensing with service. Further, even if a dispensing order under 6.9 was properly to be regarded as retrospectively validating what would otherwise have

8 Article 21 provides that "Where proceedings involving the same cause of action and between the same parties are brought in the courts of different contracting states, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

9 The rule in *Dresser UK Ltd v Falcongate* [1992] QB 502 is that English courts are seised when the claim form is served on the defendant and there are no exceptions to that rule (*The Sargasso* [1994] 3 All ER 180). Under Swiss procedural law, the Swiss courts are seised when the claim form is issued.

10 *Golden Ocean Assurance Ltd v Martin (The Golden Mariner)* [1990] 2 Lloyd's Rep 215 applied.

been ineffective service, it would have been within the court's power to have made such an order, even if its effect would have been to have altered the jurisdictional precedence under an international convention. Because the question of seisin is purely one for the national court, an English court, applying its own procedural rules to dispense with service of a particular document, can make an order which is effective retrospectively to validate what would otherwise have been an invalid form of service and it had the discretion to exercise its power in exceptional circumstances. In this case the circumstances were exceptional: the respondents suffered no prejudice by the failure to serve the original claim form but rather sought to exploit it and the essential faults were those of the Swiss authorities.

EXPERT DETERMINATION

Was an expert determination binding?

- ***Homepace Ltd v Sita South East Ltd, CA (Waller LJ (V-P), Smith LJ, Lloyd LJ) 15.1.08***

This case confirms the circumstances in which the courts can review an expert determination. The appeal was about whether a certificate issued by an expert under a lease was valid and binding.

Lloyd J gave the leading judgment. He said that the binding effect or otherwise of an expert's determination had been considered in a number of cases in recent years. The outcome of each case depended on the terms of the contract under which the determination was made, both as to what it was that the expert had to decide and as to how far his decision was binding on the parties. In each case it was necessary to examine the determination in order to see whether it lay within the scope of the expert's authority. "If it does not, then it has no effect as between the parties. If on the other hand it does, then the contract also governs the question whether the determination is binding or whether, and if so to what extent or on what grounds, the determination can be questioned."[11] The first question to be asked is what the agreement has entrusted to the expert. The second is whether that is what he has decided. If so, the third is whether it can be shown that he has made a mistake which vitiates his decision. Here, on the basis of the answers to those questions, the CA dismissed the appeal. It held that the certificate did not comply with the requirements under the lease and was not binding between the parties or effective under the lease.

11 *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277 applied.

CONTRACTS

Was a contract a guarantee or indemnity?

- ***Pitts & Others v Jones, CA (Ward LJ, Smith LJ, Wilson LJ) 6.12.07***

The appellants were employees of and minority shareholders in a company of which the respondent was the managing director and majority shareholder. The respondent provisionally agreed to sell his shares in the company to a purchaser but the appellants had a right of pre-emption. He told the appellants that he had negotiated a deal with the purchaser whereby their shares would be bought at the same price and they agreed to waive their rights of pre-emption. The appellants were summoned to a meeting at the company's office which, it turned out, was to be an EGM. The respondent attended with his solicitor and representatives of the purchaser. The appellants were not represented by any professional advisers. The respondent's solicitor explained how the purchase of the shares was to be effected and gave some warnings with regard to the purchase which worried the appellants. As a result they were unwilling to sign the option agreements. The respondent joined the meeting and he undertook that if the proposed purchaser did not pay them for their shares, he would do so. The solicitor advised against putting this undertaking in writing on the ground that there would be adverse tax implications for the respondent. The appellants signed the option agreement and also agreed to the abridgement of the notice period for holding the EGM. Subsequently, the purchaser went into liquidation and the appellants received nothing for their shares. When they looked to the respondent pursuant to his undertaking he denied that he had given any undertaking but offered to share the money he had received from the purchaser with the appellants on a pro rata basis. They refused and sued for the full amount. The recorder held that the respondent's undertaking was not a contractual promise because it was unsupported by consideration and was of no legal effect. If that was wrong, he said that the appellants' claim would still fail because, if there was a contract between the respondent and the appellants, it was a contract of guarantee and unenforceable under s4 Statute of Frauds 1677 - it was not evidenced in writing signed by or on behalf of the guarantor. The appellants submitted that there was consideration: the respondent gave his undertaking in order to "buy" their cooperation on the day of the meeting and their cooperation had been given as a result. The respondent submitted that the appellants could not give consideration subconsciously; that the recorder had held that they never gave any thought to the possibility of refusing to sign the documents and, accordingly, the undertaking had been a bare promise, unsupported by consideration.

The CA held that the although as a rule a party to a contract will be consciously aware of what consideration he is giving for the promise he is accepting, here the course of events was such that the recorder should have held that the appellants gave consideration even though they did not consciously work out exactly what it was that they had given. Cooperation was given in return for the respondent's undertaking and that was good consideration.

As regards the distinction between an indemnity and a guarantee, the appellants submitted that the recorder failed to take account of *Sutton and Co v Grey*[12] where Lord Esher MR said that the test for distinguishing between a contract of guarantee and one of indemnity is whether the defendant is "interested in the transaction". If he is totally unconnected with it, except by means of his promise to pay the loss, the contract is a guarantee. If he is not totally unconnected with the transaction but is to derive some benefit from it, it is an indemnity and s4 does not apply. As the respondent was clearly interested in the transaction his undertaking amounted to an indemnity. The CA considered the case of *Harburg India Rubber Comb Company v Martin*[13] which they held refined the test used to distinguish between guarantees and indemnities. Smith LJ said that the meaning of "interest in the transaction" as set out by Vaughan Williams LJ was that "Instead of asking whether or not the promisor had had any interest in the transaction, the court should ask what was the object of the contract or transaction and if the promisor's obligation to pay arose as an incident to the central object of the contract or transaction, that obligation would be an indemnity, whereas if it was the central obligation of the contract or transaction, it would be a guarantee." There had to be more than a motive for offering the promise; there had to be a real interest in the subject matter of the contract. Here there were two separate transactions – the sale of the respondent's shares to the purchaser and the signing of the share option agreements by the appellants. The respondent's undertaking related only to the latter. He had no interest in the share options in the sense that he could not possibly derive any benefit from them. Therefore, his promise was a guarantee within s4 of the Act and, as such, was unenforceable. Accordingly, the appeal was dismissed.

CIVIL LIABILITY (CONTRIBUTION) ACT 1978

Knowing receipt within the scope of the Act

- ***City Index Ltd & Others v David Gawler & Others, CA (Mummery LJ, Arden LJ, Carnwath LJ) 21.12.07***

This appeal raised two issues: whether liability for knowing receipt is within the scope of the Civil Liability (Contribution) Act 1978 and, if so, whether there is a rule of law or practice (at least on the facts of this case) that the knowing recipient should bear 100% of the loss. The Act provides that "1(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)...(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he

12 [1894] 1 QB 285
13 [1902] 1 KB 778

would have been liable assuming that the factual basis of the claim against him could be established. (2)(1)…in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question…(6)(1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it…is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)."

Charter plc was defrauded of large sums by a manager in their foreign exchange department (Mr Chu). He procured the transfer of over £9m to City Index to finance his personal spread-betting transactions. In December 2004 he was convicted of theft. In April 2005 Charter began proceedings against City Index alleging that City Index received the sums transferred with knowledge of breach of trust or fiduciary duty by Mr Chu; that it was unconscionable for City Index to use the funds to finance his spread-betting; and that they were accordingly "liable to account to the claimants as constructive trustee of those funds". The claim was settled for £5.5m. In the meantime, City Index had begun Part 20 proceedings against some past and present directors of Charter and the group auditors claiming contribution or indemnity under the 1978 Act. After the settlement, the Part 20 claim was amended to seek contribution or indemnity in relation to the sum of £5.5m. City Index alleged that the directors' breaches of duty had caused the unauthorised transfers to go undetected and had thereby caused or contributed to Charter's losses; that it had retained none of the money transferred; and that the payment of £5.5m to Charter was substantially more than its profit on Mr Chu's account, which was approximately £3m. The proceedings were summarily dismissed, the judge holding that even if City Index's liability was within the scope of the Act there was no reasonable prospect of contribution being ordered. The overriding cause of the loss was that City Index, having received the money, instead of paying it back paid it to someone else and it was not just or equitable to require negligent directors and auditors to contribute to the liability of the knowing recipient who had either retained the money so received or "paid it away for his own purposes, use or benefit". City Index appealed.

The CA held that the liability of a knowing recipient of money transferred "does not depend solely on receipt of money paid in breach of trust, but on their retaining it or paying it away in circumstances where it was unconscionable to do so." In this case, although the directors' legal responsibility arose at an earlier stage, it was only when City Index failed to return the money that Charter suffered any loss. Adopting a wide view of s1 of the Act, the liability to make good that loss can properly be referred to as liability to compensate the party that has been defrauded and comes within the scope of the Act. As regards the knowing recipient bearing 100% of the loss, the CA held that there is no rule of law or practice that that should be the case. "It would impose a restriction on the wide scope of section 2 of the 1978 Act, unjustified by its wording…if the money has been retained by the knowing recipient he must return it…If…he has parted with the money, then the two potential defendants are in similar positions. They will both be out of pocket if the liability is enforced against them. There is no automatic presumption that one form of liability attracts a larger share than another (even in a case where one party has been fraudulent…). It all depends on the facts, which can only be assessed at trial."[14]

14 *Friends' Provident Life Office v Hillier Parker May & Rowden (a firm) (Estates and General plc, third parties)* [1995] 4 All ER 260 applied; *Royal Brompton Hospital NHS Trust v Hammond (Taylor Woodrow Construction (Holdings) Ltd, Pt 20 defendant)* [2002] 2 All ER 801 considered.

Legislation

Civil Proceedings Fees Order 2004

■ On 11 February the Civil Proceedings Fees (Amendment) Order 2008 came into force. It makes a small number of amendments to the Civil Proceedings Fees Order 2004 (SI 2004/3121) (as amended by SI 2007/2176 and SI 2007/2801) to correct mistakes in that Order that are a result of defects in SI 2007/2176 (which sets out court fees in civil proceedings from 1 October 2007). The principal amendment is that all references to "listing questionnaire" in schedule 1 will be changed to references to "pre-trial checklist".

Review of Civil Justice Council

■ The Civil Justice Council (CJC) was established in 1998 and is an independent body made up of representatives from the civil justice system. It is an advisory public body whose primary task is to promote the needs of civil justice and monitor the system to ensure continued modernisation. An external consultant, Dr Jonathan Spencer, has been commissioned to carry out an independent review of the CJC in line with Cabinet Office Guidance for Public Bodies. The review will examine the role and performance of the CJC and make recommendations; evaluate the continuing need for the CJC to perform its role and functions as set out in the Civil Procedure Act 1997; review whether a non-departmental body remains the most appropriate form of body to carry out those functions; assess the past effectiveness of the CJC; and consider ways in which the CJC could be made more effective. Views will be sought from members of the CJC, those who work with the CJC and end users of the Civil Justice System. A report is due in April 2008.

Judicial and court statistics 2006

■ The Ministry of Justice has published a report which presents a comprehensive set of statistics on judicial and court activity in England and Wales during 2006. The report is available on http://www.official-documents.gov.uk/document/cm72/7273/7273.pdf.

First Chief Executive of Supreme Court appointed

■ Ms Jenny Rowe, currently Director of Policy and Administration at the Office of the Attorney General, has been appointed as the first Chief Executive of the Supreme Court. She will oversee the creation of the Supreme Court until it is operational, working together with the Law Lords and the Supreme Court implementation team and she will ensure that the Supreme Court is managed effectively and acts independently. The role will commence when the Supreme Court is formed in late 2009. The Supreme Court will take over the function of the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council.

Sherry Begner

Kate Elsmore

Mayer Brown offices

Bangkok Beijing Berlin Brussels Charlotte Chicago
Cologne Frankfurt Guangzhou Hanoi Ho Chi Minh City
Hong Kong Houston London Los Angeles New York
Palo Alto Paris São Paulo Shanghai 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

MAYER · BROWN

0241ldr
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