



## All Sections

### "Subject to contract" but starting work? Watch out, you might end up with a contract!

The Supreme Court decision on the first stage of a long-running dispute between RTS Flexible Systems (**RTS**) and the dairy products' manufacturer Muller was handed down in March. The dispute centres on the provision by RTS of elements of two automated yogurt pot mixing lines which were to replace Muller's manual production line.

The claim concerned the efficacy of the machinery, with the parties at odds over whether a contract had been concluded between them and, if so, on what terms (the "**contract issue**"). This led the Court to order a split trial as to (i) the contract issue and (ii) liability.

Following two different decisions in the lower courts on the issue, it was the Supreme Court's task to decide the contract issue.

#### Negotiations and work carried out

The parties had started work on the basis of a Letter of Intent with the aim that full contractual terms and conditions based on an amended form of MF1 (an industry standard contract) would be agreed in due course. No final signed contract was ever agreed.

Due to:

1. the late delivery of "free issue" equipment to RTS (which was supposed to be supplied by Muller); and
2. a request by Muller to vary the agreement and accelerate delivery to help it meet promises it had made to a supermarket,

RTS (at Muller's request) agreed to waive the requirement of testing the equipment at RTS' premises in a "steady state". RTS informed Muller that there was a degree of risk in doing this; that it would carry extra cost; and would necessitate unfettered access for RTS to the equipment (at some stage in the future) to commission and test it. However, after Muller met the order to the supermarket, RTS argued that they then failed to allow RTS unfettered access to the equipment. Muller's justification was that it had orders to fulfill. Subsequently Muller argued that the equipment did not meet what it claimed was the required output for product. They refused to pay the balance of the contract price and the extra costs incurred by RTS for accelerating delivery. RTS commenced proceedings to recover these sums. Muller counterclaimed for the return of all sums paid plus consequential damage/loss of profit in excess of £5 million.

#### The judge's decision

The judge found that there were two contracts entered into by the parties: (i) The "Letter of Intent contract", which subsequently expired and was then replaced by; (ii) certain agreed documents from the draft suite of MF1 documents, which included documents setting out the production specification, but not the limitation of liability and liquidated damages provisions which had been agreed by the parties and which protected RTS' position.

#### Court of Appeal

RTS appealed to the Court of Appeal. It pointed out that as the parties had agreed the limitation of liability and liquidated damages provisions to be included in the post Letter of Intent contract (which was not disputed), the effect of the judge's decision was to impose on RTS a form of contract which it would not have entered into voluntarily: all of RTS' previous quotations and the Letter of Intent contained clauses limiting RTS' liability. So, if the court could not find a contract which incorporated these agreed limitations, there should be no contract. If the court found that there was no contract, RTS would be entitled to payment by way of *quantum meruit*. RTS also pointed out that there was, in effect, a "subject to contract" clause which stated that the "Contract" - which was defined as the MF1 Terms & Conditions **and** all schedules - could only come into force once signed and exchanged by the parties.

The Court of Appeal held that this clause was a "subject to contract" clause and was "*a complete answer*" (per Waller, L.J.) to the question: either the composite whole had to be agreed and signed or no contract could come into being. As there had been no signature no contract existed.

This decision entitled RTS to a reasonable sum for the work done. Muller's claim for consequential losses fell away as it had no contract on which to "bite".

Muller appealed.

#### Supreme Court

Muller had argued performance was of the "first importance" when determining if a contract had been formed (*H. Percy Trentham v Archital Luxfer, CA, Steyn LJ*).

RTS' position was that despite the fact substantial performance had been rendered, this case was different because the matter was still subject to contract, and so the parties only envisaged a contract arising once it was signed. In support of this position, RTS relied on Robert Goff, J's (as he then was) comments in *British Steel v Cleveland Bridge CA*:

" when...the parties are still in a state of negotiation, it is impossible to predicate what liability (if any) will be assumed by the seller for, eg, defective goods or late delivery, if a formal contract should be entered into. In these circumstances, if the buyer asks the seller to commence work 'pending' the parties entering into a formal contract, it is difficult to infer from the seller acting on that request that he is assuming any responsibility for his performance, except such responsibility as will rest on him under the terms of the contract which both parties confidently anticipate they will shortly enter into. It would be an extraordinary result if, by acting on such a request in such circumstances, the seller were to assume an unlimited liability for his contractual performance, when he would never assume such liability under any contract which he entered into."

RTS argued that just such an "extraordinary result" had occurred when the judge "cherry-picked" contractual terms (without T&Cs and a liability cap). RTS' alternative argument was that if a contract existed, then it had to be the one argued for by RTS at first instance i.e. that incorporating the commercial terms which had been agreed, including the limitation of liability. The Supreme Court rejected the findings of both lower courts. **Despite the subject to contract provision, a contract had come into effect. Importantly for RTS, that contract did incorporate all the limitation of liability and liquidated damages provisions that the parties had negotiated and agreed.**

### Lessons

Clarke LJ said that the moral was "to agree [the contract] first and start work later". He re-iterated that, "the Court should not impose binding contracts on the parties that they have not reached. All will depend on the circumstances". In this respect, he said that there was no real tension between the decisions in *H. Percy Trentham* and *British Steel*, as both turned on their facts. Both contained applicable principles of contract formation which should be followed if the facts in a particular case allowed. However, the Supreme Court found *British Steel* (the "subject to contract" case) more helpful in this instance. **That case held that by an exchange of emails the parties had agreed all the essential terms of the contract, despite it remaining "subject to contract". However, later discussions and agreement (at a variation meeting) acted to expressly waive the "subject to contract" provision.** At that point a legally binding contract was formed, which included all documents negotiated and agreed (including the T&C, limitations of liability and liquidated damages clause) in the earlier email exchange.

### Where to go from here?

The Court's guidance is very simple, but practically might be difficult to comply with: agree and sign a contract before starting work. Where this is impossible, parties should continue to express all communications or discussions as being "subject to contract" (to give maximum protection), but tread carefully, because in the event of a dispute a court may find that a contract has been concluded, even if that wasn't intended.

[Phil Withey](#)

### Know your e-disclosure: update

[See also our brief summary of the most recent edisclosure developments at the end of this newsletter]

If you think e-disclosure was merely a buzz word in 2005 when it was first introduced into the English court rules, then think again. Since then, guidance from the courts has begun to emerge which teaches us to ignore electronic documents at our peril.

#### Lesson 1: Know your company's IT systems

*Earles v Barclays Bank* exemplifies why not being able to demonstrate a clear approach to e-disclosure can leave in-house counsel open to criticism (even if, given the limits of what in-house counsel can do, this criticism may feel unfair). In that case, the failure was not being able to explain the company's IT systems to the court. Without information about that system, the court felt unable to give directions about what would be a reasonable and proportionate search for documents. As a result the court imposed cost sanctions against the defendant, even though it had won the case overall.

In *Goodale v Ministry of Justice*, the MoJ decided that it need not search for or disclose electronic documents. When the judge came to setting directions for disclosure, he was left with no information about electronic information in the MoJ's possession.

To help the judge decide what would be a reasonable and proportionate search, the MoJ had to complete the draft e-disclosure questionnaire currently being reviewed by the CPR review committee. Although it has yet to be approved, the questionnaire helped the judge get the information he needed from the MoJ to decide what would be a reasonable and proportionate search.

*If you want to limit disclosure of electronic documents, you must first show the judge that you know your documents and considered your obligations carefully. The message is clear: the courts are getting to grips with technology and so must you.*

## Lesson 2: Give timely warnings to preserve electronic documents

In a recent US decision, Pension Committee of the University of Montreal Pension Plan, the Court imposed harsh cost sanctions on the plaintiff for failing to institute timely "litigation holds" within the business on the preservation of documents, as well as for failing to collect and produce electronic documents.

*At the first hint of a dispute, be prepared: get to know your company's IT systems now, ensure your document retention systems are litigation ready and issue timely warnings to those involved in a dispute to preserve documents.*

## Lesson 3: The costs of an e-disclosure service provider should be recoverable

In his Final Report about costs, Lord Justice Jackson recognises how we approach e-disclosure as being key to litigation. Although he does not make any specific recommendations about the recovery of costs, he envisages the use of software providers as being critical in helping lawyers search and organise the documents. As did Senior Master Whitaker in *Goodale*.

*There is no reason why a party that complies with its e-disclosure obligations should not be able to recover the fees of its e-disclosure service provider subject to the usual cost recovery principles.*

For any questions in relation to e-disclosure or how to be litigation ready, please contact [Kathryn Bailey](#). For any questions on relation to costs generally, please contact our costs drafting team, [Brian Dinnewell](#) or [Sue Fox](#).

## Banks need to balance competing duties in making Suspicious Activity Reports

The Proceeds of Crime Act (POCA) "*has put banks in a most unenviable position. They [the banks] are at risk of criminal prosecution if they entertain suspicions but do not report them or, if they report them, and then nevertheless carry out their customer's instructions without authorisation. If they act as instructed, their customers are likely to become incensed and some of those so incensed may begin litigation*" - [Shah & Anor v HSBC Private Bank \[2010\]](#), [EWCA Civ 31](#)

In 2008, HSBC applied to strike out or seek summary judgment in respect of the whole of Mr Shah's (and his wife's) claim for damages following HSBC's reporting suspicious transactions under the *Proceeds of Crime Act 2002* ("POCA"). The hearing in 2009 resulted in a substantial victory for HSBC (the "Bank"). Mr and Mrs Shah appealed. On 4 February 2010, the Court of Appeal (Civil Division) allowed the appeal, in part.

The Court of Appeal revisited the meaning of 'suspicion' under POCA, and considered whether, notwithstanding the anti money laundering provisions of POCA, a customer can require disclosure of information relating to a refusal to comply with payment instructions where the bank has submitted a Suspicious Activity Report ("SAR").

Banks and other regulated institutions, including law firms must understand the requirements for making SARs.

### Background

Mr Shah had business interests in Zimbabwe. Between July and September 2006 he had instructed the Bank (with

which he had had an account since 2002) to transfer three separate sums. In relation to the largest it told him that it could not effect the transaction because it was "complying with its UK statutory obligations". The Bank declined to comply with his instructions for the third transfer for the same reason. It made four SARs regarding these transfer instructions. The Serious Organised Crime Agency ("SOCA") consented to the transactions, but, because of the SARs, there were delays.

Possibly resulting from information provided to the Zimbabwean authorities by an ex-employee of Mr Shah, to whom money was owed (under the third delayed transfer), the Zimbabwean authorities became suspicious and demanded an explanation from him regarding the funds. In response to his request for information, Mr Shah was told by the Bank that he had been under investigation, but that the investigation had ended. SOCA told Mr Shah's solicitors that there was to be no criminal investigation. Mr Shah was given no further information. The Zimbabwean authorities seized US \$331 million of Mr Shah's Zimbabwean assets.

Mr Shah and his wife claimed damages against the Bank for failing to comply with instructions and for other breaches of its duties.

The Court had to consider the obligations of a bank under POCA to notify the authorities when it suspects a customer of money laundering.

#### The definition of 'suspicion' under POCA

Some commentators have suggested that Shah will mean that banks and others in the Regulated Sector will be required to justify all SARs.

The judgment leaves the door open for customers to require a bank which makes a SAR to prove its suspicions, with the Court of Appeal noting: "*It must be remembered that it is for the bank to prove that it suspected Mr Shah to be involved in money laundering*". This was a critical point as the Court was uncomfortable with the idea of allowing summary judgment in favour of the Bank when it was the Bank which had the burden of proving the fact in issue (whether it in fact suspected Mr Shah of money laundering).

However, the existing test for suspicion has not changed. The Court of Appeal reaffirmed the position in Da Silva: "*the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be 'clear' or 'firmly grounded and targeted on specific facts' or based on 'reasonable grounds'.*" (Also affirmed in K Ltd.)

Those making SARs do not have to prove that their suspicions are true or even reasonable. The suspicion must specifically relate to money laundering, rather than being a general suspicion about the client or the transaction. The fact that it is "smelly" will not suffice unless it relates to money laundering. There need be little change in the process of making SARs, provided that due consideration is given to the test of 'suspicion'.

#### Timing of SAR

The Bank made all the SARs within two days of receiving the transaction requests from Mr Shah. The Court of Appeal accepted that there was no evidence to suggest that the Bank had delayed in making them; however, they did say that undue delay in making them could, in theory, be a breach of a banker's duty to its customer.

The Court of Appeal dismissed the suggestion that consent in relation to future transactions should have been obtained. It is unlikely that SOCA would consent to a future transaction, without any details.

#### Balancing clients' need for information and regulatory requirements

Section 333 of POCA creates an offence of "tipping off". A person commits the offence if he or she knows or suspects that a protected or authorised disclosure has been made, and makes a disclosure which is likely to prejudice any investigation which might be conducted.

On the question of failing to keep the customer updated (and any losses occasioned by this failure), the Court of Appeal said that once the official moratorium 31 day moratorium period ends (the period in which, where a request for consent has initially been refused, the authorities may obtain a restraint order to prevent the transaction proceeding), the risk of tipping off or prejudicing an investigation by telling the client about it must diminish, and the banker's duty as agent to its principal, the customer, might prevail.

The point at which a customer may be entitled to more information about the grounds upon which the bank held the suspicion (and whether that would have avoided the loss suffered) are to be considered at trial; however, it seems that a bank cannot rely on the tipping off provisions to fail to provide any information to the client, once such information can no longer prejudice an investigation.

### Lessons for the banks and others in the Regulated Sector

In the passage quoted at the top of this article the Court of Appeal recognised the difficulties faced by financial institutions, but it also said: "*it cannot be right that proper litigation should be summarily dismissed without any appropriate enquiry of any kind. The normal procedures of the court are not to be side-stepped merely because Parliament has enacted stringent measures to inhibit the notorious evil of money-laundering, unless there is express statutory provision to that effect*".

*Shah* shows the delicate balance for banks and other businesses in the Regulated Sector in weighing their duties to their customers and the potential liability they face in fulfilling them.

The Court of Appeal may have opened up banks' suspicions to scrutiny. The burden lies with banks to prove that they held the suspicion and to satisfy the test set out in *Da Silva* (affirmed by the CA and set out above) So they should document why they suspect there is criminal property and what acts they suspect constitute money laundering. This is a good time for banks and others in the Regulated Sector to revisit compliance processes and update them, if necessary.

[Ian Hargreaves](#) and [Alexandra Heysen](#)

### Consumer credit – claims management companies fail to rock the boat

Encouraged by claims management companies (CMCs), many consumers have requested copies of their own credit card agreements under section 78 of the Consumer Credit Act 1974 (the Act). When their lenders allegedly failed to comply, the CMCs helped the consumers bring proceedings seeking (amongst other things) declarations that the lenders could not enforce the agreements.

In *Carey v HSBC Bank plc* the High Court considered a series of claims brought by consumers against lenders under the Act. Those claims were concerned with (amongst other things) requests for copy agreements, proper execution of agreements and unfair relationships.

#### The claims

Sections 77-79 of the Act entitle a consumer to make a formal request to the lender for a copy of their agreement. The lender cannot enforce the agreement until it provides a copy. But what, exactly, must be provided? Can a lender's section 78 response, by itself, be relied on to support allegations that the agreement was improperly executed at the time it was entered? And does the absence of a fully compliant response give rise to an unfair relationship?

#### Decision

A lender may provide a copy of the original executed agreement or a reconstituted version. (Failure to produce the original does not of itself mean non compliance). The reconstituted agreement must be an "honest and accurate" copy of the original, but can be compiled from any source of information held by the lender. Crucially, the reconstituted copy must contain the correct heading under the Act, the debtor's original

name and address, the creditor's name and address and the applicable cancellation notice (provided they were in the original agreement);

A section 78 response must also include a copy of the original terms and conditions in force at the time the agreement was entered, together with the latest statement of account;

If the lender has varied the agreement unilaterally, its response must also include a statement of the current terms and conditions applicable together with a copy of the latest notice of variation;

The court may declare that the lender has breached section 78, but this depends on whether the consumer seeks other relief, the extent to which that relief is connected with the section 78 issue and whether the consumer demonstrates there will be real utility in having the declaration made;

A breach of section 78 does not of itself give rise to an "unfair relationship" under section 140A of the Act;

In assessing whether prescribed terms were contained in an agreement, several principles must be applied, e.g. it is a question of substance not form as to whether separate pieces of paper containing the consumer's signature and the prescribed terms constitute one document;

A bare allegation that an agreement (as per the section 78 response or otherwise), was improperly executed (within the meaning of section 61 of the Act) is insufficient to support such a claim; and

The absence of a document signed by the consumer and containing the prescribed terms is not of itself enough to argue an unfair relationship.

### Implications

The court struck out many of the claims and several others have been discontinued. The judgment provides guidance for lenders about how to comply with section 78 and similar requests (a read across can be used for sections 77 and 79 of the Act) and is catastrophic for CMCs, who have orchestrated thousands of claims which may be doomed (despite press reports to the contrary, based on their PR).

Consumers have also failed in other recent decisions under the Act:

[McGuffick v The Royal Bank of Scotland Plc \[2009\] EWHC 2386 \(Comm\)](#), where the High Court clarified the phrase "enforce" (not defined by the Act);

[Teasdale v HSBC Bank plc \[2010\] EWHC 612 \(QB\)](#) where the High Court applied the usual costs rule and made various consumers liable for costs after they brought proceedings against lenders for a breach of section 78, then discontinued when the lender produced information to discharge its duty;

*Brophy v HFC Bank Limited* [2010] EWHC 819 (QB) where the High Court confirmed the definition of "credit limit" in the credit card agreement (expressed as "Your credit limit will be determined by us from time to time and notified to you") complied with both Schedule 1 and Schedule 6 of the Consumer Credit (Agreements) Regulations 1983; and

*Brooks v Northern Rock (Asset Management) plc* (unreported 16 April 2010) where His Honour Judge Tetlow determined that a credit agreement could contain a "nominal" or "effective" rate of interest and that both would comply with the Act, and that lenders could round the rate of interest included within a credit agreement without the agreement becoming non-compliant.

These cases and *Carey* are a welcome indication that opportunist claims by consumers who allege technical breaches of the Act, aiming to avoid repayment obligations, are likely to fail.

A team from Addleshaw Goddard's Finance Disputes department, led by Ian Hastings and Naomi Simpson, represented HSBC Bank plc. [Carey v HSBC Bank plc \[2009\] EWHC 3417 \(QB\)](#)

### [David Farnell](#)

## Pensions Ombudsman may not consider stale claims where courts can't

### Background

In *Arjo Wiggins Limited v Henry Thomas Ralph* the jurisdiction of the Pensions Ombudsman was called into question.

The Pensions Ombudsman had determined in Mr Ralph's favour, in circumstances where his complaint would have been barred by the Limitation Act 1980 if it had been made in court proceedings. Arjo Wiggins won on appeal.

Arjo Wiggins appealed on three grounds:

the Pensions Ombudsman cannot entertain a complaint which would have been statute barred if the same complaint had been made in court proceedings;  
even if the Pensions Ombudsman can investigate a time barred complaint, he should not do so as a matter of discretion;  
if the Pensions Ombudsman does have a discretion to investigate a time barred complaint and does so, he cannot make an award or give substantive directions where a court could not do so because the claim would have been statute barred.

## Decision

Lewison J allowed the appeal on the grounds that the Pensions Ombudsman had no power to award substantive relief to a complainant whose complaint would have been defeated by a limitation defence had it been brought in court proceedings. He stressed the following:

the Pensions Ombudsman must decide disputes in accordance with established legal principles. He does not have the power to make an order that the court could not make, save where the complaint relates to pure maladministration (which is not actionable by the court);  
Arjo Wiggins' contention that the Pensions Ombudsman does not have jurisdiction to investigate or determine a time barred complaint was incorrect. If a limitation defence is raised, the Pensions Ombudsman will at least have to investigate the dispute in order to see whether the defence is well founded; and

- the powers available to the Pensions Ombudsman when investigating a time barred complaint are those which are available under the Limitation Act 1980. Except in cases of pure maladministration, he must give effect to a limitation defence if it is regarded as part of the substance of the dispute.

## Points to note

Whilst Lewison J was keen to point out that the scope of the Financial Ombudsman Scheme was a very different from the Pension Ombudsman Scheme, the POS was the only exceptional Scheme highlighted. In general terms, it seems that ombudsmen may in future be more cautious to ensure they use their powers in line with the powers of the court. In Arjo Wiggins the court confirmed, were it in any doubt, that the ombudsman route cannot be seen as a way of bringing a claim which would not have been possible in legal proceedings.

[Arjo Wiggins Limited v Henry Thomas Ralph \[2009\] EWHC 3198 \(Ch\)](#)

[Abi Healey](#)

## Contract construction: main contractor cannot rely on "pay when paid" clause - strict construction by analogy with exclusion clauses

"Pay when paid" clauses were outlawed by Parliament in 1998, except where the third party employer is insolvent. The Technology and Construction Court (Mr Justice Coulson) last year decided that the insolvency of Trinity Walk Wakefield Limited (Trinity), the developer of a new shopping centre scheme in Wakefield, did not trigger a "pay when paid" clause in the sub contract between the main contractor, SCL and its steel fabrication and erection sub contractor, WHL. This was the first decision of note since the 1998 legislation.

SCL appealed, but the Court of Appeal has confirmed that the pay when paid clause is not effective, (despite the employer being in administration), and that WHL (and the other sub contractors in a similar position) must be paid by SCL for the work they carried out, notwithstanding that Trinity is insolvent and cannot pay SCL for the sub contract works.

The Court of Appeal's comments are important for clients and lawyers alike and not merely in relation to construction contracts. **Any clause which seeks to exclude or limit liability will be construed very strictly against the party seeking to rely on it.**

### The pay when paid clause

WHL was employed by SCL to fabricate and erect the steelwork on a new shopping centre. Trinity was the developer and had employed SCL to design and build the whole development. The sub contract between SCL and WHL contained a "pay when paid clause", intended to allow SCL not to pay WHL for its work where Trinity was insolvent and could not pay SCL.

In March 2009 the directors of Trinity resolved to place the company into administration with immediate effect. They were entitled to do so. In 2002, Parliament introduced two new "self certifying" routes to allow companies to enter into administration (in addition to the existing "court order" route).

The terms of the sub contract had not been amended to pick up the two new routes into administration. Had the sub contract read "under the Insolvency Act, or any amendment or re-enactment thereof, has an administrator appointed" then the "self certifying" administration route would have been covered and SCL would not have had to pay its sub contractor.

### Pay when paid clause did not apply

WHL wanted to be paid in any event. It argued that the pay when paid clause had no application, because no "administration order" had been made. The clause meant what it said, Trinity was not insolvent within the meaning of the clause. The proceedings progressed quickly, using the CPR Part 8 procedure.

SCL argued that it would be absurd if the new self certifying routes into administration were excluded when interpreting the meaning of the pay when paid clause. As drafted, the clause was incapable of producing a workable result. The court should ignore the use of the word "order" in the clause and decide that it did in fact cover all three routes into administration, SCL said.

Coulson J accepted WHL's interpretation and ordered SCL to pay WHL just short of £1,000,000: SCL appealed.

### Court of Appeal broaden the principle

The Court of Appeal dismissed the appeal, supporting the decision of Coulson J. They restated the general principles of contract interpretation:

There must be a strong case if a court is to be persuaded that "*something must have gone wrong with the language*" that parties use in their contracts.

The established test is "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.*"

Also, courts do not "*easily accept that people have made linguistic mistakes, particularly in formal documents...*"

However in construing exclusion clauses, the Court of Appeal was "doubtful" that the usual principles would apply:

The effect of the pay when paid clause had such financial significance that if the party seeking to rely on it "chose a way which was not in accordance with the legislation because he mis-drafted the provision, I can see no reason why, however obvious it was that he had mis-drafted the provision, that the principles ... would come to his rescue."

The court warned those seeking to rely on contractual terms which may include obvious mistakes. If the provisions are drafted in a way which works, then, even if the reasonable person would guess that it was not intended by the person who drafted it to be so limited and that there has been an error, the Court of Appeal saw "even less reason for the courts to come to the rescue."

Where a party is seeking to enforce the terms of an exclusion clause (such as a pay when paid clause) in which a party seeks to relieve itself from legal liability, the onus is on that party to use clear words. The Court of Appeal described this as the "dominant principle". They concluded by reinforcing it:

*"The general rule should be applied that, if a party otherwise liable is to exclude or limit his liability ..he must do so in clear words; unclear words do not suffice; any ambiguity or lack of clarity must be resolved against that party..."*

It was not open to SCL to argue that there was a lack of clarity in the pay when paid clause and ask the court to give it another meaning. It was drafted for the benefit of SCL; it excluded a liability to pay the sub contractor. It was for the party relying on the clause to make sure it was correct if it wanted to rely on it. There was no reason to interfere with it.

An end to pay when paid clauses? Are your exclusion clauses clear?

This is not the end of pay when paid clauses. A properly drafted pay when paid clause in a construction contract is legal and enforceable on insolvency. However, any party seeking to rely on any clause which seeks to relieve it from liability (of which there are many in commercial contracts of all kinds) must make sure their contract terms are clear and unambiguous. If they are not, the courts are unlikely to come to the rescue.

[Shepherd Construction Limited \(SCL\) v William Hare Limited \(WHL\) - Court of Appeal \[2010\] EWCA 283](#)

[Joe Wilkinson](#)

Joe Wilkinson, Legal Director in the Construction and Engineering Group, led the team at Addleshaw Goddard acting for WHL.

## Claim for damages under Data Protection Act fails, with libel claim

### The claim

A claim for damages in libel was recently coupled with a claim for breach of the Data Protection Act 1998 (DPA). A senior cabin crew member employed by British Airways (BA), had been found in a stop and search operation to be in possession of a number of miniature whisky bottles in excess of the amount permitted under BA's rules. He had not paid for them and could not provide a receipt. Following arrest, he was released without charge.

The claimant, Mr Hughes, sued both Mr Risbridger (employed by BA to investigate security matters) and BA for libel in relation to an internal BA e-mail report of the incident.

Mr Hughes' main contention was that the e-mail meant that he had admitted to theft during his interview at the police station and was guilty of theft from his employers. He also claimed damages for breach of s. 10 of the DPA, arguing that since he had never admitted to theft, BA's employment records should have been corrected in this respect. Section 10 of the DPA requires a data controller to cease the processing of personal data in certain circumstances (for example where it is likely to cause substantial damage or distress).

The defence of qualified privilege succeeded. Mr Hughes had accepted that the e-mail publication attracted qualified privilege as it was circulated to a limited number of employees of the BA who, by virtue of their responsibilities, had a legitimate interest in seeing it. The only issue to be resolved, therefore, was whether Mr Risbridger had acted with malice. Eady J was not prepared to make such a finding.

### DPAclaim

In respect of the claim under the DPA, Eady J also found in favour of BA:

the e-mail was transient in nature and was not part of any filing system, database or accessible record as required in the definition of 'data' under the DPA; and  
Mr Hughes could not bring himself within the terms of s. 13(2)(a) of the DPA, which is essential in order to claim damages. It is not sufficient that he suffered distress; he needed to establish that he had suffered damage, in the sense of special damage or identifiable financial loss.

### Comment

The decision under DPA is of particular interest. Notwithstanding the fact that Mr Hughes had failed to plead his case properly (s13(2)(a) of the DPA had not been pleaded), the court found that it would not have helped him. Whilst he had suffered damage (he had been demoted and suffered a loss of pay) he had failed to establish that he had suffered the damage as a result of the e-mail report.

Hughes v Risbridger and British Airways [2010] EWHC 491 (QB)

[Abi Healey](#)

## Summaries of recent developments: worldwide freezing orders – edisclosure – Part 36 Offers – without prejudice privilege

### Freezing a defendant's assets worldwide

The standard form freezing order, prescribed by the CPR, prevents a defendant from dealing with assets worldwide, except above a minimum value set by the court in each case in which an order is granted. A variation to this wording in a recent case, required a defendant to retain assets to that minimum value within the jurisdiction so that only if he transferred to this jurisdiction assets to the specified value could he deal freely with any of his worldwide assets (*JSB Bank v Abylyazov*) The Commercial Court held that there were good reasons to allow this variation which gave the claimant greater protection than the standard order.

Any claimant seeking to obtain a worldwide freezing order should think about asking the court to vary the standard form in this way. This doesn't give the claimant any security in respect of the minimum value of assets in this jurisdiction, but it does help in enforcing a judgment against the defendant if that becomes necessary. The court acknowledged that where there is a good reason the standard form wording could be amended in this way. The defendant could then apply to the court for permission to deal with any specific assets.

[JSC BTA Bank v Abylyazov & Ors \[2009\] EWHC 3267](#)

### Electronic disclosure – you may be asked to fill in a Questionnaire

Judges are expecting parties to disputes to plan and carry out edisclosure efficiently. The CPR already requires this. A separate Edisclosure Practice Direction is in the pipeline, with a CPRC Sub Committee currently reviewing a detailed draft. Accompanying it is a draft Disclosure Questionnaire which parties will have to fill in, exchange and discuss before Case Management Conferences. Some in the judiciary are already making orders to encourage early and detailed exchange of information: in one recent case penalties in costs were ordered against a bank which had not carried out edisclosure in a guarantee claim against a business customer. More recently Senior Master Whitaker required parties to group litigation to complete the draft Edisclosure Questionnaire which is yet to be issued officially by the CPRC; whilst informally available, it has not been finalised and is not part of the CPR or PDs. The Questionnaire is directed to, for example, giving information about where and how electronic documents are stored, how best to effect exchange and to allow parties to review them. It is annexed to the decision in its current, draft, form.

When completed, in tandem with discussion with a Master or Judge who is keen to manage a case proportionality and efficiently, the additional step of dealing with the Questionnaire is likely to save both parties time and costs. It may also, as in this case, at least initially, limit the disclosure to be carried out.

[Goodale v MoJ \[2009\] EWHC B41 QB](#)

### More twists in relation to Part 36 offers

The format, consequences and tactical use of Part 36 offers can be difficult. Getting them wrong can be costly: you may lose the benefit of a well judged offer; you may even lose a favourable settlement opportunity.

Part 36 Offers survive rejection and counter offers (*Sampla v Rushmoor*). They can only be removed when expressly withdrawn (even after the period within which the costs consequences if the offer is accepted are automatic – CPR 36.9 (2)). Whether they retain their "costs potency" in terms of shifting costs, even after a trial on liability, was the issue in *Pankhurst v MIB* [2010] EWHC 311.

In *Pankhurst* the claimants withdrew an offer made before the trial, but said that they intended to rely on it on the question of costs if they recovered more in respect of damages and costs. At the quantum trial the court awarded a lower sum than a later more favourable defendant's offer and it was accepted that the defendants would get their costs from the date of that later offer.

Did the earlier claimant's offer retain its costs potency (in this case the power to permit the claimant enhanced costs

recovery from the defendant for the period between that offer and the defendant's higher offer), even after the liability trial? The judge said that the costs potency remained. The offer was not just to do with liability; it dealt with quantum too. The defendants were ordered to pay enhanced interest on the claimant's damages from the date their earlier offer had been accepted (with a reduction for delay by the claimant in bringing the case to trial).

[Pankhurst v White and another \[2010\] EWHC 311 \(QB\)](#)

### Without prejudice privilege

Both the Court of Appeal (CA) and the Commercial Court have recently upheld without prejudice privilege against the competing public interest of the court having all possibly relevant material before it.

The public policy that allows without prejudice communications to be kept from the court is there to encourage settlements. It protects communications between parties genuinely attempting to settle their disputes. Encouragement to parties to negotiate is embodied in several court Rules, notably in the Overriding Objective to the Civil Procedure Rules.

### Without prejudice communications and contract construction

In the first case, Oceanbulk, the CA refused to broaden the exception to without prejudice privilege that permits the disclosure of such communications to prove that a settlement has been reached. The defendant wanted to adduce evidence of without prejudice negotiations in which they claimed that Oceanbulk had told them that a cooperation clause in a settlement agreement, which specified a time by which disputed accounts should be closed, would not take effect until Oceanbulk had settled accounts with third parties.

The Commercial Court judge had held that the distinction between adducing evidence of matters that went to whether a settlement had been concluded, and evidence as to how its terms should be interpreted, was a very fine one which he could not maintain. But the CA noted that the Agreement was in writing and its terms were clear. It did not have to decide whether, but for the without prejudice point, it would have admitted the evidence under the narrow exception to the normal exclusionary rule on contract interpretation disallowing evidence of contractual negotiations (*Chartbrook v Persimmon*).

[Oceanbulk Shipping and Trading SA v TMT Asia \[2010\] EWCA Civ 79](#)

### Without prejudice communication where there's a duty to the court of full disclosure

*Linsen*, a Commercial Court decision, looks at the exceptions to the without prejudice rule in a very different context. Should an applicant for a freezing order refer to without prejudice negotiations in an application made without notice being given to the defendant?

Applicants have a duty of full and frank disclosure to the court when making such applications because the defendant is not present, and so can't put before the court evidence which might support its case. In *Linsen* the defendant applied to set aside the freezing order which the claimant had obtained against it, partly on the grounds that the claimant had not disclosed that there had been without prejudice negotiations.

The decision contains some interesting observations about the difficulties for applicants where there is without prejudice material that may be relevant to the application. The answer, the court said, is not generally to disclose it, just because there is a duty of full disclosure (because that would be to waive the privilege without the defendant's permission) but instead to consider the material and reach a view as to whether without it the court will be misled. The applicant should consider whether either the fact of without prejudice negotiations or their content undermines its other submissions. If they do, either the material should be disclosed or the claimant's submissions generally may have to be toned down.

[Linsen International Ltd. & Ors v Humpuss Sea transport Pte Limited & Ors \[2010\] EWHC 303 \(Comm\)](#)

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