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### Electronic disclosure - courts decide what are reasonable searches

*Digicel (St Lucia) Limited and others v Cable & Wireless plc*, a decision of Mr Justice Morgan in the Chancery Division last October confirms that parties to disputes are expected to co-operate at an early stage in agreeing the scope of e-disclosure. If they don't they may be ordered to undertake further searches, irrespective of how much they have already spent on disclosure.

In *Digicel* the claimants were mobile telephone companies based in the Caribbean. They brought proceedings against the defendants who operated the telephone networks in the relevant countries. They claimed, among other things, that the defendants had deliberately delayed the connection process.

The defendants had searched available electronic documents using 14 keyword searches, which had resulted in 1,140,000 documents being provided to their solicitors. They had not restored back-up tapes. The process had cost over £2M in legal fees, and £175,000 in disbursements. The claimants applied under CPR 31.12 for the back-up tapes of 17 former employees to be restored and for further searches in respect of 34 additional keywords to be carried out.

The judge made the following general points about such applications:

- The reasonableness of the e-disclosure search is a matter for the court;
- The scope of the applicant's search should not be a yardstick for the reasonableness of the respondent's search;
- The Creswell Report on e-disclosure (following the recommendations of a working party chaired by Mr Justice Creswell) provides useful background reading on what is required for a reasonable e-disclosure search; and
- The possibility of cost shifting should be considered. The applicant could be ordered to pay for further searches to be carried out if the respondent considered them to be disproportionately expensive.

The judge criticised the parties for not following the guidelines set out in Practice Direction 31.2A.2 and failing to meet early in the proceedings to discuss electronic disclosure. The defendants' unilateral decision as to the scope of their own keyword searches exposed them to the risk that the court could deem their search inadequate, as was the case here. The judge ordered that:

1. the parties meet and co-operate fully in discussing the best way to permit restoration so far as was reasonably practicable of the back-up tapes of seven of the former employees; and
2. the defendants carry out some, but not all, of the additional keyword searches requested by the claimants.

Interestingly, the judge ordered the additional disclosure in the full knowledge that doing so might jeopardise the trial date that had been fixed.

A similar pragmatic approach was taken more recently in *Abela and others v Hammonds Suddards (a firm) and others*, in December last year. In that case the judge invited the parties to consider and discuss the form of further electronic searches, with appropriate IT assistance. He was clearly not impressed by arguments that he felt overstated the difficulty and expense of searching for electronic documents.

One of the keys to e-disclosure is that the parties should understand how their own and their opponents' electronic information is stored so that they can agree on what searches are proportionate. To this end a Sub Committee of the Civil Procedure Rules Committee is compiling a draft e-disclosure questionnaire to be completed by the parties identifying the scope of electronically stored information to enable them to agree the scope of reasonable searches. If approved, it is likely that this questionnaire will be incorporated into the CPR as part of the practice direction on e-disclosure.

[Kathryn Bailey](#)

### The race for assets - an unusual route

The holder of an interim charging order order may take priority over other creditors, even where a judgment debtor is made bankrupt before the charging order becomes final. A startling proposition, perhaps, to those unfamiliar with section 346 of the Insolvency Act 1986.

Section 346 (1) provides that:

"...where the creditor of any person who is adjudged bankrupt has, before the commencement of the bankruptcy ... issued execution against the goods or land of that person ...that creditor is not entitled, as against the official receiver or trustee of the bankrupt's estate, to retain the benefit of the execution or attachment, or any sums paid to avoid it, unless the execution or attachment was completed, or the sums were paid, before the commencement of the bankruptcy.

"But, under section 346(6):

*"The rights conferred by subsections (1) to (3) on the official receiver or the trustee may, to such extent and on such terms as it thinks fit, be set aside by the court in favour of the creditor who has issued the execution or attached the debt."*

That the exercise of the court's discretion to allow a judgment creditor to steal a march on other creditors in a bankruptcy is rare is only to be expected. So it is of interest when it happens, as it did last month in *Tagore Investments SA v. The Official Receiver*.

### The facts

Tagore Investments SA ("**Tagore**") started enforcement proceedings in respect of a multi-million dollar judgment for fraud against "Lord" Terence Montague-Moore, former CEO of its predecessor company, who had misappropriated millions of dollars from the company after (falsely) posing as an oil executive and claiming to be a member of the House of Lords.

The day before Tagore obtained security for the judgment debt with a final charging order over Montague-Moore's residence, he secretly petitioned for his own bankruptcy and a bankruptcy order was granted. As a charging order is not complete until the interim order is made final, the bankruptcy order meant that pursuant to s.346(1), prima facie, the rights of the Official Receiver (OR) to receive the property for distribution without being bound by the charge would defeat Tagore's final charging order, obtained in ignorance of the bankruptcy order granted the day before.

Tagore asked the court to exercise its discretion under s.346(6) to set aside the rights of the OR, and to allow the charging order to stand, notwithstanding the bankruptcy.

Had the relief been refused Tagore would have lost the benefit of its charging order altogether.

### The judgment

The judgment of Mr Justice Mann includes a helpful summary of the parameters for the court's discretion under section 346(6) and parallel provisions in previous insolvency legislation. He re-affirmed the overriding principle of *pari passu* distribution amongst all creditors of the same class at the date of bankruptcy (i.e. distribution in proportion to their debts as at the date of bankruptcy). However fraud, trickery or some other illegal act preventing the judgment creditor from completing execution before the start of liquidation/bankruptcy will justify the exercise of the s.346(6) discretion.

There are six factors to take into account:

1. The court has the discretion to do what is fair, by reference to appropriate criteria, and not in a "*palm tree justice*" sense.
2. In judging fairness, the prime considerations are factors going to enforcement of the judgment and the reasons why enforcement has been frustrated.
3. The emphasis is on post-judgment events that have frustrated the enforcement process.
4. It may, however, be open to the court to consider pre-judgment events that resulted in a delay in obtaining judgment (and therefore completing enforcement) in so far as they reflect on post-judgment events, and enable the court to draw proper inferences from them.
5. The *pari passu* rule must be afforded great weight and should not be lightly displaced. The court's jurisdiction must be exercised with great caution and only in exceptional cases.
6. There is a heavy burden on the applicant to establish that events have led to sufficient unfairness, were execution not to be permitted, to justify an exception in his favour.

On the unusual facts of this case, the judge allowed the final charging order to take effect, notwithstanding the bankruptcy. He held that Montague Moore's petition for bankruptcy, and the timing of the petition, was an "*act of manipulation... not taken in the interests of his creditors but taken in order to disadvantage Tagore, and as a counterpart to the disadvantage to Tagore, to promote his own and his family's personal interests*".

In focusing on the unfairness to Tagore, as opposed to any unfairness to the bankrupt's other creditors that would result from the exercise of the s.346(1) exemption, the judge gave "*only a small*" amount of weight to the fact that sums owed to the other creditors were minimal by comparison to sums owed to Tagore. However, if a significant creditor of the bankrupt would have been prejudiced by the order sought, this would no doubt have been a significant consideration in the determination of fairness.

At the time of writing, there are no reported cases on the exercise of the s346(6) discretion in respect of a debtor's petitioning for his own bankruptcy deliberately to frustrate execution by a creditor. Reported cases relate to deliberate fraud (or delaying tactics falling just short of fraud) by the debtor, designed to delay the execution.

*Tagore* is a rare exercise of the court's discretion under s 346(6). In the recession, this little used exception to the normal rule on bankruptcy could provide an invaluable tool to a creditor up against a devious debtor.

### [Asana Abu](#)

1 Roberts Petroleum Ltd v Bernard Kenny Ltd (in liquidation) [1983] 1 All ER 654

## **The race for assets - trying to get round the "claims moratorium"**

Two claims, brought following the collapse of Lehman Brothers on 15 September 2008, were attempts to "leap frog" the statutory moratorium on litigation imposed whilst a company is in administration. Both involved prime brokerage agreements. Both failed.

### **RAB Capital Plc v Lehman Brothers International (Europe)**

RAB Capital Plc and RAB Capital Market (Master) Fund (together RAB) had entered into a prime brokerage agreement with Lehmans. RAB claimed to have a proprietary interest in two US treasury bills held at Lehmans which together totalled approximately US\$50 million. If RAB's proprietary claim succeeded, it would have been entitled to the return of the bills from Lehmans. If it failed, RAB would rank as an unsecured creditor for the full US\$50 million. Obviously, this was something that RAB wanted to avoid given the precarious position of unsecured creditors in a company's insolvency.

RAB issued an urgent application for directions that its substantive claim be listed for Friday 26 September. The court refused the application on two main grounds.

First, it noted that it was the job of the administrator, as officer of the court to appraise any claim, deal with it, and give effect to any established rights. In the court's view, RAB had presented very little in the way of legal argument but instead had framed an application which was, in reality, little more than for the return of assets. The court was very conscious of the fact that there were likely to be many other similar claims, and emphasised that it was the job of the administrator to process them, and not the court. The court expressed great sympathy with the claimant, but was not prepared to grant an application that had the potential to open the floodgates to a tidal wave of similar claims, thus creating a burden for the courts that they would struggle to handle.

### **Terminology**

**Administration** is a procedure under Schedule B1 of the Insolvency Act 1986, under which a company may be reorganised or its assets realised, whilst under the protection of a statutory moratorium. The statutory moratorium is intended to give the administrator some breathing space by "freezing" all creditor claims for a defined period of time.

**Prime brokerage** is the generic term for a bundled package of products offered by investment banks to hedge funds and other professional investors. At its most basic level, a prime brokerage agreement offers the hedge fund or investor the ability to trade with multiple brokerage houses while maintaining all the hedge fund's or investor's cash and securities in a central master account.

Secondly, the court said that even were it to order the hearing to take place on 26 September, the application would almost certainly be derailed by other legal issues arising on the particular facts. Not least that the assets in question were held in America by another Lehman group company and further steps would be required to recover them.

### **Re Lehman Brothers International (Europe)**

The applicants here were four private investment funds. Under a prime brokerage agreement they had lodged securities with Lehman Brothers Inc as their prime broker. Lehman Brothers Inc had transferred the securities to Lehman Brothers International (Europe).

The applicants claimed that by 12 September 2008 they had agreed with Lehman Brothers Inc that most of their securities would be transferred to a third party bank on 16 September. On 15 September Lehman Brothers International (Europe) went into administration.

At the request of the applicants, the administrators had provided information relating to the securities. However, the applicants sought further information and when the administrators failed to provide it, asked the court to compel the administrators to do so.

The order was refused. As the court had done in the RAB case, it expressed sympathy for the applicants' position, but said that the administrators must be given space to go about their duties. An administrator's job would be unmanageable if it was at the "beck and call" of every creditor wanting information about his claim.

The court said that there was no inference that the administrators had acted improperly, and that to grant the order would run contrary to the nature and purpose of administration. As with the RAB case, the court did not want to risk confusing the role of the court and the administrator.

### Conclusion

In both cases, the issue was essentially the same: should the court intervene in an administration to assist a claimant, or should it leave the administrators alone to get on with their job? Both claims had merit: the applicant risked suffering serious financial loss. However, in both cases the court refused to intervene.

So where there is no inference of improper conduct on the part of the administrator, or other exceptional circumstances, the court is not going to interfere with the conduct of an administration. To do so would undermine the statutory regime.

[Nick Jones](#)

### Jurisdiction clauses - what happens to them when the whole agreement may be void?

In *Deutsche Bank AG and others v Asia Pacific Broadband Wireless Communications Inc and another* [2008] EWCA Civ 1091 the Court of Appeal had to decide whether a jurisdiction clause was valid when the validity of the agreement as a whole had been challenged..

#### The agreement

The agreement between the parties in this case provided that it was to be governed by English law and subject to the exclusive jurisdiction of the courts of England and Wales. Deutsche Bank agreed to provide Asia Pacific Broadband with a credit facility, which had been guaranteed by Asia Pacific Broadband's parent company.

At the time, Asia Pacific Broadband was controlled by the Wang family, certain members of which had been indicted for fraud in Taiwan. Events of default subsequently occurred under the credit facility agreement. US\$175 million was due to Deutsche Bank (and other lenders). Deutsche Bank issued proceedings in the English courts.

#### The claim

The claim form stated that the English court had jurisdiction on the basis that the defendants were parties to an agreement conferring jurisdiction to which article 23 of Council Regulation (EC) 44/2001 (the Judgments Regulation) applied. Article 23 provides that the courts of a Member State will have exclusive jurisdiction where the parties have agreed that such courts will have jurisdiction to settle any disputes.

The defendants had argued that the agreement was void, on the basis that it had been entered into by the Wang family as part of a large scale fraud. Deutsche Bank therefore applied for permission to amend its claim form, adding two alternative claims:

(1) a restitutionary claim – that if the agreement was void, monies had been paid out under a mistake of fact and/or law for a consideration which wholly failed; and

(2) a misrepresentation claim – if the agreement was void for lack of authorisation, Mr Wang made representations to Deutsche Bank for which Asia Pacific Broadband was liable (Mr Wang had represented to Deutsche Bank that a board meeting had been held to authorise him to enter in to the agreement).

The defendants challenged the English courts' jurisdiction to hear the alternative claims and the judge at first instance refused the application to amend the claim form, ruling that he had no jurisdiction to determine them. The claimants appealed.

#### Appeal

The Court of Appeal upheld the appeal. There had been consensus between the parties on the jurisdiction clause and thus the English courts had jurisdiction by virtue of article 23(1) of the Judgment Regulations.

#### Consensus

The Court of Appeal held that, if a claimant wanted to rely on a jurisdiction clause pursuant to article 23 of the Judgments Regulation, it had to demonstrate clearly and precisely that the clause had been the subject of a consensus. If that was in dispute, the claimant had to show, on the available material, that the requirements of article 23(1) had been met. In this case they had: the agreement confirming jurisdiction had been in writing, contained in a written agreement which had been signed or "chopped" by the parties. In those circumstances, it was clear that consensus had been reached. Accordingly, the requirements of article 23 were met, subject to the argument that the signatories had no authority to enter into the agreement.

#### Separability

The Court of Appeal observed that it was uncontroversial as a matter of domestic and European law that a jurisdiction clause, like an arbitration clause, was a separate agreement from the agreement as a whole. It followed that disputes as to the validity of the agreement had to be resolved pursuant to the terms of the jurisdiction clause. It was only if the jurisdiction clause itself was under some specific attack that a question could arise as to whether it was appropriate to invoke the jurisdiction clause.

### Comfort

The Court of Appeal's approach offers comfort to parties who are based in Member States and who seek to rely on jurisdiction clauses. The decision at first instance had left some uncertainty concerning when jurisdiction clauses would fall within the scope of article 23 of the Judgments Regulation. That uncertainty has been largely reduced by the Court of Appeal decision. A jurisdiction clause cannot be defeated by arguing that the agreement as a whole is void (be it as a result of mistake, misrepresentation, illegality or lack of authority). Instead, it must be the jurisdiction clause itself which is the subject of attack. If the formal requirements of Article 23 are met, the scope for attack must be very limited.

[Abigail Healey](#)

### Restitutory damages in cartel cases: is a new approach required for group actions?

The Court of Appeal decision in *Devenish v Sanofi-Aventis* [2008] EWCA Civ 1086 confirmed that a claimant, in a private action for damages against a cartel operator, can only seek compensatory damages and not restitutory damages, where compensatory damages are claimable.

### Fines

In 2001, the European Commission found that a number of vitamin manufacturers were operating cartels in breach of the competition rules of the EC Treaty. The Commission imposed fines of over €855m, at the time the highest ever. Some of the companies to whom the cartel operators had supplied vitamins sued them in the High Court for damages.

### High Court - compensatory damages only

The type of damages available as a remedy for a competition law infringement was tried as a preliminary issue. The claimants argued that, given the difficulty of proving loss, they were entitled to exemplary damages, an account of profit or a restitutory award for unjust enrichment rather than just compensatory damages.

The court found that domestic courts should decide the type of damages available in keeping with the European principles of equivalence (EC remedies not to be less favourable than domestic remedies) and effectiveness (national law must not make it excessively difficult to exercise EC rights). With these two principles in mind, the court held that claimants seeking damages based on anti-competitive practices are entitled to compensatory damages but neither exemplary damages, a restitutory award, nor an account of profits.

Exemplary damages would infringe the principle of double jeopardy: the defendants being punished twice for the same wrong because they had already been fined.. The court was bound by the Commission's ruling that the fines imposed were an adequate deterrent to the cartel operators. Also, as the claimants formed only part of the class affected by the unlawful cartels, awarding exemplary damages would give them an unfair windfall: other companies which had suffered losses would not benefit.

Under the current tort case law (which has never been fully tested in the House of Lords), the Court of Appeal indicated that there might be exceptional circumstances where restitution would be available. These circumstances, however, do not cover the case where compensation could be claimed but the claimant had difficulties in proving its claim. The difficulty of proving loss did not preclude effective compensation in domestic law, the court said. So neither a restitutory award nor an account of profits was necessary. Restitutory awards were not available in competition cases and "if the law is to be changed, it must be done by a higher court than this one", Lewison J held.

### Court of Appeal - compensatory damages only

The Court of Appeal decision was heralded as a potentially decisive moment in the history of group actions in England and Wales. Compensatory damages had offered little to potential claimants; the availability of a restitutory award would have been a significant change. It might have encouraged more claimants. Success might have led to an increase in group actions.

But the appeal failed. Restitutory damages are not available in cartel cases. Despite their extension in 2001 by the House of Lords, in *Attorney General v Blake*, to breach of contract cases in exceptional circumstances, restitutory remedies are only available for non-proprietary torts. That excludes private actions for damages based on breaches of statutory duty in cartel cases. The Court of Appeal was not persuaded that European law requires the English courts to make them available.

Permission to appeal to the House of Lords was refused by the Court of Appeal, but the claimants have applied directly to the House of Lords for permission. At the time of writing there has been no decision on that application.

### Group actions – the future

The Court of Appeal declined to open up competition infringement actions to restitutionary damages in a case brought by indirect purchasers. However, until the House of Lords is given the opportunity to consider the question of remedies in competition infringement cases, or EC or national legislation is adopted on the issue, *Devenish* has important implications for collective redress in the UK. Recognition of restitution as an available remedy would have fulfilled the policy objectives of, among others, the Office of Fair Trading and the Commission, to encourage private actions for collective redress. The availability of restitutionary damages would boost group actions in England and Wales. If some or all of the claimant's loss has been passed on down the supply chain he may not be able to claim substantial compensation. At the end of the chain, where the level of loss is minimal for individuals, there is little incentive to seek redress when compensatory damages may be too small to justify the costs of bringing or joining a group action.

Since *Devenish* the Civil Justice Council has published its recommendations on Collective Redress which have been passed to the MoJ and Lord Chancellor. Whilst primarily procedural they do propose aggregate awards of damages (avoiding the need for individuals to prove loss). Legislation, although unlikely in the short term, may result, boosting collective redress by a slightly different route.

[Sarah Vallotton](#)

## Recent developments in brief

### Costs reviews all round

The cost of civil litigation and how to fund it continue to be hot topics and have prompted a major review into costs and funding.

Lord Justice Rupert Jackson is carrying out a comprehensive review of the civil litigation costs system. His review has its own web pages on the Judiciary of England and Wales website. The public consultation phase of the inquiry will run from May to July 2009, but interested parties (organisations, professionals and court users) were invited to submit before the end of January information on costs currently being incurred and their views on topics such as the proportionality of costs, CFAs, costs capping, the "loser pays the winner's costs" rule and hourly rates.

The Law Society is conducting a survey seeking its members' views on civil litigation costs and funding issues.

Information about Addleshaw Goddard's Contro£, a unique and flexible approach to funding litigation can be found at: [www.fundingcontrol.co.uk](http://www.fundingcontrol.co.uk)

### Rome II: EU introduces Regulation for law applicable to torts

On 11 January, the EU introduced a new approach to the way in which courts within the EU will determine what law applies to non-contractual obligations (torts and similar claims). On that date the Rome II Regulation (**Rome II**) came into force. Rome II is designed to harmonise conflicts of law, and thus facilitate mutual recognition of court judgments between EU states. It is relevant to all businesses which trade anywhere outside England, and which may face tort claims, such as product liability, personal injury or unfair competition.

Note that Rome II does not affect EU rules on jurisdiction. The question of which courts should hear a dispute is still determined by the Brussels Regulation 44/2001.

The new general rule is that the applicable law is the law of the country in which direct damage occurs, although there are exceptions where the claimant and defendant to a claim have their "habitual residence" in the same country or if the damage is "manifestly more closely connected" with another country. For example, if an English resident travelling in France is involved in a car accident, the law of France will apply to his or her personal injury claim unless the party causing the accident also has habitual residence in England.

There are rules for certain specific torts, some of which are very complex. Broadly speaking these can be summarised as the law of the country where, for claims based on:

- product liability, the product has been marketed;
- restriction of competition (cartels/monopolies), the relevant market is located;
- intellectual property, the IP protection is sought;
- industrial action, the action takes place;
- unjust enrichment, the relationship giving rise to it was based.

...and there are other detailed specific provisions, together with exemptions.

Rome II also, and importantly, introduces the novel concept of parties "agreeing" what law will apply to non-contractual obligations.

Rome II has "universal application", so can result in the application of non EU law. It also applies to the question of quantum (how much a claim is worth), which is a radical departure from the previous English approach of leaving that question to the courts where the dispute is heard, as a matter of procedural rather than substantive law. The spectre thus arises of large foreign law claims being litigated in the English courts.

All businesses need to be aware of the possible consequences of Rome II, as it will apply to all tortious claims which have a connection with legal systems outside England and Wales. It should also be taken into account in the drafting of international contracts.

[Clare Dwyer](#)

## EU Regulation on Service of Judicial Documents

Another EU level change that will interest those handling civil disputes is the entry into force of the EU Brussels Service Regulation on 13 November 2008 (EC No 1393/2007) (the Service Regulation). Note that the Service Regulation is not to be confused with the Brussels Regulation 44/2001 which governs jurisdiction.

The Civil Procedure Rules permit service of English claims (where the English courts have jurisdiction) abroad through governments/judicial authorities, by any method that is valid under local law or under an international convention on service. There are two such international conventions: the Hague Convention (which, broadly, covers jurisdictions outside the EU who have signed up to it) and the Service Regulation (The Service Regulation).

The new Service Regulation replaces one that had been in place since 2000. It brings in a uniform rule for postal service by Member States, speeds up service through judicial authorities (imposing a requirement on the receiving country to serve within one month of receipt of the document to be served) and permits Member States to serve directly on individuals in other Member States.

Although neither the CPR nor the White Book point this out, it appears that if you are serving on a defendant resident in an EU Member State you must use one of the methods set out in the Service Regulation. You must not use any other method permitted by the CPR.

There is some debate in this jurisdiction about how postal service will work. The rule permitting postal service on litigants in other Member States (Art 14) does not permit postal service by solicitors or individual litigants, only by "Member States".

[Kate Menin](#)

## Mortgage Claims Pre Action Protocol

This was given prominence in the national press when it came into force last November in response to fears that in the recession lenders would take swift action to repossess homes or pursue homeowners in the courts for orders for possession for defaults in mortgage payments. It requires both sides to communicate early about defaults, and to try to avoid legal action. Matters which should be discussed include the cause of arrears, the borrower's financial circumstances and proposals for repayment. Starting repossession claims should be a last resort; other options such as capitalising arrears, extending the mortgage term or deferring interest should be explored first. But lenders' rights to possession are not affected by the Protocol.

[Kate Menin](#)

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