CLIFFORD
CHANCE

Newsletter July 2015

Contentious Commentary

Contract

Words reborn

The Supreme Court emphasises the importance of the words in construing a contract.

Since the Hoffmannite revolution in the interpretation of contracts, there has been a tension at the heart of any issue on the meaning of a contract: when should the words the parties have chosen to express their bargain dictate the result, and when should the judge's view of business common sense permit a departure from what may otherwise be the natural meaning of those words?

Different courts have reached different solutions, but the highest court has generally favoured context over words (eg *Re Sigma* [2009] UKSC 2 and *Rainy Sky* [2010] UKSC 50). But in *Arnold v Britton* [2015] UKSC 36, the Supreme Court has signalled a move back to a greater emphasis on the natural meaning of the words used. It declined to depart from that meaning, or to imply additional words, merely because the outcome has, as events have transpired, proved uncommercial, even extreme.

Arnold v Britton concerned 99 year leases on plots in a caravan park on the Gower Peninsula. The leases, all of which ran from 1974 (though the relevant leases were granted, in the main, in the 1980s), provided (in various forms) for the lessees to pay "a proportionate part of the expenses and outgoings incurred by the Lessor in the repair maintenance renewal and the provisions of services hereinafter set out in the yearly sum of Ninety Pounds... for the first Year of the term hereby granted increasing thereafter by Ten Pounds per hundred for every subsequent year or part thereof" (punctuation was not, then at least, a big feature in the conveyancer's life).

The problem, for the lessees, was that this seemed to compound the service charge at 10% annually. If so, by the end of the leases the service charge would be more than £1 million pa. The service charge was already some five times the level that inflationary increases in the starting £90 would have reached and, if inflation stays as it is (or, more accurately, isn't), the real gap will accelerate.

As a result, the lessees argued that the clause should be read with "up to" inserted before "Ten", ie so that £90, duly compounded, acted as a cap on the service charge rather than the absolute sum due.

The majority of the Supreme Court (Lords Neuberger, Sumption, Hughes and Hodge; Lord Carnwarth dissenting) would have none of this. The natural meaning of the wording was that lessee had to pay £90 a year, compounded annually at 10%, and the unexpected, even unfortunate, result was not enough to allow the court to depart from that meaning (nor was there any statutory power to interfere). In context, there was no obvious mistake. Between 1974 and 1981, inflation had been well over 10% pa (and, indeed, had been over 15% for six of those eight years). The clause imposed on the lessor the risk that inflation would continue at greater than 10% for the remainder of the term, while the lessees took the risk that inflation would drop, as it has in fact done. Nothing necessarily strange in that.

Of potentially more far-reaching importance than the actual result are Lord Neuberger's comments about the importance of the language used by the parties, denigrating judicial reliance on commercial common sense:

Contents

- Contractual interpretation should heed the parties' words
- LP certificate conclusive even if fraudulent
- Courts can correct obvious mistakes
- "Consummated" in context
- Contract clause rejected as repugnant to the rest
- Contractual notices must be clear
- EU ratifies Convention on Choice of Court Agreements
- The fate of the surplus in solvent insolvencies
- ISDA jurisdiction clause non-exclusive
- Arbitrators' anti-suit orders outside Brussels I
- Clicking to agree to internet terms is binding
- Jurisdictional challenges must be timely
- Champerty doesn't invalidate contractual claim
- Experts must reveal acquaintance with the parties
- FCA identification need not be express

- "... the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook*, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, the meaning is most obviously to be gleaned from the language of the provision."
- "... when it comes to considering the centrally relevant words to be interpreted... the less clear they are, or, put another way, the worse the drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning."
- "... commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, even disastrously, for one of the parties is not a reason for departing from the natural language."
- "... while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of the wisdom of hindsight."

This looks very much like a counterblast to the more context-focussed - even anti-textual - approach taken by some judges in, for example, *Re Sigma* and *Rainy Sky* (it also echoes worries expressed by lower courts, such as the Court of Appeal in *BMA Special Opportunity Hub Fund Ltd v African Minerals Finance Ltd* [2013] EWCA Civ 416).

Despite his counterblast, Lord Neuberger was not seeking to change fundamentally the approach to the interpretation but rather to move the dial back towards the wording. Judges should think harder than some might currently be inclined to do before they depart from the natural meaning of the wording, still more if inclined to use what they perceive to be an uncommercial outcome to manufacture ambiguity in the wording. Contracting parties should generally be afforded the courtesy of being assumed to mean what they say.

Companies

Fraud does not unravel all

A certificate of registration for a limited partnership is valid even though fraudulently obtained.

If the requisite documents for a limited partnership are filed at Companies House, the Registrar is obliged to register the limited partnership (section 8 of the Limited Partnerships Act 1907). The certificate of registration is "conclusive evidence that a limited partnership came into existence on the date of registration" (section 8C(4)). The requisite documents include an application signed by or on behalf of each partner. The Registrar does not - realistically, cannot - check the authenticity of the documents. As long as the documents are apparently completed correctly, the Registrar accepts them as valid, registration is effected and a certificate issued. But what if the documents are fraudulent, having being signed by someone with no authority on behalf of the purported general partner?

In *Bank of Beirut SAL v Prince Adel El-Hashemite* [2015] EWHC 1452 (Ch), the documents purportedly signed on behalf of C, as the supposed general partner, were fraudulent. Despite this, Nugee J rejected an application that the Registrar remove all record of the limited partnership ever having existed. He considered that the conclusive evidence provision in section 8C(4) prevented him from declaring that the limited partnership had never existed and that he could not require it to be expunged from official records. As a result, the limited partnership did exist (despite the general partner never having agreed to be such), and will forever be shown as having existed.

The register of limited partnerships is a rather odd thing. It records the existence of limited partnerships, but has no provision for de-registration. The judge could not even find a provision requiring anyone to notify the Registrar of the dissolution of a limited partnership. The Register is, therefore, a historical curio, recording the existence of limited partnerships on a particular date, but little else.

Mistakes defined

The court might only rarely conclude that the parties' use of language is mistaken, but it does happen.

At the extreme end of contractual interpretation, beyond merely interpreting ambiguous wording in the light of business common sense, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 establishes that the court can correct the parties' mistakes through the interpretative process. But this requires the court to find an obvious mistake (an arbitrary or irrational outcome) and for the correction to be equally clear. This can happen when, eg, a cross-reference is clearly wrong, but it can also happen in other circumstances, as the Chancellor found in *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 plc* [2015] EWHC 1560 (Ch).

LBG Capital concerned contingent convertible bonds (commonly called CoCos, or enhanced capital notes) issued by a bank in 2009 to boost its capital ratios. The CoCos pay interest at an average of 10.33%, or £940k per day, far above what the bank would need to pay if it issued comparable instruments now. The bank is therefore understandably keen to redeem the bonds; the bondholders, who include consumers, are equally keen to resist redemption.

The CoCos allow the bank to redeem the bonds if the capital requirements are changed with the result that the bonds "ceased to be taken into account... for the purpose of any "stress test" applied by the FSA in respect of the Consolidated Core Tier 1 Ratio." The mistake the Chancellor spotted was not in the reference to the FSA, which meant the relevant regulator from time to time, but in the use of "Core Tier 1 Ratio". This was linked to "Core Tier 1 Capital", which was defined by reference to the capital requirements in place in 2009.

The Chancellor considered this temporal constraint to be an obvious mistake. The parties meant a stress test applied to the top grade of loss-absorbing capital as defined by the regulator from time to time (now common equity tier 1 capital). After all, the redemption right only applied if there was a change in the regulatory capital requirements, and the parties knew at the time of issue that changes were coming. A redemption right that came into being on a change in capital requirements couldn't simultaneously evaporate because the regulator changed the definition and name of the capital against which it conducted the stress tests. The inconsistency drove the Chancellor to his conclusion that there was a mistake.

However, this was not enough to get the bank home. The CoCos were contingent capital (counting as lower tier 2) that converted into equity if the bank's common tier 1 capital ratio fell below 5%. They were therefore counted by the regulator as common tier 1 capital if, in stress testing, the bank's capital ratio fell below 5% and thus helped in passing the stress tests.

The capital rules were not, however, static. By 2014, common tier 1 capital had become the more restrictive common equity tier 1 capital, and CoCos only counted as the more useful additional tier 1 capital if the conversion trigger was above 5.125%. As a result, the CoCos were not taken into account in the PRA's December 2014 stress tests because the bank's core equity tier 1 ratio was both above the required level (4.5%) at the time and above the trigger level of 5% in the CoCos. The CoCos remained beached as lower tier 2 capital. As a result, said the bank, its right of redemption arose.

The Chancellor disagreed. The redemption right couldn't depend upon the bank's capital ratios from time to time. It required a rule change to exclude them or, at least, to affect them. Nor was it sufficient that the bank would now fail the stress test before the trigger for conversion of the CoCos into equity was reached. The CoCos would still be relevant in the assessment of the remedial measures required in the light of failing the stress test. The inevitable risk arising from changes in capital requirements therefore fell on the bank, not its bondholders.

Consumed by passion

Consummated means completed.

African Minerals Ltd v Renaissance Capital Ltd [2015] EWCA Civ 448 turned on what was meant by "consummated" in the context of the sale of a business. If it meant completed, the agent was not entitled to commission; if it meant agreement of the material terms for the sale, the agent was entitled to commission.

The Court of Appeal opted for completed, even though Completion was a concept used in the Agreement. Applying the somewhat unfortunate analogy of marriage, the Court of Appeal decided that an agreement was not consummated when entered into, but only when the transfers required by the Agreement had actually taken place. Marriage vows and consummation do not usually take place simultaneously (to the relief, doubtless, of those attending the event).

Repugnant variations

Terms of a contract are rejected as repugnant to the whole.

If correcting mistakes is at the extreme end of contractual interpretation (see above), rejecting a term as repugnant to the whole is way off piste. Yet that is what Phillips J did in *Mercuria Energy Trading Pte Ltd v Citibank NA* [2015] EWHC 1481 (Comm).

The case concerned repo transactions to finance C's metal holdings. The metals were held in warehouses in China. C sold the metal, by delivery of warehouse receipts, to D. The transactions were expressly stated to be a true sale. Before the repurchase date, fraud became suspected at the warehouses, and it was impossible to remove the metal (if, indeed, it existed at all). D therefore accelerated the repurchase dates and claimed to be entitled to deliver back essentially the same warehouse receipts that it had received.

Section 29(4) of the Sale of Goods Act 1980 requires that, where goods being delivered are in the possession of a third party, delivery is effected by the third party attorning to the buyer, ie acknowledging that it holds the goods to the order of the buyer. This was repeated in the master agreement governing the repo transactions, but the confirmations for individual transactions went on to provide that D could deliver warehouse receipts without any need for confirmation from the warehouse owner. The master agreement provided that, in the event of inconsistency, confirmations took precedence over the master agreement.

Despite this, Phillips J concluded that the removal in the confirmation of the need for attornment was inconsistent with the general wording, and the parties could not have intended the confirmation to cause a fundamental change in the overall commercial scheme and in D's delivery obligations. The words were, in the judge's view, repugnant, could not be harmonised and, as a result, should be rejected, ie treated as if not there. That really is a rare decision, distinctly hors catégorie.

Nevertheless, D succeeded on other issues. The judge decided, inter alia, that, on the terms of the master agreement, C was obliged to pay the price before D's delivery obligation arose, which C had not done. D was not therefore liable for non-delivery. Further, C's failure to pay was a repudiatory breach. D had not accepted the repudiation and, because it subsequently made other deliveries, it would normally have waived the right to accept the repudiation (despite reserving its rights). However, because C had a continuing obligation to pay, C was in continuing repudiation, which D could still accept.

Notified failure

A claim notice under an SPA must say what it is.

In *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), Simon J laid down in a strict manner the requirements if a warranty claim notice under typical Sale and Purchase Agreement provisions is to be effective. The SPA required the notice to specify in reasonable detail the matters giving rise to the claim, the nature of the claim and the amount claimed. Simon J identified four aspects for a notice if it was to achieve this:

- The purpose is to let the seller know in formal terms that a claim is being made. It must be sufficiently clear and unambiguous as to leave no room for argument about the particulars of the complaint.
- In construing a notice, the issue is how it would be understood by a reasonable recipient with knowledge of the context in which it was sent.
- It must specify that a claim is actually being made, rather than merely indicating the possibility that a claim may yet be made.
- The required matters must be "specified"; leaving them to inference is not enough.

Again, as is usual, the claim notice had to be given within a fixed period (here, two years) of completion, with legal proceedings within a further six months. Simon J decided that C's notice failed to meet his requirements and, as a result, that C's claim was barred.

C had previously sent a notice under a different provision of the SPA that had expressly stated that it was not a claim notice, but what C relied on as a claim notice failed to say that it was a claim notice or even to refer to the provision of the SPA under which warranty claims were made. Further, there was no sufficient attempt to specify the factual basis upon which the claim was made, nor the nature of the claim. The judge accepted that it was not necessary to go into the detail expected of a pleading - there was a further six months before that had to be done - but something formal and more akin to short form pleadings was required.

The judge also recognised that the requirements of any particular notification clause will depend upon its wording, but stressed that clarity in purpose and content is the key.

Jurisdiction

Mexican waves

The EU has ratified the Hague Convention on Choice of Court Agreements.

The Hague Convention on Choice of Court Agreements requires its adherents to give effect to exclusive jurisdiction agreements in favour of the courts of a contracting state and then to recognise and enforce the judgment given by those courts. Only two signatories, Mexico and the EU, have got as far as ratifying the Convention, which will come into force on 1 October 2015 as between them. As a result, if there is an exclusive jurisdiction clause in favour of the Mexican courts, EU courts will be bound to stay proceedings in favour of the Mexican courts and then to enforce any judgment given by the Mexican courts (and vice versa). Perhaps not earth-shattering for the financial world. Singapore and the US have also signed, but not yet ratified, the Convention. If either ratifies, particularly the US, the Convention will become more significant.

Danish pastries

A jurisdiction clause does not prevent proceedings under foreign insolvency law.

If a counterparty to an ISDA Master Agreement goes bust, the agreement not unreasonably gives most of the cards to the solvent party. The solvent party can either terminate the agreement, claiming the close-out amount in the insolvency (with the not insignificant disadvantage that it probably won't get paid the whole amount, and certainly won't be paid anything quickly). But, if the close-out sum would be due to the insolvent party, the solvent party can both decline either to pay any sums that would otherwise fall due or to close-out (section 2(a)(iii) and *Firth Rixson* [2012] EWCA Civ 419), thereby potentially avoiding a deal that has turned out disadvantageously.

Insolvency practitioners will obviously look for a way around this in order to realise the value in a transaction. In *SwissMarine Corporation Ltd v O W Supply & Trading A/S* [2015] EWHC 1571 (Comm), this involved D's starting proceedings in Denmark in order to invoke Danish insolvency law as a reason why C was obliged to pay a sum akin to that due on close-out despite C not having closed out and D not being entitled to close out. C sought an anti-suit injunction to restrain D from pursuing the Danish proceedings, as well as declarations that it was entitled to rescind the agreement for misrepresentation and that it had no obligation to pay any sums otherwise due under the Agreement because of section 2(a)(iii). (Denmark is not subject to the EUIR.)

Insolvency

The long firm

Currency conversion claims can be made in an insolvency.

Companies go into an insolvency procedure (usually administration or liquidation) for the tautological reason that they are insolvent. As a result, there is little law on what happens when an insolvent company turns out not to be so. But that has transpired in the case of the main European arm of Lehman, LBIE. It has a huge surplus after paying off its unsubordinated debts. Creditors are understandably looking to maximize their claims to the surplus spondulicks.

LB Holdings Intermediate 2 Ltd v Lomas [2015] EWCA Civ 485, commonly referred to as *Waterfall I*, has now reached the Court of Appeal. *Waterfall II* is trogging its way through the first instance courts, some distance behind, raising further issues on the fate of LBIE's surplus, including as to the proper interpretation of the interest provisions in the ISDA Master Agreement.

In *Waterfall I*, the Court of Appeal decided various issues, including that LBIE's subordinated debt, forming part of its regulatory capital, ranked above share capital but below everything else, including interest and non-provable claims.

The Court of Appeal also decided (Lewison LJ dissenting) that foreign currency creditors of LBIE can claim for any shortfall between the sterling amount they receive by way of dividend and the sum in foreign currency they should have received. A shortfall can arise because, initially, foreign currency claims are proved at the exchange rate applicable at the start of the administration or liquidation even though payment of a dividend will not be made until many months or years later. If sterling declines, the creditor will receive a sterling sum less than the foreign currency amount. While Lewison LJ held that payment of the sterling sum discharged the debt, leaving no further claim, the majority (Briggs and Moore-Bick LJJ) decided that the creditor was entitled to revert to its contractual claim to be paid the foreign currency sum. The creditor therefore had a non-provable claim for any currency conversion shortfall.

The rarefied nature of this claim is illustrated by the fact that these non-provable currency conversion claims are payable after interest on unsecured provable debts, but before subordinated claims and shareholders' equity. The monetary waterfall flows fast and long.

Andrew Smith J refused the anti-suit injunction. He concluded that the Danish action was not covered by the jurisdiction clause in the 2002 ISDA Master Agreement because the action did not arise out of, nor was it connected with, the Agreement. The Danish action was concerned with Danish insolvency law.

The judge also decided that the jurisdiction clause was non-exclusive so far as Denmark was concerned. The clause states that it is generally non-exclusive but that it morphs into exclusivity if the proceedings involve a "Convention Court". A Convention Court is defined as a court that is bound to apply articles 17 of the Brussels or Lugano Conventions. Neither Convention applies now (with the exception of to some colonial islands), and the judge refused to give the Agreement an updating interpretation so that it applied to the current incarnations of those instruments (which are materially different). As a result, the jurisdiction clause was non-exclusive, and did not stop D from taking proceedings in Denmark.

The judge also rejected the argument that the Danish proceedings were vexatious and abusive because they were seeking to use Danish law to override the governing law chosen by the parties, English law. This followed from his decisions that the Danish proceedings were not concerned with the ISDA Master Agreement and were not covered by the jurisdiction clause.

(Clifford Chance LLP acted for the defendant in *SwissMarine.*)

Outside in

The Brussels I Regulation does not stop courts from enforcing the equivalent of anti-suit injunctions issued by arbitrators.

West Tankers (Case C-185/07) provides that a court in an EU member state cannot grant an anti-suit injunction to restrain proceedings in another EU member state brought in breach of an arbitration clause. That decision was given under the old Brussels I Regulation; some harbour the hope that the position has been changed by the recast Regulation, but few are holding their breath in expectation that the CJEU will see it this way.

Be that as it may, *Gazprom OAO v Lietuvos Respublika* (case C-536/13) raised the inverse question, ie whether Brussels I also prevented enforcement of the equivalent of an anti-suit injunction granted by arbitrators requiring the withdrawal of court proceedings in a member state because the arbitrators decided that the court proceedings had been brought in breach of the arbitration clause.

The CJEU said no. *West Tankers* hinged upon the requirement of mutual trust between EU courts. That was not engaged where one of the tribunals was arbitral. Further, arbitration is outside the scope of the Regulation, and the enforcement of the arbitral award therefore fell to be determined by the Lithuanian courts in accordance with the New York Convention, not Brussels I. The Lithuanian courts must make up their own minds as to how they handle Russian enterprises without the safe cover of EU law.

Click-wrapped

A jurisdiction clause in online terms and conditions is binding.

When anyone buys stuff on the internet, they click to say that they have read and agreed to the terms and conditions. Of course, no one - not even lawyers - in fact reads the terms or has a clue what they say. If there is a jurisdiction clause tucked away at the end of the unread terms, is it binding?

Insofar as the Brussels I Regulation applies, according to *El Majdoub v CarsOnTheWeb Deutschland GmbH*, Case C-322/14, the answer is yes, the CJEU clearly being concerned to come into the modern world. The Regulation requires the clause to be in writing, and adds that an electronic means of communication that provides a durable record of the agreement constitutes writing for that purpose. The fact that the terms do not open or download automatically does not prevent the terms from being in writing. (But consumers are different.)

Timed out

A challenge to the jurisdiction of an arbitral tribunal must be made within the time limited for doing so.

In *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Limited* [2015] EWHC 1452 (Comm), D challenged the jurisdiction of an arbitral tribunal before the tribunal itself, lost, and then lost the substantive arbitration. D then challenged the award in court under section 67 of the Arbitration Act 1996 on grounds of the tribunal's lack of substantive jurisdiction. Popplewell J was clear that D was out of time. Section 70(3) requires a challenge to an award to be brought within 28 days, and section 73(2) provides that a failure to challenge jurisdiction in accordance with the Act deprives the relevant party of the ability to do so. The partial award on jurisdiction was final, and should have been challenged immediately.

Courts

Shrunken champerty

An assignment of all rights against a person is not champertous.

Champerty seemed to have died a natural death until signs of life were spotted by the Court of Appeal in *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2012] QB 640 and *Sibthorpe v Southwark LBC* [2011] EWCA Civ 25. In the former, an assignment of a tortious claim was struck down because of the absence of any commercial justification for the assignment.

In *JEB Recoveries LLP v Binstock* [2015] EWHC 1063 (Ch), the judge declined to offer further life-support to champerty. All rights an individual had against D were assigned to an LLP in which the individual had a one-third interest because this was thought, not necessarily correctly, to offer greater protection in pursuing the claims. Another of the limited partners had been pursuing the same D for some time, and was allowed to act as advocate in the case.

Even if the assignment of a bare right to litigate was still champertous and therefore void, the judge considered that this was not a bare right to litigate. There were contractual rights involved, not just tortious claims. The judge considered that the central question was whether the effect of the assignment might be to tempt those involved to corrupt or undermine the legal process. The judge could see no reason why it should do so.

Permission to appeal was given, so the Court of Appeal may yet be able to have its say. The underlying facts are somewhat contorted, which might make it a less than ideal testing ground for the survival of champerty.

Linked fates

An expert known to a party should always make that clear at an early stage, so that any questions as to independence can be dealt with before the trial.

In *EXP v Barker* [2015] EWHC 1289 (QB), C had suffered an aneurism that, she contended, that D should have seen on an MRI scan some years earlier. D called an expert, M, in support of his argument that nothing abnormal had appeared in the scan.

According to M's CV, he was a neuroradiologist at a high-profile hospital, had been an examiner for certain degree subjects and was involved in training and writing on his specialist subject. D's CV said that he had trained at the same hospital, and the dates of the training coincided with the time that M was there. Neither M nor D made any reference in their evidence to knowing one another, even though, during evidence, it transpired that M had trained D, had written at least one paper with D (which was not mentioned in his CV) and referred to D by his first name. ("I was somewhat taken aback by this use of nomenclature," said the judge, querying whether M had the necessary "emotional distance" from D.)

D argued that it should have been obvious to C from the CVs that D and M would have known one another in some capacity, but the judge held that "the burden was fairly and squarely on [D], in particular on [M], who was to be [D]'s key (in the event sole) expert witness at the trial, to state frankly, and with adequate particulars, the nature and extent of any connection between [D] and [M]" and, further, to do it before the trial began.

Ideally, an expert should be found who has no such connection but, if that is not possible, it must be made very clear from the outset that such a connection exists.

Financial services

Macro images

A wider view of when someone is identified is taken than the FCA would like.

Only harmless drudges normally worry about what words, such as “identifies”, mean. But when it appears in a statute, lawyers start worrying too. In the case of section 393 of FSMA, it is not only to lawyers who worry but also the FCA because this one small word could affect how the FCA goes about some of its disciplinary business in future.

Section 393 gives third parties rights in respect of warning or decision notices addressed to others. In particular, if a notice "identifies" a third party and is, in the opinion of the FCA, prejudicial to him, a copy of the notice must be given to the third party, who then has the opportunity to object to the comments made about him. This has particular implications for notices issued to corporations. If an individual within a corporation is fingered, that person has the opportunity to protest. The FCA knows that while it might be able to do a deal with the corporation, which will often want to move on as quickly as it can (and the FCA can still do the deal even if it has to give a section 393 notice), an individual whose reputation and employment prospects are traduced may fight harder, potentially bogging the FCA down in a fight it hoped it had already won.

So it was in *Financial Conduct Authority v Macris* [2015] EWCA Civ 490. The FCA did a deal with a bank over alleged regulatory infractions,

CLIFFORD CHANCE

leading to a fine. In its notices, the FCA studiously avoided naming individuals, but M contended that he was "identified" within the meaning of section 393 by the references in the notices to "CIO London management" and, as a result, that he had the right to take the matter to the tribunal to protest his innocence.

The Court of Appeal agreed with M and the lower tribunal that he was identified in the notices given to the bank. The Court of Appeal decided that the issue of identification was to be approached in, broadly, the same way as for defamation. The question was whether the matters set out in the notice are such as would reasonably lead persons acquainted with the third party or operating in his area of the financial services industry to believe that, as at the date of promulgation of the notice, he was a person prejudicially affected by matters stated in the notice.

The notice must contain a pointer to an individual; if so, the question is then whether reasonable persons would believe the third party in question is that individual. The FCA can rail generally against corporate failures, but the narrower the range of those involved, and the more the FCA wants inferences of individual blame to be drawn without actually pursuing individuals, the greater the risk of a section 393 notice being required. The FCA will need to be more careful in its drafting or accept the need to go after individuals too, which gets round this problem.

(Clifford Chance LLP acted for the respondent on this appeal.)

Contentious Commentary is a review of legal developments for litigators

Contacts

Simon James
Partner

T: +44 20 7006 8405
E: simon.james
@cliffordchance.com

Anna Kirkpatrick
Senior PSL

T: +44 20 7006 2069
E: anna.kirkpatrick
@cliffordchance.com

Susan Poffley
Senior PSL

T: +44 20 7006 2758
E: susan.poffley
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ
© Clifford Chance 2015
Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571
Registered office: 10 Upper Bank Street, London, E14 5JJ
We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

35245-5-68-v0.5