Commercial team Newsletter

April 2019

First edition of the St John's Chambers Commercial team newsletter

Welcome to the first edition of our new Commercial team newsletter, designed to bring you a selection of important and interesting updates in the world of commercial law. Each quarterly issue will feature four or five articles about interesting developments over the preceding three months, together with a summary for those in a rush, and some useful practitioner's tips.

Our newsletter will also keep you abreast of any important news, big wins or interesting cases in which members of our specialist Commercial team have acted.

In this issue Nick Pointon looks at the Court of Appeal's decision in **Medsted v Canaccord Genuity Wealth** [2019] EWCA Civ 83 and its implications for the law concerning fiduciary obligations and secret commissions.

Joss Knight considers the Court of Appeal's decision in **Eze v Conway** [2019 EWCA Civ 88, another case considering the imposition of fiduciary obligations and the identification of agents.

Annie Sampson discusses the need for certainty in the formation of contractual relationships, following the long awaited Supreme Court decision in **Devani v Wells** [2019] UKSC 4.

Emma Price addresses commercial common sense in the construction of contracts, following the Court of Appeal decision in **Spirit Energy Resources Ltd v Marathon Oil UK LLC** [2019] EWCA Civ 11.

Natasha Dzameh reviews **Freeborn v Marcal** [2019] EWHC 454, concerning the extent to which an architect can alter a design without informing the client, and **Chudley v Clydesdale Bank Plc** [2019] EWCA Civ 344, on the subject of third party enforcement of contracts.

Adam Boyle provides a brief company law note dealing with the type of application which is required to extend the time limit for registering a charge created by a company with Companies House, and, more specifically, where said application can be brought.

We hope you enjoy the first of many editions to come.

In this issue...

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"Nick is exceptionally able for his age, very user-friendly and a bright rising star. He's simply exceptional on paper and dominating in the courtroom. I would happily instruct him on a complex matter ahead of barristers twice his call." **CHAMBERS UK, 2019**

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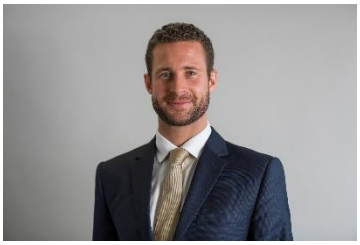
"Natasha is extremely intelligent, with an eye for practical and innovative solutions." **LEGAL 500, 2018**



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Annie Sampson (Call 2015) has recently joined chambers following the successful completion of a specialist pupillage within the Commercial and Chancery Practice Group. She is now building on that experience to develop a broad commercial and chancery practice, and already enjoys a busy court practice. Read more here.

Fiduciary obligations and secret commissions

Medsted Associates v Canaccord Genuity Wealth [2019] EWCA Civ 83

Nick Pointon

Background

In Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd [2019] EWCA Civ 83 the Court of Appeal considered the scope of the fiduciary duties owed by an introducing broker, and the secrecy or otherwise of their commissions, in the world of international investment.

Medsted is a BVI company which conducts business as an introducing broker. Canaccord is a Guernsey company which conducts business as an investment institution. Medsted introduced a number of wealthy Greek individual investors to Canaccord, to trade in contracts for difference ("CFDs").

The investors contracted directly with Canaccord and paid nothing to Medsted. Canaccord generated income by charging a commission on opening and closing the CFD and a daily financing charge for keeping the position open.

Medsted received a share of these charges from Canaccord by way of commission. The investors were told that Medsted would receive a commission but were not told how much that commission was.

By March 2010 Medsted had introduced 16 investors to Canaccord and Canaccord was paying Medsted a share of the income generated on those investments in commission. Keen to cut out the middle man and increase its own revenue, Canaccord secretly agreed with a number of investors to open new accounts without telling Medsted, and to hide trades from Medsted by putting them through these accounts.

Medsted got wind of this and sued Canaccord for its lost commissions. Teare J, at first instance, found that Canaccord had acted in breach of contract but held that Medsted were entitled to only nominal damages because of their own related breach of fiduciary duty in failing to disclose the extent of their commission to the investors in the first place.

The Court of Appeal allowed Medsted's appeal, holding that (1) even if Medsted occupied a fiduciary position towards the investors, its fiduciary obligations did not extend to require it to disclose the extent of its commission; and (2) in any event, as a matter of public policy, there was no basis for limiting Medsted to nominal damages here.

Fiduciary obligations

It is trite law that a fiduciary must not receive a secret commission, but it is less clear what amounts to "secret" in this context.

Longmore LJ considered at length the nature of the relationship between introducer and investor in this context. Finding it to be fiduciary in character, he went on to hold that *"the scope of the fiduciary duty is limited where the principal knows that his agent is being remunerated by the opposite party"* (at [42]). In this case the duty was limited so as to require disclosure of the existence, but not the extent, of Medsted's commission. Consequently Medsted was not in breach of fiduciary duty in the first place, and so there was no basis for rendering damages nominal only.

The judgment is interesting for Longmore LJ's discussion of the circumstances in which the fiduciary obligations of a broker may go further and require fuller disclosure of the amount of any commission earned. The relevant principles can be summarized as follows:

- A broker occupying a fiduciary position cannot receive a secret commission. But the level of disclosure required of the broker depends upon the circumstances of the case.

> *"...even if the relationship of Medsted and its clients was a fiduciary one, the scope of the fiduciary duty is limited where the principal knows that his agent is being remunerated by the opposite party."*
>
> Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd [2019] EWCA Civ 83, per Longmore LJ at [42]

- In the ordinary case a broker need only disclose the fact of that commission, and not its amount, in order to avoid breaching his fiduciary obligations.

- In some circumstance those fiduciary obligations will be stronger, requiring the fiduciary to disclose the amount of his commission too. Such circumstances include dealings unsophisticated or vulnerable investors.

Where an "enhanced" obligation requires disclosure of the amount of the broker's commission, disclosure of the existence (but not the amount) of the commission will prevent it from being a "secret commission" but will still amount to a breach of fiduciary obligation. The practical consequence of this halfway house is that the claimant is not entitled to the enhanced proprietary remedies available for secret commissions (following FHR European Ventures LLP v Mankarious [2015] AC 250), but is still entitled to damages (or equitable compensation) for breach of fiduciary duty. Indeed this was the outcome reached in the earlier case of Hurstanger Ltd v Wilson [2007] 1 WLR 2351, in which an ordinary consumer (an unsophisticated investor) was introduced to a lender via a broker in receipt of a disclosed but understated commission.

> *"It is the scope of the agent's obligation that is important, not the fact that he may correctly be called a fiduciary."*
>
> Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd [2019] EWCA Civ 83, per Longmore LJ at [45]

The upshot of the decision is that care must be taken in analysing the specific scope of any fiduciary obligations owed by a broker or other agent. The simple fact of being a fiduciary does not necessarily entail an obligation to disclose the full extent (rather than mere existence) of an otherwise secret commission.

Public policy and illegality

The decision to cap damages at a nominal sum was an application of the maxim *ex turpi causa non oritur action* – the illegality doctrine. At first instance Teare J held that it would offend the public policy imperatives underlying that doctrine to permit Medsted to recover more than nominal damages where the circumstances of that loss were so closely connected to their own breach of fiduciary obligation in failing to disclose the full extent of the commission earned from Canaccord.

On appeal it was unnecessary to address this issue, having already resolved that Medsted did not owe (and so could not have breached) any fiduciary obligation to disclose the amount of their commission. Nevertheless Longmore LJ addressed the point briefly (at [48] – [51]), suggesting (without reaching any conclusion) that even if Medsted had been in breach of fiduciary obligation it would have been a disproportionate reaction to cap damages at a nominal level.

For Longmore LJ it was important to consider the requirement imposed by the Supreme Court in Patel v Mirza [2017] AC 467, that non-recovery of damages would be a proportionate response to any illegality. Having regard to the fact that Canaccord agreed to pay commission to Medsted *knowing* that the extent of it would be kept secret from the investor clients, Longmore LJ felt that it would be disproportionate to allow Canaccord to avail itself of an illegality defence based on those same facts.

Summary

The case underscores the need to be careful when considering the scope and content of fiduciary obligations. The level of disclosure of commissions required by agents will depend upon the circumstances of their agency.

The decision also suggests that the proportionality element introduced into the illegality defence by Patel v Mirza [2017] AC 467 will prevent defendants from crying "illegality" where they have knowledge of, or acquiesced in, the circumstances underlying any wrongdoing.

Permission to appeal to the Supreme Court was refused. It is not yet known whether the application will be renewed to the Supreme Court itself.

In brief...

- A broker occupying a fiduciary position must ordinarily disclose the existence (but not the extent) of any commission received.

- In some circumstances (e.g. dealings with unsophisticated or vulnerable investors) the fiduciary obligation of disclosure will be stronger, requiring the broker to disclose the extent of his commission.

- Where an "enhanced" disclosure obligation applies, disclosure of the existence (but not the extent) of commission will be a breach of fiduciary duty **but** the commission will no longer be "secret". The principal will be entitled to damages / equitable compensation, but not to the enhanced proprietary remedies available in bribery / secret commission cases.

When is an agent not an agent? Secret commissions: A Prince and 3 Richards

Eze v Conway & Anor [2019] EWCA Civ 88

Joss Knight

In the second Court of Appeal decision on bribery and secret commissions this year, Eze v Conway is an important reminder that establishing the fiduciary obligation is not always straightforward, and a party who looks very much like an agent maybe nothing of the sort.

Richard [I] and Deborah Conway owneda large property in north-west London which they wished to sell. Initially placed on the market at £7m, they reduced it to £5.5m shortly thereafter. Even then, they considered this on the high side – later valuations put it at £4.2m - £4.75m.

Enter Mr Richard [II] Obahor – property developer, acquisition agent and master opportunist. He viewed the Property on 6 April 2015 and told the Conways he was acting on behalf of a confidential Nigerian client interested in buying the property. Negotiations ensued, and a price of £5m was agreed, together with a possible 1.5% finder's fee (£75,000) payable to Mr Obahor. He indicated his buyer wished to complete by the end of May 2015.

The only problem was Mr Obahor's buyer did not exist. Needing to find someone willing to shell out £5m for a suburban townhouse, Mr Obahor demonstrated admirable brass neck in cold-calling Prince Arthur Eze – a Nigerian energy tycoon and one of richest men in Africa – offering him the excellent deal he had negotiated.

Amazingly, this worked. Prince Eze agreed not only to buy the property for £5m, but also to pay Mr Obahor a 3% fee –£150,000. Nobody told Prince Eze at any point prior to proceedings that the Conways were paying Mr Obahor £75,000.

Prince Eze instructed Mr Obahor to contact his private wealth adviser, Mr Richard [III] Howarth, to progress matters.

With this success, Mr Obahor returned to Mr and Mrs Conway and told them that the buyer would not pay the finder's fee and thus they would have to pay the £75,000 finder's fee previously discussed. He threatened to scupper the transaction if they did not. This of course, was not true; Prince Eze had made no such refusal.

Thereafter he shuffled between the parties edging matters towards a sale and on 25 June 2015 he ultimately persuaded Prince Eze to sign the sale contract, the TR1, and a letter, addressed to the solicitors for Prince Eze's company based in the BVI, which stated:

"*I have authorised Mr Richard Obahor. . . to act on my behalf for the purchase…kindly avail him of what is necessary to facilitate the process as and when required.*"

On 29th June 2015 Prince Eze paid the £150,000 finder's fee. On 7 August 2015 contracts were exchanged and a £500,000 deposit paid. Soon after, and for reasons unknown, the Prince got cold feet and stalled, and ultimately failed to complete.

Instead, the Conways sold the Property for £4.2m to a third party and sued Prince Eze for breach of contract. Damages were sought on the difference between the difference in sale price (£800,000), minus the £500,000 deposit (retained) and plus the associated costs of delay.

Prince Eze's defence was one of bribery. He said he had not been informed that the Conway's were paying Mr Obahor a commission and consequently the contract of sale was void or otherwise not enforceable. HHJ Keyser QC disagreed, finding that Mr Obahor was not acting as agent for either party and consequently there was no duty to disclose the intended payment by the Conroys.

> "*The real question, therefore, is whether the person receiving the benefit or the promise of a benefit was acting in a capacity which involved the repose of trust and confidence in relation to the specific duties performed rather than on some general basis.*"
>
> Eze v Conway [2019] EWCA Civ 88, per Asplin LJ at [43]

Prince Eze appealed. The Court of Appeal summarised the relevant principles as follows [35-36]:

- At its heart, a bribe is a commission or other inducement given by a third party to an agent which is secret from his principal.
- Once promised, it must give rise to a realistic prospect of a conflict between the agent's interest and the interests of his principal.
- Dishonesty or corrupt motives need not be proved – they are irrebuttably presumed.
- The payment only needs to be promised. It need not actually be paid.
- The rationale for the strict approach is that the principal is entitled to have confidence that the agent will act wholly in their interests. As such there is no need to prove the payer intended for the agent to be influenced by the payment.

The court then considered the nature of the agent, their duties, and what was required for the principle to be engaged: x

> *"there must be a relationship of trust and confidence between the recipient of the benefit or the promise of a benefit and his principal (used in the loosest of senses) which puts the recipient in a real position of potential conflict between his interest and his duty."*
>
> Eze v Conway [2019] EWCA Civ 88, per Asplin LJ at [39]

- The question is less whether the receiving party is in fact an 'agent' of the alleged principal, but the nature and extent of the fiduciary duties owed. The answer to that question is highly fact sensitive.
- It depends on the receiver's duties, and whether there is a relationship of trust and confidence. Not everyone described as an "agent" will owe such a duty, equally there will be others who are not agents who will do so.
- In the context of bribes, fiduciary relationships should be interpreted broadly and loosely. (*Reading v The King* ([1951] AC 507).

Asplin LJ summarised this at para 43:

"The real question, therefore, is whether the person receiving the benefit or the promise of a benefit was acting in a capacity which involved the repose of trust and confidence in relation to the specific duties performed rather than on some general basis and whether the payment to him in that capacity was such that a real position of potential conflict between his interest and his duty arose."

Applied to the current case, the judge had found that Mr Obahor was not an agent of Prince Eze. He was initially a salesman (offering the Prince a pre-packaged deal he had found) and then became something of a 'gofer' or 'chivvier' in the conveyancing process. Crucially, he performed 'ministerial' tasks rather than providing a decision-making function.

"he had no ability to affect Price Eze's legal position vis-à-vis the Conways" and his function was to "chivvy"; and in the final stage when the documentation was signed his authority "could not be construed as extending to anything other *than progressing the purchase in accordance with the agreed terms of the contract."*

Asplin LJ, in a somewhat lukewarm endorsement of the judgment, held that the judge had carefully considered the issues and come to a conclusion to which he was entitled to on the facts.

The case nevertheless serves as a useful reminder that merely to be remunerated by both sides is not enough. In Mr Ohabor's case, the fact he had:

- warranted to Prince Eze that it was a "good deal";
- progressed matters on the Prince's behalf;
- instructed the Conways they could use the deposit toward their own purchase (contrary to the instructions of Prince Eze's solicitors); and finally
- obtained the written authority of 25 June 2015;

was not enough – he had still had not achieved trusted adviser status. The law on bribery did not apply and the Conways were entitled to damages.

How certain is certain enough?

Devani v Wells [2019] UKSC 4

Annie Sampson

In Devani v Wells [2019] UKSC 4, the Supreme Court addressed whether a contract between a vendor and an estate agent was sufficiently certain to be enforceable where the circumstances in which the estate agent's commission became payable were not expressly identified.

Background

Mr Wells was looking to sell seven flats and when he mentioned this to a friend, Mr Nicholson, in late January 2008, Mr Nicholson put him in contact with Mr Devani. On 29 January 2008, Mr Devani called Mr Wells and it was found that, during that conversation, Mr Devani told Mr Wells that his commission terms would be 2% plus VAT.

Shortly after the telephone conversation, Mr Devani contacted a housing trust which, following a meeting with Mr Wells, agreed to purchase the flats on 5 February 2008 for £2.1m. Later that day, Mr Devani emailed Mr Wells his terms of business and stated that '[a]*s per our terms of business our fees are 2% + VAT*'.

The agreed sale subsequently completed and Mr Devani claimed his commission, but Mr Wells refused to pay.

First Instance

Mr Wells contended that (a) due to uncertainty, there was no binding contract with Mr Devani and (b) due to Mr Devani's failure to comply with s.18 of the Estate Agents Act 1979 (regarding the information which must be provided to the client, including the circumstances in which the client becomes liable to pay commission), any contract between them was unenforceable.

The first instance judge proceeded on the basis that the terms of business were irrelevant and that the court was therefore concerned with what was said on 29 January 2008. He recognised that there was no express reference to precisely when an obligation to pay commission would be triggered. Instead, he held that '*the law would imply the minimum term necessary to give business efficacy to the parties' intentions*'. In this case, this was considered to be that commission would be due upon the completion of any purchase of the flats by any party which Mr Devani had introduced to Mr Wells. It was therefore held that Mr Devani was entitled to commission.

However, in recognition of Mr Devani's failure to comply with s.18 of the Estate Agent's Act 1979, the commission payable would be reduced by one third. The decision in respect of the application of s.18 was upheld by both the Court of Appeal and Supreme Court, so I will not address it further.

Court of Appeal

In respect of whether there was a binding contract, the Court of Appeal, by a majority, overturned the first instance decision for the following reasons (as summarised by Lord Kitchin JSC at [13]):

1. In order for terms to be implied, there must be a concluded contracted into which they can be implied.

2. As the event triggering the payment of commission is of crucial importance and a variety of events can be specified, its identification is essential to the formation of a legally binding contract.

3. Unless the parties specify that event, their bargain is incomplete

> *"it seems to me that it is possible to imply something that is so obvious that it goes without saying into anything, including something the law regards as no more than an offer"*
>
> Devani v Wells [2019] UKSC 4, *per* Lord Kitchin JSC at [33]

and the court cannot turn an incomplete bargain into a binding contract by adding implied terms.

Arden LJ, dissenting, concluded that there was an enforceable contract, but for reasons different to those of both the first instance judge and those eventually adopted by the Supreme Court. She considered that the contract was a unilateral contract which became binding upon the completion of the purchase by the housing trust to which Mr Wells had been introduced by Mr Devani.

Supreme Court

The Supreme Court restored the decision of the first instance judge: there was an enforceable contract between Mr Devani and Mr Wells and as such Mr Devani was entitled to his commission, less the one third deduction.

Construction

It, however, reached that conclusion on the basis of construction of the agreement rather than the implication of terms into it:

'the parties meant by their words and actions that the agent was engaged on the usual terms, that is to say that a commission became payable [...] upon completion of the sale and then from its proceeds'.

Per Lord Kitchin JSC at [23]

Further, Lord Kitchin JSC commented that '*I agree with Lewison LJ that the event giving rise to the entitlement to commission may be of critical importance but I respectfully disagree that this means that unless this event is expressly identified the bargain is necessarily incomplete*' (at [26]).

This observation in particular underlines the extent to which courts are able, and often willing, to infer the parties' intentions from the surrounding circumstances.

Implied Terms

The Supreme Court nonetheless proceeded to consider whether, in the alternative, a term to the effect that commission would be payable upon completion of a sale to a purchaser introduced by Mr Devani could properly be implied into the agreement.

Similarly, while it might be surprising that a term identified as being of '*critical importance*' would be provided by implication, this too underlines that terms are implied only out of necessity.

However, contracts are only likely to be 'rescued' in such circumstances, where (a) there is a clear intention to create legal relations; (b) the contract is of '*a simple, frequently used type*'; and possibly (c) there aren't any complications in the execution of the agreement. It seems that a hypothetical situation was presented to the court where Mr Devani had introduced a purchaser who had signed, but subsequently repudiated the sale contract. Lord Briggs JSC refused to address what would be the outcome in such a situation, but it is certainly difficult to see how the agreement could be construed, or a term implied into it, so as to enable any agreement between the parties to be carried into effect in a manner consistent with their objectively ascertained intentions or with implying the minimum necessary to achieve business efficacy.

The court concluded, without hesitation, that it could imply a term in respect of commission. In so doing, Lord Kitchin JSC observed that '*I do not accept that there is any general rule that it is not possible to imply a term into an agreement to render it sufficiently certain or complete to constitute a binding contract*'. That must be correct, not least because terms are only to be implied when necessary, rather than when it would be reasonable, and otherwise such a power would become virtually redundant.

> *"there are occasions [...] where the context in which the words are used, and the conduct of the parties at the time when the contract is made tell you as much, even more, about the essential terms of the bargain than do the words themselves"*
>
> Devani v Wells [2019] UKSC 4, *per* Lord Briggs JSC at [59]

In brief...

- *The Supreme Court underlined the extent to which the intentions of the parties can be inferred from their conduct and surrounding circumstances when it comes to contracts of a simple, frequently used type.*
- *Similarly, it also demonstrated a willingness to imply even critically important terms into such contracts when necessary.*

Commercial common sense in construction of contracts

Spirit Energy Resources Ltd v Marathon Oil UK LLC [2019] EWCA Civ 11

Emma Price

Background

In Spirit Energy Resources Ltd and others v Marathon Oil UK LLC [2019] EWCA Civ 11, the Court of Appeal considered the proper construction of a joint operating agreement ("JOA").

The appellants were three participants in a joint venture operating in the oil and gas sector in the Brae Fields in the North Sea ("the Participants"). The respondent was the operator, but its affiliate was also a participant ("the Operator").

The Operator hired employees to work on the operation, which included offering them defined benefit occupational pensions. The operations were approved by the Operating Committee established under the JOA. A substantial pension deficit arose, which led to calls upon the Participants to fund the deficit. The operations in question (including the cost of in-year employer's pension contributions) had been the subject of prior approval by the Participants by reason of their inclusion in "*Brae Management Plans*" ("BMPs"). The Participants initially agreed to make payments to fund the shortfall, but decided to make no further contributions.

At first instance, Knowles J, finding in the Operator's favour, held that the Participants had approved the incurring of the disputed pension costs by virtue of the inclusion in BMPs of operations which were approved and the consequential expenditure authorised. As such, they were precluded from subsequently withholding approval and refusing to pay their allotted proportion of the deficit recovery charge ("DRC") ([2018] EWHC 322 (Comm)).

The Operator contended that it was entitled under the JOA to *require* the Participants to pay their appropriate share of the pension deficit. It sought to recover an allocation percentage of the DRC. The Participants argued that, under the JOA, they were not required to pay for future liabilities which they had not foreseen nor contemplated when the Operating Committee approved and authorised the programme and budget.

The Court of Appeal dismissed the appeal.

The "natural and ordinary meaning"

The Court took as its starting point the "*natural and ordinary meaning*" of the JOA, considered with regard to the individual clauses, the JOA as a whole and inferences drawn from it and a purposive construction. The Court noted the mandatory and all-encompassing language used in the relevant provisions. As to the "*overall purpose of the clause and the [agreement]*", the task was rendered straightforward by the express inclusion of the relevant purposes, namely an equitable allocation of costs and benefits as between Participants, and an Operator hold-neutral principle. The Court held that, when the draftsperson of a contract went to the length of explicitly setting out guiding purposes to facilitate purposive construction, it was incumbent upon the courts to attach weight to that expression of common purpose. The normal and ordinary meaning of the JOA, including by reference to its purpose, compelled the conclusion that the Participants must bear the DRC.

"Commercial common sense"

As to the scheme's overarching commercial purpose, in a sense, the Court considered, there was no need to resort to it, since the JOA had identified by what criteria the commercial rationale of the JOA was to be measured. In any event, the Court was not persuaded by the appellants' arguments in this regard.

> *"When the draftsperson of a contract goes to the length of explicitly setting out guiding purposes to facilitate purposive construction it is incumbent upon the courts to attach weight to that expression of common purpose."*
>
> Spirit Energy Resources Ltd v Marathon Oil UK LLC [2019] EWCA Civ 11, *per* Green LJ at [40]

First, they had contended that a construction of the JOA that could lead to an impasse with neither the Operator nor the Participants agreeing to bear the unexpected costs, was unproblematic because, in practice, when such a situation arose it would lead to negotiation and agreement. The Court disagreed: it was not a commercially sensible construction of a JOA of this type to leave such an important issue as who bears the costs of operations to be resolved though the inherently uncertain mechanism of future negotiations. Had that been the intention of the parties upon contracting, they would surely have said so.

Secondly, the appellants argued that there was commercial logic in the Operator being held liable for the DRCs because it had always been open to the Operator to take steps to ameliorate pension liabilities and they should be held responsible for their failure to curb runaway costs. The Court disagreed: the rationale behind the Operator being required, annually, to spell out its future operating programme and budget accompanied by relevant estimates, assumptions and contingences was to enable the Operating Committee to consider, revise and approve or disapprove the budget. If it was approved, the Operator was authorised to incur the expenditure. Having exercised that judgment call and expressly authorised the operations, the Participants assumed responsibility for those liabilities and could not argue that it was the Operator's fault.

Thirdly, the appellants contended that, applying Arnold v Britton [2015] UKSC 36, provided parties to a dispute could advance rival commercial rationales then one cancelled out the other. The Court did not agree: not all arguments are equal. It found the Participants' purported rationale to be counterintuitive and lacking in commercial logic, and that the optic through which to construe the JOA was that decided upon by the parties themselves. There was no identifiable logic whereby the Participants could take the benefits, but avoid the risks.

Finally, the Court dealt with other arguments advanced by the appellants, including that Knowles J's analysis served to confer upon the Operator the ability to write a "*blank cheque*", implying that the Operator could spend the Participants' money with impunity and without control or protection. It held that that was not so. It might be true that, under the JOA, the Operator was given a blank cheque, but: (i) the Operating Committee, fully appraised of the relevant facts, formed a judgment that the Operator should be granted that freedom and they authorised the expenditure in question; (ii) it was in the nature of the operations that the authorisation covered costs which might, at the time of approval, be uncertain in scope and nature; and (iii) insofar as the Participants needed protection, they obtained it from the common law - they would not be liable for any cheque written by the Operator in bad faith or dishonestly.

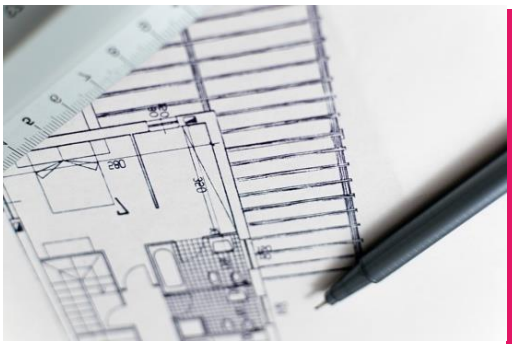
> *"In one sense there is no need to have resort to commercial common sense or rationale since the JOA itself, in setting out its guiding purposes in Exhibit A, has identified by what criteria the commercial rationale of the JOA is to be measured.*
>
> Spirit Energy Resources Ltd v Marathon Oil UK LLC [2019] EWCA Civ 11, *per* Green LJ at [42]

Summary

Whilst the judgment examined in some detail the particular language adopted in the relevant provisions of the JOA, and the specific overarching commercial purpose of the scheme concerned, it does provide a useful recap of the principles of contractual interpretation and an illustration of how these may be applied in practice. The decision will no doubt be of particular interest to those in the oil and gas industry, as the JOA in question was said to be typical of operating agreements in that sector.

In brief...

- *When the draftsperson of a contract went to the length of explicitly setting out guiding purposes to facilitate purposive construction, it was incumbent upon the courts to attach weight to that expression of common purpose.*
- *The normal and ordinary meaning of the JOA, including by reference to its purpose, compelled the conclusion that the Participants must bear the deficit recovery charges.*
- *The optic through which to construe the joint operating agreement was that decided upon by the parties themselves. There was no identifiable logic whereby the Participants could take the benefits but avoid the risks.*



To what extent may a design be altered?

Freeborn and another v Marcal [2019] EWHC 454

Natasha Dzameh

Background

The Claimants, Philip Freeborn and Christina Goldie, were the owners and occupiers of a property consisting of a main house and a pool house. The Defendant was an architect registered by the Architect Registration Board. Christina Goldie wanted to convert the pool house into a function room and build a cinema for Mr Freeborn. Between 2014 and 2016 a variety of works were carried out to the main house and the pool house by way of several principal contractors. The Defendant was engaged as an architect and project manager in 2014.

There were various aspects of the project that the Claimants were unhappy with. In particular, they expected the cinema room to have a *"sleek modern look"* rather than the *"wonky industrial look"* of the finished project. The Claimants sued the Defendant for professional negligence.

The key aspect of the dispute was whether the Defendant redesigned the cinema box without informing the Claimants and arranged for the construction of a cinema box they had not approved. A related issue was whether the Claimants could recover the cost of demolishing the cinema room or whether they should mitigate their losses by way of repairs and simply get used to the appearance of the room.

Assessing the liability of an architect

Martin Bowdery QC, sitting as a Deputy High Court Judge in the TCC, confirmed the following seven general principles as an accurate summary regarding the duties and obligations of architects:

"i) The primary basis for the duties owed by an architect is the contract pursuant to which he is engaged;
ii) It is common ground that the Defendant owed the Claimants a duty to provide the services he supplied with reasonable care and skill (s.13 of the Supply of Good and Services Act 1982);
iii) The standard of reasonable care and skill is not a standard of perfection. It does not make an architect the insurer or guarantor that the work has been properly done. It is not sufficient to prove an error to show that there has been a failure to exercise reasonable skill and care. A claimant must establish actual negligence;
iv) An architect is entitled to recommend to a client that the client appoint a third party with the requisite knowledge to carry out work which requires that specialist knowledge. Ordinarily the architect will carry no legal responsibility for the work to be done by the specialist which is beyond the capability of an architect of ordinary competence;
v) An architect's obligation to supervise or inspect works will depend on various factors including the terms of the retainer, the nature of the works and his confidence in the contractor;
vi) The Claimants are only entitled to recover any loss and damage caused by the Defendant's negligence and which they have sought to mitigate;
vii) The damage ordinarily recoverable where a building suffers from defects consequent upon the negligence of an architect is the cost of rectification."

Strength of the Defendant's evidence

The contract was determined to be partly oral and partly written. The Defendant had supplied, to an incorrect email address, the RIBA Standard Agreement 2010 Conditions for Appointment for an Architect 2012 Edition. The sending of this email suggested the Defendant expected to be appointed and to act as architect for the project.

A bundle containing extracts from daybooks, notebooks and sketch pads belonging to the Defendant was supplied to the judge. The Defendant described this as a *"tumble dryer of information"*. HHJ Bowdery QC suggested that it was in fact a *"tumble dryer of misinformation"*, the notebooks being *"confused, confusing and chaotic"*. There was no order to the use of said documents. The Defendant had "*no clear recollection whether any entry was a proposed agenda, minutes of a meeting or subsequent retrospective musings"*. It was not possible to determine from the notebooks who was in attendance at a meeting or who had made comments at said meeting.

The Defendant failed to produce:

i) a written contract;
ii) a written brief for the project or any part of the project;
iii) minutes of any meetings with the Claimants and/or the contractors for the Claimants to agree or disagree;
iv) progress or planning reports;
v) interim accounts or valuations for the works.

The learned judge found that whilst the Defendant's answers were not dishonest, they were *"self-serving assertions based on little thought and chaotic records"*.

Duty of care and the format of a brief

It was determined that the Defendant had provided no written brief. The experts disagreed as to whether the brief should be written down and whether any changes or variations to the brief should be recorded in writing.

HHJ Bowdery QC described a written brief as being *"essential"* at the least to avoid misunderstandings. He stated that changes to the brief must be recorded whether by way of drawings, sketches and/or minutes of meetings. Failure to do so must be explained to the clients in writing and it is for them to make an informed decision not to receive such a brief with records of changes or developments. The absence of this documentation was considered causative of the losses claimed. The Defendant was described as going *"on a frolic of his own"* producing a different design to that expected by the Claimants.

A written brief was held to be of even greater importance on a small project with a novel design. The learned judge noted that in such circumstances a brief expressed in words was insufficient. There must be a drawing (3-D or otherwise) and/or a mock-up along with a detailed written description. He determined that:

i) Any reasonably competent architect should ensure that the brief is recorded in writing whether or not that is best expressed in 3-D sketches together with drawings and detailed descriptions.

ii) Any reasonably competent architect who did not in exceptional circumstances produce a written brief and did not explain in those exceptional circumstances in writing why such a written brief had not been produced, would be in breach of any duty of care owed to the client.

iii) The same approach should be adopted to changes or variations to the written brief.

HHJ Bowdery QC found that the Claimants had not approved the features of the brief which they complained of.

Damages – entitlement

The Claimants primarily argued that they were entitled to demolish the cinema and either reinstate the pool or hibernate the pool properly. They sought to recover these costs and the *"wasted costs"* spent on the cinema room. Alternatively, additional sums were sought due to works not being tendered and design changes caused by the Defendant's negligence. Additionally, the cost of other works in the main house and works in respect of the pool were sought in addition to damages for distress and inconvenience.

The decision to demolish the cinema was a reasonable one. Whilst the ordinary measure of damage for a negligent architect is the cost of rectification, HHJ Bowdery QC stated *"I do not consider that this particular ugly duckling can be turned into a swan"*. The Claimants were awarded their wasted costs spent on the cinema room (c.£431,000).

Restoration of the pool was not something which flowed from or was caused by the Defendant's breaches of duty. The Claimants wanted to convert the pool into a function room and the cost of finishing this was £49,500 of which the Defendant was liable for £26,000.

Damages for distress and inconvenience were awarded in the sum of £5,000. The retainer was one which was to *"provide peace of mind, pleasure or freedom from discomfort"*.

Analysis

This case provides a useful summary of how an architect's liability in negligence is assessed and clarifies the expectations and duties surrounding the initial brief and subsequent variations. It is expected that a written brief will be provided to the client except in exceptional circumstances. If the circumstances are exceptional the client must be supplied with a written explanation for this failure thereby enabling them to make an informed decision on the point.

Unsurprisingly, changing a project brief without consulting or informing the client is an unwise move and complying with the rules and guidance of the ARB is preferable. Further, this decision confirms that aesthetic deficiencies may warrant a departure from the ordinary measure of damage such that a client is not restricted to recovering the cost of rectification. An argument that the client should simply get used to the final design may well be unreasonable.

In brief...

- A reasonably competent architect should ensure that the brief is recorded in writing unless there are exceptional circumstances.
- Where there are exceptional circumstances, no written brief is provided and the client is not furnished with a written explanation of why no such brief has been supplied, the architect will be in breach of any duty of care owed to the client.
- The same approach applies to changes or variations to the written brief.
- Aesthetic deficiencies may warrant a departure from the ordinary measure of damage.

Third party enforcement of contracts and class identification

Chudley and others v Clydesdale Bank Plc (t/a Yorkshire Bank) [2019] EWCA Civ 344

Natasha Dzameh

Background

The first appellant and the deceased were business partners. Their wives were the second and third appellants. The deceased's estate was the fourth appellant. The appellants invested in a property development scheme which failed. The scheme was structured in such a way that investors would place a deposit on a plot and in return Arck LLP agreed to purchase said plot back from the investors at a profit on a specific date. The investors' funds were paid into Arck LLP's client account which was held with the respondent. Arck LLP provided investors with its letter of instruction to the bank detailing how the investments would be deposited but the client account it referred to was never opened. Instead the monies provided by investors were paid into a client account which was not governed by a Letter of Intent ("LOI") and was not a segregated client account. The appellants were not provided with a LOI in any event and when redemption was to occur they received no funds. In 2009 funds were paid out of the account at the direction of Arck LLP.

In 2012 Arck LLP went into liquidation and its incorporators were imprisoned for fraud. The appellants became aware that the property development scheme had been subject to a fraud which involved extraction of funds by various parties thus the units they had invested in were unlikely to complete. They commenced a variety of proceedings including the claim against the bank. The appellants sought to recover their losses on the basis that a contract existed between Arck LLP and the bank as set out in the LOI and they were entitled to claim the benefit under the Contracts (Rights of Third Parties) Act 1999 ("CRTPA").

The provisions of the CRTPA 1999 of particular importance in this case are those contained in section 1(1)-(3):

"(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if–

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into."

First Instance Decision – [2017] EWHC 2177 (Comm)

HHJ Hancock QC determined that no contract existed between Arck LLP and the bank. The LOI was not intended to be legally binding. It did not come into effect until the account was opened, this being a precondition. Nonetheless the third-party issue was considered. He decided that, had there been a binding contract, the investors could take the benefit of it under the CRTPA 1999. The purpose of the LOI was to provide third party investors with a safeguard.

The bank would have been in breach of contract in not opening the account governed by the LOI however this breach was not causative of any loss to the investors. The causation point is not analysed in detail in this article.

> *"I suppose it is theoretically possible for a contract to be subject to a pre-condition but for the party relying upon it not to be able to inform the court what its terms were or how and when it was agreed, but it would seem inherently unlikely that such a case would succeed on the balance of probabilities."*
>
> Chudley v Clydesdale Bank Plc [2019] EWCA Civ 344, *per* Flaux LJ at [74]

The LOI did not refer to anyone other than the bank, the developer and the solicitor who gave the undertaking. Nonetheless for the purpose of section 1(3) CRTPA 1999 a third party could be "expressly identified" through construction of the contractual terms provided there was no implication involved.

The learned judge distinguished the case of Avraamides v Colwill [2006] EWCA Civ 1533. In that case a beneficiary asserted that a class of beneficiaries was anyone to whom the company in question *"owed money of any sort"*. The Court refused to allow the beneficiary's claim. HHJ Hancock QC asserted that the proposed class in Chudley was much more limited therefore contractual interpretation was permissible.

The appellants appealed and contended that there was a contract in existence which they were entitled to the benefit of under the CRTPA 1999 and that they suffered loss as a result of the breach.

Court of Appeal

The CA was asked to consider:

1. Whether the judge had erred in concluding that the LOI did not constitute a concluded and unconditional contract;
2. Whether the appellants were entitled to claim the benefit of the contract under the CRTPA 1999;
3. Whether the judge had erred in concluding that the appellants had not established that their loss had been caused by the bank's breach of contract.

> *"...it is not a requirement of the 1999 Act that a third party who is entitled to the benefit of a contract was aware of the contract at the time it was made or at any particular time thereafter."*
>
> Chudley v Clydesdale Bank Plc [2019] EWCA Civ 344, *per* Flaux LJ at [80]

The CA held that there was no evidence that the contract contained in the LOI was subject to a pre-condition or there was insufficient evidence to establish this on the balance of probabilities. The judge at first instance made a finding unsupported by the evidence and thus erred in law. The LOI was expressed to be an irrevocable and unconditional instruction to open the segregated client account and hold the monies as per the terms of the LOI. Consequently, the LOI constituted a valid binding contract between Arck LLP and the bank.

The bank had not put forward a case arguing the existence of an unfulfilled pre-condition or condition precedent. It was theoretically possible for a contract to be subject to a pre-condition and for the party relying on it to be unable to inform the Court what the terms were or how and when it was agreed. Nonetheless it was inherently likely that such a case would succeed on the balance of possibilities and the judge had lost sight of that.

The issue of express identification for the purpose of section 1(3) CRTPA 1999 depended on construction of the contract as a whole, but viewed against the admissible factual matrix. In considering the LOI as a whole it was clear that reference to a client account constituted express identification of the class, this being clients of Arck LLP investing in the relevant property development scheme. The appellants were within that class. The same contractual term was capable of satisfying section 1(1)(b) of the CRTPA 1999 and the principle purpose of the LOI was to protect investors. The judge was correct to decide that he would have determined the CRTPA 1999 issue in favour of the appellants.

The appellants' claim was for breach of contract rather than a reliance based claim (their negligent misstatement claim having failed at trial) and the CRTPA 1999 contained no requirement that a third party entitled to the benefit of a contract needed to be aware of it at the time of the contract or any specific time thereafter.

If the bank had not been in breach of contract the monies would have been retained in the account and the appellants would not have suffered the loss. It was wrong for the judge to conclude that the appellants had no established their loss was suffered due to the bank's breach of contract. It was not necessary for the appellants to demonstrate what would have happened to the monies if there had not been a breach.

In brief...

- Principles of contractual interpretation may be applied to determine express class identification for the purpose of the CRTPA 1999.
- The same contractual term may satisfy section 1(1)(b) CRTPA 1999 and section 1(3).

Company law note: Bringing applications under s.859F locally

Adam Boyle, Commercial & Chancery Barrister

Those practising in company law, and potentially those practising in conveyancing, may have come across the issues which arise when for one reason or another a charge created by a company has not been registered with Companies House within 21 days of its creation.

This brief note deals with the type of application which is required to extend the time limit for that registration, and, more specifically, where said application can be brought.

The initial time period of 21 days is specified in section 859A of the Companies Act 2006 as being the "period allowed for delivery" in respect of the relevant documents (i.e. the section 859D statement of particulars and any charge instrument).

Where the relevant documents have not been satisfactorily delivered to the registrar within 21 days, it is usually necessary to apply for an order extending said 21 day period pursuant to section 859F, which is helpfully titled 'Extension of period allowed for delivery'.

The court may, on hearing such an application, extend the period allowed for delivery if it is satisfied that the relevant documents were not delivered on time, and that the section 859F(2) requirement is met. That requirement is as follows:

> "(a) that the failure to deliver those documents—
> (i) was accidental or due to inadvertence or to some other sufficient cause, or
> (ii) is not of a nature to prejudice the position of creditors or shareholders of the company, or
> (b) that on other grounds it is just and equitable to grant relief."

In practice, such applications often feel like they ought to be more straightforward than they in fact are, and the process of ensuring that the various necessary parts of the application are present and correct can be rather painstaking.

One issue in particular which can arise is where to bring the relevant application, or to put it another way: must the application be brought in London, or can it be brought somewhere regional instead?
The question arises because of the historic reliance on London for similar applications and because there are mixed messages across the literature available (including, in my view, in the White Book) regarding whether one can, or cannot, make an application to extend time under 859F outside of London.

In that regard, the author of this note wishes to highlight that he recently, and successfully, brought a section 859F application to extend time in Bristol and further, that he has heard, anecdotally, of others doing the same. That being so, it would seem that it *is* acceptable to bring such applications outside of London, both in Bristol and (I assume) in other regional centres. Knowing this has the potential to save solicitors both costs and hassle, and, more generally, it speaks to the increasing march towards regionalisation in the courts.

Nick Pointon successful in landmark breach of contract claim against States of Jersey Employment Board

Alwitry v States of Jersey Employment Board [2019] JRC 014

Nick Pointon and Jersey Advocate Steven Chiddicks acted for the successful plaintiff, Mr Amar Alwirty, in his high-profile claim against the States of Jersey Employment Board (SEB) for substantial damages arising out of the wrongful termination of his contract of employment. The SEB were represented by the Solicitor General, Mark Temple QC, assisted by Mark Sutton QC of Old Square Chambers and Advocate Stephen Meiklejohn.

Following a two-week trial on liability, the Royal Court of Jersey held that the Hospital acted wrongfully and in breach of contract by terminating Mr Alwitry's position one week before he was due to relocate from the mainland and commence work. Significantly, the Royal Court accepted Mr Alwitry's argument that damages were not capped by virtue of the UK Supreme Court decision in Edwards v Chesterfield NHS [2011[UKSC 58, holding that upon the proper construction of the terms of Mr Alwitry's consultant contract of employment the SEB could not terminate the position upon notice without cause. The case exemplifies the rare circumstances alluded to by Lord Mance JSC and Baroness Hale JSC in Edwards, in which an employee has the contractual security of indefinite employment absent cause for his dismissal, falling outside the so-called "Johnson exclusion area" created by Johnson v Unisys Ltd [2001] UKHL 13.

The SEB are appealing the decision of the Royal Court to the Jersey Court of Appeal.

Commercial and chancery pupil barrister, Georgina Thompson, available for instruction

Specialist commercial and chancery pupil, Georgina Thompson, entered the second six months of her pupillage on 1 April 2019 and is available for instruction. Currently the pupil of John Dickinson, Georgina has seen a wide range of Chambers' work during the first six months of her pupillage and has shadowed many members of the team before a variety of tribunals. In the year between completing the Bar course and commencing pupillage, Georgina worked as an Advocate acting on behalf of families appearing at NHS appeal panels nationwide. She is looking forward to being back on her feet.

To instruct Georgina please contact her clerk, Simon Lyons, on 0117 923 4696 or simon.lyons@stjohnschambers.co.uk.

If you would like to keep up to date with our latest news and events in the field of commercial law, please visit:
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Commercial work is broad-ranging, covering an endless variety of different situations. Our commercial barristers pride themselves on their ability to approach problems pragmatically and flexibly, with their focus firmly on their clients' commercial interests. This is reflected in the wide range of commercial work that our team carries out, across many different industries. We are regularly instructed by law firms from across the South West and South Wales, including all of the largest commercial firms. Our clients range from large companies, such as Airbus, Dyson and Lloyds Bank, to SMEs, partnerships and private individuals, and cover all industries from agriculture, construction, retail and manufacturing to financial services and insurance.

We have barristers across the spectrum of seniority, and so we can provide the right level of expertise for the size of the dispute. Members of our team have considerable experience of appearing in high-value disputes in the High Court, especially in the Business and Property Courts, as well as claims in the County Court. Our barristers regularly represent clients in the Court of Appeal and the Supreme Court, as well as in international jurisdictions; we have links in Bermuda, Hong Kong and Jersey.

Our members also act for parties in specialist tribunals, arbitrations, adjudications and mediations.

Our culture and ethos is to provide high-quality legal advice in an approachable and pragmatic manner. On whatever aspect of commercial law you need advice, we should be able to help.

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