ALLEN & OVERY

*November/December 2019*

# Litigation and Dispute Resolution

# *Review*

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Contributing Editor:
Amy Edwards
Senior Professional Support Lawyer
Litigation – London

Contact
Tel +44 20 3088 2243
amy.edwards@allenovery.com

# Antitrust

## UK'S FIRST CARTEL FOLLOW-ON DAMAGES AWARD REDUCED BY COURT OF APPEAL

*BritNed Development Ltd v ABB AB and ABB Ltd: ABB AB and ABB LTD v BritNed Development Ltd [2019]* EWCA Civ 1840, 31 October 2019

The Court of Appeal ordered BritNed to repay EUR4.94 million it had received in damages from ABB as a result of ABB's participation in a power cable cartel. This case is the first follow-on damages claim arising from cartel conduct to proceed to final judgment in a UK Court. The Court of Appeal endorsed the approach taken by the first instance judge in assessing the overcharge and provided detailed guidance on how to assess damages in light of recent EU jurisprudence on cartel damages.

The case stems from a 2014 European Commission decision which found that, between 1999 and 2009, ABB and ten other companies were involved in a global cartel in the underground and submarine high-voltage power cable sector by bid-rigging, market sharing and exchanging competitively sensitive information.

BritNed was a customer of ABB during the cartel period. ABB supplied cable to BritNed for the construction of the BritNed Interconnector, an electricity submarine cable system connecting the UK to mainland Europe.

**BritNed claims for loss and damage**

BritNed issued proceedings against ABB in 2015, claiming it had suffered loss and damage in excess of EUR180m as a result of the cartel and its operation, under three heads of loss:

- **Overcharge claim**: as a result of the cartel, it had paid more for the cable than it otherwise would have done;
- **Loss of Profits Claim**: absent the cartel, it would have bought a cable with higher capacity which would have generated higher profits than the cable actually purchased; and
- **Compound Interest Claim**: as a result of the overcharge, it had incurred higher capital costs in commissioning the Interconnector than would otherwise have been the case under competitive conditions.

The trial judge, Smith J, found that there was no "deliberate" overcharge as ABB's costings had been compiled honestly and competently with a view to putting forward a competitive bid. However, there had been an overcharge arising out of "baked-in inefficiencies" in ABB's cable design. The effect of the cartel had been to insulate ABB from inefficiencies in its own product and the cost of these inefficiencies had been passed on to BritNed. Smith J also considered that ABB had been able to achieve certain internal "cartel savings" as a result of not having to compete with its co-cartelists to win projects.

Smith J dismissed the Loss of Profit Claim, as the evidence showed that, even without the cartel, BritNed would have chosen the same power cable at the same price, and also dismissed the Compound Interest Claim, as BritNed had been funded entirely through shareholder equity provided by its parent companies and had not itself incurred any additional costs from having to raise more capital. Smith J ordered damages of EUR13m in respect of the Overcharge Claim (later reduced to EUR11m, to address a risk of over-compensation) – a fraction of the amount claimed by BritNed.
Both parties appealed.

**Principles for assessing cartel damages**

The Court of Appeal set out the approach to be taken when assessing cartel damages, including in light of recent EU jurisprudence:

- **Cartel damages in the UK must be compensatory, not punitive**: the Court of Appeal rejected BritNed's submissions that the CJEU's recent judgment in Skanska[1] had recognised "the punitive rationale behind compensation" for cartel damages claims.
- **Presumption of harm in cartel cases**: the Court of Appeal disagreed with BritNed that the burden would fall upon ABB, as the cartelist, to prove that the price would have been no different absent the cartel, ie that harm should be presumed. The burden of proof was on BritNed to establish that it had suffered loss, and the quantum of that loss. BritNed might benefit from the application of the "broad axe" principle if there were difficulties in proving quantum.
- **In assessing cartel damages it is not sufficient to look at the general effects of the cartel**: the Court of Appeal confirmed that Smith J had been right to focus on the specific issue of the overcharge (if any) caused to BritNed arising out of the contract in issue, as opposed to considering the alleged general effects of the cartel on the market. It is for the claimant to prove that, on the balance of probabilities, the price it actually paid was higher than it would have been absent the cartel.

**ABB successfully appeals "cartel savings"**

ABB successfully appealed against the "cartel savings" aspect of the judgment. The Court of Appeal found that the award reflecting the savings ABB was said to have made, rather than the loss suffered by BritNed as a result of having overpaid due to the infringement, was based on an error of law. There was no evidence before Smith J about the way in which the so-called "cartel savings" correlated with prices so as to turn a benefit to ABB into a loss to BritNed for which BritNed was entitled to compensation. The compensation was accordingly reduced by EUR4.94m.

**Ruling on overcharge and loss of profits upheld**

BritNed sought to appeal the entirety of Smith J's findings on the overcharge and the dismissal of its Loss of Profits claim. The Court of Appeal upheld Smith J's approach to the overcharge assessment and his consideration of the "competitive counterfactual". As to the Loss of Profits Claim, the Court of Appeal agreed with Smith J's finding that, even if the infringement had not occurred, BritNed would have made the same decision concerning the capacity of the cable which it bought.

## COMMENT

In this judgment, the Court of Appeal has provided useful guidance as to the correct approach for assessing damages. It requires a detailed examination of the specific facts of the case. The court was willing to award damages for loss arising out of anticompetitive behaviour, even where the overcharge was unintentional. However, a claimant must still first prove, on the balance of probabilities, that it has suffered loss and the quantum of that loss. A rebuttable "presumption of harm" applies to competition claims for loss or harm suffered on or after 9 March 2017, when the Damages Directive was implemented in the UK. Paragraph 13 of schedule 8A to the Competition Act 1998 provides that: "For the purposes of competition proceedings, it is to be presumed, unless the contrary is proved, that a cartel causes loss or damage". The conduct in this case preceded the Damages Directive which did not therefore apply. However, remarks made by the judge at first instance and Court of Appeal ("…*on the facts of the present case, it is hard to see how such a presumption could have assisted BritNed, given the need for its loss to be quantified*…") suggest that the English courts' rigorous approach to assessing loss and damage will not necessarily be much affected by the presumption of harm in cases where it applies.

Sophie Walker
Associate
Litigation & Investigations – London

Contact
Tel +44 20 3088 4189
sophie.walker@allenovery.com

[1] Vantaan Kaupunki v Skanska Industrial Solutions Oy (C-724/17) EU:C:2019:204.

# Contract

## PROBLEMS WITH NO SET-OFF CLAUSES: PREVENTION IS BETTER THAN CURE

*TMF Trustee Ltd & ors v Fire Navigation Inc & ors* [2019] EWHC 2918 (Comm), 1 November 2019

A no set-off clause did not stop borrowers from relying on the "prevention principle", namely that the alleged breach was caused by the lenders.

Set-off is a common law right that a debtor has to net obligations it owes to a creditor against obligations the creditor owes to it and only to pay the balance. The rules governing what can be set-off against what are complex. It is generally possible to exclude a party's right to set-off by including clear contractual provisions to this effect.

In this case, lenders had lent USD69m and taken mortgages over two ships to secure the debt. A notice was served under a clause requiring the borrowers to provide additional security if the value of the ships fell below a set level. However, this notice overstated the amount required to remedy the shortfall in value of the vessels. The borrowers did not provide the additional security demanded. The facility agent served an acceleration notice on the borrowers requiring them to repay the whole loan and arrested one ship in Los Angeles and subsequently sold it.

The lenders then sought summary judgment for the outstanding balance of the loan, default interest and various declarations. By the time of the hearing the facility agent had arrested the other ship in Singapore.

The borrowers argued that they were not in breach of the loan because they had been prevented from performing their obligations by the facility agent's prior breaches (the wrongful arrest of the first ship had scuppered their attempts to sell the vessels). This "prevention principle" is well established: a party can use it to defend itself from claims that it has breached the contract when the alleged breach is caused by the other party's actions.

The hearing focused on whether the no set-off provision in the loan agreement which required the borrowers to pay "all amounts due from the Borrowers … without any form of set-off, cross-claim or condition …" prohibited the borrowers from relying on the prevention principle to avoid repaying the principal.

The borrower's argument was that they had not exercised the right of set-off but that the prevention principle meant that the debt under the loan had not become due at all because of the lenders' breach: the lenders could not rely on the fact that the loan remained unpaid despite the acceleration notice and the final maturity date passing as they had engineered this situation by making it impossible for the borrowers to repay. No set-off clauses such as this one applied merely to debts that were due; the borrowers were claiming that their obligation was not due.

The court found on the facts that the borrowers' defence had a real prospect of success and that the lenders were not entitled to summary judgment.

Philip Carstairs
Senior Professional Support Lawyer
Banking – London

Contact
Tel +44 20 3088 3379
Philip.carstairs@allenovery.com

# Injunctions

## CRYPTOCURRENCY TREATED AS PROPERTY IN FREEZING ORDER

*Elena Vorotyntseva v Money-4 Limited t/a Nebeus.Com, Sergey Romanovskiy, Konstantin Zaripov* [2018] EWHC 2596 (Ch), 28 September 2018 (but only recently made public)

The High Court has granted a freezing order over GBP1.5 million worth of Bitcoin and Ethereum cryptocurrency GBP1.5m against a trading platform and its directors, in only the second-known example of the Court treating cryptocurrency as property. The question of whether cryptocurrency is property is relevant to determining competing rights parties may have in it.

Until recently, *Robertson v Persons Unknown* was thought to be the first time that the English High Court had engaged with the question of whether cryptocurrency is property for the purposes of making a proprietary order. However, that was preceded by the present case, a decision from September 2018 only published in November 2019. The claimant, Elena Vorotyntseva (**EV**), had transferred to Money-4 Limited (trading as Nebeus.Com) (**Nebeus**) a significant amount of Bitcoin and Ethereum cryptocurrency (the **Cryptocurrency**) to be held on Nebeus' trading platform. The Cryptocurrency was valued at the time at around GBP1.5m.

Funds were transferred to Nebeus on the understanding that it would hold and deal with the Cryptocurrency on EV's behalf. When EV became concerned that the Cryptocurrency may have been dissipated, she sought confirmation from Nebeus that it was still in Nebeus' "possession". In the absence of any such confirmation, EV applied for a freezing order against Nebeus and its two directors (the **Respondents**).

**Risk of dissipation**

The Respondents were represented at the hearing, having been given very short notice of the application the night before. Nebeus offered an undertaking to maintain the Cryptocurrency pending further order, but EV wanted confirmation that she still had control of the Cryptocurrency. The Respondents produced two screenshots at the hearing, one in relation to each form of cryptocurrency. The court accepted EV's submission that the Bitcoin screenshot was insufficient to establish that Nebeus still held EV's Bitcoin. The Ethereum screenshot was even more problematic, since it appeared to have been altered to make it look as if EV's name appeared on the screenshot, when in fact it did not.

The Respondents failed to produce evidence to demonstrate that Nebeus still held the Cryptocurrency, and the questionable nature of some of the evidence bore out EV's concern about the risk of dissipation. Satisfied that there was a real risk of dissipation of the Cryptocurrency, Mr Justice Birss granted a freezing order against the Respondents to prohibit their disposal of the relevant quantities of Bitcoin or Ethereum.

**Cryptocurrency as property**

This decision is notable for the court's willingness to grant a proprietary injunction as part of the freezing order. This prohibited the disposal of the relevant quantities of Bitcoin or Ethereum (rather than their sterling equivalent value). Birss J was satisfied that the court could make a proprietary order in this case, noting only that there was no suggestion that the Cryptocurrency did not belong to EV, nor "any suggestion that cryptocurrency cannot be a form or property or that a party amenable to the court's jurisdiction cannot be enjoined from dealing in or otherwise disposing of it".

The decision does not shed light on the basis on which the court held that Bitcoin and/or Ethereum should be treated as property, but Birss J's readiness to do so is noteworthy.

COMMENT

This decision will provide further reassurance, alongside *Robertson*, of the English courts' willingness to deal with cryptocurrency as property (albeit both are interlocutory decisions). Although the orders and legal tests the court considered in this case and *Robertson* (where an Asset Preservation Order was granted in respect of stolen Bitcoin) were different, both decisions required the court to proceed on the basis that cryptocurrency could be personal property. In neither case did the court directly address on what legal basis cryptocurrencies could be property.

This direction of travel was also reflected in the "*Legal statement on cryptoassets and smart contracts*" recently published by The UK Jurisdiction Taskforce (**UKJT**) of the LawTech Delivery Panel. The UKJT pronounced that cryptoassets are capable of being property. Being decentralised, intangible and not fitting within a classification as either chose in possession or action should not, in the UKJT's view, disqualify them.

The UKJT proposed that they be recognised not as choses in possession or choses in action but as some "other intangible assets".

Georgina Thomson
Associate
Litigation & Investigations – London

Contact
Tel +44 20 3088 2426
georgina.thomson@allenovery.com

David Rowlands
Trainee
Litigation & Investigations – London

Contact
Tel +44 20 3088 1735
david.rowlands@allenovery.com

# Privilege

## LEGAL ADVICE PRIVILEGE UPHELD FOR DISSOLVED COMPANIES

*Lee Victor Addlesee v Dentons Europe LLP* [2019] EWHC Civ 1600, 2 October 2019

The Court of Appeal has confirmed that documents protected by legal advice privilege remain so protected even upon the dissolution of the company to which the privilege belongs. Once attached, legal advice privilege exists unless overridden by statute or waived. In addition, the court found that legal professionals have a duty to assert privilege over their former client's documents and are entitled to resist disclosure of such documents, even if not instructed to do so.

These proceedings stemmed from a failed investment scheme. The appellant (**Addlesee**) comprised a large group of investors that invested in a scheme marketed by a Cypriot company called Anabus. Anabus was advised by the respondent (**Dentons**).

Some time after the investment, Anabus was dissolved. Addlesee subsequently claimed that the scheme was fraudulent and, in May 2016, issued proceedings against Dentons, claiming damages for deceit or negligence on the basis of letters it claimed had induced it to invest

Addlesee requested disclosure of documents which had passed between Anabus and Dentons. The question on appeal was whether the legal advice privilege originally attaching to these documents subsisted notwithstanding the dissolution of the company.

At first instance, Master Clark ruled that privilege subsisted in these documents, distinguishing the decision in *Garvin Trustees Ltd v The Pensions Regulator* which held that legal advice privilege did not survive the dissolution of a Northern Irish company.[1] This distinction

was made on the basis that, unlike in Garvin, it was still legally possible for Anabus to be restored to the register.

Addlesee appealed that decision, arguing that legal advice privilege requires the existence of someone entitled to assert it; once a company is dissolved it can no longer do so and so the right ceases to exist. Alternatively, if the dissolution meant that privilege had passed to the Crown as *bona vacantia*, then the Crown had "disclaimed" it, which also had the effect of lifting the privilege protection.

**Legal advice privilege for dissolved companies**

The Court of Appeal dismissed Addlesee's appeal. Legal advice privilege attaches from the moment the relevant communication between client and lawyer is made. It remains in place unless and until it is waived by the client (or someone else entitled to waive it) or overridden by statute.

It was accepted that Master Clark at first instance was bound by *Garvin*, but the Court of Appeal was not. In *Garvin*, the Upper Tribunal held that legal advice privilege did not survive the dissolution of a Northern Irish company because it could not assert its privilege and so that privilege ceased to exist.

The Court of Appeal overruled *Garvin*, holding that the principle applied by the Upper Tribunal was wrong. Upon the dissolution of a company, it is not a question of there being someone to assert privilege, but someone to waive it (and if there is, whether this person has done so). In the instant case, Anabus had not waived their privilege, and upon dissolution the Crown had made it clear that it neither asserted nor waived the company's privilege. It therefore remained effective.

The court also confirmed that it is a "lawyer's duty" to assert a client's privilege – even former clients, now dissolved. As such, Dentons were "doing no more than fulfilling that duty" by resisting the application for disclosure.

**The iniquity exception**

The Court of Appeal noted in addition that no legal advice privilege attached to documents if they are created for "the furtherance of crime, fraud or other iniquity". This exception does not, however, conflict with the principle that once privilege subsists in a document, it does so until it is waived. In fact, in such circumstances, the documents are never privileged in the first place – where a client is acting fraudulently or criminally, there is no policy justification to protect his communications with his lawyer.

## COMMENT

This case serves as an important reminder from the Court of Appeal of the fundamental importance and inviolability of legal advice privilege. The court was not prepared to extend the exceptions to the current rule for fear of undermining the absolute principle that a client should be able to consult his lawyer in confidence.

It is clear that once a communication is made between a lawyer and client in connection with giving or receiving legal advice, otherwise than for an iniquitous purpose, legal advice privilege protects that communication unless or until waived by the client or overridden by statute.

The case also provides helpful confirmation to lawyers of their duty to protect the privilege of their clients, even those which have been dissolved or who (in the case of individuals) have died.

David Siesage
Associate
Litigation & Investigations – London

Contact
Tel +44 20 3088 2006
david.siesage@allenovery.com

[1] [2015] Pens LR 1, [2014].

## WITHOUT PREJUDICE COMMUNICATIONS OPEN TO INSPECTION IN SETTLEMENT AGREEMENT

*BGC Brokers LP & ors v Tradition (UK) Ltd & ors* [2019] EWCA Civ 1937, 18 November 2019

The Court of Appeal held that without prejudice material incorporated into a settlement agreement between the claimants and one of the defendants could be inspected by the remaining defendants in on-going multi-party proceedings. Although the negotiations in their original form had the benefit of without prejudice protection, they did not do so in the context of the settlement agreement.

This judgment serves as a reminder that settlement agreements are not covered by the without prejudice rule. Parties should be mindful of this when considering whether to include information which otherwise would not be open to inspection or available as evidence.

The claimant companies (**BGC**) were inter-dealer brokers. The first defendant (**Tradition**) was a competitor. The third defendant (**the Broker**) was a broker at BGC who supplied its confidential information to Tradition.

BGC started proceedings against Tradition and the Broker in relation to this information leak. In an effort to settle the proceedings against him, the Broker told BGC on a without prejudice basis what confidential information he had disclosed to Tradition (the **Disclosures**).

As a result, a settlement agreement was concluded between BGC and the Broker. Importantly, the settlement agreement:

- appended (or incorporated by reference) the without prejudice communications detailing the Disclosures;
- expressly preserved the without prejudice nature of these communications (save that it could be waived on the Broker's breach of the agreement); and
- the Broker warranted that the Disclosures were the full extent of the confidential information he had passed on to Tradition.

BGC disclosed a redacted version of this agreement to Tradition with the without prejudice material removed on grounds of without prejudice privilege and/or litigation privilege. Tradition challenged the legitimacy of these redactions.

**No without prejudice protection**

The without prejudice rule broadly protects communications made in a genuine attempt to compromise a dispute between the parties from being inspected by other parties to that litigation and put before the court as evidence. The public policy justification for this protection is that parties should not be discouraged from settling their disputes for fear that something they say in the course of settlement negotiations could be used against them on the question of liability.

Settlement agreements do not benefit from the without prejudice rule. However, this does not affect the without prejudice status of any prior negotiations that led to a settlement agreement (other than where an accepted without prejudice offer forms part of the settlement agreement).

The question the Court of Appeal had to decide in this case was whether the Broker's without prejudice communications detailing the Disclosures lost their without prejudice status when situated in the settlement agreement. The Court of Appeal held that they did.

The purpose of the particular communication at issue is what matters for the without prejudice rule. Here the relevant communication was the settlement agreement. The without prejudice communications were included in the settlement agreement not as live negotiations but as part of an integral term of that agreement. They were there to provide BGC with a warranty on which it could sue, if the Disclosures turned out to be inaccurate or incomplete. In the context of the settlement agreement therefore, the communications could not benefit from the without prejudice rule.

**No litigation privilege protection**

The Court of Appeal then turned to the claimant's alternative ground for resisting disclosure, namely, that litigation privilege applied.

Litigation privilege applies to communications between a lawyer, client and/or third party made for the dominant purpose of obtaining information or advice in connection with the conduct of adversarial litigation which is in progress or in reasonable contemplation.

***No dominant litigation purpose***

The Court of Appeal found that there was one glaring problem with BGC's claim to litigation privilege. The without prejudice communications were not included in the settlement agreement for the dominant purpose of obtaining information or advice in connection with the conduct of litigation. Although the court was prepared to accept that the original purpose of generating these communications might have been to gather evidence, this was not why they were included in the settlement agreement. Here their purpose was as a warranty to BCG. This purpose was distinct from any initial evidence-gathering purpose and could not be subsumed into any overarching dominant litigation purpose. BGC's claim to litigation privilege was therefore defeated.

***Opposing parties***

Tradition also argued that the claim to litigation privilege must also fail as litigation privilege cannot attach to communications between opposing parties to litigation unless those two parties share a common interest against another party. The court recognised that this involved difficult issues and given its finding on dominant purpose felt that these issues would be better dealt with "in a case where their resolution matters".

COMMENT

Although this judgment primarily involves settled principles, it is a helpful reminder of the vulnerability of settlement agreements to inspection in multi-party litigation where those agreements are responsive to a disclosure order. Parties should be mindful of this when drafting settlement agreements and avoid including without prejudice material or at the very least should not include it in wholesale form.

Christabel Constance
Senior Professional Support Lawyer
Litigation – London

Contact
Tel +44 20 3088 3841
christabel.constance@allenovery.com

## ANONYMOUS EMAIL AND OVERHEARD PUB CONVERSATION IN DISABILITY DISCRIMINATION CLAIM

*Curless v Shell International Ltd* [2019] EWCA Civ 1710, 22 October 2019

A leaked email between lawyers and an overheard conversation between lawyers in a pub, both concerning redundancy, were not admissible as evidence in disability discrimination proceedings in the Employment Tribunal. The leaked email was privileged, and there was an insufficient connection between the overheard conversation and the email to allow the conversation to be used as an aid in interpreting the email. The Court of Appeal left open the question of whether the iniquity principle (which is a bar to privilege) applies beyond circumstances involving crime or fraud.

**A claim for disability discrimination**

A senior lawyer (the **claimant**) at a large company suffered from a disability. From 2011, the company had expressed concerns about the claimant's performance at work, and in August 2015 the claimant brought a claim against the company alleging that the actions taken in respect of his alleged performance issues gave rise to unlawful disability discrimination and/or a failure to make reasonable adjustments (the **First Claim**)

In November 2016 the claimant was issued with notice of termination, allegedly by reason of redundancy, with his employment ending on 31 January 2017.

**Further claim for disability discrimination, victimisation and unfair dismissal**

In March 2017, the claimant brought a second claim alleging further disability discrimination, victimisation and unfair dismissal (the **Second Claim**). In the Second Claim, the claimant referred to the following:

- **A pub conversation**: the claimant overheard a conversation in a pub between two people whom he understood to be lawyers from Lewis Silkin. The individuals mentioned a senior lawyer at the company who had commenced a discrimination claim, and allegedly stated that this individual's "days are numbered" as the company planned to use the context of a redundancy exercise to terminate his employment.
- **An anonymous email**: the claimant was (anonymously) sent an email between a senior in-house lawyer at the company and a lawyer at Lewis Silkin. In the email, the in-house lawyer reported that she had told the company's General Counsel that there were likely to be redundancies of legal personnel "including the individual" (who was acknowledged to be the claimant), and that:

  > *"If done with the appropriate safeguards and in the right circumstances, while there is always the risk he would argue unfairness/discrimination, there is at least a wider reorganisation and process at play that we could put this into the context of…otherwise we risk impasse and proceedings with on-going employment with no obvious resolution."*

The company applied to strike out references to the pub conversation and the email on the basis that these communications were privileged. The Employment Tribunal (the **ET**) had to consider whether these communications engaged the "iniquity principle" which prevents a party from relying on privilege where a communication or document has come into being for the purpose of furthering a crime or fraud.

The ET found both the pub conversation and the email to be privileged. The ET also held that discrimination and victimisation are torts which do not engage the iniquity principle, as they do not constitute a crime or fraud. The Employment Appeals Tribunal (**EAT**) took a different view, finding that the iniquity exception applied. The company appealed to the Court of Appeal (the **court**).

**Email was normal employment advice**

The court held that the email was the sort of advice which employment lawyers give "day in day out". This was not advice to act in an underhand or iniquitous way. The email was legal advice on the redundancy process and how this could be applied to the claimant with appropriate safeguards. The author was considering two alternative risks:

- if the processes led to the claimant being selected for redundancy, there was a risk that he would argue that the decision was unfair and discriminatory; and
- if the claimant was not considered for redundancy and remained in employment, the First Claim would continue anyway and there was a risk of an impasse.

The email remained privileged and could not be relied on in support of the claimant's case.

**Pub conversation could not be used as an interpretive aid**

The court held that this had been relied on by the claimant only in relation to how the email should be interpreted, and there was insufficient connection between the email and the pub conversation for the latter to be used as an aid in interpreting the former.

Consequently, the appeal was allowed and the relevant paragraphs in the Second Claim were struck out.

**Scope of the iniquity principle**

As the court did not consider that the email was advice to act "in an underhand or iniquitous way", the scope of the iniquity principle did not arise for decision. *Obiter*, the court did recite the company's arguments that the iniquity principle be confined to instances of dishonesty, and that the decision in *BBGP v Babcock* [2010] EWHC 2176 (Ch) went too far in suggesting that the iniquity principle was engaged in any circumstances "which the law treats

as entirely contrary to public policy". However, the court remarked that this was "an important argument, which will no doubt have to be decided one day; but not in this case".

**Anonymity**

The company sought an anonymity order in respect of the proceedings, arguing that if the 29 April email was excluded from evidence, the mind of the judge hearing the substantive dispute would nevertheless be tainted by knowledge of the 29 April email gained through learning about the hearing and appeals on this point. The court rejected this argument on the basis that judges are used to excluding evidence which is inadmissible from their consideration of the merits, and anonymity would run contrary to the principle of open justice.

COMMENT

As well as a timely reminder ahead of the festive season that the pub is not an appropriate forum in which to discuss sensitive HR or legal issues, there are a couple of key takeaways from this case:

- the fact that the EAT interpreted the email so differently from the ET and the court demonstrates the importance of drafting advice unambiguously. Legal advice should clearly set out the options available to the employer and the associated risks so that it cannot be (mis)construed as advice on how to act in an underhand way. This is especially important given that the scope of the iniquity principle remains unclear; and
- parties to litigation should not assume that anonymity orders will be granted by the court, even in circumstances where lower instance proceedings have been conducted in private or been the subject of an anonymity order. The court has made it clear that there is no general exception to open justice where privacy or confidentiality is in issue, and derogations may only be made in exceptional cases.

Pete Summers
Associate
Litigation – Employment – London

Contact
Tel +44 20 3088 1128
pete.summers@allenovery.com

# Service

## PAVEMENTS AND SOCIAL MEDIA – SERVICE ON TRICKY DEFENDANTS

*Lonestar Communications Corp LLC v Daniel Kaye & Ors* [2019] EWHC 3008 (Comm), 1 November 2019; and *Alexander Gorbachev v Andrey Grigoryevich Guriev* [2019] EWHC 2684 (Comm), 14 October 2019

In *Lonestar v Marziano & ors*, the court made an order dispensing with service on the basis that Lonestar's "striking efforts" to inform a defendant of the proceedings (including social media communications) and the steps taken by the defendant to evade service gave rise to exceptional circumstances. In *Gorbachev v Guriev*, the court found that dropping documents on the ground next to the defendant's car amounted to effective personal service. Both decisions demonstrate the courts taking a flexible approach to service, to the benefit of claimants.

**Serving cyber-attackers**

In *Lonestar v Marziano & ors*, the underlying claim was for damages for conspiracy and unlawful interference with business arising out of alleged cyber-attacks on Lonestar's activities in Liberia. Lonestar applied for an order dispensing with service of the claim form and other documents on Marziano (the **second defendant**).

Lonestar had attempted to serve Marziano in Israel through Hague Convention channels but was unsuccessful. It went on to make "striking efforts" to contact Marziano and inform him of the proceedings. It sought contact details from solicitors understood to have acted for Marziano in other proceedings, and used information obtained from the leak of the Panama papers to contact a company believed to have a connection to Marziano. In addition, three attempts to contact him made use of social media (on three different platforms), and a fourth attempt involved his personal website.

The court found that Marziano was aware of the proceedings and had actively evaded service, such that there were exceptional circumstances enabling the court to dispense with service.

**"Heroic efforts" on internet and social media**

The court was impressed by Lonestar's "heroic efforts" using the internet and social media:

- Lonestar's solicitors used Facebook Messenger to send a message to Marziano. The evidence showed that this message reached its target. A second message was sent a few months later, but failed. The court inferred that Marziano had closed his Facebook Messenger account in the interim.
- Marziano had a personal website that referred to his connection with a company with an address in Israel. A letter was sent to that address and delivery was confirmed. Subsequently, it was discovered that the website containing the reference to the company had been taken down. The court inferred that Marziano had taken down the website following delivery of the letter.
- Lonestar's solicitors sent two further messages to Marziano using a Flickr account, which sends the full content of messages to users' email addresses. No response was received.
- Lonestar's solicitors sent a LinkedIn request to connect with Marziano, which failed.

The court found that the failure to respond to the Facebook messages and the closing of the account, together with the removal of content from the website, indicated that Marziano was aware of the proceedings and was taking active steps to evade service. (The court observed that there may well have been other reasons why Marziano was aware, including correspondence with other parties to the proceedings.) These amounted to the exceptional circumstances required for the court to make an order dispensing with service. The court considered such an order to be fair and just in the circumstances, and noted that Lonestar had undertaken to continue to take steps to inform Marziano of the proceedings.

**Personal service by leaving documents on the ground next to the car**

In *Gorbachev v Guriev*, the parties disputed whether good personal service had been effected when Gorbachev's process server had left the claim form and other documents on the ground next to Guriev's car before it was driven off. There was no dispute between the parties as to the legal principles applicable to personal service. However, there was significant disagreement as to what assessment the court should make of the evidence and how the legal principles should apply to that assessment.

The evidence comprised written witness evidence from both sides and video footage (with audio) recorded on mobile phones by the process servers who were present. The court found that Guriev had sufficient knowledge of the nature of the documents and that Gorbachev's process server had left the documents sufficiently near to Guriev, and therefore concluded that personal service had been effected.

**As close as was "reasonably practicable"**

The court relied heavily on the video and audio footage in concluding that Gorbachev was able to show an adequate evidential basis for each of the elements required for effective personal service. The court found that:

- given the proximity of the process server to Guriev, and the discussion that took place among those next to Guriev (if not Guriev himself), Guriev realised that Gorbachev's process server was trying to serve papers on him;
- based on the apparent discussion about what the process server was trying to do, and the evidence that those with Guriev were trying to stop the process

server approaching him, Guriev knew that service of court proceedings was being attempted; and

- the overall impression from the footage was that the process server "got as near to Mr Guriev as he could have done without assaulting someone and/or risking his own safety" before letting go of the documents.

## COMMENT

The Lonestar decision is one of a number of recent examples of the courts' flexibility and willingness to embrace mechanisms in order to allow victims of cyber-attacks to pursue effective legal remedies,[1] which should offer encouragement to such claimants. Claimants have also benefited from the *Gorbachev v Guriev* decision on personal service. However, this decision acts as a reminder to claimants to ensure that process servers are equipped with clear instructions as to what will and will not suffice and, where possible, to obtain video and audio evidence which can be produced in court in the event of a dispute over personal service.

Elizabeth Staves
Senior Associate
Litigation & Investigations – London

Contact
Tel +44 20 3088 4308
elizabeth.staves@allenovery.com

[1] In relation to cybercrime, see *also CMOC Sales & Marketing Ltd v Person Unknown & 30 ors* [2018] EWHC 2230 (Comm) in which the court confirmed its jurisdiction to grant world-wide freezing orders against persons unknown and also sanctioned the service of defendants by "innovative" methods including Facebook Messenger, WhatsApp and a data room system. This case was covered in the November 2018 Litigation Review.

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# Key contacts

If you require advice on any of the matters raised in this document, please call any of our Litigation and Dispute Resolution partners, your usual contact at Allen & Overy, or Karen Birch.

Allen & Overy LLP

One Bishops Square, London E1 6AD United Kingdom | Tel +44 (0)20 3088 0000 | Fax +44 (0)20 3088 0088 | allenovery.com