CLYDE&CO

Commercial dispute resolution newsletter

November 2017

Overview

The English Courts have continued to be busy in 2017. The Courts have been asked to interpret the meaning of standstill agreements on more than one occasion in the last six months. Disputes as to costs, always at the forefront of litigants' minds, have been fairly frequent and the Courts have offered some guidance as to what happens when parties file cost budgets late. As ever, with so many international disputes before the English Courts, there were numerous applications made in relation to jurisdictional issues. The Courts proved willing to delve into the substance of these matters and to consider in detail all of the relevant circumstances. Numerous parties also applied to the Courts for related emergency relief such as freezing injunctions. The Court of Appeal set out the test for whether a defendant has assets for the purpose of such relief and considered the impact of delay in applying for such relief. The Courts have also spent time considering issues of disclosure and privilege and we distil below some lessons about what to do when privileged documents are inadvertently disclosed.

Russell & Anor v Stone (t/a PSP Consultants) & Ors [2017] EWHC 1555 (TCC)

Judge interprets meaning of a standstill agreement

A standstill agreement can either suspend time for the purposes of limitation (i.e. if one month was remaining to issue proceedings when the standstill agreement was concluded, then the claimant still has one month to issue at the end of the limitation period) or it can extend time (i.e. if time runs out during the standstill agreement, the claimant can still commence proceedings up until the end of the standstill agreement). In this case, the operative part of the standstill agreement provided for time to be suspended, and it also provided that neither party would issue or serve proceedings during the period of the standstill agreement. However, the recital to a second standstill agreement (entered into when the first one expired), provided that "the parties have agreed to further extend the period in which proceedings can be issued…." An issue therefore arose as to whether time had been suspended or extended.

Coulson J held that the parties had agreed to suspend time, given the clause in the agreement which prevented either side from starting proceedings during the period of the standstill agreement: "It is an untenable construction of any agreement if it requires one party to breach its terms in order to make the agreement work in the way contended for". Accordingly, the claimant had not had to commence proceedings on or before the very last day of the standstill period. The judge rejected an argument that the use of the word "until" in the agreement meant up to and did not include the last day of standstill period. Accordingly, the "extension" referred to by the parties only meant that they were extending the time to issue proceedings. Even if that was wrong, it is an established principle that the operative part of an agreement always takes precedence over a recital.

Therefore, if a party wishes a standstill agreement to extend time to issue proceedings but not stop time running, the agreement needs to be drafted very clearly, by providing that the parties agree to extend the time to issue proceedings to X day, and by not including a term about the parties agreeing that they will not commence proceedings until the end of the standstill period. As indicated by the judge, a safer option might be to issue proceedings and then either agree an extension of time for service of the claim form or seek a stay of, say, six months to complete any Protocol process.

Sabbagh v Khoury & Ors [2017] EWCA Civ 1120

Court of Appeal rules on test for establishing jurisdiction against a non-anchor defendant

The anchor defendant in this case was sued under Article 2(1) of Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments ("the Regulation") on the basis of his domicile in England. Article 6(1) provides that a person domiciled in another Member State can be sued in the English Courts (where one of the defendants is domiciled) where the defendant in question is one of a number of defendants and the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments from separate proceedings.

It is established practice in the Commercial Court that a good arguable case against the anchor defendant must be shown. However, it was argued in this case that, in *Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784, the Court of Appeal had held that the strength of the case against the non-anchor defendants need not be assessed and so the same position should apply in respect of the anchor defendant too.

The Court of Appeal was divided on this question but the majority (Patten LJ and Beatson LJ) held that it was necessary to consider the merits of the claim against the anchor defendant (although in the end it was not necessary to decide the issue, and so their views are obiter). They were doubtful that the *Aeroflot* judgment could be applied to the position of an anchor defendant and noted that, "If the claims against one or more foreign co-defendants fall away, there would be no effect upon the claim against the anchor defendant or the claims against other foreign co-defendants. In contrast, without a legitimate claim against the anchor defendant, there is no reason for the foreign co-defendants to be ousted from their jurisdiction of domicile. .. Accordingly, how can it be expedient to determine a claim against an anchor defendant that is not seriously arguable together with a claim against a foreign co-defendant over whom there would be no jurisdiction under Article 6 apart from the link to the anchor defendant" (paragraph 66).

By contrast, Gloster LJ, in her dissenting judgment, found that there was clear Court of Justice of the European Union authority that Article 6(1) can be used to establish jurisdiction against non-anchor defendants even if the claim against the anchor defendant will not proceed (unless the claimant is engaged in a fraudulent abuse of Article 6(1)).

Caretech Community Services Ltd v Oakden [2017] EWHC 1944 (QB)

Court considers various service issues where claim form was sent to solicitors (not instructed to accept service) for information only

The claimant failed to effect personal service of the claim form on the defendant. Prior to the expiry of the 4 month period for service of the claim form, a photocopy of the claim form (and no response pack) was delivered by post and email to the defendant's solicitors. However, it was common ground that those solicitors had not been authorised to accept service. The claimant applied under CPR r6.15(2) for an order that "steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service".

Although the defendant had argued that CPR r6.15(2) cannot apply where there has been no service (as opposed to mis-service), Master McCloud decided the case on a different basis. She held as follows:

1. Service is an objective question and a party who says he is not delivering a claim form by way of service, but for information only, is to be taken at his word. The content of the letter enclosing the claim form is therefore material.
2. Generally, good service requires delivery of a hard copy document, as sealed and issued by the court (unless, for example, service is by fax or email).
3. When considering relief under CPR r6.15(2), it is critical that the form and contents of the claim form has come to the attention of the defendant, but that alone is not enough. CPR r6.15(2) cannot be used where a claim form has been provided expressly for information only (i.e. not for service) (by contrast, a claim form bearing no such statement can be treated as served).
4. Even if the Master was wrong on the points above, the statement that a document is provided "for information only" forms part of all the circumstances as to whether there is good reason for validating service. Various matters can be taken into account when deciding if there is "good reason": the reason why the claim form could not be served in time, the conduct of the parties, the absence of a Limitation Act time bar and prejudice to the defendant will all be relevant factors. The payment of a further issue fee if a claimant has to re-issue is not a relevant factor. Furthermore, the new form of the overriding objective points towards a more rigorous approach to requiring compliance with the rules.
5. Finally, the use of the word "or" in CPR r6.15(2) does not prevent the Court from validating service where there has been a failure of both method of service and location of service.

So, on the facts of the case, the Master declined to exercise her discretion to grant relief under CPR r6.15(2). Although the claim form had been delivered to the solicitors in order to bring it to the attention of the defendant, that step was not capable of being service because the claimant had elected to state that delivery was "for information". Alternatively, there was no good reason to allow a claim form which was expressly delivered on that basis to be validated as service after the event: the claimant "should be held to its word and a party should be able to know that when its lawyers receive documents which on their face are not being served, that such can be relied on" (paragraph 73).

Yukos Finance BV & Ors v Lynch & Ors [2017] EWHC 1821 (Comm)

Judge rules on various service of a claim form issues

In this case, Teare J ruled on various issues relating to service of a claim form, including the following:

1. The claimants had done nothing wrong in waiting 4 months after the issue of the claim form to apply for permission to serve out of the jurisdiction. On the evidence, it was clear that the claimants had initially hoped to serve in the jurisdiction because it was thought that the defendant travelled to England on a regular basis (he was not domiciled in an EU country). Permission to serve the defendant out of the jurisdiction in Florida and Moscow had been given and it had been appropriate for the claimant to attempt to serve in Florida as a priority because the Foreign Process Service had advised that service in Russia would take a minimum of 12 months.
2. The claimants had then attempted personal service in Lebanon. *Tseitline v Mikhelson & Ors* [2015] EWHC 3065 (Comm) established that a process server must hand the relevant document to the person upon whom it has to be served. If the defendant refuses to accept it, the process server may tell him what the document contains and leave it with him or near him. A person can only "accept" the document if the nature of the document is readily apparent or known to the recipient. Where the defendant refuses to accept the claim form, the focus is on the knowledge of the recipient, not the process by which it is acquired. Whilst in most cases knowledge of the nature of the document will be found to have been imparted by a simple explanation, it is clear that it can also readily be inferred from pre-existing knowledge, prior dealings or from conduct at the time of or after service.

In this case, the defendant was not told that documents placed in front of him in a bag at a check-in counter at an airport were related to legal proceedings in London. However, it could be inferred that the defendant had that knowledge because the documents were visible and easily accessible and the defendant had leafed through them.

Noble Caledonian Ltd v Air Niugini Ltd [2017] EWHC 1095 (QB)

Service within the jurisdiction and whether a foreign company had a place in England "where it carries on its activities"

The claimant failed to effect personal service of the claim form on the defendant. Prior to the expiry of the 4 month period for service of the claim form, a photocopy of the claim form (and no response pack) was delivered by post and email to the defendant's solicitors. Where a defendant has not given an address for service (and no business address of a lawyer in the EEA has been given), CPR r6.9 provides that service must be made (where the company is not incorporated or registered in England and Wales) at "any place within the jurisdiction where the corporation carries on its activities; or any place of business of the company within the jurisdiction". If there is no such place, service must be made out of the jurisdiction. The defendant in this case was a company incorporated in Papua New Guinea. The claimant sought to argue that it "carried on activities" in England via its agent (FDL) based near Gatwick Airport.

Counsel had informed the judge that there was no prior case law on the meaning of "carries on its activities" in the context of CPR r6.9. The judge therefore sought to decide whether the activities of FDL were the defendant's activities, noting that "[w]hile an agent may bind his principal, it by no means follows that the business of the agent can be described as that of the principal. An agent need not be an agent for only one principal, but may be an agent for many" (paragraph 50). On the facts of the case, the judge found that the requirements of CPR r6.9 were not satisfied. The most important factor was to look at context. Here, FDL worked for several principals and was limited in its ability to enter into contracts and deprived of any realistic discretion in terms of pricing or contractual terms. Further, the defendant exercised little control over the running of FDL and made no contributions to the financing of FDL's business. Accordingly, the defendant had to be served out of the jurisdiction.

Dennis v Tag Group Ltd & Ors [2017] EWHC 919 (ch)

Whether defendant had submitted to the jurisdiction by resisting an injunction application

The defendants were a Jersey and Bahraini company. The English solicitors of the Bahraini company advised that they were not instructed to accept service of the claim form and stated that "all our client's rights, including as to jurisdiction… are fully reserved". The claimant then issued an application for an injunction and the defendants participated in, and resisted, that application. It was argued that they had thereby submitted to the jurisdiction of the English court. The respondents countered that they had had no real option but to defend the injunction and that this should not be treated as a submission to the jurisdiction.

It is an accepted principle that a person who appears merely to contest the jurisdiction of the English court does not thereby submit. It must instead be shown that they have taken some step which is only necessary or useful if the objection to jurisdiction had been waived. The defendants sought to argue that the position is different in relation to injunctions because there is no acknowledgement of service form (alerting the defendant that it can contest jurisdiction) and a party is entitled to defend an injunction application without being taken to have submitted to the jurisdiction.

The judge held that those arguments arose from a mis-reading of earlier cases and that there was no special carve-out for injunction applications: "It would be perfectly possible to defend such an application by contesting jurisdiction at the hearing of the injunction" (paragraph 20). Similarly, if a defendant seeks a declaration that the English court has no jurisdiction and at the same time applies separately for security for costs, that will not amount to a voluntary submission. Further, the language used by the solicitors did not protect the defendants: "To reserve is not the same as informing the Court or other party that "we are not properly here"". The language used did not inform the court that the respondents intended to challenge jurisdiction.

ICICI Bank UK PLC v Mehta & Ors [2017] EWHC 1030 (Comm)

Whether delay fatal to application for a freezing injunction and requirements for an "anchor defendant"

Various issues arose in this case regarding the continuation of worldwide freezing orders against the defendants. One of the issues was whether delay by the applicant was fatal to the application. The respondent had received a formal demand threatening asset seizure in July 2016 and was notified that a claim form had been issued against her in August 2016, but no application for a freezing order was made in England for a further 7 months (settlement discussions having taken place during this time). HHJ Waksman QC noted that delay alone will not usually prevent the grant of a freezing order if the court is satisfied that there is still a real risk of dissipation. However, on the facts, the judge found that a risk of dissipation could not be proven "on the simple basis that if Mona did really pose such a risk, or the Bank thought that she did, it is somewhat odd that it took no earlier step to secure its position; it could still have negotiated with her afterwards" (paragraph 92).

A further issue in the case related to Article 8(1) of the recast Brussels Regulation which provides that a person domiciled in a Member State may also be sued "where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together". In *Bord Na Mona Horticulture Limited & Ors v British Polythene Industries PLC* [2012] EWHC 3346 (Comm) Flaux J held that, if (contrary to his decision) the claim against the "anchor defendant" had been struck out, he would have concluded that jurisdiction against the other defendants under Article 8(1) could not be maintained. Applying that decision here, HHJ Waksman QC concluded that there was a properly arguable case against one of the anchor defendants (and the applicant need only find a real prospect of success against one anchor defendant) and so jurisdiction under Article 8(1) was satisfied. The same position would have applied had it been concluded that this fell under the common law rather than the recast Brussels Regulation.

This case reflects the decision in *Anglo-Financial SA v Goldberg* [2014] EWHC 3192 (ch) where the claimant was refused a freezing injunction, in part because it had delayed by entering into lengthy negotiations to seek payment from the defendant. However, this case also recognises that whether or not delay is relevant to a freezing order application will depend on the particular circumstances of the case.

Ras Al Khaimah Investment Authority & Ors v Bestfort Development LLP & Ors [2017] EWCA Civ 1014

Court of Appeal sets out test for whether defendant has assets for a freezing order application and considers the impact of delay in applying

The judge at first instance refused to grant worldwide freezing orders in favour of the applicants (based in the UAE and Georgia) against the respondents (LLPs registered in England and Wales and owned by a Georgian national) in support of proceedings taking place overseas. Her decision was in part based on *A v C* [1981] 1 QB 956, which is authority for the proposition that a claimant will only be entitled to a freezing order if the defendant has assets which will be caught by the order; the Court will not make an order which is futile. She was not satisfied that there were substantial assets held by the respondents anywhere in the world. She also held that there had been considerable delay in bringing the application, and therefore the defendant would have had ample opportunity to dissipate assets during that time had he been so inclined, and so the risk of dissipation could not be proven. The Court of Appeal has now allowed an appeal from that decision and held as follows:

1. The test for showing that a respondent has assets which will be caught by the order was not merely that the defendant is wealthy and therefore must have assets somewhere. Instead, the correct test is that there are "grounds for belief" that the respondent has (or is likely to have) assets: "That is not an excessive burden but if an order is sought against numerous companies or LLPs and those companies and LLPs can show that there is no money in their accounts and the claimant cannot show that the account has been recently active, it may well be right to refuse relief" (paragraph 39).
2. Whilst a failure to obey court orders might invite adverse inferences to be drawn, "it does not follow that compliance with a court order will negative a risk of dissipation if that risk has already been found to exist" (paragraph 54).

On the issue of delay, the Court of Appeal found that the delay in making the application had not been as long as the judge had found (it was in fact only about a month). That was far shorter than the delay of several years in the case of *Anglo-Financial SA v Goldberg* [2014] EWHC 3192, on which the judge had relied to find that delay had negatived the risk of dissipation.

The Court of Appeal noted that delay usually gives rise to two arguments:

(a) An applicant does not genuinely believe there is any risk of dissipation. The Court of Appeal said that that argument is open to the objection that it is the fact of the risk that matters, not whether the claimant believes in it; and

(b) A defendant who is prone to dissipate will have already done so by the time the court is asked to intervene. The Court of Appeal commented that this "argument assumes that a defendant is already of dubious probity and it is a curious principle that would allow such a defendant to rely on his own dubious probity to avoid an order being made against him" (paragraph 55).

The Court of Appeal found no reason on the facts to counter the finding of a risk of dissipation because of delay.

Prior case law has tended to take delay into account as a factor (depending on all the circumstances of the case), but usually for the reasons cited above which the Court of Appeal appears to have generally discounted. However, the Court of Appeal did not go so far as to hold that *Anglo-Financial SA v Goldberg* was wrongly decided: instead, it appears to have distinguished this case on the basis of the length of the delay.

Atlantisrealm Ltd v Intelligent Land Investments (Renewable Energy) Ltd [2017] EWCA Civ 1029 and Microgeneration Technologies Ltd v RAE Contracting Ltd & Ors [2017] EWHC 1856 (Ch)

Inadvertent disclosure of privileged documents

CPR r31.20 provides that, where a party inadvertently allows a privileged document to be inspected, the party who has inspected it may use it (or its contents) only with the permission of the Court. Case law has clarified that, in the absence of fraud, the Court may prevent the use of privileged documents only if there has been an "obvious mistake" in making such documents available for inspection. As instances of actual fraud are rare, disputes most commonly arise where one party argues that the privileged material was obviously disclosed by mistake and the other party states it believed that privilege had been waived.

The principles for determining whether the Court will restrain the use of a privileged document which has been disclosed are set out in *Al Fayed & Ors v Commissioner for Police for the Metropolis & Ors* [2002] EWCA Civ 780 (paragraph 16):

"(iii) A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived….

(v) …, the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, as for example in the case of inspection procured by fraud.

(vi) In the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake.

(vii) A mistake is likely to be held to be obvious and an injunction granted where the documents are received by a solicitor and:

(a) the solicitor appreciates that a mistake has been made before making some use of the documents; or

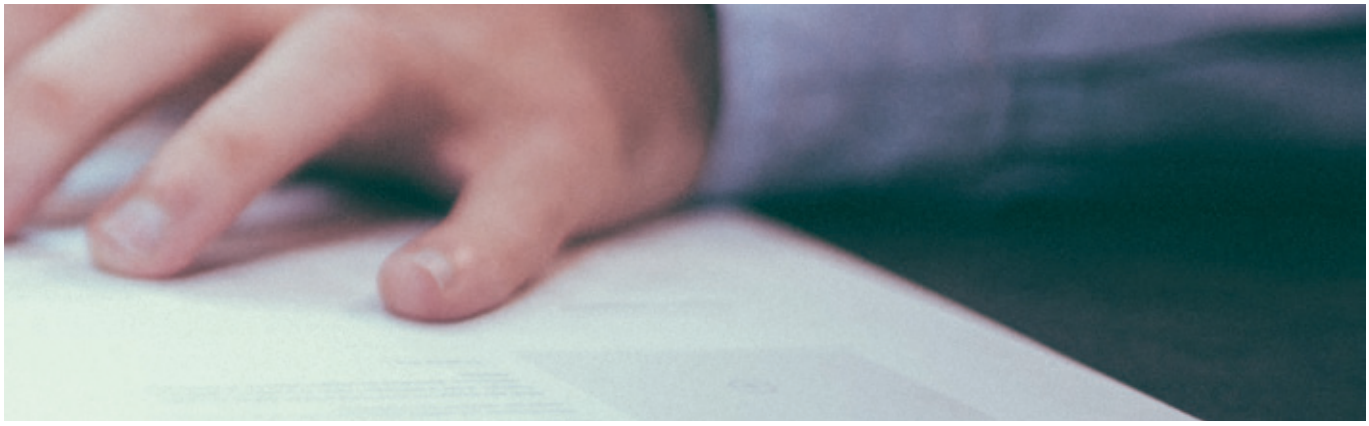
(b) it would be obvious to a reasonable solicitor in his position that a mistake has been made; and, in either case, there are no other circumstances which would make it unjust or inequitable to grant relief.

(viii) Where a solicitor gives detailed consideration to the question whether the documents have been made available for inspection by mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made, but is not conclusive; the decision remains a matter for the court.

(ix) In both the cases identified in (vii) (a) and (b) above there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief, but all will depend upon the particular circumstances.

(x) Since the court is exercising an equitable jurisdiction, there are no rigid rules."

It is commonly the case in commercial litigation that junior lawyers conduct a first pass review of documents before more senior lawyers review those documents identified for them during the first pass review. What happens when the "obvious mistake" is only identified on this second pass review? This "two solicitors" situation was considered by the English Courts for the first time by the Court of *Appeal in Atlantisrealm Ltd v Intelligent Land Investments (Renewable Energy) Ltd* [2017] EWCA Civ 1029. In this case, a privileged document was disclosed by the defendant to the claimant because it had not been marked as privileged by a junior member of the defendant's review team,



and was not referred to the more senior lawyer working on the case. At first instance, the judge accepted that the claimant's solicitor who had reviewed the disclosed document had not appreciated that it had been disclosed by mistake and refused to order the deletion of the privileged document.

On appeal, the Court of Appeal accepted that it could not go behind this finding of fact. However, in this case, the solicitor who had reviewed the privileged document had then passed it on to a more senior colleague. The Court of Appeal held that the more senior solicitor had appreciated that the document had been disclosed by mistake. The Court of Appeal went on to add a "modest gloss" to the principles laid down in earlier case law (paragraph 48):

"If the inspecting solicitor does not spot the mistake, but refers the document to a more percipient colleague who does spot the mistake before use is made of the document, then the court may grant relief. That becomes a case of obvious mistake."

In *Microgeneration Technologies Ltd v RAE Contracting Ltd & Ors* [2017] EWHC 1856 (Ch), the respondents sought an injunction to restrain Microgeneration from making use of legal advice from counsel given pursuant to the Chancery Bar Litigant in Person Support Scheme ("CLIPS") and contained in a letter from CLIPS, which was exhibited to one of the respondents' witness statements in error. The respondents said that they had intended to exhibit counsel's contemporaneous manuscript note of the hearing and not the legal advice given by him prior to and following the hearing. Microgeneration was promptly notified of the issue by correspondence in which the respondents gave a full explanation of the circumstances. Microgeneration reserved its position and said it would revert. However, instead, it filed a witness statement referring to the privileged material. Counsel for Microgeneration argued that it was not obvious that the CLIPS letter was disclosed by mistake. Counsel for the respondents argued the contrary, noting that the relevant paragraph of the witness statement to which the document was exhibited referred to a handwritten note of the hearing and not a standard form letter.

The Court accepted the respondents' arguments and granted the injunction, finding that a reasonable solicitor in the position of Microgeneration's representative (who was not in fact a solicitor) would not have concluded that privilege had been waived by the respondents. By the time Microgeneration made use of the CLIPS letter by referring to it in a witness statement, it was fully aware that the respondents had made a mistake in exhibiting it.

Whether a document is in fact privileged and what protection the Court will order in the event such a document is disclosed to another party will depend on the factual circumstances in each case. Even where the disclosing party can ultimately prevent the inadvertently disclosed privileged material from being used, the cat will still be very much out of the bag so to speak. The receiving party will still have obtained information it should not have done. Even if the relevant document is ultimately not adduced in evidence, it could open up lines of enquiry and the receiving party may be able to make use of the information for strategic purposes.

Grosvenor Chemicals v UPL Europe [2017] EWHC 1893 (Ch)

Judge rules on committal application where "use" allegedly made of disclosed documents for collateral purpose

The claimants applied for permission to bring committal proceedings against the defendants and their solicitors. The defendants had previously obtained a Norwich Pharmacal Order ("NPO") which was then replaced by a consent order. The consent order did not specify the use which could be made of documents disclosed pursuant to the order. After receiving the documents, the defendants' solicitors wrote to a former employee of the claimants warning that if certain steps were not taken by him, proceedings would be commenced against him.

The claimants alleged that this was a breach of CPR r31.22 because the defendants and their solicitors were using the disclosed documents for a collateral purpose.

Birss J held as follows:

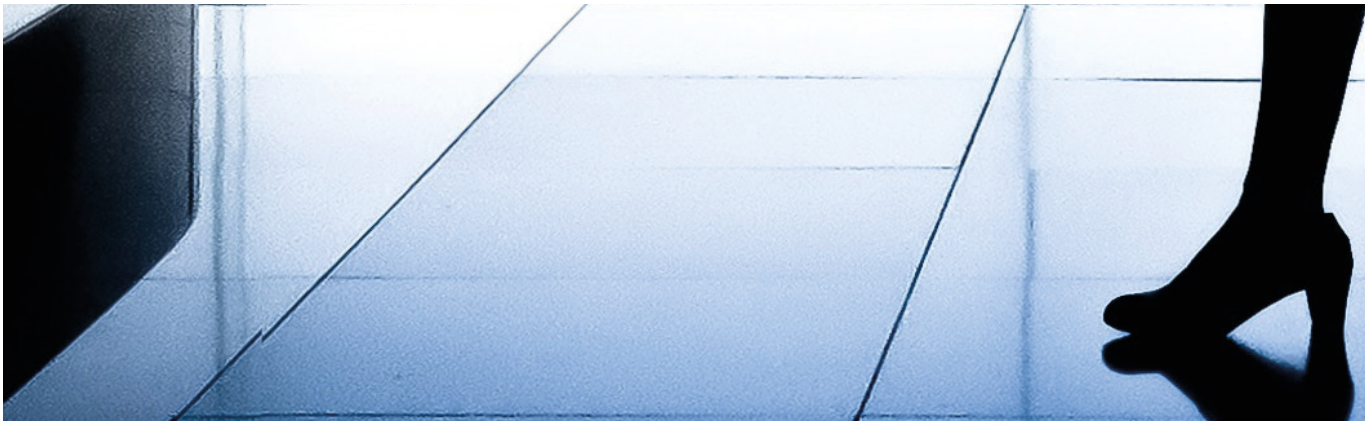
1. Committal proceedings could be brought against the defendants, as well as their solicitors, because (on the evidence) any misconduct by the solicitors was done on the instructions of the clients (albeit those instructions were on the solicitors' advice).
2. As there was nothing expressly provided for in the consent order, CPR r31.22 applied.
3. Reference was made to the earlier decision of *Tchenguiz v Grant Thornton* [2017] EWHC 310 (Comm) in which it was held that if the purpose of a review of disclosed documents was to advise on whether other proceedings would be possible, then the review would be a use for a collateral purpose, but if the purpose of the review had been to advise on the ongoing litigation, but when undertaken the review showed that other proceedings would be possible then the review would not have been for a collateral purpose (a further step would be a use for a collateral purpose, but the use of the document for the purpose of seeking permission or agreement to take that further step would be impliedly permitted). Here, the review had been for orthodox reasons in the course of existing proceedings.
4. Furthermore: "If a party reviewing documents disclosed in a given set of proceedings identifies that there is a properly arguable basis for joining a third party into those proceedings as a co-defendant with the existing defendants, in relation to the existing causes of action pleaded in the proceedings, then that party has done nothing other than use the documents for the purposes of the proceedings in which they were disclosed" (paragraph 158).
5. However, here, new proceedings were threatened against the third party, and that had been a breach of CPR r31.22.
6. Even so, the application for permission to bring committal proceedings was refused on the basis that there was no prima facie case of a deliberate or reckless breach of the rule. It was also relevant in this case that, had the NPO still been in place, the solicitors could have written the letter which they sent to the former employee.

Jeffrey Ross Blue v Michael James Wallace Ashley [2017] EWHC 1553 (Comm)

Whether non-party allowed access to witness statements referred to at a pre-trial hearing

The applicant (a non-party to the proceedings) sought access to witness statements which had been referred to at a pre-trial hearing. CPR r5.4C allows non-parties to obtain copies of statements of case from the court record, but that does not include documents filed with the statement of case (such as witness statements). However, permission can be sought from the Court for access to any documents filed by a party. Leggatt J rejected an argument that he had no power to allow access to the witness statements in this case because they were not on the court file. A document is "filed" at Court when it is delivered to the court office and it does not matter if a copy of the document is no longer on the court file (as the court could order the document to be filed again or for a copy to be provided directly to the non-party). The judge also rejected an argument that it is implicit in CPR r32.13 that a non-party cannot be allowed to inspect a witness statement until it stands as evidence in chief during the course of the trial.

Accordingly, the Court did have power to give permission for a non-party to have access to the witness statements. However, the judge cautioned that "There are, in my view, good reasons why the court should not generally make witness statements prepared for use at a trial publicly available before the witnesses give evidence" (paragraph 12). The judge went on to find that "once documents have been placed before a judge and referred to at a public hearing, access to the documents should be permitted other things being equal. But it does not remove the need for the court to consider the particular circumstances, including the nature of the documents in question, their role and relevance in the proceedings and, importantly, the purpose for which access to the documents is sought" (paragraph 21). If the purpose of the non-party here had been to facilitate a better understanding of the arguments made at the hearing, then, in the absence of a sufficient countervailing reason, the open justice principle would indicate that access should be allowed. However, that was not the purpose here and the application was (in the main) refused.



EMW Law LLP v Halborg [2017] EWHC 1014 (ch)

Judge rules on various issues relating to without prejudice privilege

A solicitor delegated work to another firm of solicitors. When the underlying litigation between the solicitor's clients and their opponent settled, the agent-solicitors were not paid their costs and they commenced proceedings against the principal solicitor. Of issue in this case was whether the agent-solicitors were entitled to disclosure of without prejudice documents produced when the principal solicitor had conducted settlement negotiations with the solicitors for the opponents in the underlying litigation. Various issues concerning without prejudice privilege were considered by Newey J, including the following:

1. Can a party which is entitled to claim without prejudice privilege show a privileged document to a third party? It is an accepted principle that without prejudice privilege can be waived only with the consent of both parties. However, the judge said that a voluntary disclosure differs from compulsory disclosure during litigation: "The fact that a party to without prejudice negotiations is entitled to withhold communications within their scope on disclosure cannot mean that he is not free to show them to someone else if he so chooses, at least if there is a legitimate reason for doing so. Were the position otherwise, a litigant might find himself unable to provide relevant documents to, say, an expert unless and until the other side agreed, which would be absurd" (paragraph 45).
2. The judge held that the agent-solicitors could not rely on common interest privilege to insist on seeing without prejudice communications: common interest privilege is a shield, not a "sword".
3. One of the well-established exceptions to the without prejudice rule is if the Court needs to look into the issue of whether or not there was an agreed settlement. Newey J held that that exception could apply here even though no one involved in the without prejudice correspondence was alleging that an agreement had been reached: "On any view, the concluded agreement exception means that [a party to without prejudice negotiations] runs the risk of the correspondence becoming admissible because his opponent alleges that the negotiations resulted in an agreement. The extent of the risk arising from the exception does not seem to me to be significantly increased if it is understood as allowing not merely a party to the negotiations, but someone else with a legitimate interest in their outcome, to rely on it" (paragraph 56).
4. A further exception to the without prejudice rule applied here too: where one of the issues is whether a party has acted reasonably to mitigate its loss. Newey J held that this can be a valid exception to the rule, and it did not matter whether the issue had been raised by a party to the without prejudice negotiations or by a third party: "There is a persuasive argument that if, as here, a client authorises his solicitor to employ an agent on the footing that the agent's remuneration depends on what (if any) agreement as to costs is reached with the other side, the client can hardly complain if his negotiations with the opposing party are susceptible to being revealed to and relied on by the solicitor-agent" (paragraph 64).

Accordingly, the principal solicitor could not rely on the without prejudice rule to decline disclosure of the relevant documents. However, legal professional privilege could be relied on in relation to certain other documents, the judge finding that "the mere fact that a solicitor delegates work to an agent does not mean that the client has waived privilege, so that the agent can demand disclosure of documents other than those provided to him in the course of his agency" (paragraph 68).

The judge's conclusion that a document protected by without prejudice privilege can be shown by one party to a third party without the consent of the other negotiating party (if for a "legitimate reason") is of interest. In *French v Groupama Insurance Co Ltd* [2011] EWCA Civ 1119 a (probably) privileged (without prejudice) offer was shown by one party (the offeree) to a third party, with the consent of the other party (the offeror). Rix LJ declined to decide whether privilege could be waived unilaterally, without the offeror's agreement and concluded that the matter was "not clear". It may therefore be safer for parties to agree expressly at the outset that documents protected by without prejudice privilege cannot be disclosed to third parties, if this is a concern. It is also noteworthy that the judge described common interest privilege as a shield and not a sword. He relied on text book commentary to reach this conclusion. However, there is other commentary, not referred to in the judgment, which suggests that it can be used as a sword in certain circumstances.

Mott & Anor v Long & Anor [2017] EWHC 2130 (TCC) and Lakhani & Anor v Mahmud & Ors [2017] EWHC 1713 (ch)

When the Courts will grant relief from sanctions for late costs budgets

In *Mott & Anor v Long & Anor* [2017] EWHC 2130 (TCC), the defendants applied for permission to be able to rely on their costs budget, which was filed some 10 days late (an earlier costs budget was not filed due to IT problems, although the defendants' solicitors thought it had been filed). HHJ Grant held (applying the principles laid down in *Denton v TH White Ltd* [2014] EWCA Civ 906) that the delay here was serious or significant, in part because "lateness in serving a cost budget has the capacity to prejudice the very process of co-operation in the cost budgeting process which the rules are designed to achieve" (paragraph 21). Furthermore, although IT failures can amount to a good reason, the defendants had not established a good reason on the evidence, no witness statement from someone in the solicitors' IT department having been produced.

However, the judge was prepared to grant relief taking into account all the circumstances in the case. The costs budget had now been served (some nine days before the CMC) and, importantly, there was a significant difference between the figures in the costs budgets for the claimants and the defendants. That was because of a difference in approach between the parties, e.g. the claimants wanted to adduce expert evidence from two categories of expert, the defendants from only one. It was possible that the parties might not have been able to agree these matters and so would have had to make oral submissions at the CMC (with a revised costs budget likely to then be ordered): "In those circumstances, the process of cost budgeting would not have been completed today in any event… The fact that the parties are now in precisely the same procedural position in which they would have been so far as the process of cost budgeting is concerned, had the defendants served their cost budget in time, is a highly significant circumstance in the case, and one to which the court should have proper regard" (paragraph 35).

By contrast, in Lakhani & Anor v Mahmud & Ors [2017] EWHC 1713 (ch), it was found that a district judge did not err in refusing relief from sanctions where costs budget were filed a day late. The automatic consequence for the defendants filing a late cost budget under the rules is that they cannot recover any more than court costs if they win, unless relief from sanctions is permitted. The district judge refused to grant relief and so the defendants appealed. That appeal was dismissed. The defendants argued that the breach had not been serious because the parties had still been able to engage in debate about the costs estimates and there was little dispute about the defendants' costs (which were estimated to be about half of the claimants' budget).

It was held that the district judge had not erred in finding that the breach was serious (the appeal from that decision was a review, and not a rehearing, by the appeal court). Whilst the actual impact on the ability to perform a task required by an order is very important, the authorities do not suggest that it is the overriding factor: "In my judgment, in evaluating the seriousness of breach, a court is entitled to consider the risk of difficulty that the failure to meet a deadline has created even if, in the event, it has been possible to perform the task required, notwithstanding the breach. That is particularly legitimate in the case of orders whose performance requires a degree of co-operation because, in such cases, even though it may be possible for the non-defaulting party still to do what is required as well, it may make it more inconvenient and costly, since extra time may need to be made available. That may be all the more so, if the number of effective working days to complete a co-operative task is limited, thereby reducing flexibility" (paragraph 37).

The judge was also entitled to take into account the distraction caused by a debate between the solicitors as to whether the time limit had been breached: “if a party in breach takes rapid and reasonable steps to minimise the impact of any default on the opposite party and the court, the court may conclude that a minor breach has been kept minor … leading to it being treated as less serious” (paragraph 45).

Nor had there been any reasonable excuse for the default. The defendants’ solicitors had miscalculated the time for filing the costs budget and: “while it is true that some judges may have taken a more charitable view as to the calculation of time and whether days had to be clear or not, I am unable to say that the judge’s evaluation was clearly wrong in this case” (paragraph 55). Although an error by a legal representative can provide support for the grant of relief against sanctions, this factor did not have to be treated as of significance in this case.

Eastern European Engineering v Vijay Construction (Proprietary) Ltd [2017] EWHC 797 (Comm)

Judge decides whether defendant resisting enforcement of an ICC award should be ordered to put up security

The claimant was granted leave to enforce an ICC arbitration award in England. The defendant applied to set aside that order. Flaux J ordered that that application be adjourned pending the final determination of the defendant's challenge to the award before the French Courts. He also ordered the provision of security by the defendant. The defendant did not put up that security and the claimant subsequently sought the dismissal of the defendant's set aside application, because of its failure to comply with the order for security and the failure of its challenge to the award in the French Courts. The defendant argued that Flaux J had been wrong to order security in the first place. It relied on the recent Supreme Court decision of *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2017] UKSC 16.

Baker J acknowledged that the issue of whether Flaux J had been wrong to order security had to be decided by the Court of Appeal. He instead focused on what sanction, if any, should be imposed because of the defendant's non-compliance. The claimant argued that the order should be treated like any other court order and that the court should consider granting an unless order. That argument was rejected by the judge, who held that: "In the specific context of a challenge to the enforcement of a New York Convention award, an order requiring the party challenging the award to provide security for it is permissible (if at all) only where the enforcing court has judged that a challenge in the courts of the seat is to delay the enforcing court's determination of the challenge but that should in fairness be on the basis that security be provided. However, where that adjournment is not sought by the party resisting enforcement, there is no sense in which the security ordered can properly be regarded as the "price of relief sought as a matter of discretion or concession", as Lord Mance put it in IPCO v NNPC" (paragraph 19).

Accordingly, as the defendant here had resisted adjournment of the English proceedings, it would be wrong to impose "unless" terms on the order for security. Instead, the judge ordered that the adjournment should be terminated, the order for security discharged, and the set aside application should be heard as soon as possible.

Contact us

Chris Burdett
Partner
T: +44 (0) 20 7876 5466
E: chris.burdett@clydeco.com

Neil Jamieson
Partner
T: +44 (0) 20 7876 6514
E: neil.jamieson@clydeco.com

Tom White
Partner
T: +44 (0) 20 7876 6568
E: tom.white@clydeco.com

Nicola Vinovrški
Legal Director
T: +44 (0)20 7876 4325
E: nicola.vinorski@clydeco.com

Conrad Walker
Consultant
T: +44 (0) 20 7876 4544
E: Conrad.walker@clydeco.com

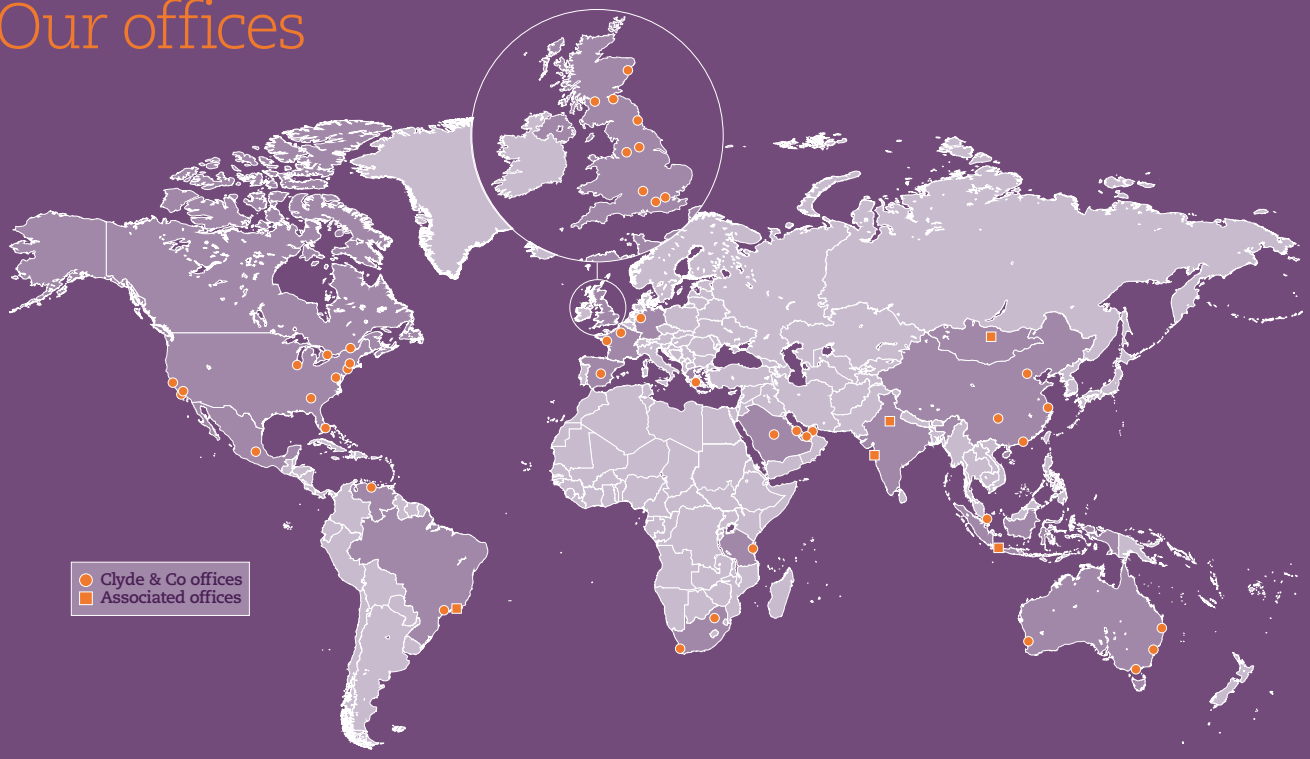
Tim Crockford
Partner
T: +44 (0) 207 876 6165
E: tim.crockford@clydeco.com

Helen Rowlands
Partner
T: +44 (0) 20 7876 4536
E: helen.rowlands@clydeco.com

Anna Myrvang
Legal Director
T: +44 (0) 20 7876 4313
E: anna.myrvang@clydeco.com

Ivan Wilkinson
Legal Director
T: +44 (0) 20 7876 6569
E: ivan.wilkinson@clydeco.com

Our offices



45+
offices across
6 continents

390
partners, 1,500 lawyers
and 3,600 total staff

*Associated offices

For full office details please refer to the Clyde & Co website
www.clydeco.com/locations/offices

Asia Pacific
Beijing
Brisbane
Chongqing
Hong Kong
Jakarta*
Melbourne
Mumbai*
New Delhi*
Perth
Shanghai
Singapore
Sydney
Ulaanbaatar*

Europe
Aberdeen
Dusseldorf
Edinburgh
Glasgow
Guildford
Leeds
London
Madrid
Manchester
Nantes
Newcastle
Oxford
Paris
Piraeus

Americas
Atlanta
Caracas
Chicago
Long Beach
Los Angeles
Mexico City
Miami
Montreal
New Jersey
New York
Rio de Janeiro*
São Paulo
San Francisco
Toronto
Washington, DC

Middle East/ Africa
Abu Dhabi
Cape Town
Dar es Salaam
Doha
Dubai
Johannesburg
Riyadh

Clyde & Co LLP **www.clydeco.com**

J403329 - November 2017