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REED SMITH

1 ARBITRATION

1.1 WHAT AMOUNTS TO TAKING A STEP IN PROCEEDINGS FOR THE PURPOSES OF SECTION (9)3 OF THE ARBITRATION ACT

In the case of ***Bilta (UK) Ltd v Nazir - [2010] EWHC 1086 (Ch)*****,** Bilta asserted that the parties had entered into a Framework Agreement under which Bilta purchased European Emissions Trading Scheme Allowances from Jetivia, and that the Agreement contained an arbitration clause under which: "Any dispute arising under, out of or in connection with this Agreement or under, out of or in connection with sale and buy transactions shall be resolved by arbitration". Bilta asserted that two of its directors had diverted funds, and that Jetivia had knowingly assisted them in their breach of fiduciary duty. Proceedings were commenced by Bilta. By a letter dated 15 December 2009 Jetivia stated: "We expressly reserve Jetivia's position in respect of the jurisdiction of the English court. The remainder of this letter is without prejudice to Jetivia's right to contend that this matter must be dealt with by arbitration in accordance with the contract". Following further correspondence, on 20 January 2010 Jetivia issued an application for a consent order extending an extension of time for the filing of a defence. Subsequently, Jetivia sought a stay of Bilta's action under section 9 of the *Arbitration Act 1996*, in reliance on the arbitration clause in the Framework Agreement. Bilta argued that: (1) it had not entered into the Framework Agreement; (2) if there was an agreement, the arbitration clause did not apply to claims for knowing assistance or to a claim for misappropriation arising from a sale outside the Framework Agreement; and (3) Jetivia had taken a step in the proceedings by failing to apply to the court to contest the jurisdiction of the court within 14 days of the filing of its acknowledgment of service as required by *CPR Part 11*, or by applying for an extension of time for filing a defence, so that the right to seek a stay had been lost under section 9(3) of the Arbitration Act 1996.

Sales J held as follows.

(1) There was a triable issue as to the validity of the Framework Agreement.

(2) The arbitration clause was wide enough to encompass claims arising out of contracts made under the Framework Agreement, and there was a triable issue as to whether the arbitration clause was wide enough to encompass non-contractual claims.

(3) Jetivia had not taken a step in the proceedings: (a) CPR Part 11 did not apply to arbitration claims, so failure to apply to the court to contest its jurisdiction did not prevent reliance on section 9; (b) an application to the court for an extension of time did not amount to a step in the proceedings, given that Jetivia had expressly reserved its rights even though that reservation had been made in correspondence between the parties and not in communications with the court.

Sales J, rather than staying the proceedings and allowing the arbitrators to determine the jurisdictional issues, gave directions for a hearing by the court on those issues.

The court therefore held that, in certain circumstances, it may be reasonable for a defendant who considers he may have the right to rely on a contractual arbitration clause to engage in correspondence with the claimant and/or make an application such as one extending time for service of his defence, without waiving his right to later assert the proceedings should be stayed for arbitration.

1.2 ICSID TRIBUNAL HAS JURISDICTION OVER INVESTMENTS RELATING TO A SHIP

In ***Inmaris Perestroika Sailing Maritime Services GMBH and others v Ukraine*** **(ICSID Case No ARB/08/8)** an ICSID tribunal ruled that it had jurisdiction over a claim, brought by a German company, Inmaris, and various related companies (Inmaris Companies), against the Ukraine in connection with multiple interrelated contracts concerning the use and operation of a Ukrainian ship. The Inmaris Companies claimed that the Ukrainian government had prevented them from operating the ship and commenced proceedings under the German-Ukraine bilateral investment treaty (BIT).

The award discusses several interesting issues relating to the question of what amounts to an "investment" for the purposes of establishing jurisdiction:

- *Interrelated contracts and multiple claimants***:** The purported investments were all substantially derived from the contracts. The Inmaris Companies brought proceedings jointly and presented claims on behalf of all of them arising out of the interrelated contracts. The tribunal found that there was an investment in the transaction as a whole. It was not necessary to consider whether each component part of the overall transaction would satisfy the requirements of the BIT. The question was whether the arrangements could properly be considered to be "part of an integrated, unitary operation that comprises an investment over which the tribunal has jurisdiction". On the facts, the tribunal held that this requirement was satisfied.
- *Did payments made by the Inmaris Companies to the Ukraine constitute investments for the purposes of grounding jurisdiction?* The tribunal concluded that it was necessary to identify an "asset" which constituted an investment protected by the BIT. The payment streams under the contracts did not necessarily constitute an investment for the purposes of founding jurisdiction. The investment was the asset acquired by the investor, typically as a result of such payments, and it could be tangible or intangible, such as a claim to money or claim to performance, as was the case here.
- *Were the alleged investments undertaken or invested in the territory of the Ukraine?* Whether the BIT was treated as including a territoriality requirement as an overarching jurisdictional limit, or as including territorial limits among the elements of substantive protections underlying the claims, it was necessary to examine the territorial nexus of the Inmaris Companies' investments. The tribunal concluded on the facts that the investments met the former more exacting standard and, therefore, it did not need to decide the exact nature of the BIT's territorial requirement.

2 COSTS

2.1 CLAIMANT EXPOSED TO COSTS ORDER DUE TO FAILURE OF SOLICITOR TO OBTAIN ATE INSURANCE

In the case of ***Adris and others v Royal Bank of Scotland (Cartel Client Review Ltd and others, additional parties) [2010] EWHC 941 (QB)*** the court considered applications for non-party costs orders. The applications were made after consumer credit claims were discontinued because of a ruling on section 78 of the *Consumer Credit Act 1974* which went against the claimants. The claimants were ordered to pay costs and the defendant banks sought non-party costs orders against the solicitor representing many of the claimants and the sole shareholder and managing director of the claims management company that had referred them.

The Mercantile Court held, in awarding a non-party costs order against a solicitor acting as a sole practitioner and declining to award a non-party costs order in favour of the director of a claims management company, that where a solicitor in sole practice or a firm of solicitors had failed in its obligation to take out ATE insurance in respect of their clients and had failed to inform them of that fact, a non-party costs order could be imposed on the solicitor or firm where it was shown that there was a sufficient causal link between the failure to obtain insurance and the costs generated by the case. The court should be slow to pierce the corporate veil to expose a director to a non-party costs order in circumstances where, although the director would benefit from the success of the litigation, it could not be said that he had promoted or funded the proceedings or that the proceedings were solely or substantially for his own financial benefit and where the company itself was a third party to the proceedings.

The decision is another useful first instance decision on causation and non-party costs orders. The judge noted that the existence of a causal connection between the non-party and costs is sometimes, but not always, a necessary and sufficient condition for a non-party costs order. In this case, a causal connection could be shown against both non-parties but an order was only made against one of them. A non-party order was considered to be clearly justified against the solicitor because he had failed to obtain after-the-event (ATE) insurance for the

claims and failed to inform the claimants of this. This had directly caused the claims to go ahead as, had the claimants been informed there was no protection on costs, they would not have allowed the claims to go ahead. It also meant that the solicitor was controlling the litigation. However, although the claims management company had loaned the solicitor the funds to bring the claims and directly caused them in that sense, this causal link was not sufficient to make an order against its shareholder or director in the absence of other factors. He was not the real party to the litigation and did not, unlike the solicitor, control the litigation.

2.2 APPROPRIATE ORDER WHERE CLAIMANT FAILING TO BEAT PART 36 OFFER BUT DEFENDANT WHOLLY UNSUCCESSFUL IN PART 20 PROCEEDINGS

In the case of ***Fraser v Bolt Burdon (a firm) and others [2010] All ER (D) 211 (May)*** the Queen's Bench Division gave a ruling as to costs in proceedings where the defendant firm of solicitors had defeated the claimant's claim which had resulted in the defendant being wholly unsuccessful in *Pt 20* proceedings against the Pt 20 defendants.

Following judgment in the claimant's unsuccessful claim against the defendant firm of solicitors, the issue of costs fell to be determined. The claimant's claim was an action for damages against the defendant, a firm of solicitors, based upon a contention that she had been negligently advised to accept in settlement of a claim which she had against a previous firm of solicitors, Parlett Kent, in the amount of £200,000. In the litigation against Parlett Kent, the claimant was represented by leading and junior counsel, the Pt 20 defendants. The defendant brought a Pt 20 claim against the Pt 20 defendants. In the event, the claimant's claim was dismissed. The judge held that the sum of £200,000 which the claimant was advised to accept in settlement of the claim against Parlett Kent was a generous offer to settle the claim against Parlett Kent. It was not a figure which was capable of being criticised as negligent in the evaluation of those who had advised the claimant to accept it. The defendants had made a *Pt 36* offer to the claimant. The outcome of the litigation was plainly that the claimant did not do as well as the Pt 36 offer. The consequence of the success of the

defendants in defeating the claim of the claimant was that the defendants had been wholly unsuccessful in the Pt 20 proceedings against the Pt 20 defendants. The Pt 20 defendants sought an order against the defendants for payment of their costs. The defendants sought an order that it was the claimant who was directly liable to pay the costs of the successful third parties and not them. However, as an alternative, the defendant contended that, if they were ordered to pay the costs of the successful third parties, those costs should be added to the costs which they were able to recover against the claimant. The issue was the appropriate order as to costs as between the unsuccessful claimant and the successful defendant, and the successful Pt 20 defendants and the unsuccessful defendant.

The court ruled: In the ordinary run of cases under the CPR, a successful Pt 20 defendant should not be deprived of his prima facie right to an order for costs against a Pt 20 claimant merely on the ground of the claimant's impecuniosity. In the instant case, the appropriate order would be for the defendant to pay the costs of the successful Pt 20 defendants to be assessed on the standard basis unless agreed, and that the claimant pay the costs of the successful defendant including in those costs the amount of the costs which the defendant had to pay to the successful Pt 20 defendants, again those costs to be assessed on the standard basis unless otherwise agreed. In principle, it was appropriate, having regard to the Pt 36 offer which had been made on behalf of the defendant, that the defendant should recover interest on the costs which it had been entitled to recover from the claimant and that those costs, insofar as they had been costs which the defendant had to pay to the Pt 20 defendants, should be reflected by a similar order in the Pt 20 proceedings, namely the Pt 20 defendants should recover interest on costs.

3 EU

3.1 EUROPEAN COMMISSION CONVENES LEGAL EXPERT GROUP TO SEEK SOLUTIONS ON CONTRACT LAW

On 26 April 2010, the Commission set up an expert group on a Common Frame of Reference in the area of European contract law (*Commission Decision 2010/233/EU*). Until May 2011, this group will meet once a month. It brings together legal academics, people practising contract law on a daily basis like lawyers and notaries, as well as consumer and business representatives.

Legal scholars, who were funded by the EU's overall research programme, have been working on this complex area of private law for many years. Their work resulted in a *Draft Common Frame of Reference*. The new group will prepare a user-friendly text in simple language. Their draft will follow the life cycle of a contract – from pre-contractual duties and the formation of a contract to remedies for the breach of a contract and the consequences of termination.

The Commission will also issue a policy paper and launch a public consultation in the summer on the best way forward on contract law in Europe. The consultation will run until the end of January 2011 and will cover cross-border problems faced by consumers and businesses and how best to solve them.

3.2 EU DRAFT REPORT REJECTS PROPOSED DELETION OF ARBITRATION EXCLUSION IN BRUSSELS REGULATION

The European Parliament's Committee on Legal Affairs (the Committee) is currently considering the European Commission's report and green paper on the functioning of *Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Foreign Judgments (Brussels Regulation)*. The Committee has published a draft report on the European Commission's proposals for amendment of the Brussels Regulation, prepared by the Committee's rapporteur.

The conclusions in the draft report essentially reflect the rapporteur's preliminary findings in his December 2009 working document. The key point of interest from an arbitration point of view is that the draft report strongly opposes the abolition (even partial) of the arbitration exclusion from the scope of the Brussels Regulation. Suggestions are also made to strengthen and clarify the arbitration exclusion.

3.3 WHETHER COURT SEISED HAD JURISDICTION WHERE DEFENDANT ENTERED APPEARANCE BUT DID NOT CONTEST JURISDICTION

In the case of ***Ceska Podnikatelska Pojistovna AS, Vienna Insurance Group v Bilas C-111/09*** **– [2010] All ER (D) 203 (May)** the applicant insurance company, CPP brought an action against the respondent, B, before the referring court seeking an order for the payment by the latter of the sum of CZK 1,755, plus default interest, as the premium due under an insurance policy concluded between those parties on 30 May 2002. Having been called on by the district court to submit his observations, B challenged CPP's claim as to its substance without contesting the jurisdiction of the court seised. The district court observed that it followed from *Council Regulation (EC) 44/2001* (on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters) that, where its jurisdiction had not been contested, that court could not conduct an examination as to its own jurisdiction since the dispute did not fall within the situations provided for in arts 25 and 26 of the Regulation. It also observed that, if it ruled on the substance without examining its jurisdiction, its judgment could not be recognised for the purpose of art 35 of Regulation 44/2001. That provision did not allow the recognition in a member state of a judgment which had not been given by a court with jurisdiction for the purposes of the provisions of ss 3, 4 and 6 of Ch II of that Regulation. According to the district court, insofar as it was seised in breach of art 12(1) of the Regulation, it would not be possible for its judgment to be recognised in another member state. The district court was accordingly uncertain as to whether that conclusion was correct. It considered that either it should have the possibility to examine its jurisdiction irrespective of art 26 of Regulation 44/2001, or it should be able to apply art 24 of that Regulation to its jurisdiction, even though art 8 of that Regulation did not

expressly provide for the possibility to apply that provision. In those circumstances, the district court decided to stay the proceedings and to refer a question to the Court of Justice of the European Union for a preliminary ruling.

The question was whether art 24 of Regulation 44/2001 had to be interpreted as meaning that the court seised, where the rules in s 3 of Ch II of that Regulation were not complied with, had jurisdiction where the defendant entered an appearance and did not contest the court's jurisdiction.

The Court ruled Article 24 of the Regulation had to be interpreted as meaning that the court seised, where the rules in s 3 of Ch II of that Regulation were not complied with, had to declare itself to have jurisdiction where the defendant entered an appearance and did not contest that court's jurisdiction, since entering an appearance in that way amounted to a tacit prorogation of jurisdiction.

3.4 GUIDANCE ON WHEN COURT SEISED OF RELATED ACTIONS PURSUANT TO APPLICATION TO STAY PROCEEDINGS

In the case of ***FKI Engineering Ltd v Stribog Ltd - [2010] EWHC 1160 (Comm)***, FKI commenced proceedings in England against DWL as assignee of claims under a Business Transfer Agreement made in 2005 in respect of which DWL had failed to pay the purchase price. FKI had earlier commenced proceedings against DWL in Germany, seeking to overturn, under German law, transactions which had resulted in intellectual property and other assets being transferred to DWL. Purchase price claims did not form a part of the German action. DWL sought to have the English proceedings stayed under article 28 of the Brussels Regulation, *Council Regulation (EC) No 44/2001*, article 28(1), which provides that where related actions are pending in the courts of different member states, any court other than the court first seised may stay its proceedings, and for this purpose - under article 28(3) - "actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". Burton J refused a stay.

(1) The test under article 28 was a risk of irreconcilable judgments, and it was not enough that the same issue could arise in the two sets of proceedings. In the present case purchase price claims had been excluded by FKI from the German proceedings.

(2) The introduction of a new case in the German proceedings by DWL so as to raise matters common to both sets of proceedings and which rendered them related did not operate to make the German court first seised of the new case under article 30 of the Regulation. Burton J held that, where a first action is subsequently amended to add a party or a cause of action which has, in the meanwhile, been raised in a second action, it was the court of the second action which was first seised. The English court was thus first seised of the matters raised by DWL in the German action and accordingly the English court had no jurisdiction to stay its own proceedings under article 28.

The court therefore dismissed the defendant's application under Article 28 of the Brussels Regulation for a stay of the English proceedings, which had been made on the basis that earlier related proceedings were pending before the German courts.

The decision follows the approach in *Underwriting Members of Lloyds Syndicate 980 v Sinco SA [2009] Lloyd's Rep I & R 365*, and clarifies the question of which court will be first seised in the context of related actions under Article 28, in circumstances where the first action is subsequently altered. The case also highlights the importance, in appropriate circumstances, of ensuring that an original claim is drafted as fully and completely as possible so as to encompass all appropriate claims and minimise the risk, with its inherent costs and delays, of an "unrelated" action being commenced in another jurisdiction.

4 INSURANCE

4.1 INSURER APPLYING "BUT FOR" CAUSATION TEST FOLLOWING DAMAGE BY HURRICANES

In the case of ***Orient-Express Hotels Ltd v Assicurazioni General S.p.a. (UK) Trading as Generali Global Risk) [2010] EWHC 1186 (Comm)*** on the proper interpretation of a business interruption insurance policy it required a "but for" approach to causation so that the insured owner of a hotel in New Orleans which had been damaged by hurricanes could only recover in respect of loss which it could be shown would not have arisen had the damage to the hotel not occurred.

The appellant insured (H) appealed against an arbitration award on questions of law concerning the correct interpretation of a combined property damage and business interruption insurance policy issued by the respondent insurer (G). H owned a hotel in New Orleans which was damaged by hurricanes in the autumn of 2005. The hotel was closed for two months and H sustained substantial business interruption losses. The surrounding area of New Orleans was also devastated by the hurricanes. A mandatory evacuation of the city was ordered. That meant that the city itself was in effect "closed" for part of the time when the hotel was closed. The policy covered "loss due to interruption or interference with the business directly arising from damage". A "trends clause" provided for revenue figures to be adjusted as necessary so as to "represent as nearly as may be reasonably practicable the results which but for the damage would have been obtained". The policy also provided cover for prevention of access and loss of attraction. H had recovered an indemnity under the latter clauses but that was subject to significantly lower limits than would be the case under the main insuring clause. The arbitral tribunal held that as a matter of construction the insuring clause provided cover only for losses caused by damage to the hotel itself but not, save for the prevention of access and loss of attraction extensions, losses caused by the damage to and devastation of the city; the policy wording required a "but for" approach to causation and it was thus necessary to assess the business interruption loss on the hypothesis that the hotel was undamaged but the city was devastated as in fact it was.

The issues on appeal were whether on its true construction, the policy provided cover in

respect of loss which was concurrently caused by physical damage to the property and damage to the surrounding area; and whether the trends clause should be interpreted as permitting an adjustment for the consequences of the very same insured peril which caused the insured damage which gave rise to the relevant business interruption loss.

Appeal dismissed.

(1) As a general rule the "but for" test was a necessary condition for establishing causation in fact. However, there might be cases in which fairness and reasonableness required that it should not be a necessary condition. Whether or not that was so would depend on all the circumstances of the particular case. In the instant case the tribunal had not erred in law in applying a "but for" causation approach under the policy on the facts as found by it. As the tribunal held, under the policy it had been agreed that a "but for" approach to causation should be adopted to the assessment of loss of revenue. Even if that consideration was not in itself conclusive, it was difficult to see how the tribunal could be said to have erred in law in adopting the causal approach laid down in the policy itself. On any view it was highly relevant to what fairness and reasonableness required. It had not been shown that fairness and reasonableness required that the "but for" test should not be applied. None of the suggested alternatives appeared to be more fair and reasonable than the "but for" test adopted by the tribunal, still less so clearly so as to require the discarding of that test. Furthermore, the "but for" test did not have the consequence that there was no cause and no recoverable loss on the facts, but rather a more limited recoverable loss. The answer to the question whether, on its true construction, the policy provided cover in respect of loss which was concurrently caused by physical damage to the property and damage to or consequent loss of attraction of the surrounding area was therefore "yes" unless the application of the "but for" test meant that the loss claimed was not caused in fact by physical damage to the insured property.

(2) The tribunal was right to say that the trends clause was concerned only with the damage, not with the causes of the damage. What was covered were business interruption losses caused by damage, not business interruption losses caused by damage or "other damage

which resulted from the same cause". Nowhere in the trends clause did it state that "variations or special circumstances affecting the business either before or after the damage or which would have affected the business had the damage not occurred" had to be something completely unconnected with the damage in the sense that it had an independent cause to the cause of the damage. The assumption required to be made under the trends clause was "had the damage not occurred", not "had the damage and whatever event caused the damage not occurred". H's construction effectively required words to be read into the clause or for it to be re-drafted. Further, such a re-drafting of the trends clause, which would allow H to recover for the loss in gross operating profit suffered as a result of the occurrence of the hurricanes as opposed to the loss suffered as a result of the damage to the hotel, was inconsistent with the causation requirement of the main insuring clause which required proof that the losses claimed were caused by damage to the hotel. Therefore the tribunal's construction and application of the trends clause was correct.

4.2 WHERE CLAIMANT OVERSTATED A CLAIM FOR DAMAGE FOLLOWING A FIRE IT WAS FATAL TO ENTIRE CLAIM

In the case of ***Yeqaneh v Zurich plc and another (unreported)*** the claimant (Y) claimed the benefit of a buildings and contents insurance policy as against the defendant insurers (Z) following damage to his home and its contents by fire. The property was covered by a policy of buildings and contents insurance which covered damage to property and contents caused by fire. The limit of cover under the policy for contents was £40,000. It was a further term of the policy that Z would not make any payment in respect of its cover if a claim was, in any way, found to be fraudulent or false. Z refused to pay out on the policy, claiming that Y, or a person acting on his behalf, had deliberately caused the fire and that Y had overstated his contents claim. The value of claims which Z accepted in respect of the damaged contents comprised some £38,788. Nevertheless, Z disputed claims by Y that numerous and expensive articles of clothing had also been damaged or destroyed in the fire. Y submitted that (1) it was inherently improbable that he would have caused the fire and that where a court was presented with one or more possible causes of a fire, the law did not permit or require a court to simply choose the one which it considered to be more likely; (2) his

schedule of contents said to have been damaged by the fire was prepared as an estimate from recollection and may have included errors, but that was not fraud.

Judgment for the defendants.

(1) It was for Z to show that Y caused the fire and to do so clearly given the seriousness of the allegation, *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No.1) [1995] 1 Lloyd's Rep. 455* and *Continental Illinois National Bank & Trust Co of Chicago v Alliance Assurance Co Ltd (The Captain Panagos DP) [1989] 1 Lloyd's Rep. 33* considered. Y's reasons for not desiring to burn down his house were powerful. In light of the absence of a motive by Y for committing arson Z had not proven that arson had occurred, *Rhesa Shipping Co SA v Edmunds (The Popi M) [1985] 1 W.L.R. 948* applied.

(2) Y's approach to his contents claim was, at best, careless. In the course of giving evidence, Y did not hesitate to be untruthful where it was in his financial interests to do so. Thus, it was difficult to accept the truth of his assurances that he was innocent in regard to making a fraudulent or untrue insurance claim. On the evidence, it was apparent that Y had falsely claimed for damaged clothing so as to bolster his contents claim as a whole. Accordingly, Y's claim fell in its entirety.

4.3 WHETHER ARBITRATORS PROPERLY DECIDING LOSSES ARISING OUT OF ONE EVENT

In the case of ***IRB Brasil Resseguros SA v CX Reinsurance Company Ltd – [2010] EWHC 974 (Comm)*** the claimant reinsurers participated in an excess of loss reinsurance programme which protected the respondent reinsured's worldwide casualty book of business for the period 1976 to 1983. The reinsurance contained a qualified "follow the settlements" clause under which settlements were binding on the reinsurers "provided such settlements are within the conditions of the original policies and/or contracts and within the terms of this reinsurance ..." The reinsurance contained a period clause which stated: "This reinsurance covers all losses as herein defined occurring during the period commencing with ... and

ending with ..., both days inclusive, local standard time at the place where the loss occurs". The ultimate net loss clause provided that there was a limit of liability for each and every loss, a term defined as "each and every loss ... arising out of one event". A variety of class actions were brought against different assureds, and three issues arose on appeal from arbitrators.

(1) The follow the settlements clause allowed the reinsured to recover if the reinsured could prove its liability on the balance of probabilities. In circumstances where there had been global settlements of claims the reinsured had, following *Equitas v R & Q [2009] EWHC 2787 (Comm)*, proved its loss even though it was likely that some of the claimants might not have had valid claims or might have been overcompensated.

(2) In relation to asbestos claims against the assured, although the reinsured had only been on risk for about 63.6 per cent of the period of exposure, the reinsured had proved its loss under a settlement of 70 per cent of the loss, on the basis that the US courts would have applied the "triple trigger" theory of liability under which an insurer on risk at the date of exposure is liable for all losses up until manifestation. On that basis the reinsured potentially faced 100 per cent liability so that a 70 per cent settlement fell within the terms of the direct policy.(3) The term "event" was capable of meaning the determination of the assured each year to install asbestos in its premises, so that all asbestos claims against the assured in any one year could be aggregated and treated as a single claim within the aggregation clause.

5 JURISDICTION

5.1 WHETHER COURTS WHERE COMPANY HAD ITS SEAT HAD JURISDICTION

In the case of ***Depfa*** ***Bank Plc V Provincia Di Pisa - [2010] EWHC 1148 (Comm)*** the claimant Banks asserted that the English courts had jurisdiction in respect of two interest rate swap agreements on the basis of English jurisdiction clauses contained in the swap agreements. The Italian defendant asserted that its decisions to enter into the swap contracts were invalid, and therefore the actions fell within the exclusive jurisdiction of the Italian courts under Article 22(2) of the Brussels Regulation. That provision allocates jurisdiction to the courts of the member state where a company has its seat, in proceedings which have as their object the validity of a company's decisions. The defendant argued that the actions were "principally concerned" with such matters.

Hamblen J dismissed the defendant's jurisdictional challenge, adopting the approach of the Court of Appeal in its recent decision in *Berliner Verkehrsbetriebe (BVG) and another v JP Morgan Chase Bank NA and another [2010] EWCA Civ 390*. That approach requires the court to undertake an "overall classification" of the nature of the proceedings (particularly in multiple issue cases) and make an overall judgment of the issues to determine whether the proceedings are "principally concerned" with matters falling within Article 22. In the present case, although the "meat" of the proceedings would be the defendant's defence that its decisions were invalid (which would, if successful, dispose of the claim without further factual enquiry), there were further issues which arose. Looking at the case overall, there were likely to be issues raised by way of defence involving misrepresentation/non-disclosure and failure to advise/mis-selling. In all the circumstances, the proceedings were not likely to be "principally concerned" with the validity of the defendant's decisions, and the invalidity issue was unlikely to be the only ground upon which the enforceability of the swap agreements was challenged.

The case applies the approach set down in *BVG*, but illustrates the difficulties that flow from the relative imprecision of the "overall classification" test. It highlights the scope for jurisdictional battles in circumstances where the outcome of the application of that test is not

sufficiently certain or predictable. In that context, it is also interesting to note Hamblen J's comment that the court must be alive to the fact, in such jurisdictional challenges, that applicants may display only part of their hand in order to "wrest jurisdiction away" from the contractually chosen forum in favour of their home court.

5.2 WHETHER LATER PROCEEDINGS COULD BE STAYED WHERE THERE WERE CROSS-CLAIMS

In the case of ***Secret Hotels 2 Ltd v EA Traveller Ltd. [2010] EWHC 1023 (Ch)*** the claimant was a company registered and domiciled in England and Wales. At all material times, it provided holiday accommodation in Cyprus, amongst other countries. The defendant company was registered and domiciled in Cyprus. At all material times, it operated as the claimant's agent in Cyprus under two written agreements. The second agreement (the 2007 agreement) was to be performed in Cyprus, but contained a jurisdiction clause providing that it was to be governed and construed in accordance with English law, and that the parties submitted to the non-exclusive jurisdiction of the English courts. The contractual period of the 2007 agreement was May 2007 to April 2012. In February 2009, the claimant ceased to operate in Cyprus and no longer had any need for the defendant's services. The defendant issued proceedings in Cyprus (the Cyprus proceedings), claiming damages for breach of the terms of the 2007 agreement. In May, the claimant issued proceedings in England, claiming an account in respect of all sums held by the defendant on its behalf and the payment of the sums found to be due on the taking of the account. In June, the defendant applied for a stay of the English proceedings under art 27 of *Council Regulation (EC) 44/2001* (on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters) (the Regulation), on the basis that those proceedings and the Cyprus proceedings involved the same cause of action. In the course of the hearing of that application, the defendant submitted, and the claimant accepted, that its claim in the Cyprus proceedings could, as a matter of law, be set off against the claimant's claim in the English proceedings, so that both sets of proceedings would necessarily involve the same cause of action for the purposes of art 27 of the Regulation. The court granted the defendant's application and stayed the proceedings.

The claimant appealed. The claimant resiled from the position it had taken before the court below in respect of set off, and contended at the instant hearing that the defendant had no right of set off against its claim. It further submitted, inter alia, that the Cyprus proceedings would be dealt with by that court adjudicating on the defendant's claim for damages against the claimant, whereas the English court would simply address the question of the account of sums found due to the claimant from the defendant, so that the two sets of proceedings did not involve the same cause of action. Consideration was given to, inter alia, the decision of the European Court of Justice in *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV: C-111/01 (Gantner)*, and in particular whether that decision, which had focused on the types of set off found in Austria and the Netherlands, applied in the instant case.

The appeal was dismissed.

(1) The domestic court had no control over the Cyprus proceedings, and nothing in the domestic jurisdiction could stop those proceedings continuing. Further, if not stayed, the English proceedings for an account would also continue. Even if neither party chose to raise defensively its claim in the proceedings brought against it, there would nevertheless be the need to address the fact that proceedings were taking place in parallel in different jurisdictions; if both parties did choose to raise their respective claims defensively, both sets of proceedings would be determining both claims. That would necessarily lead to the potential for conflict which the Regulation was designed to avoid. Even if that were not correct, it did not follow that there might not be differences in evidence that might lead to differing and contradictory conclusions. Finally, the parties would be forced to instruct lawyers in two jurisdictions; that was precisely the type of duplication that the Regulation was designed to avoid. As a matter of practicality, if the stay remained in place all the issues arising under the 2007 agreement would be litigated and determined in one court only. As to whether or not there was a close connection for the purpose of an equitable set off, on the facts, *Gantner* was not intended to have any application to the forms of set off in English law identified in the instant case. For those reasons, the appeal would be dismissed

(2) There was sufficient material for the discretion under art 28 of the Regulation to be exercised, and the instant case fell precisely within that provision. It was inevitable that parallel proceedings would exist in both jurisdictions with all the risks that that might cause. The only difference was that the English court might be slightly advantaged because the agreement was covered by English law. However, that was not a significant justification for allowing the two actions to carry on. Therefore, even if the conclusion on art 27 of the Regulation was wrong, the court would unhesitatingly exercise the discretion to stay the English proceedings under art 28.

5.3 INTERACTION BETWEEN BRUSSELS REGULATION AND SPECIALISED CONVENTIONS

In ***TNT Express Nederland (Area of Freedom, Security and Justice)* [2010] EUECJ C-533/08**, the European Court of Justice (ECJ) considered the interaction between the *Brussels Regulation* and *1956 Geneva Convention for the International Carriage of Goods by Road* (CMR) and, in particular, which convention took precedence. The issue arose in the context of the *lis alibi pendens* rule which, although couched in similar terms in both, was interpreted differently under ECJ jurisprudence and national case law on the CMR.

The ECJ ruled that while the rules set out in a specialised convention had the effect of precluding the rules of the Brussels Regulation on the same question, they could not be applied to the detriment of the objectives of the EU. They could only be applied to the extent that their application did not compromise the principles that underlay judicial co-operation, such as the free movement of judgments, predictability of jurisdiction, minimisation of risk of concurrent proceedings and sound administration of justice.

6 MISCELLANEOUS

6.1 WHETHER DAMAGES COULD BE RECOVERED FOR LOSS OF USE OF FUNDS BY REASON OF FRAUD

In the case of ***Parabola Investments Ltd v Browallia Cal Ltd - [2010] EWCA Civ 486*****,** the claimant companies were special purpose vehicles set up by their ultimate beneficial owner, G, for the purposes of trading in financial instruments. For a period of time the trading was entrusted to the three defendants, two stockbroking companies trading on the London Stock Exchange and B, a senior futures broker with the first defendant, who gave G false statements of his account, not disclosing the losses made. G's trading was represented by B to be progressing so that his assets were in the vicinity of £10 million, whereas in fact there had been losses so that when the fraud was discovered, there were in reality about £817,000. G and his claimant companies sued for damages. Fraud was admitted.

The issues for determination were: (i) was the claimant induced by the misrepresentations made; (ii) what identifiable heads of loss had been suffered as a consequence of the fraud; and (iii) what measure of damages was recoverable as a direct result of the fraud.

Flaux J in the court below held that there had been inducement and that damages were recoverable. The case for G and the claimants having been induced by the numerous fraudulent misrepresentations made by B, was an overwhelming one. Nevertheless, this was not an appropriate case for exemplary damages. The claimant was entitled to recover all its losses flowing directly from the fraud consisting not only of the depletion of its trading fund and loss of profits it would otherwise have made on that fund in the period of the fraud, but also of the loss of profits suffered up until the trial as a result of having had only a smaller fund with which to trade.

The appeal to the Court of Appeal was on the question of whether the claimant could recover damages for loss of the profits which would otherwise have been made but for the fraud.

The Court of Appeal, dismissing the appeal, held that the claimant had established a recoverable head of loss, and the only issue was quantification - if the amount of loss was not provable, the court had to make a reasonable assessment.

6.2 WHETHER CONTRACTS SIGNED BY MUNICIPALITIES VOID DUE TO LACK OF CAPACITY

In the case of ***Haugesund Kommune V Depfa ACS Bank - [2010] EWCA Civ 579*****,** the claimant municipalities sought declaratory relief to the effect that they were not bound by the interest rate swap transactions into which they had entered with Depfa, the defendant bank, because they had not been competent to enter into those transactions and the transactions were as a result void. Tomlinson J at first instance held that this was so, but that Depfa was entitled to recover in restitution the full amount of the principal advanced by way of loan under the swap contracts, and the losses suffered on those investments by the adverse turn in the market. This was the municipalities' appeal against the judgment of Tomlinson J.

The issues on appeal were: (1) whether the judge had been correct to conclude that the municipalities lacked the capacity to enter into the swaps contracts, with the consequence that they were void as a matter of their applicable law; (2) if the swaps were void, what was the scope of the restitutionary remedy; and (3) whether the judge had correctly assessed the "change of position" defence as to both policy and authorities.

The Court of Appeal dismissed the appeal of the municipalities (Etherton LJ dissenting in part).

(1) On the first issue, the rule in *Dicey* provided that the "capacity" of an entity to enter into a transaction was governed by both the law of the entity and the law of the transaction. The question was what was meant by "capacity" and if the Norwegian Act which conferred substantive power on the municipalities could be said to confer capacity; or if the distinction in English law between power and capacity in relation to a corporation created by Royal Charter was a better analogy. The Court of Appeal held that the distinction between power and capacity was out of place and that capacity must be interpreted as the legal ability of a

corporation to exercise specific rights, in particular, the legal ability to enter a valid contract with a third party, so that a lack of substantive power to conclude a contract of a particular type was equivalent to a lack of capacity. Under English contract law, if a corporation lacked capacity, it could not conclude a valid contract.

(2) On the second issue, restitution in loan contracts: a claim to recover money paid under an *ultra vires* borrowing contract could not normally be made in equity. The Court of Appeal followed *Westdeutsche Landesbank Girozentrale v Islington London BC [1996] AC 669* over *Sinclair v Brougham* [1914] AC 398 and held that money advanced under a borrowing contract which is rendered void because *ultra vires* the borrower could be recovered in a claim at law, as money had and received; subject to any restitutionary defences. Depfa was therefore not prevented from advancing its claim for restitutionary recovery of the sums advanced to the municipalities.

(3) On issue three, the Court of Appeal held that in relation to a public policy defence based on a foreign statute, the English court should take account of the express or clearly implied intention of the foreign statute in deciding whether and to what extent a restitutionary remedy should be available, even though the restitutionary claim was governed by English law. Although the restitutionary claim was governed by English law and no English statute was involved, the reason a restitutionary claim had arisen was that the putative contract was void because of the lack of substantive power and so capacity of the foreign corporation to conclude the contract. However the municipalities had failed to prove that the effect of the Norwegian statute was that recovery of money paid under a contract which was held invalid would be barred or would be contrary to the statutory intent. The second point under issue three was the defence of change of position. The Court of Appeal held that even if the loan contracts were void, the municipalities had received the money on the understanding that they had to repay it. The municipalities would not have made the investments that lost them the money without first having received the money, but they made those investments without the involvement of Depfa and on the understanding that they would have to repay the money whatever happened to the investments. The risk was therefore on the municipalities.

7 PRACTICE

7.1 GUIDANCE ON SERVICE OUT OF THE JURISDICTION AND STANDARD OF PROOF IN JURISDICTION ISSUES

In the case of ***Astrazeneca UK Ltd v Albemarle International Corp and Another*** **[2010] EWHC 1028 (Comm)** the claimants, AZ, were an English company involved in the manufacture of prescription drugs. The defendants (collectively, Albemarle) were incorporated in Virginia and manufactured and traded chemicals. In 2005, the parties entered into a supply contract for a chemical, DIP, used by AZ to manufacture an anaesthetic, Diprivan (2005 contract). The 2005 contract was governed by English law and provided for English jurisdiction. Clause H of the 2005 contract allowed Albemarle the right of first refusal in the event that AZ reformulated Diprivan and a dispute arose in relation to this clause. In February 2008, Albemarle issued proceedings in South Carolina for damages for breach of contract and subsequently terminated the contract. Those proceedings were dismissed for infringement of the English jurisdiction clause and an appeal was pending.

In June 2008, the parties entered into a further contract for the supply DIP (2008 contract). This 2008 contract was governed by South Carolina law and provided for South Carolina jurisdiction. In March 2009, AZ issued proceedings in England submitting that they were forced to enter into the 2008 agreement as a result of Albemarle starving them of DIP and alleging breach of the 2005 agreement, as well as duress and conspiracy. AZ obtained an order to serve the proceedings out of the jurisdiction on Albemarle in South Carolina.

Albemarle applied for an order that the English court had no jurisdiction to try these proceedings because of the South Carolina jurisdiction clause in the 2008 contract or, alternatively, that it should stay its proceedings pending resolution of the issues in the US courts.

The judge ruled that the English courts had jurisdiction over all AZ's claims. However, as matter of discretion, the duress and conspiracy claims should be stayed in the light of the South Carolina exclusive jurisdiction clause in the 2008 contract. The breach of contract claims under the 2005 contract would, however, proceed in England and no stay would be ordered. His reasoning ran as follows:

Service out of the jurisdiction

To show that a claim came within a jurisdictional gateway, the standard of proof was to establish a "good arguable case". This connoted more than a serious issue to be tried or a real prospect of success but not as much as a balance of probabilities (*Seaconsar*). It was common ground between the parties that in considering whether a good arguable case had been made out, it was appropriate to apply the Canada Trust gloss, namely, whether the claimant had shown that it had much the better or the better of the argument.

None of the case law made clear what material difference the additional word "much" made to the test. It would be clearer and simpler to apply a test of who had the better of the argument, not least because it avoided the uncertainty of the word "much" and also the issue of who had the burden of proof. However, in the absence of an authoritative determination, the test to be applied was who had much the better of the argument, which meant that the relevant party had to show not only on balance that they had the better of the argument but that they clearly did so.

In addition to showing that the claim came within the jurisdictional gateway, the claimant also had to show that there was a serious issue to be tried on the merits of the claim. The test was whether the claimant had a reasonable prospect of success or had shown that there was a serious issue to be tried, which was the same as the test for resisting summary judgment.

There were two matters in issue between the parties in relation to service out:

- The burden of proof.
- Applicable law for the issue of separability of the jurisdiction clause.

Burden of proof

AZ submitted that it was for the defendant to establish the South Carolina jurisdiction agreement on which it relied; he who avers must prove. Albemarle submitted that once the issue had been raised evidentially by the defendant, it was for the claimant to show that it remained an appropriate case for permission to serve out of the jurisdiction.

Following the intuitive approach of earlier case law, the judge held that although it was ultimately always for the claimant to show that it was a proper case for service out of the jurisdiction, where this was disputed by the defendant on a ground such as the existence of a foreign jurisdiction agreement, it was for the defendant to establish the scope, applicability and validity of the jurisdiction agreement rather than for the claimant to prove a negative.

Applicable law to separability of jurisdiction agreement

Unless the alleged ground of invalidity offended some mandatory law of the forum, in principle, questions of validity were governed by the law by which the agreement would be governed if it was valid. As a general rule, this was the law by reference to which the English court would determine whether the doctrine of separability applied.

Jurisdiction of English courts

On the facts, in relation to the breach of the 2005 contract claim, AZ had much the better argument and prospects on the issue of whether there was an existing English jurisdiction agreement between the parties and whether there was a serious issue to be tried.

In relation to the claims of duress and conspiracy, the judge agreed that these came within the relevant jurisdictional gateway and that there was a serious issue to be tried on the merits of both.

Discretion

In relation to the breach of contract claims in respect of the 2005 contract, the judge was satisfied on the facts that AZ had shown that England was clearly the appropriate forum for the trial of these claims. In relation to the duress and conspiracy claims, the judge was satisfied that Albemarle had much the better of the argument for demonstrating that the duress claim could only be litigated in South Carolina by reason of the exclusive jurisdiction clause in the 2008 agreement, and that the conspiracy claim was very closely bound up with the duress claim.

Separability of jurisdiction clause

The issue was whether the jurisdiction agreement was valid or whether it was impeached by the duress claim. The judge ruled, applying *Fiona Trust*, that the invalidity of the main contract did not necessarily entail the invalidity of the jurisdiction clause. Although AZ could point to duress relating to the acceptance of Albemarle's standard terms, they could not point to duress relating specifically to the jurisdiction clause. Albemarle therefore had much the better of the argument that it could rely on the South Carolina jurisdiction clause.

The judge rejected the argument submitted by AZ that this was an exceptional case where a jurisdiction clause should not be enforced under the court's discretion for the following reasons:

- Although there was an overlap between the contract and the duress and conspiracy claims, they were distinct claims.
- Any duplication or inconvenience was a foreseeable consequence of agreeing two separate jurisdiction clauses.
- Since the contract claim and the duress and conspiracy claims were distinct claims, there was no necessary inconsistency between them being decided differently.
- This was not a case involving parallel proceedings on the same claims and issues, or on the risk of directly inconsistent decisions. Nor was it a case in which other parties' interests were involved.

The case illustrates once again that it is only in exceptional circumstances that a court will set aside a jurisdiction agreement even if the outcome of this is that separate elements of a case will be heard in different jurisdictions. It is another reminder of the practical importance of ensuring that the jurisdiction agreements in different contracts mirror each other if possible.

The case provides useful clarification of the standard of proof required to establish whether a claim falls within one of the jurisdictional gateways in CPR 6, essentially the

test of who has "much the better of the argument". The decision also provides guidance on the issue of separability of forum selection clauses and the law applicable to that issue.

7.2 FISHING EXPEDITION UNACCEPTABLE IN PRE-ACTION DISCLOSURE APPLICATION

In the case of ***Pineway Ltd v London Mining Company Ltd and another [2010] EWHC 1143 (Comm)*** the Commercial Court considered the jurisdictional requirements in *CPR 31.16* in order for an order for pre-action disclosure to be made and held, applying those requirements, that the applicant had not made out its case. The application was refused where no prima facie case against the respondent had been made out.

The applicant was the assignee of all rights to the claim issued against the respondents, collectively called 'London Mining'. The applicant applied pursuant to s33 of the *Superior Courts Act 1981* and CPR 31.16 for pre-action disclosure. The application was for general disclosure and specific disclosure. The general disclosure application was very wide and had the stated purpose to discover whether a cause of action existed. Under CPR 31.16 in order for the court to have jurisdiction the applicant had to surmount certain hurdles. First the respondent or applicant had to be likely to be a party to the contemplated proceedings; secondly the documents sought had to be documents which would fall within the respondent's duty to produce by way of standard disclosure; and thirdly disclosure before proceedings had started had to be desirable in order to dispose fairly of the anticipated proceedings assist the dispute to be resolved without proceedings and save costs. If the court had jurisdiction, it then had to consider whether to exercise its discretion to order disclosure. The respondent opposed the application for general disclosure.

The issues in the case were, inter alia; (i) whether the precondition of 'likely' required that it be likely that proceedings were to be issued or only likely that the respondent and the applicant would be parties if subsequent proceedings were issued; (ii) whether the applicant had to establish that it had a good arguable case for the jurisdiction to be exercised; and (iii) whether there was no realistic prospect of the applicant establishing that there were parties to an authentic and valid assignment; and (iv) whether the documents sought had to be documents which would fall within the respondent's duty to

produce by way of standard disclosure; (v) whether it was desirable or reasonably necessary for disclosure to be ordered.

The application was dismissed.

(1) In order for the court to consider granting a pre-action disclosure order under CPR 31.16, the substantive claim to be pursued in the proceedings had to be properly arguable and to have a real prospect of success. The pre-condition of 'likelihood' under CPR 31.16 referred to the parties concerned and whether those parties were likely to be parties in the proceedings if those proceedings were issued. Although the likelihood of proceedings as such was not material, it did not follow that the existence of a prima facia claim upon which such proceedings could be instituted did not remain a necessary requirement. In the instant case, on the evidence, it was doubtful whether the applicant had established an arguable claim with a realistic prospect of success on any aspect of the case.

(2) All documents the subject of a pre-action disclosure order had to be subject to standard disclosure, therefore any application had to be highly focussed and did not include categories of documents which would simply be relevant to the factual background, if at all. The scope of standard disclosure encompassed documents upon which a party relied and documents which adversely affected his case or supported another party's case. There was therefore a need for caution, when considering pre-action disclosure. In order to discern standard disclosure the issues in the pleadings had to be clearly formulated. Although CPR 31.16 extended to both documents and classes of documents it was well established that it was inappropriate for any applicant to obtain pre-action disclosure of documents which would not in due course be subject to standard disclosure by simply calling for classes or categories of documents in which some documents would be discloseable. By the same token it was in appropriate to require a respondent to identify which documents were within the scope of standard disclosure. In the instant case, the request was not a targeted request for specific documents which could be readily disclosed at little cost or inconvenience to the respondents. To the contrary, it was an admitted fishing expedition by way of request for a great range of documents in the hope of advancing an entirely speculative commercial claim. In those circumstances there was no jurisdiction under that head.

(3) In order to obtain pre-action disclosure on the grounds of desirability, circumstances had to be outside the 'usual run' for the hurdle to be surmounted. Otherwise it could be advanced in almost every dispute that a case could be made out that pre-action disclosure would be useful in achieving a settlement or otherwise saving costs. The absence of any convincing grounds for distinguishing the case from the normal run would be telling grounds for not exercising the courts discretion. In the instant case, that jurisdictional hurdle had not been surmounted.

David Steel J undertook a careful analysis of the requirements of CPR 31.16(3). His judgment provides a useful reminder of the criteria to be met before an order will be granted. It also emphasises the need for judges to take "a big picture view" when considering applications that involve case management decisions.

7.3 TEST FOR USUAL RESIDENCE FOR PURPOSES OF SERVICE

In the case of ***Varsani v Relfo Ltd [2010] EWCA Civ 560*** *(in liquidation)* the Court of Appeal, held that in determining whether a person's residence was their 'usual' residence within *CPR 6.9*, the critical test was the defendant's pattern of life and how he used the address, not merely a comparison of the duration of periods of occupation of the address and the defendant's other residences. In the instant case, the court found that the deputy judge had been both entitled and right to conclude that a claim form had been properly served by the claimant on the defendant at the defendant's London address.

V unsuccessfully applied for service to be set aside on the ground that the London address was not his usual or last known residence within CPR r.6.9. V argued that (1) the judge had wrongly found that the property in London was his "usual" residence. The appropriate contrast was between "usual" and "occasional" use, and the judge had failed to apply the proper test of comparative use based on frequency and duration of residence; (2) only a last known usual residence could be a last known residence.

Appeal dismissed.

(1) The judge had been correct to hold that the property in London was V's usual residence for the purposes of CPR r.6.9. It was possible to have more than one usual residence. That was borne out by the distinction between "usual residence" and

"principal" place of business and "principal" office in CPR r.6.9, which the judge had rightly taken into account. The test to be applied was not one of merely comparing the duration of periods of occupation, taking little account of the nature or quality of use of the premises, and ignoring altogether the fact that the premises were occupied permanently by the defendant's family and that the premises could be described as his family home. The critical test was the defendant's pattern of life. The settled pattern of V's life was to visit his family home in London regularly each year, albeit not at the same time each year, for reasonably extensive periods. That was in marked contrast to the facts in *Cherney v Deripaska [2007] EWHC 965 (Comm), [2007] 2 All E.R. (Comm) 785* and *OJSC Oil Co Yugraneft v Abramovich [2008] EWHC 2613 (Comm)* Those were cases in which the court found that the defendant had not been resident in England at all for the purposes of jurisdiction, and so the question of "usual" residence had never arisen as a serious issue. The marked difference between the settled pattern of V's life and the facts of those cases provided a good illustration of what was and was not a "usual" residence, *Deripaska* and *Abramovich* considered.

(2) It was unnecessary to consider the "last known residence" ground. However, where a defendant continued to reside at premises which were not his usual residence, there was doubt as to when, and if so, how the provisions of CPR r.6.9 paras (3)-(6) were engaged and operated. It would be desirable for the CPR Committee to consider that matter.

7.4 FREEZING INJUNCTIONS: DETERMINING THE APPROPRIATE CROSS-UNDERTAKING

In ***Bloomsbury International Ltd (in administration) and others v Mark Alan Holyoake and others* [2010] EWHC 1150 (Ch),** the court considered two applications by the defendants:

- To fortify the cross-undertaking that had been ordered when worldwide freezing orders had been made against the defendants on the application of the claimants (companies in administration).
- To seek the appointment of additional administrators, on the basis that the existing administrators were conflicted.

The Court held that a substantial fortification of an insolvent claimant's undertaking was required from the administrator or creditors where the existing undertaking was effectively worthless. The judgment on the first application provides some useful discussion and analysis of the following points:

- The purpose of the cross-undertaking, including whether it must be of "real value".
- The appropriate approach to such undertakings in the context of insolvent companies.
- What approach should be adopted when considering the potential harm that could be caused to the defendant by the making of the order.

It also highlights a number of practical issues to bear in mind when applying for freezing injunctions, or defending applications for increased cross-undertakings. For example, in this case, the position of the claimant might have been improved if it had taken steps to establish whether the company would be good on the cross-undertaking by the time it came to be enforced, or had come up with a workable plan for "ring fencing" assets.

7.5 SUPREME COURT RULES ON EFFECT OF LIMITATION ON CHANGE OF CAPACITY AND ADDITION OF NEW PARTY

In ***Mark Roberts v Gill & Co and others* [2010] UKSC 22**, the Supreme Court considered whether a beneficiary under a will, who sought to amend his particulars of claim so as to bring a claim in a representative capacity (in addition to his personal claim), had to join in the existing personal representative and whether the representative claim was time-barred.

In 2002, the appellant beneficiary of a will had brought proceedings, in negligence, against two firms of solicitors claiming that, in breach of the provisions of the will, they had allowed a property to be sold and the proceeds of sale to be paid to another beneficiary. The claim alleged that the firms of solicitors owed the appellant a duty of care personally. However, the correct legal position was that a firm of solicitors advising a person administering an estate owes a duty of care to the estate of the deceased and not to the beneficiaries. A claim in negligence should, therefore, have been brought by the

person administering the estate, unless there were special circumstances entitling a beneficiary to bring a claim on behalf of the estate.

In 2006, the appellant applied to amend the particulars of claim to claim in both a personal capacity and on behalf of the estate. The respondents resisted on the grounds that the claim was time-barred under *CPR 19.5* and section 35 of the *Limitation Act 1980*, and that there were no special circumstances to enable the appellant to continue the claim on behalf of the estate. The High Court refused the application on the basis there were no special circumstances; the Court of Appeal held that there were special circumstances but that the amendment was time-barred.

The Supreme Court unanimously dismissed the appeal. A majority of their Lordships held that the claim was time-barred while Lords Hope and Clarke, declining to find that the claim was time-barred, held that there were no special circumstances to enable the appellant to bring a claim on the part of the estate.

7.6 SUBSTITUTION OF NEW PARTIES AFTER EXPIRY OF THE LIMITATION

In ***GE Money Home Lending Ltd and Another v HC Wolton & Sons Ltd (t/a Wolton Chartered Surveyors)* [2010] EWHC 1011 (Ch)**, the court considered an appeal against a decision permitting one company within a group of companies to be substituted as the claimant in the place of another company after the expiry of the relevant limitation period.

The application was made under *CPR 19.5(3)*, which provides for the addition or substitution of a party after the end of the limitation period if the relevant limitation period was current when the proceedings were started and the addition or substitution is necessary.

The court refused the application and struck out the claim. Following the Court of Appeal's guidance in *Sheldon Gary Adelson and Las Vegas Sands Corp v Associated Newspapers Ltd [2007] EWCA Civ 701*, Behrens J accepted on the evidence that there was a genuine mistake in issuing the proceedings. He also found that the mistake was "as to name" not "as to identity". However, he decided that the defendant did not know the true identity of the correct claimant at any relevant time and that this was not a case in

which the defendant was aware of the proceedings and of the mistake so that no injustice was caused by the substitution.

This case demonstrates the importance of carrying out full investigations as to the proper parties to proceedings well in advance of issuing a claim. Here, had the claimant's solicitors taken care to identify the correct claimant from a group of companies, the mistake could have been avoided before the claim became time-barred. It also highlights the importance of claimants carefully checking documents before instructing their solicitors to issue them.

7.7 WHETHER REMAINING DEFENDANTS ENTITLED TO DISCLOSURE OF SETTLEMENT AGREEMENT BETWEEN CLAIMANT AND OTHER DEFENDANTS

In the case of ***Cadogan Petroleum plc and others v Tolley and others [2009] EWHC 3291 (Ch)*** the ninth and tenth defendants were sued by the claimants as members of the GPS group of companies which sold two gas processing plants to the third and fourth claimants. It was alleged in the proceedings that the gas processing plants were sold at an excessive price. The claimants alleged that the ninth and tenth defendants paid bribes to the first and fifth defendants and contended that the ninth and tenth defendants were liable to account for all such payments as money had and received. They also alleged that the eleventh and twelfth defendants dishonestly assisted the first and fourth defendants in an alleged breach of fiduciary duty. Finally, the claimants alleged that the first to fifth and ninth to twelfth defendants conspired to defraud them. The ninth defendant issued a claim on 8 October 2009 against the second claimant, claiming the sum of $10,958,560 was due and owing under the gas plant agreements. On 15 October, the claimants and the ninth to twelfth defendants entered into a settlement agreement in respect of the proceedings. On 19 November, the first and second defendants sought, pursuant to CPR 31, specific disclosure and inspection of the settlement agreement and, on the same day, the fourth and fifth defendants issued an application in substantially the same terms. The first, second, fourth and fifth defendants asserted that the terms of the settlement agreement were potentially relevant to the maximum amount of loss allegedly suffered by the claimants in respect of the purchase of the gas plants from the former GPS defendants. Second, it was asserted that the settlement agreement was potentially relevant to consideration of whether the claimants had properly mitigated the alleged losses.

Third, it was argued that the settlement agreement could, in certain cases, have the effect of releasing joint tortfeasors, and finally it was possible that contribution issues could arise between the defendants who remained in the action.

The application was allowed in part. The law on disclosure of documents was very clear, and of universal application; the test was whether or not an order for discovery was necessary for fairly disposing of the proceedings. Relevance was a factor but it was not, of itself, sufficient to warrant the making of an order. The documents had to be of such relevance that disclosure was necessary for the fair disposal of the proceedings. No party could resist disclosure of information on the basis solely that it was confidential. There was no clear right to paramountcy of any factor, however what had to be borne in mind at the end of the day was that the court had to ensure that every party had an opportunity for a fair disposal of the proceedings in which it was involved. If, without the material sought to be disclosed, the applicants had a reasonable apprehension that they might not have a fair trial, that factor should outweigh any questions of confidentiality. The confidentiality could be preserved by appropriate means but, ultimately, if that was not effective then the disclosure had to nevertheless be ordered. The first, second, fourth and fifth defendants should have disclosure of such parts of the settlement agreement as were necessary for them to be able to conduct their defences fairly at the trial.

8 SHIPPING

8.1 WHETHER SUBCONTRACTOR ENTITLED TO CONTRIBUTION FROM CHARTERER WHERE SHIP DAMAGED BY SUBCONTRACTOR

In the case of ***Farstad Supply AS v Enviroco Ltd - [2010] UKSC 18, United Kingdom Supreme Court***, on 7 July 2002 the oil rig supply vessel *Far Service* ("the vessel") was damaged while berthed in Peterhead harbour by a fire inadvertently caused by an employee of E, the defender. She was owned by F, the pursuer, and was under charter to a third party, A. A had engaged E to clean out some of the tanks on board the vessel. In this action, E argued that if it was liable to F, it would be entitled to contribution from A. If A was liable to E, it would in turn be entitled to contribution from F under the charterparty, clause 33(5). F had therefore made the submissions in the trial that A would have made. On appeal, it had been held that E was entitled to contribution from A.

F appealed to the Supreme Court.

The Supreme Court allowed the appeal. Under section 3(2) of the *Law Reform (Miscellaneous Provisions) Act 1940*, there was an entitlement for E to recover to the extent that the court deemed just from any other person who if sued might also have been held liable. However, if A had been sued by the owner, it would not have been held liable because it had a contractual defence against a claim from F. The effect of clause 33.5 of the charterparty was to exclude the charterer's liability in respect of damage to the vessel caused by its own negligence. If A was not liable to the owner because it had a contractual defence under the charterparty, E would not be entitled to contribution from A. As a result E was not entitled to indemnity from A.

A defence provided by a pre-existing contract, such as a charterparty, could be taken into account when determining for the purposes of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 s.3(2)* whether a person "if sued, might also have been held liable" for damage caused by negligence.

The court was required to determine the meaning and effect of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 s.3(2)* in an appeal brought by an appellant (F) against a decision of the Inner House of the Court of Session (*[2010] CSIH 35, 2009 S.C. 489*). F owned an oil rig supply vessel which it had chartered to the second

respondent (X). The charterparty was governed by English law. X had engaged the first respondent (E) to clean out some of the tanks on board the vessel whilst it was in port. The vessel caught fire whilst it was being moved by E from one berth to another upon X's instructions. F brought a claim against E for negligence, and E sought a contribution from X under s.3(2). X took no part in the proceedings since if E's claim against it succeeded, it was nevertheless entitled to an indemnity from F under the terms of the charterparty.

The issues to be determined were: (1) whether a defence provided by a pre-existing contract (such as the charterparty) could be taken into account when determining for the purposes of s.3(2) whether a person "if sued, might also have been held liable"; (2) if yes, whether the charterparty had the effect that X was not a person who, if sued, would have been held liable to F for the purposes of s.3(2). E argued that it would be unjust to allow X to rely upon a contractual defence of which E had been unaware.

Appeal allowed.

(1) In the instant case the claim for contribution was made under s.3(2) but that section had to be construed in the context of the section as a whole. In an action under s.3(1), in order for F to obtain a decree against X, it would have had to establish that X was liable to it in damages, which in turn would have involved the court considering whether X had a defence under the charterparty. That was so whether the alleged breach concerned a contractual duty or a duty of care at common law. The same applied to an action brought by E against X under s.3(2). E's claim against X under s.3(2) could also have been made by third party proceedings in the original action. The outcome of the instant appeal therefore depended upon the true construction of the charterparty. If X was not liable to F because it had a contractual defence under the charterparty, E would not be entitled to a contribution from X. That would be the result of deliberate contractual arrangements apportioning risk between F and X as owner and charterer under the charterparty. There was nothing unjust in that result. E must have known that there was a charterparty governing the relationship between X and F. It could have refused to contract with X without seeing the terms of the charterparty, or it could have made provision for an indemnity in its favour in its contract with X.

(2) The relevant clause in the charterparty clearly excluded the charterer's liability to the owner in respect of damage to the vessel caused by the charterer's negligence. It followed

that E was not entitled to a contribution from X under s.3(2) because it could not establish that "if sued" X might have been liable to F in respect of damage to the vessel caused by the fire. X would have had a defence to F's claim because any such liability was excluded by that clause of the charterparty. If that clause had been an indemnity clause, rather than an exclusion clause, the position would have been the same. The charterparty was governed by English law and any claim by F against X would have been met by the defence of circuity of action (on the basis that even if F were entitled to judgment against X, X was entitled to an indemnity from F under the charterparty). The position was the same under Scottish law, *Workington Harbour and Dock Board v Owners of the Towerfield (The Towerfield) [1951] A.C. 112* and *French Marine v Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz [1921] 2 A.C. 494* considered. The Lord Ordinary's interlocutor was therefore restored.

8.2 WHETHER SHIP MANAGERS ENTERING INTO CHARTERPARTIES AND DIVERTING DIFFERENCE IN HIRE AS PART OF FRAUDULENT SCHEME

In the case of ***Antonio Gramsci Shipping Corporation v Recoletos Ltd - [2010] EWHC 1134 (Comm)***, the claimants were 30 one-ship companies incorporated in offshore jurisdictions, all subsidiaries of the same company, LSC, which also managed their business. They alleged that between 2003 and 2005 they had been the victims of a large-scale fraud perpetrated by former members of the Management Board and Supervisory Council of LSC. The defendants were BVI and Gibraltar companies, set up at the request of "the Ventspils Group", the majority shareholders of LSC. Between 2003 and 2005, the claimants, through LSC, had entered into 63 time charterparties with the defendants. The defendants had subchartered them to third parties, also through LSC, retaining the profits (the "scheme"). The claimants argued that the scheme enabled the defendants to make substantial profits at the claimants' expense and also at the expense of shareholders in LSC who did not belong to the Ventspils Group. The claimants sought summary judgment, not based on the value of the charterparties (which would have to be explained at trial) but based on the contention that there could be no honest reason for interposing the charters; the claimants should have been put into a direct chartering relationship with the subcharterers.

Gross J held that the defendants did have a case to answer on fraud.

(1) The defendants' explanation was that the scheme was a way to facilitate the buyout of the minority shareholders, in the best interests of LSC. Given that the claimants were wholly-owned subsidiaries of LSC and that the transactions had not been at arm's length there was a case to answer that the claimants' corporate opportunities had been lost, because the profits should have been earned by the claimants and LSC and not by the Ventspils Group.

(2) There was also a strong case that the charters were void because they had been made in breach of the management agreement which required managers to use their best endeavours. This would not be different if it was in the management company's best interests *qua* parent company to proceed in the way it had.

(3) There was at least a cogent case that there had been a fraud on the minority shareholders, in that the transactions involved the secret use of LSC's assets to benefit the majority shareholders at the expense of the minority. As a result there was also a formidable case for concluding that the charters were void under English law.

(4) For claimants' case to succeed, dishonesty must be established on the part of some or all of the LSC individuals associated with the Ventspils Group. The defendants raised a defence of *ex turpi causa*, namely that the same individuals were involved in both LSC and the Ventspils Group so that LSC was both perpetrator and victim of the fraud. The question was therefore whether LSC "knew" of the fraud in that the knowledge of the alleged masterminds was at least arguably attributable to LSC; a question of Latvian law. The claimants' arguments in this respect were not so persuasive as to motivate a summary judgment. The knowledge of at least some of the alleged fraudsters was arguably attributable to the claimants themselves.

(5) It would not be appropriate to give summary judgment on the scheme alone, excluding the *ex turpi causa* issues. However, given the strength of the claimants' case on the scheme, a conditional order would be made stipulating that defendants must pay a sum of money into court as a condition for defending the claim.

A claim that the interposition of companies between shipowners and sub-charterers involved the diversion of profits, want of authority and illegality was not suitable for

summary judgment but it was appropriate to make a conditional order requiring the payment into court of a significant sum as a condition of defending the claim.

8.3 WHETHER ADVANCED PAYMENT BOND ISSUED BY BANK INCLUDED PRE-PAID SUMS IN EVENT OF BUILDER'S INSOLVENCY

In the case of ***Rainy Sky SA v Kookmin Bank - [2010] EWCA Civ 582*** the appellant bank (K) appealed against a decision *([2009] EWHC 2624 (Comm), [2010] 1 All E.R. (Comm) 823*) giving summary judgment in favour of the seventh respondent (M) on its action against it for monies due under a number of advance payment bonds. K had issued the bonds to secure the obligations of one of its customers, a shipbuilder, under contracts made with the first to the sixth respondents as buyers. M was the assignee of the buyers' rights under the bonds. Each shipbuilding contract required the buyer to pay the contract price in pre-delivery instalments, and entitled him, in the event of the shipbuilder's insolvency, to a refund of any instalments paid. Paragraph 2 of the bond entitled the buyer, on rejection of the vessel, to repayment of any pre-delivery instalments. By para.3 of the bond, K guaranteed "all such sums due to you under the contract". After the buyers had paid the first instalments the shipbuilder entered into a "debt work out procedure", failing to repay the instalments. The buyers began the instant action, contending that K had guaranteed the shipbuilder's obligation to repay the instalments. The question was whether that obligation was covered by the bonds. The judge held that it was.

The issue on appeal was whether, as the judge found, the words "all such sums due to you under the contract" in para.3 of the bond referred to the instalments becoming repayable in any circumstances under the shipbuilding contracts; or whether, as K contended, the guarantee covered repayment of the instalments only in the circumstances described in para.2 of the bond.

Appeal allowed. (Sir Simon Tuckey dissenting).

In a commercial contract the parties chose to define the limits of their obligations by the language used. The purpose of the contract was to provide an objective record of their agreement and the court was to give effect to those obligations by respecting the terms in which they were cast. The court could only resolve a dispute as to the contract's meaning or scope, by construing the words used so as to give them the meaning that the contract

would convey to a reasonable person having all the background knowledge available to the parties at the time of the contract, *Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1) [1998] 1 W.L.R. 896* applied. Problems of interpretation could largely be overcome by construing the disputed terms in the light of what the parties knew at the time and what was the subject matter of the contract. No other approach was possible, and the court could not reformulate clear contractual provisions simply because they balanced the interests and obligations of the parties in a way which the judge considered to be one-sided or unfair, *Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios) [1985] A.C. 191* considered. The starting point had to be that commercial parties could look after themselves and were able to ensure that the contract accurately reflected their intentions.

In the instant case the court was privy to neither the negotiations between the parties nor to other pressures which might have dictated the balance of interests struck by the contract. Unless the most natural meaning of the words produced a result that was so extreme as to suggest that it was unintended, the court had to give effect to the contract's terms. To do otherwise would be to risk imposing obligations that the parties were never willing to assume, and in circumstances that amounted to no more than guesswork on the part on the court, *Prenn v Simmonds [1971] 1 W.L.R. 1381* and *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101* considered. In construing the words "all such sums due to you under the contract", the word "such" could not be ignored. The draftsman intended the content of the phrase to be supplied by the sums to which it referred. The issue was therefore to identify what the word "such" referred to. It was clear that "sums" had to refer to the pre-delivery instalments paid under the shipbuilding contract, because the purpose of the bond was to guarantee their repayment and nothing else. The difficulty about the construction favoured by the judge was that it robbed para.2 of any purpose or effect. If the purpose of the bond was to provide a guarantee for the repayment of the instalments regardless of the circumstances in which they came to be repayable, para.2 could have been omitted in its entirety. As it was, the obvious purpose of para.2 was to give the buyer a clear statement of the shipbuilder's obligations under the contract covered by the guarantee. Although the buyers' construction was arguable, it was the meaning that the document would convey to a reasonable person reading it with knowledge of the terms of the shipbuilding contract.

The construction contended for by K would not produce an absurd or irrational result, and merely to say that no credible commercial reason had been advanced for the limited scope of the bond would put the court in real danger of substituting its own judgment of the commerciality of the transaction for that of those who were actually party to it.

(2) (Per Sir Simon Tuckey) K's construction had the surprising and uncommercial result of making the guarantee unavailable to meet the shipbuilder's obligations in the event of its insolvency. On that basis it was to be rejected.

In summary, the words "all such sums due to you under the contract" in a bond were to be construed as limiting the extent of the guarantee provided by it. Such a construction produced a result that was neither absurd nor irrational and it was not open to the court to construe the terms of the bond more widely simply because no credible commercial reason had been advanced for its having a limited scope.

8.4 WHETHER TITLE TO BUNKERS PASSED TO SHIPOWNERS ON REDELIVERY OF VESSEL

In the case of ***Angara Maritime Ltd v Oceanconnect UK Ltd and Anr (The "Fesco Angara") [2010] EWHC 619 (QB)*****,** on 3 July 2008 the vessel *Fesco Angara* was time-chartered for what was intended to be a period of 12 months. Clause 40 provided:

> "The Charterers on delivery, and the Owners on redelivery, shall take over and pay for all bunkers remaining on board the vessel. On delivery quantity of bunkers on board shall be abt 300/100 RME180/DMB respectively. The vessel to be redelivered with about the same quantities of bunkers, however its quantity shall be sufficient to reach major bunkering port. …"

On 30 September 2008 the charterers entered into a contract with bunker suppliers for the provision of 170 mt of IFO and 60 mt of MGO at a total price of $177,305.59. The bunker suppliers were never paid, and subsequently went into administration. The bunker supply contract contained a retention of title clause whereby the suppliers retained title to the bunkers.

On 29 October 2008 the charterers informed the shipowners that because of financial difficulties they were left with no choice other than to redeliver four vessels including the *Fesco Angara*.

The master of the vessel then sent a "Redelivery Notice" stating that the vessel had been "early re-delivered" on 5 November 2008 and that the "redelivery" bunker ROB were "REM180 – 295 MT MDO – 0 MT". The Notice concluded by saying "Please be advised preliminary debts due to owners is 197,127.25 usd …". Subsequently the shipowners sent a "Statement of Account" to the charterers which gave a credit for "bunker on redelivery" of $235,705.00.

The bunker suppliers alleged that the shipowners assumed ownership of the bunkers first when they were consumed and secondly, after the charter was terminated and the vessel was "returned" to the shipowners.

The shipowners brought proceedings against the bunker suppliers seeking a declaration of non-liability. They denied that they had converted the bunkers when they were consumed during the charterparty, and they relied on the "buyer in possession" provisions of section 25(1) of the *Sale of Goods Act 1979*, which read:

> "Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods … the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods … under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

The bunker suppliers denied that section 25 applied. They said that there was no contractual "redelivery" of the vessel, and therefore no delivery of the bunkers to the shipowners. They said that the shipowners had failed to discharge their burden of proof to show that they acted in good faith and without notice of any rights of the bunker

suppliers. Moreover, even if the protection of section 25 was potentially available the shipowners remained liable through breach of their duties as bailees.

Held, that the charterers clearly obtained possession of the bunkers with the consent of the bunker suppliers. On the facts, there had been a voluntary act of "delivery" of the bunkers by the charterers to the shipowners (*Forsythe International (UK) Limited v Silver Shipping Co Ltd (The Saetta)* [1993] 2 Lloyd's Rep 268 and *The Span Terza* [1984] 1 Lloyd's Rep 119 distinguished). Such documents as existed were consistent with there being a sale by the charterers to the shipowners. The redelivery notice presupposed on a preliminary basis that the debt due to the owner was $197,127.25, as did the Statement of Account.

The submission of the bunker suppliers that the shipowners lacked good faith and/or had notice of their rights was rejected. On the facts, the shipowners had no knowledge of the bunker suppliers' standard terms or that there was a retention of title clause within them. Nor were the shipowners aware that the charterers had not paid for the bunkers. There was no evidence of negligence or suspicion in what the shipowners did and did not do. The shipowners acted in good faith and without notice of the bunker suppliers' rights because there was nothing to put the shipowners on enquiry.

Accordingly, the shipowners had established that they acquired title to the bunkers under section 25(1) of the Sale of Goods Act 1979. As the shipowners purchased bunkers from the charterers upon redelivery in good faith and without notice of any adverse right, what would otherwise be a good claim in conversion failed.

The shipowners were not in breach of their duties as bailees prior to the redelivery. Upon delivery to the vessel the bunkers would have been held by the charterers as bailees, and by the shipowners as sub-bailees on terms (see *The Pioneer Container* [1994] 2 AC 324). The shipowners were entitled to rely upon the terms of the contract between them and the charterers under which the sub-bailment of the bunkers took place and the bunker suppliers were to be taken as having consented to the charterers sub-bailing the bunkers on the terms of the charterparty. Those terms required the charterers to provide and pay for the fuel. Although the shipowners were bailees the relationship was a classic illustration of a sub-bailment on terms. In a claim based on bailment the bunker suppliers could not be in any better position than that which the charterers would have enjoyed.

There was thus no basis for the bunker suppliers' bailment claim either during the period prior to redelivery or afterwards.

Judgment was given in favour of the shipowners.

8.5 WHETHER OWNERS IN BREACH OF OBLIGATION TO DELIVER VESSEL READY TO RECEIVE CARGO WITH CLEAN SWEPT HOLDS

London Arbitration 7/10 LMLN

The vessel was chartered on the NYPE form as amended for a period of 110/170 days. The relevant charterparty provisions were as follows:

> Lines 17-22:
>
> Acceptance of delivery by Charterers shall not constitute any waiver of Owners' obligations hereunder.
>
> Vessel to be placed at the disposal of the Charterers on dropping last outward sea pilot Haldia … Vessel on her delivery to be ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted for the service…
>
> Clause 54: Hold Condition on Delivery/Redelivery:
>
> Vessel's holds condition on arrival at first loading port to be fresh water washed down, clean dry, free from loose rust flakes/scales and residues of previous cargo and in every way ready and suitable to load Charterers' intended cargo to the satisfaction of the independent surveyor. If vessel is rejected by the independent surveyor at load port, vessel to be off-hire until ready to pass inspection.…
>
> Clause 56: Paramount Clause
>
> Clause Paramount, U.S. Clause Paramount, Canadian Clause Paramount, wherever applicable or any national legislation or convention as may

> mandatory [sic] apply to the Bills of Lading issued hereunder shall be deemed to form part of this Charter Party.…
>
> Clause 124: Hold Cleaning Intermediate
>
> All intermediate hold cleaning to be in Charterers' time, risk and expense, and vessel to remain always on hire, however crew to perform such cleaning with the same care as if they were acting on behalf of the Owners against payment by Charterers of US$ 500 per hold used only for steels excluding removal and disposal of dunnage/lashing etc and US$ 750 per hold used for clean cargoes

The vessel was duly delivered DLOSP Haldia and sailed in ballast to the first port of loading, Bangsaphan, Thailand, to load hot rolled and galvanised steel coils/plates. Whilst en route to Bangsaphan the crew cleaned the holds using on board equipment. The on-hire survey report at Bangsaphan carried out by a jointly appointed surveyor reported that the holds were generally in a sound condition. The report was supplemented by photographs which showed dark staining on the bulkheads and sides which the master subsequently attributed to the previous coal cargo discharged at Haldia prior to delivery under the present charter.

The vessel departed Bangsaphan on 14 July and discharged her steel cargo at Long Beach, California, and Kalama, Washington between 15 and 19 August. On 19 July the charterers had fixed the vessel to load grain at Vancouver, Washington.

On 17 August there was an inspection by a NCB surveyor as a result of which the charterers telexed the owners and master expressing concern that the vessel was unlikely "to pass the hold inspection for grain loading due to previous cargo residue [which] has been determined as coal [and] which … should have been properly removed before vessel's delivery at Bangsaphan".

The master replied stating that the "pre hold inspection" on 17 August "did not mention for any previous cargo residues" although the inspector had insisted that "the stain" be removed from the bulkheads. The holds had been swept, and scraped, and were being

cleaned with chemicals. It was expected that the holds would be clean and ready for loading by 0800 on 19 August.

The vessel completed discharge at Kalama at 0030 on 19 August and shifted to Vancouver anchorage, arriving there at 0710 that day. The vessel was inspected by USDA and NCB inspectors who reported that the holds were not suitable to load grain because of "coal residue". The holds were cleaned between 20 August and 25 August by both the crew and a shore team and were passed by the NCB and USDA on 25 August.

The charterers brought arbitration proceedings against the owners alleging that the owners were in breach of lines 21-22 of the charter in that the vessel's holds were not, on delivery (DLOSP Haldia), in a fit state to receive grain cargo because of the presence of coal residues. Alternatively, by virtue of the Clause Paramount, US COGSA was incorporated into the charterparty and applied in relation to the voyage from Vancouver, Washington: the owners were in breach of section 3(1) of US COGSA in failing, before and at the beginning of the voyage from Vancouver, to exercise due diligence to make the holds fit and safe for the reception, carriage and preservation of the second cargo.

The charterers said that but for the owners' breach the holds would have passed inspection during the weekend of 19/20 August, there would have been no further hold cleaning to remove the coal residues, and the vessel would have started loading the grain cargo at or about 0818 on 21 August. The charterers accordingly claimed some 5 days' hire and bunkers, together with cleaning costs and other expenses.

The owners denied liability. They said that following the Bangsaphan inspection the charterers had accepted the ship unconditionally and had accordingly waived any breach (*The Bunga Saga Lima [2005] 2 Lloyd's Rep 1*). In any event, clause 124 meant that all intermediate hold cleaning was in charterers' time and at their risk and expense, and was a complete answer to the charterers' claim.

The charterparty provisions did not have effect to incorporate US COGSA into the time charter, and even if US COGSA *was* incorporated it did not have effect to transfer from the charterers to the owners the responsibility for those operations which had been allocated to the charterers by the express provisions of the charter. Thus, US COGSA did not apply (a) insofar as charterers had the right and the responsibility of ensuring that

the ship's holds conformed to their commercial needs on delivery (clause 54) and (b) to intermediate hold cleaning (clause 124). In any event, the owners had exercised due diligence with regard to the cleanliness and cargo worthiness of the holds before the vessel was presented for inspection at Vancouver. There had been cleaning prior to the vessel being acceptable to the charterers at Bangsaphan, and the charterers having given the vessel only some 7 hours between the completion of discharge at Kalama and inspection at Vancouver, the crew had done all they could in the time available.

The charterers responded that there had been no waiver of their rights in accepting delivery of the vessel DLOSP Haldia or preloading at Bangsaphan because line 17 of the charter expressly stated that acceptance of delivery should not constitute any waiver of the owners' obligations. As to clause 124, that only applied to cleaning which was required as a result of the cargoes which the charterers ordered the vessel to carry (dictum of Staughton LJ in *The Berge Sund* [1993] 2 Lloyd's Rep 453 at 461 col 2 relied on).

Held, that the first question was why the vessel was rejected at Vancouver. The NCB/USDA documents referred to "coal residue". The use of the singular was significant. The problem was coal stains, not coal residues. The cleaning that the crew had done between Haldia and Bangsaphan and again at Kalama and between there and Vancouver would have removed any coal residues (ie coal dust or small particles of coal), and the photographs bore that out. Clearly it was the staining from the coal cargo which ostensibly concerned the surveyors.

There was no breach of the obligation in lines 21/22 of the charter that "vessel on her delivery to be ready to receive cargo with clean-swept holds … and in every way fitted for the service". The vessel had completed discharge of her coal cargo at Haldia. Since delivery was DLOSP Haldia it would have been impossible to clean the vessel by that time. The charter catered for that by clause 54, which provided for the standard of cleanliness the vessel had to meet "on arrival at first loading port". That was something which was within the crew's competence to achieve between Haldia and Bangsaphan, and indeed they did so to the satisfaction of the surveyor at the latter port. Lines 21/22 had to be read subject to clause 54, which contained much more detailed requirements in relation to hold cleanliness, and specified exactly when, with an eye to the commercial reality of the situation, the cleanliness obligation applied. Clause 54 also provided that

the charterers were entitled to put the vessel off-hire. That was a self-contained and comprehensive clause which superseded any question of off-hire under clause 15. On the facts, the vessel complied with clause 54.

Even if the US COGSA seaworthiness/cargo worthiness obligation applied to a time charter (which was doubtful), it had to yield to the more specific obligation spelt out in the charter by clause 54, which was satisfied.

The Bunga Saga Lima [2005] 2 Lloyd's Rep 1 was of considerable assistance to the owners. It was in one respect a stronger case in that the charter in that case provided that the vessel was, on delivery, to be "clean per grain standard up to independent surveyor's satisfaction". There was no similar requirement in the present charter, merely the lines 20/21 obligation: nor was the vessel found unclean at Bangsaphan.

The charterers had been correct to point out that line 17 of the present charter negated any waiver argument, but the owners did not need to rely on that argument because, by complying with the requirements of clause 54, they avoided committing any breach of the charter or of US COGSA (if incorporated). The allocation of responsibility was addressed by clause 54 and satisfied by the owners.

In the tribunal's view clause 124 reinforced and fitted in with its construction of the charter. Clause 124 was not restricted to cleaning necessitated by the cargoes which charterers had ordered to be carried. It was to all intents and purposes similar to clause 92 in the *The Bunga Saga Lima [2005] 2 Lloyd's Rep 1* charter. *The Berge Sund* was of no assistance because there was no breach of contract by the owners in the present case.

Accordingly the charterers' claim failed.

8.6 WHETHER OWNERS ENTITLED TO HIRE FOR EARLY REDELIVERY

London Arbitration 6/10 LMLN

A number of disputes arising under a sub-charter were referred to arbitration.

Bunkers

The vessel was expected to redeliver under her previous charter and deliver into the present charter on 11 January. However, the redelivery/delivery process did not take place until 14 January. Meanwhile, on 11 January, surveyors ("X") instructed by the previous charterers had conducted an off-hire survey in which they had purported to establish the quantities of bunkers then remaining on board. The quantities shown on that report were very precise, being calculated to three decimal places.

When the nature of the present dispute was referred to the head owners, with whom the disponent owners ultimately settled, the head owners said that the quantities had been given orally by the chief engineer on an "about" basis due to the ship having a substantial trim and a list. They said that when, on 14 January, the chief engineer took soundings again (the ship then being on an even keel and having no list such as she was said to have had on 11 January) he found that the actual bunker quantities were considerably higher. The quantities he then gave were in round tonnes, namely 556 mt IFO and 148 mt MDO.

No survey was carried out on 14 January to establish the quantity of bunkers. Instead, the disponent owners were presented with a report from another surveying company ("Y") which suggested that a surveyor had attended on the ship to ascertain bunker quantities on 14 January. The report purported to find that 525.437 mt of IFO and 124.40 mt of MDO were on board at that time. Those were the quantities found by X on 11 January, with the MDO figure slightly adjusted to reflect the elapse of three days.

In due course it transpired that Y did not in fact attend the ship on 14 January or at all, but had effectively sub-contracted the survey to X, expecting that redelivery/delivery would take place on 11 January, and had adopted X's figures as slightly amended to reflect the elapse of three days.

The disponent owners adopted the registered owners' position, which relied on the chief engineer's subsequent alleged measurements. In addition, they prepared a "back calculation" suggesting that the ship was delivered with 545.699 mt IFO and 153.483 mt MDO (as compared with the figures of 556 mt IFO and 148 mt MDO calculated by the chief engineer on 14 January). On that basis, they claimed $23,528.40.

Held, that the tribunal had to determine the quantity of bunkers on board at delivery on the basis of the evidence presented in the arbitration. It was regrettable that no proper on-hire survey was carried out and it was even more regrettable that Y had represented themselves as having attended when they had not, and that attempts were made to give the impression that X had attended on 14 January, when they had not.

On the one hand, there was X's report with the necessary adjustment for the elapse of three days, and on the other hand there was the "back calculation", and possibly the chief engineer's 14 January figures.

There were bound to be a number of variables in a calculation such as that upon which the disponent owners relied. There had to be a question as to the exactitude of any quantities supplied during the relevant period. There was, as always, a question mark over the ROB measurements from which the calculation started. Then it was necessary to assume the accuracy of the consumption figures provided by the ship during the period over which the calculation was made, an assumption that was frequently not entirely justified.

A substantial margin of possible error had to be taken into account when considering each of those factors, and any one of them alone could easily explain a substantial discrepancy. Together they made such a calculation fraught with the risk of substantial inaccuracy.

Against that, a survey based on actual measurements very close to the relevant time was, on the face of it, likely to be more accurate. The only substantial criticism made of X's report was that the ship had a substantial trim and a slight list at the time the measurements were taken. However, that had only been alleged after the event. No evidence in support of the contention had been adduced. The master at the time had

signed off the report without any qualification, and the figures given were accurate to three decimal places.

If there had been any concern on the ship's side as to the accuracy of the figures, that should, and probably would, have been expressed contemporaneously. Moreover, the precision of the figures suggested that there was probably no doubt in anyone's mind about how accurate they were. Further, they were to be contrasted with the roundness of the figures produced by the chief engineer three days later. It was also relevant to note the fact that the chief engineer's figures bore no real relationship either to the 11 January figures or those produced by the "back calculation".

In the result, there was little doubt that the best evidence as to the bunker quantities on delivery was to be found in X's report as adjusted, and on that basis the disponent owners' claim for $23,528.40 had to fail.

Redelivery

The ship was to be redelivered on dropping the last outward sea pilot at one safe port in Turkey. The sub-charterers purported to redeliver her at her berth, which the disponent owners said was some six hours earlier than would otherwise have been the case. They claimed hire for that period in the sum of $6,748.97.

The sub-charterers said that the charter provided for redelivery as the disponent owners said "unless otherwise mutually agreed", and that the master had agreed to accept redelivery at the berth. They said that he was well within his authority in that respect. The sub-charterers said that that agreement took account of the practicalities of the situation, since the ship was to load cargo for the next sub-charterers at the same berth and it would have been completely impractical to fulfil the requirement of taking the ship out until she dropped her last pilot, only for her to return immediately.

Held, that in any event the disponent owners could not claim hire, as such, for the period in question. Redelivery took place when it took place, ie at the berth. That was, possibly, a breach of charter (although the master's agreement was probably sufficiently binding on the owners to stop there having been any breach), but even if that was the case, the disponent owners could show no damages for any such breach because, following

redelivery, the ship immediately delivered into and started earning hire under the next charter; and in the absence of evidence, or even assertion, to the contrary, it had to be assumed that they therefore suffered no loss. That claim also failed.

Owners' expenses

The disponent owners said that the sub-charterers had withheld $2,000 from hire in respect of owners' expenses, but that under clause 39 of the charter they were only entitled to deduct up to $500 per port, and as the ship called at two ports, the only entitlement was to withhold $1,000. Accordingly the balance of $1,000 was claimed.

The sub-charterers said that the provision in question was not in fact contained in the charterparty and that in the fixture recap it had been specifically mentioned as being deleted. In response, the disponent owners did not deny that, but they said that the subcharterers had to produce vouchers in support of any costs claimed but had failed to do so, and therefore they had "unlawfully deducted US$1,000 in respect of unsupported claims".

Held, that on the basis of the owners' last argument they should have been claiming $2,000, being the total amount deducted which remained unvouched. However, the tribunal could not award a party more than it claimed and so it allowed only $1,000 in that respect. There was probably no injustice in that since it seemed extremely likely that the sub-charterers would in fact have incurred disbursements that were properly recoverable from the owners and it would be surprising if they did not amount at least to $1,000.

On-hire and off-hire survey costs

The disponent owners contended that no on-hire survey was carried out and therefore they were not liable for the alleged $550 split costs of such survey which the sub-charterers had withheld. They also said that the sub-charterers had used an inappropriate exchange rate when converting the off-hire bunker survey costs into US dollars, and claimed $30 in this respect. The sub-charterers' response to the first point was that Y's report was "tantamount to an on-hire survey". They made no comments about the rate of exchange point.

Held, that it was plain that no on-hire survey was in fact carried out, so the disponent owners were entitled to recover the $550 claimed in that respect. In the absence of any defence from the sub-charterers, the owners were also entitled to the $30 claimed in respect of the off-hire survey.

Shortfall in hire payments

The sub-charterers said they had paid $590,374.70 but the disponent owners had only received $590,280.80. The disponent owners therefore the claimed the shortfall of $93.90.

Held, that it was well known that bank charges were commonly deducted from foreign transfers, and they explained the difference in the present case. It was equally well-known that it was for a debtor to pay the full amount of his debt to the creditor. If the creditor received less than that because of bank charges or similar, he was entitled to have the shortfall made up. The disponent owners' claim succeeded.

Costs

At the end of the day the disponent owners recovered $1,673.90 plus some interest. They had failed in respect of the substantial claim they had brought, without which it was doubtful whether there would ever have been an arbitration. On the other hand, they did recover a sum, modest though it was. In the circumstances, the just approach was to direct that each side should bear its own costs, and that the sub-charterers should pay half the costs of the award, which had already been paid in full by the owners.

Should you have any queries on anything mentioned in this Briefing, please get in touch with Sally-Ann Underhill/Jo Cullis or your usual contact at Reed Smith.

Reed Smith LLP
The Broadgate Tower
20 Primrose Street
London EC2A 2RS
Phone: +44 (0)20 3116 3000
Fax: +44 (0)20 3116 3999
DX 1066 City / DX18 London
reedsmith.com

Email: ***sunderhill@reedsmith.com***

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