ZFZ | ZEILER FLOYD ZADKOVICH

COMMERCIAL CASES –
A YEAR IN REVIEW: 2019-2020

NEW YORK | VIENNA | LONDON | MEXICO CITY | CHICAGO | HOUSTON | SYDNEY

INTRODUCTION

This Guide has been written by the team at Zeiler Floyd Zadkovich to provide an overview of the significant commercial cases that have been decided by the English courts in 2019 and 2020. The aim of the Guide is to present brief summaries of the major cases and the important points of law that were extrapolated in each matter.

COMMERCIAL CASES

NORWICH PHARMACAL ORDERS: ALIVE AND WELL

Hall and Birtles Ltd v HSBC UK Bank [2020] 4 WLUK 202

Hall and Birtles (H), a solicitors' practice, was purportedly instructed by a client (C) in relation to a transaction. H received email communications purportedly from C, and later made enquiries to C as to the correct bank account details. H transferred a large sum of money. It later transpired that C knew nothing about the emails and his email account had been hacked. The IP address used to send the emails was traced to Lagos, Nigeria. H was liable to reimburse C and was, as a result, the victim of the fraud.

HSBC was an innocent conduit in the fraud, as its banking services were used to conduct the transfer of the funds. H applied for a Norwich Pharmacal order against HSBC for the disclosure of information in order to trace the funds and the people who had been parties to the fraud. Specifically, H sought information of certain accounts and details in relation to the funds that had been transferred.

Mr Justice Chamberlain granted H's application for the Norwich Pharmacal order. His Lordship held that it was highly likely that H could establish wrongdoing by those who had hacked C's account by obtaining the information requested, and therefore the order was necessary and proportionate in all the circumstances. Although HSBC was an innocent conduit through which the funds had been transferred, justice required that it should co-operate in righting the wrong even if it only unwittingly facilitated the perpetration of the fraud.

ANTI-SUIT INJUNCTION UPDATE

The 'Joker' [2019] EWHC 3541 (Comm)

Following damage to cargo in Chittagong, cargo receivers arrested and commenced proceedings in Bangladesh. The Bill of Lading incorporated London Arbitration by reference to a Charterparty

Owners applied for an anti-suit injunction. The Court followed *The Angelic Grace*, and looked at two key indicators on whether or not they should grant the application:

1) Had Owners taken positive steps in the Bangladesh action? - Answer: No. All steps were taken with clear protest. Anti-Suit brought promptly.

2) Any other good reason not to grant anti-suit? - Answer: No. This was for the Respondent Receivers to demonstrate, and they did not appear.

The case exemplified that if you face a claim in breach of a jurisdiction agreement, act fast. Don't submit to the foreign jurisdiction and bring the anti-suit quickly.

ANTI-SUIT INJUNCTIONS: A RACE AGAINST THE CLOCK

Enka v Chubb Insurance [2020] 1 Lloyd's Rep. 71

A four-month delay in bringing an anti-suit injunction was held to prevent its issue in this matter.

PJSC was the contractor for the construction of a power plant. Enka, an engineering business, was engaged to provide works relating to the plant. The contract contained an arbitration agreement that provided for disputes to be settled by arbitration in London.

A fire occurred in February 2016 at the power plant. Chubb Russia indemnified PJSC, paying US$400 million. Chubb Russia alleged that the fire had been caused by Enka's negligence. In May 2019, Chubb Russia filed a claim with the Moscow Arbitrazh Court. Enka decided to engage and defend the claim against it.

In September 2019, Enka sought permission in England to obtain an anti-suit injunction to restrain Russian proceedings. Baker J refused the application. First,

while the express choice of seat in London may convey or imply a choice of English law to govern the contract, it would be wrong to reach a firm conclusion by considering the arbitration clause in isolation. Further, given that Enka was delayed in bringing the anti-suit injunction application and had participated in the Russian proceedings, these were found to be strong reasons not to grant an anti-suit injunction.

ARBITRATION PROCEEDINGS AND THE DOCTRINE OF APPROBATION AND REPROBATION

MPB v LGK [2020] EWHC 90 (TCC)

MPB and LGK entered into an agreement by exchanging a series of emails, both of which contained MPB's Terms and Conditions, and LGK's Terms and Conditions. LGK's Terms provided, at clause 11, that the parties could refer a dispute to adjudication at any time, until the dispute is finally resolved through arbitration.

A dispute arose, and MPB commenced adjudication by relying on Clause 11 of LGK's Terms. LGK then commenced arbitration proceedings (also by relying on Clause 11) to challenge the adjudicator's decision. The arbitrator found in favour of LGK. MPB then appealed to the High Court to set aside the arbitrator's award and argued that the arbitrator lacked jurisdiction as Clause 11 of LGK's Terms was not incorporated into the agreement.

The High Court found that the doctrine of approbation and reprobation applied. Because MPB had originally relied on Clause 11 in order to commence adjudication (and therefore elected to accept that clause 11 was incorporated into the agreement between the parties), it was not open to MPB to later assert that Clause 11 was not part of the agreement between the parties.

FRAUDULENT BANKING DETAILS: WHO IS RESPONSIBLE FOR THE RISK?

K v A [2019] EWHC 1118 (Comm)

By a written contract confirmation drawn up by Vicorus as intermediary broker, A agreed to sell, and K agreed to buy, 5,000 mt of sunflower meal for US$229 per mt. The payment provision provided "100% Net cash within 2 banking days to Sellers' bank" upon presentation of the commercial invoice. In November 2015, A loaded the goods on the carrying vessel. On the same day, A sent an email to Vicorus attaching an invoice for US$1,167,900 directing payment to be made to Citibank New York.

However, as a result of a fraud, the email that K actually received from Vicorus was one that attached an invoice directing payment to a different account (in the name of Ecobank) at the London branch of Citibank. K then instructed its bank to make payment of the price to A, and payment of US$1,167,900 was made to the fraudulent Citibank account. The payment was converted by Citibank into sterling before being credited to the fraudulent account in the amount of £768,372.45.

By the end of November 2015, the parties suspected fraud. On 24 November 2015, Ecobank approved the debit from their account of £674,831.46. The difference between that amount and the sum credited of £768,372.45 was due to exchange rate fluctuations. The £674,831.46 was transferred to A's correct account on 18 December 2015. Conversion at the prevailing exchange rate made that equivalent to US$1,006,253.07, leaving a shortfall from the contractual price of US$161,646.93. A brought arbitration proceedings against K claiming to recover the shortfall of US$161,646.93.

The GAFTA Board of Appeal ordered K to pay to A US$161,646.93 plus interest. The Board held that the emails and invoices sent by A to Vicorus contained the correct bank details for payment into A's nominated bank account. It was K which bore the risk of receipt of the incorrect bank details which was what caused payment to be made into the wrong account. K appealed to the Commercial Court. Mr Justice Popplewell held that the contractual payment obligation was to pay the price in "net cash" to A's bank within two days of presentation of documents, which had to include a commercial invoice. His Lordship reasoned that an obligation to pay in cash, against the background of modern banking practice, permitted any commercially recognised method of transferring funds; however, the payee would not have the equivalent of cash unless and until she had credit available at the bank upon which in the normal course of banking practice she could draw, if she wished,

in the form of cash. K's payment obligation was therefore not fulfilled, as at the time the payment was due, it could not draw the specific amount due under the contract.

COURT OF APPEAL FINDS TRIAL JUDGE FAILED TO APPLY THE BALANCE OF PROBABILITIES TEST

Bank St Petersburg PJSC v Arkhangelsky [2020] EWCA Civ 408

The first claimant bank brought a claim for £16.5 million against the first and second defendant husband and wife under personal guarantees and a personal loan. They, together with their company, the third defendant, counterclaimed for damages in respect of an alleged conspiracy unlawfully to raid and seize the assets of two of their main businesses in Russia, which owned land at port terminals. The counterclaim was made against the bank and its chairman, the second claimant, for unlawfully causing the defendants harm under art. 1064 of the Russian Civil Code by selling the assets pledged to the bank to connected parties for less than their proper market value.

There was a 46-day trial and the primary judge gave judgment 22 months later. He held that the bank's debt claims succeeded and dismissed the defendants' counterclaims. However, he declined to make negative declarations sought by the claimants as to the absence of any dishonesty or deceit on their part. He dismissed the counterclaims "having regard to the strength of the evidence that was necessary to discharge the burden of proof".

The Court of Appeal allowed an appeal. The Court held that primary judge had failed to correctly apply the standard of proof and assess the case on the balance of probabilities. It was reasoned that given that the judge held that both parties had behaved dishonestly and lied to the court, there were indications throughout his findings of fact on the counterclaim that he was applying too high a standard. He had been wrong to say that the defendants' "burden of proof ... could only be discharged by showing the facts to be incapable of innocent explanation".

KNOWING BREACH OF A FREEZING ORDER NEGATED BY FAILURE TO WARN OF RIGHT TO SILENCE

Andreewitch v Moutreuil [2020] EWCA Civ 382

The appellant and the respondent, his former wife, were in dispute concerning the beneficial ownership of a valuable property. The property was owned by a company of which the appellant was sole director and the respondent was the sole shareholder. A freezing order was made restraining the parties from disposing or dealing with the company's income or assets, except to enable the company to meet its tax or other liabilities. It was alleged that the appellant had used company funds to pay his living expenses and legal costs after the freezing order was made. The respondent applied for the appellant's committal for contempt.

At the hearing, the appellant was unrepresented but indicated that he wished to waive his right to legal representation and legal aid. He had filed an unsigned statement and was invited to take give evidence from the witness box to swear to the truth of its contents. He was then cross-examined and asserted that the payments had been in respect of the company's liability to pay him a salary and repay loans he had made to it. The primary judge found that he had been in knowing breach of the freezing order and that contempt was established.

On appeal, the appellant submitted that he had not been informed of his right to silence and had not known that he did not need to give oral evidence. He alleged that the hearing was therefore procedurally unfair. The Court of Appeal allowed the appeal. It was held that while CPR PD 81 and FPR PD 37A did not explicitly refer to the right of silence, the overall objective was fairness, and in seeking to achieve that the court had to take into account the interests of all parties and the public interest in maintaining the court's authority. Accordingly, the court had a duty during the committal proceedings to ensure that the accused was made aware that he were not obliged to give evidence and also warned that adverse inferences might arise from exercising the right to silence. Those messages contained a tension, but what mattered was that the choice of how to proceed belonged to the litigant and not to the other party or to the court. It was of particular importance when the litigant was unrepresented.

SERVING DOCUMENTS ON A NON-EXISTENT COMPANY: IS IT AN ABUSE OF PROCESS?

Cowley v LW Carlisle & Co Ltd [2020] EWCA Civ 227

L was the Third Defendant in the Claimant's claim for damages for noise-induced hearing loss against four different employers between 1963 and 2000. L had been struck off the Register of Companies and was dissolved. Despite that the Claimant's solicitors knew this to be the case, the claim form was sent to L's last known place of business with a letter stating that the Claimant would be seeking L's restoration to the register. Copies were also sent to L's insurer, who stated that L was dissolved so proceedings could not be served on them. However, in 2018, solicitors for the insurer purported to lodge an acknowledgement of service on behalf of L indicating an intention to contest the jurisdiction, and issued an application notice for an order striking out the claim against L pursuant to CPR rule 3.4(2) as an abuse of process.

The district judge held that the court would only allow the legal process to be affected against a company that existed. He therefore struck out the claim against L on the basis that the purported defendant did not exist and therefore the claim was an abuse of process.

The Court of Appeal upheld the findings of the primary judge. The Court stated that the action involved four defendants and the district judge had been entitled to consider how best to progress the matter in the exercise of his case management powers. He was entitled to consider whether the overriding objective was properly served by the continued presence in the action of a non-existent company. He therefore correctly exercised his power to strike out the claim and he had not erred in doing so.

POST-JUDGMENT FREEZING INJUNCTIONS AND THE ANGEL BELL EXCEPTION

Michael Wilson & "Partners" Ltd v John Forster Emmott [2019] EWCA Civ 219

In this decision, the Court of Appeal dismissed an appeal against the removal of an "Angel Bell" exception to a post-judgment freezing order, with the effect that the defendant was prevented from continuing to make payments in the ordinary course

of its business.The exception enables a party to a freezing order to continue to deal with its assets in the ordinary course of its business. The court held that there is no "presumption" that the exception should be excluded from a post-judgment freezing order.

However, the Court noted that the exception's inclusion "will sometimes and perhaps usually be inappropriate". The Court found that the existence of an unsatisfied judgment debt "does make a difference" when considering the ambit of a freezing order. It reiterated that it will be easier to justify the exclusion of a business expenditure exception when a party has refused to honour a judgment.

MICHELIN-STARRED DISPUTES AND ISSUE ESTOPPELS

MAD Atelier International B.V. v Manès [2020] EWHC 1014 (Comm)

Mr Axel Manès is a Michelin-starred French chef and the owner of a well-known French restaurant in Paris called "L'Atelier de Jöel Robuchon". In 2015, he entered into a joint venture with Dogus Group to develop the L'Atelier de Jöel Robuchon brand internationally. MAD International ("MAD") was incorporated to be the vehicle for the joint venture.

In 2017, MAD issued proceedings in France against two of Mr Manès' companies. It alleged that Mr Manés had fraudulently induced it to transfer its shares in the Paris Restaurant to one of the companies. In July 2018, the Paris Commercial Court dismissed MAD's claim. MAD appealed and the appeal decision is expected in October 2020.

In April 2019, MAD issued English proceedings against Mr Manès for breach of the joint venture. Mr Manès sought an order striking out MAD's Claim Form and Particulars in whole, or in part, pursuant to CPR 3.4(1)(a)-(b), on the ground that they are an abuse of process because the claim gives rise to an issue estoppel, as it has already been decided in Paris.

Bryan J held that there was no issue estoppel. Whilst he accepted that a foreign judgment could give rise to issue estoppel, for that to be the case, the judgment must be final and conclusive. His Lordship reasoned that to be final and conclusive, the foreign legal system must regard the particular issues relied upon as forming the

English legal estoppel as having preclusive effect. The foreign legal system must therefore either have a doctrine of issue estoppel which covers the issues raised or have a doctrine which has precisely the same underlying basis and operation. Given that no such doctrine existed in France, there could be no issue estoppel in England.

ARBITRATION CLAUSES IN AUSTRALIA – NOT QUITE WHAT IT SAYS ON THE TIN

Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association [2020] FCA 682

Qantas Airways Ltd, Australia's largest and oldest airline suspended all "regularly scheduled" international passenger flights and substantially reduced the number of domestic flights due to Covid-19. In March 2019, Qantas announced that they would be standing down around two-thirds of their workforce. Employees who were stood down without pay included a number of licensed aircraft maintenance engineers (LAMEs). Those stand downs were purportedly made under a stand down clause in an enterprise agreement, which enables Qantas to deduct payment from any employee who "cannot usefully be employed" because of a "stoppage of work through any cause for which Qantas cannot reasonably be held responsible".

The Australian Licensed Aircraft Engineers Association (ALAEA), filed an interlocutory application with the Fair Work Commission (the "Commission") on behalf of the engineers who were stood down, seeking that the Commission hear the dispute by way of arbitration. This was because, in the relevant enterprise agreement, a dispute resolution clause stated that any disputes arising under the agreement were to be arbitrated in the Commission. Qantas claimed that the Commission had no jurisdiction to deal with the disputes and filed an originating application in the Federal Court of Australia on 12 May 2020 seeking a constitutional writ to permanently restrain the Commission from hearing or determining by arbitration the dispute.

Katzmann J reasoned that since the relief Qantas sought was in the nature of an anti-suit injunction, it must establish that the interests of justice favour the action being heard in the Federal Court. Her Honour held that there were three major reasons why this was the case. First, the Federal Court's specialist function is the determination of controversies concerning existing rights and liabilities. In contrast,

that is not the traditional function of the Commission. Second, the dispute was "not without difficulty". It raised complex legal issues concerning the interpretation of the scheme under the Fair Work Act 2009 (Cth) for the making of enterprise agreements and their variation, which deserved the attention of a superior court. And finally, her Honour was of the view that there was the potential for delay if the dispute was heard in the Commission. The Court, however, could move quickly to determine the substantive issues and the delay would be insignificant. Thus, it was found that the Federal Court should resolve such a complex and urgent dispute, irrespective of the fact that the agreement stated that all disputes should be heard by way of arbitration in the Commission.

ZFZ | ZEILER FLOYD ZADKOVICH

SYDNEY
Zeiler Floyd Zadkovich LLP
Level 15, 1 O'Connel Street, Sydney
NSW 2000

T +61 27 908 26 26
E sydney@zeilerfloydzad.com

VIENNA
ZFZ Zeiler Rechtsanwälte GmbH
Stubenbastei 2
Entrance Zedlitzgasse 7
3rd floor: conference area
6th floor: office
1010 Vienna, Austria

T +43 1 890 10 87 – 0
E vienna@zeilerfloydzad.com

LONDON
Zeiler Floyd Zadkovich LLP
Summit House
12 Red Lion Square
London WC1R 4QH, United Kingdom

T +44 203 740 25 76
E london@zeilerfloydzad.com

NEW YORK
Zeiler Floyd Zadkovich (US) LLP
215 Park Avenue South
11th floor
New York, NY, 10003 USA

T +1 332 213 06 70
E usa@zeilerfloydzad.com

MEXICO CITY
Zeiler Floyd Zadkovich S.C.
G. González Camarena No. 1600,
4th floor Suite 80, Santa Fe, 01210
Mexico City, Mexico
Alcadía Alvaro Obregón

T +52 55 5081 8457
E mexico@zeilerfloydzad.com

CHICAGO
Zeiler Floyd Zadkovich (US) LLP
500 West Madison Street
10th floor
Chicago, Illinois, 60661 USA

T +1 708 320 00 10
E usa@zeilerfloydzad.com

HOUSTON
Zeiler Floyd Zadkovich (US) LLP
4265 San Felipe Street
Suite 1100
Houston, Texas 77027 USA

T +1 346 235 01 19
E usa@zeilerfloydzad.com