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A 'Limitation Direction'

Marc Brittain

1. There are of course, many reasons why a company might be struck off the register – including the end of the insolvency process, because the company is defunct or deemed to be defunct, or voluntarily.

2. Under the Companies Act 2016, whether company has been struck off of the register or dissolved, an application may be made to the Court under s.1029 to restore the company to the register.

3. The effect of a dissolution is that the company as a separate legal entity ceases to exist; thus it can neither sue nor be sued and it goes out of existence for all purposes.

4. Under the Companies Act 2006, ss.1024 – 1028 there is now only one mode of revival of a struck off/dissolved company, namely restoring it to the register; but there are two different methods of restoration, namely *administrative* restoration and restoration by *order of the Court*.

5. The circumstances in which the administrative procedure can be used to restore a company are limited compared with the Court application route.

6. The general effect of the company being restored to the register, (by whichever method), is that it is deemed to have *continued in existence* as if it had not been dissolved or struck off the register.

7. Sections 1029 – 1034 of the Companies Act 2006 provide for restoration of a company by Court order.

8. On an application pursuant to s.1029 to restore the company to the register the Court may order the restoration:

"103(1) On an application under section 1029 the court may order the restoration of the company to the register-

(a) *if the company was struck off the register under section 1000 or 1001 (power of court to strike off defunct companies) and the company was, at the time of striking off, carrying on business or in operation;*

(b) *if the company was struck off the register under section 1003 (voluntary striking off) and any of the requirements of sections 1004 to 1009 was not complied with;*

(c) ***if in any other case the court considers it just to do so***"

9. Thus where a company has been struck off the register after the insolvency process, the Court can restore the company if it considers it just to do so.

10. The relevant parts of section 1032 of the Companies Act 2006, provide:

"1032(1) The general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register

....

1032(3) ***The Court may give such directions and make such provision as deems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register****"*

11. Section 1029(2) sets out a list of who is entitled to make an application to the Court to restore a company to the register. One permitted category is that of *"(f) any person with a legal claim against the company".*

12. The problem commonly arises where a creditor has a claim against a company that, at the time the company was struck off the register, was not time barred but had not been pursued by the creditor but by the time the creditor decides to pursue the claim and the creditor applies to restore the company to the register, the creditor's claim has become time barred by the provisions of the Limitation Act 1980, with the effect that the company having been restored, the position is as if the company was never struck off, ergo, the creditor's claim has become time barred.

13. In those circumstances, an application can be made to the Court pursuant to s.1032(3) for what is known as a *limitation direction*; that is a directions that the running of time for bringing claims should be suspended during all or part of the period when the company was dissolved.

14. Of course, if the creditor's claim was time barred at the time of striking off, no direction by the Court postponing the running of time for the purposes of the Limitation Act 1980 on restoring the company to the register, could save the claim.

15. Although the most usual scenario, is that of a creditor applying to restore the company with a view to suing it and applying for a limitation direction, the situation also arises where it is the company that wishes to pursue claims that it had against third parties that would otherwise be time barred.

16. Different considerations apply, depending on whether it is a creditor who seeks a limitation direction or the company itself.

The second scenario – the company seeking to pursue a claim

17. In the recent case of *County Leasing Asset Management –v- Hawkes* [2015] EWCA Civ 1251, the Court of Appeal, Jackson LJ, Briggs LJ and King LJ, considered the test to be applied where it was the company that was seeking a limitation direction.

18. The facts, in summary, were as follows:
    - Telerate (then called Michael Green Plant Limited) was on the wrong end of an HMRC winding up petition due to be heard on 17th November 2004.
    - Mr. Hawkes, the sole director and shareholder wanted to continue Telerate's business and to that end entered into an arrangement with the Defendants to sell Telerate's assets to one of the Defendants, an SPV set up for this purpose, and then to lease those assets back whilst using the sale proceeds to pay off HMRC.
    - The Sale/leaseback took place in late 2004 and as part of the scheme Telerate was placed into administration in late January 2005 with Mr. Valentine being appointed as liquidator.
    - In fact, Telerate subsequently went into liquidation and Mr. Valentine took office as liquidator.
    - Unfortunately, apart from £40,000, the promised purchase price for Telerate's assets, some £225,000, never reached Telerate (or Mr. Valentine as administrator/liquidator).
    - Most of the purchase price was paid over to 2 of the other Defendants – Mr. Cook and Mr. Kirkpatrick.
    - Mr. Valentine, as liquidator, in April 2005 began investigating the sale/leaseback and the payments to Mr. Kirkpatrick and Mr. Cook.

- However, Mr. Valentine delayed and by the time Telerate was dissolved on 29th April 2009, some 4 ½ years had passed since Telerate's cause of action against Mr. Kirkpatrick and Mr. Cook (for the failure to pass on the sale proceeds) had accrued.
- Prior to this, in 2008, Mr. Hawkes had been keen to sue Mr. Kirkpatrick and Mr. Cook and tried to by an assignment of Telerate's cause of action from Mr. Valentine, but this got nowhere as Mr. Hawkes could not afford the £10,000 asked for by Mr. Valentine.
- In September 2010, Mr. Hawkes (as he was entitled to do being a former member of Telerate) applied to restore Telerate to the register.
- In December 2010, just as the 6-year period for bringing a claim against Mr. Kirkpatrick and Mr. Cook was expiring (2004 – 2010), Mr. Hawkes applied for a limitation direction.
- Telerate's claims were assigned to Mr. Hawkes by Mr. Valentine's successor.
- In October 2011 the restoration order as made and it was not until April 2014, that the limitation direction was granted by Andrews J.
- The Defendants, including Mr. Kirkpatrick and Mr. Cook, appealed.

19. In giving the lead judgment, Briggs LJ followed the ratio of the only previous reported case, *Regent Leisuretime –v- Natwest Finance Limited* [2003] EWCA Civ 391, and the judgment of Jonathan Parker LJ. Briggs LJ held (in summary):

(i) the discretion given to the Court by s.1032(3) can only be exercised in *exceptional circumstances* [paragraph 25];

(ii) but that this means no more than that the burden of proving *exceptional circumstances* lies squarely on the company seeking the limitation direction [judgment paragraph 27];

(iii) the starting point was to realise that time would have run against the company even were it not dissolved [paragraph 25];

(iv) the Court must therefore ask itself whether, had it not been dissolved, the company would have commenced the relevant proceedings within the relevant limitation period – i.e. was the dissolution the *real* cause of the company being disabled form its claim [paragraph 30];

(v) although this 'test' should not be slavishly followed in every case it being a good servant but a poor master [paragraph 36];

(vi) even if it can be shown that the company probably would have brought the claim in time had it not been dissolved, that is not an end to it, the Court will consider other factors such as where, despite knowing about the claim, the liquidator chooses to dissolve the company – would it then be fair to give the company a further opportunity to the prejudice of persons who would be deprived of a limitation defence [paragraph 31].

20. The Court of Appeal allowed the appeal, reversing the limitation direction made by the judge at first instance.

21. In *Brian Michael Pickering –v- Graham Frank Davys* [2017] EWCA Civ 30, the Court of Appeal, Longmore LJ, Lewison LJ and Richards LJ, were again seised of the same issue.

22. It seems that *County Leasing Asset Management –v- Hawkes* [2015] EWCA Civ 1251 had been decided by the Court of Appeal whilst *Pickering* was on its way to the Court of Appeal.

23. In *Pickering*, counsel for the creditor submitted that the judge at first instance was correct in making the limitation direction on the basis that the creditor had been deprived of a *window of opportunity* in which to bring his claim [paragraph 62].

24. The Court of Appeal in following *Hawkes*, decided that before the Court could make a limitation direction, there had to be a causal link between the dissolution and the failure to bring proceedings within the applicable limitation period [paragraph 60]. In other words, the Court was required to ask whether, but for the dissolution, the applicant would have brought a claim against the company in time, and that was a question of probabilities.

25. The Court of Appeal in *Pickering* also confirmed that where the company itself applies to be restored to the register and for a limitation direction, extra considerations might apply even where it could be shown that the company would have brought any claim within the limitation period; for example where the company itself was the author of its striking off, it may not be fair to deprive a Defendant of a limitation defence.

Summary

(i) Where a company has been struck off the register and/or dissolved the CA 2006 provides two ways to restore the company.

(ii) Where an order is made to the Court to restore the Company to the register, the Court may restore the company to the register.

(iii) On making such order for restoration, the Court may give such directions and make such provision as deems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register,

including a direction that the running of time for bringing claims should be suspended during all or part of the period when the company was dissolved.

(iv) That directions should only be made where there is a causal link between the dissolution/striking off and the failure to bring proceedings within the limitation period i.e. would the applicant have in fact commenced proceedings within time but for the dissolution/striking off.

(v) Where the company is the applicant for a limitation direction, extra considerations may apply – especially where the company is the author of its dissolution/striking off.

MARC BRITTAIN

Insurance –

Declining cover due to failure to comply with Notification Clauses

Louise Worton

1. On 12th January 2017, judgment was handed down by the Court of Appeal in **Zurich Insurance PLC v Maccaferri Limited [2016] EWCA Civ 1302.** The Court, consisting of Lady Justice Black and Lord Justice Christopher Clarke, affirmed the decision of Mr Justice Knowles in Maccaferri Limited v Zurich Insurance PLC [2015] EWHC 1708 (Comm).

2. In this case, the Court considered the correct approach as to the interpretation of a notification clause in a liability insurance policy. For the year 2011/12, Zurich were the providers of a Public and Products Liability Policy for Maccaferri. Zurich agreed to indemnify Maccaferri in respect of all sums which they might become legally liable to pay as compensation for… *"accidental death of or accidental personal injury to any person other than an employee".*

3. By virtue of Clause 1 of the policy, due observance of the conditions by the Maccaferri as the Insured was a **condition precedent** to any liability of the Insurer to make payment.

4. Clause 2 of the terms of the policy provided as follows:

   *"The Insured shall give notice in writing to the Insurer **as soon as possible** after the occurrence of **any event likely to give rise to a claim** with full particulars thereof. The Insured shall also on receiving verbal or written notice of any claim intimate or send same or a copy thereof **immediately** to the Insurer and shall give all necessary information and assistance to enable the Insurer to deal with, settle or resist any claim as the Insurer may think fit. ...".* (Emphasis added)

5. The dispute as to the correct interpretation of this clause arose when Zurich ultimately refused to provide cover to Maccaferri for a claim brought against it arising out of an accident involving Mr McKenna. Mr McKenna, an employee of Drayton Construction Limited, was working on site, operating a digger. Drayton Limited specialised in earthmoving and landscaping work. It had hired in a piece of equipment, known as a Spenax gun, a pneumatic lacing tool, used for tying together the sides of steel wire mesh cages. The considerable force of the machine was provided by its connection to a compressed air line. Drayton hired the gun from Jewsons, the builder merchants, who in turn arranged for its provision from the head supplier, Maccaferri.

6. The particular gun or stapler in question was left on the ground lying in the path of Mr McKenna's digger. He left the cab and moved the gun. According to his version of events, he was then struck in the eye by a c-shaped clip fired from the gun, seemingly upon the trigger being pressed. Unfortunately Mr McKenna was hit in his eye and partially blinded by the accident. However he had already, prior to the accident in question, lost the sight in his other eye.

7. The accident itself took place on 22nd September 2011, but was not recorded in Drayton's accident book until the 27th. On the next day, Drayton contacted Maccaferri to notify that the gun had been involved in an incident and to request the particular gun was taken off hire. It also told Jewsons about the accident and informed them that the gun had to be kept for investigation. The hire charges for the gun were duly suspended, but progress seems to have been limited. In October, Maccaferri agreed to provide test certificates from its repair and maintenance contractor, CAT Industrial.

8. Limited progress again occurred and in January 2012, Maccaferri made enquiries with Jewsons and asked them to follow-up. It had come to Maccaferri's knowledge by this time that someone had been injured in the incident but very little other information was known. It was not until 12th June 2012 that Jewsons confirmed that the gun was still needed for testing and that its own solicitors were dealing with a claim surrounding the accident. At around the same time, an employee of Maccaferri overheard a conversation in an Abingdon pub about an employee of Drayton who had lost an eye at work whilst using some sort of equipment. The employee reported the overheard conversation to his line manager and between them they discussed the possibility that it might have had something to do with their gun. However, it was asserted that they did not discuss the gun being faulty or that this might have been the cause of the accident.

9. In July 2012, Mr McKenna issued a personal injury claim against Drayton. However this action was ultimately compromised and on 18th February 2013, judgment was entered by consent, for damages to be assessed. That action was ultimately settled by an agreement to pay £1.4 million, plus costs, to Mr McKenna.

10. On 29th March 2013, Drayton issued proceedings as against Jewsons seeking an indemnity or contribution, or damages for breach of contract. On 12th July 2013, Jewsons took the step of joining Maccaferri as Part 20 Defendant. This information was communicated to Maccaferri and came to their attention on 22nd July 2013. On that very same day, Maccaferri notified its brokers of the claim against it, who in turn immediately informed Zurich. However on 25th September 2013, Zurich refused to indemnify Maccaferri on the grounds of late notification and breach of clause 2.

11. In the substantive proceedings, a settlement was reached, whereby Mr McKenna was to receive £1,400,000 plus £292,000 costs. In March 2015, a settlement was agreed in the satellite proceedings with all further proceedings between Drayton, Jewsons and Maccaferri stayed on terms of payment of £350,000. This liability was divided two-thirds, one-third, with Maccaferri contributing paid £233,333. Thereafter Maccaferri issued proceedings against Zurich to challenge the refusal of indemnity.

12. The submissions of the parties focused around three authorities dealing with insurance and notification clauses, the first of which was **Layher Ltd v Lowe [2000] Lloyd's IR 510**. This insurance policy contained a clause which required immediate notice of "*the happening of any occurrence likely to give rise to a claim under this Certificate, of the receipt of the Assured of notice of any claim and of the institution of any proceedings against the Assured…"*

13. The occurrence in question was a storm in January 1990, which blew off the temporary roof erected on scaffolding on a National Trust property. Unfortunately two men died and there was significant property damage. It was not until June 1992, two and a half years later, that the claimants (suppliers of certain scaffolding components) received notification of a possible claim by its subcontractors due to the alleged negligent design of wedges securing the roof. Upon referring the matter to their insurers, cover was refused for late notification.

14. The judge at first instance held that the storm in January 1990 was not such an occurrence as to require notification. This decision was upheld by the Court of Appeal which held that "likely" (in the sense of likely to give rise to a claim) meant at least a 50% chance of success. The mere fact that a claim was possible was not enough. Saville LJ determined that the test to be applied was an objective one.

15. The insurers also argued in the alternative that the event did not become an *"occurrence likely to give rise to a claim"* until as and when later events showed that a claim was likely. However, this argument was also rejected as *"doing irretrievable damage to the ordinary words in the clause".*

16. The submissions also addressed **Jacobs v Coster [2000] Lloyd's Rep IR 506**. The policy in that case required immediate notice, within 30 days *"if any event gives or is likely to give rise to a claim".* Compliance with the terms and conditions was a condition precedent for cover.

17. In March 1994, the claimant fell over on a garage forecourt and hurt her leg. She was carried into the payment kiosk and an ambulance called to take her to hospital. On October 1994, her solicitor gave notice to the garage of a possible claim and the insurers were promptly informed thereafter. However cover was refused for late notification.

18. In the Court of Appeal, it was determined that the test to be applied was an objective one, but *"taking account of such knowledge as the insured had"*. Laws LJ, giving the lead judgment, rejected the idea that the garage should have been aware due to the circumstances of the accident, expressing the opinion that he was reluctant to think that society had reached such a sorry state that a reasonable man would have realised that there was a likelihood of claim in the circumstances.

19. The final case considered by the parties was **Verlest's Administratrix v Motor Union Insurance Co Ltd [1925] 2 KB 137**, concerning an accident insurance policy covering death. The clause required a claim to be notified as soon as possible *"after it has come to the knowledge of ... the insured's representative*". The insured died in January 1923 in a motor accident in India. Her personal representative, her sister, was notified of the death within a month, however she was unaware of the insurance policy until January 1924 when she was clearing out her sister's former property in Ripon. Upon the discovery, she notified the insurers but the claim was refused for late notification.

20. Roche J held that notice had to be given as soon as possible within the meaning of the condition. This required that all existing circumstances should be taken into account, including the available means of knowledge of the administratrix, as to the policy and the identity of the insurance company, and the exercise of reasonable diligence.

21. On behalf of Zurich, it was submitted that the clause required notification "as soon as possible after the event" and that Maccaferri had failed to do so. It was argued that it would be absurd if the insured did not have to give notification as soon as he became aware OR should have become aware of an event likely to result in a claim. If the Insured did not know of the event when it occurred, it must notify when it becomes aware of the event that was likely to give rise to a claim. In such circumstances, "as soon as possible" is not limited to specifying just a period after the event. It also meant as soon as possible after the state of knowledge was such (or should have been such) as it was possible to notify. It was submitted that an obligation to give full particulars was consistent with a duty to be pro-active in making enquiries and showed that the notice might be given a considerable time after the event when such particulars become available.

22. For Maccaferri, it was submitted that in order for the notification clause to be triggered, there must be an event at a particular time. In this case, the event in question occurred on 22nd September 2011. The critical question was whether the event, when it occurred, was likely to give rise to a claim and, it was submitted, that question should be answered based on what the insured actually knew. In the present case, the insured should not have considered the event as likely to give rise to a claim and

therefore no notification was required at that time. It was submitted that the fact that months later it became likely that a claim would arise was irrelevant for the purposes of notification.

23. It was argued that the insurer was seeking to impose a double meaning upon "as soon as possible", by both stating when the duty to notify occurs and how soon after it arises notice should be given. It was expressed that if notification of 30 days was required instead, then it could not be argued that such period ran from the date of the emergence of the likelihood of the claim. Nor could the same arguments be raised if the word substituted was "immediately". It was therefore submitted that the insurer was attempting to stretch the wording of the clause beyond its true meaning.

24. Giving the lead judgment, Christopher Clarke LJ rejected the submissions on behalf of Zurich. He determined that to accept the approach of Zurich would be to introduce a condition which "*has the potential effect of completely excluding liability in respect of an otherwise valid claim for indemnity. If Zurich wished to exclude liability it was for it to ensure that clear wording was used to secure that result. It has not done so."* (para 32)

25. He described the approach of interpreting as soon as possible as meaning that the obligation to notify arises at a later time - whenever the insured knew or ought to have known that an event in the past was likely to give rise to the claim - as *"a strained interpretation and erroneous".* (para 32)

26. The Court considered that even regardless of Zurich's approach, there was ambiguity as to the interpretation of the clause and therefore such ambiguity must be resolved in favour of the insured, applying the contra proferentem rule. Applying the authorities considered above, it was held that whether there was an obligation to notify with regard to the event was, prima facie, to be determined by the position immediately after the event. In contrast, Zurich's interpretation sought to impose a "rolling assessment" obligation, requiring constant review as circumstances develop. The Court observed that "*There are clauses which have that effect, particularly in claims made policies insuring against professional liability, but they are not in this form. If that was what was intended, the insurers could be expected to have spelt it out."* (para 33)

27. The question, therefore, to be answered was whether, when the event occurred, was it likely to give rise to a claim? This will depend on whether, in the light of the actual knowledge of the insured, a reasonable person in his position would have thought it at least 50% likely that a clam would be made. In the present case, a claim was not 50% likely here, as at September 2011. The Court briefly considered HLB Kidsons & Ors v Lloyd's Underwriters [2009] EWCA Civ 1205. The correct approach to the clause would be to construe it as meaning that "*on the facts known to the insured that likelihood ought to have been apparent to him. Likelihood in this context must be apparent to*

someone and the insured is the obvious candidate. At the same time, likelihood should not be determined by the insured's subjective views (which may be idiosyncratic).” (para 37)

28. The Court of Appeal upheld the finding of Knowles J that the claim was not 50% likely in the present case as at September 2011. The judge’s analysis found favour, having observed that whilst there had been an accident and the gun was involved, it was only a possibility that the accident involved a fault in the gun. There were other possible causes and the mere possibility of a claim was not sufficient to engage the obligation to notify. It was observed that the circumstances of the incident were *“unclear”*, particularly quite how the staple had been ejected into Mr McKenna’s eye. In the subsequent proceedings, two of the experts could find no fault in the gun.

29. Further and in any event, the Court also found that Maccaferri had exercised reasonable diligence in its enquiries, especially when no blame was being targeted at the insured.

30. **Analysis** - The decision of Maccaferri is therefore an example of the application of a restrictive approach to the interpretation of an exclusion clause. The clause in question had the potential effect of completely excluding liability for an otherwise valid claim for an indemnity, that is to say taking away with one hand what was given by the other. The clause did not need the label of “exclusion clause” in order to be treated as such, where in reality that was the effect of the clause.

31. Another recent case in the field of insurance cover is **Impact Funding v AIG [2016] UKSC 57**, a recent decision of the Supreme Court which was not cited in Maccaferri. The case concerned a policy of professional negligence insurance. Cover was provided to a firm of solicitors, Barringtons, who offered CFAs and ATE as part of its service for personal injury claims. Impact Finance agreed to lend the money to the firm to cover disbursements, so long as the merits had been assessed as bring over 50%. However the solicitors were negligent in their assessments and misused some of the loans. They defaulted on other loans. Ultimately, the solicitors became insolvent and Impact Finance pursued AIG for its losses.

32. AIG provided a standard professional indemnity policy, under which it agreed to pay on behalf of the insured *“all Loss resulting from any Claim for any civil liability of the Insured which arises from the performance of or failure to perform Legal Services”.* This cover was subject to various exclusions, including any loss arising out of the breach of any terms of “*any contract … for the supply of goods or services in the course of providing Legal Services”*.

33. AIG successfully argued that the provision of funding by Impact Finance was a service provided to the solicitors in the course of their providing legal services, therefore it was excluded by the terms of the policy. Impact argued that such a clause ought to be interpreted narrowly, applying the contra

proferentem rule. However the Supreme Court disagreed. It found that the clause in question was not attempting to *"exclude or limit a legal liability which arises by operation of law, such as liability for negligence or liability in contract arising by implication of law".* Instead the clause was simply defining the extent of an otherwise wide indemnity. It was not trying to take away *"part of the benefit which it appears to have been the purpose of the contract to provide".*

34. Lord Toulson gave the analogy of a decorator who had agreed to paint the outside woodwork of a house, save for the garage doors. The writer of the contract could draft in various ways in order to achieve the same result. He could set out the obligation to paint all of the woodwork save for the garage doors within one clause. Alternatively, he could provide for all the woodwork to be painted in one clause and then set out the exclusion in the separate clause. In such circumstances, there would be no sensible argument that simply because it was defined as an exclusion clause, the clause should be construed narrowly. In the particular case, the clause in question was simply a method of defining the scope of the main obligation, namely to provide insurance for the true clients of solicitors. Accordingly a narrow interpretation was not required.

35. Considering both Maccaferri and Impact Finance, the correct approach to interpretation of a particular clause will therefore depend upon the function of the clause. Is the aim of the clause, when read in context, to simply define the scope of an otherwise wide obligation, without negating the underlying purpose of the insurance or cutting out a remedy which would otherwise arise? – If so, the words should be read literally. However, if the aim of the clause is to curtail the indemnity for a liability which goes to the heart of the contract, then the restrictive approach of contra proferentem and Maccaferri is more appropriate.

LOUISE WORTON

Breach of contract:

Agreed remedies and loss of a chance

Christopher Edwards

Scottish Power UK plc v BP Exploration Operating Company Limited and others [2016 EWCA Civ 1043]

1. This Court of Appeal case related to the interpretation of a clause in a commercial contract that set out agreed remedies for failure to provide gas.

2. Scottish Power had entered into a number of long-term gas supply contracts with BP in relation to gas supplied from the Andrew Field in the North Sea. BP decided to 'shut in' the Andrew Field for a period of 3½ years so that production could be tied in with a neighbouring field. During this period, in breach of contract, and Article 7.1 (below) in particular, no gas was delivered by BP to Scottish Power.

3. The contracts contained an agreed method of remedying underdeliveries by BP to Scottish Power. The dispute between the parties was, in part, whether Scottish Power's remedy for BP's breach of contract was confined to the contractual remedy, or whether it was entitled to damages for breach of contract under the common law, which would have been considerably higher.

The Contracts

4. Article 7.1 of the contracts provided:

> *"Throughout the Contract Period the Seller will, in accordance with the Standard of a Reasonable and Prudent Operator, provide, install, repair, maintain and operate those Seller's Facilities which are (in the opinion of the Seller and the other Sellers) necessary to produce and deliver at the relevant times the quantities of Natural Gas from the Andrew Field which are required, in accordance with the terms of this Agreement, to be delivered to the Buyer at the Delivery Point."*

5. The "*Seller's Facilities*" were defined in Article 1 of the Agreements to mean:

> *"the production wells, platforms, separation, processing and treating equipment, pipelines and other equipment ... whether or not owned by the Seller and the Other Sellers installed or used for the purpose of producing Natural Gas from the Andrew Field and delivering the same at the Delivery Point under this Agreement."*

6. A "*Reasonable and Prudent Operator*" was defined in Article 1 as:

   "...a Person seeking in good faith to perform its contractual obligations and, in so doing and in the general conduct of its undertaking, exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking under the same or similar circumstances and conditions, and the expression the 'Standard of a Reasonable and Prudent Operator' shall be construed accordingly."

7. Article 16, headed "*Default*", contained provisions in relation to underdeliveries.

8. Article 1.1 defined "*underdelivery*" as:

   "...a failure by the Seller to deliver an amount of Natural Gas which the Seller was obliged to deliver in accordance with the Buyer's proper nomination and of which the Buyer was able to accept delivery and 'underdeliver' and 'underdelivered' shall be construed accordingly."

9. Article 16.1 provided:

   "In respect of any Day ... on which an underdelivery occurs, a quantity equal to the difference between the amount properly nominated under this Agreement ... and the amount delivered by the Seller shall be calculated and such quantity shall be classified (subject to the provisions of Clause 16.3) as 'Default Gas'."

10. Article 16.2 provided a mechanism whereby quantities of Default Gas to which Scottish Power became entitled were aggregated on a monthly basis and then drawn down when deliveries were next made so that, in respect of gas delivered under the Agreement, the Default Gas Price was payable until all the gas classified as Default Gas had been drawn on. The Default Gas Price was 70% of the Contract Price.

11. Article 16.3 provided that there should not be treated as Default Gas any amount which the Seller did not deliver by reason of Force Majeure.

12. Article 16.4 dealt with the situation where the Agreement was terminated at a time when there was an outstanding amount of Default Gas which had not been delivered. It provided for a payment to be made by the Seller to the Buyer in that event in accordance with a set formula - which was, broadly, the difference between the Contract Price and the Default Gas Price as at the date of termination of the Agreement multiplied by the quantity of Default Gas which was outstanding.

13. Article 16.6 provided:

    "The delivery of Natural Gas at the Default Gas Price and the payment of sums due in accordance with the provisions of Clause 16.4 shall be in full satisfaction and discharge of all rights, remedies and claims howsoever arising whether in contract or in tort or otherwise in law on the part of the Buyer

against the Seller in respect of underdeliveries by the Seller under this Agreement, and save for the rights and remedies set out in Clauses 16.1 to 16.5 (inclusive) and any claims arising pursuant thereto, the Buyer shall have no right or remedy and shall not be entitled to make any claims in respect of any such underdelivery."

14. Throughout the period of the shut-in Scottish Power made proper nominations of natural gas for delivery on every day of the period. There was, accordingly, an underdelivery in respect of every such day and Scottish Power became entitled to Default Gas in respect of the amount nominated.

Scottish Power's Claim

15. Scottish Power argued that as its claim for breach of contract was based not on the nominations it actually made and did not receive (as would have been the case in tort), but rather the nominations that it would have hypothetically made and received if BP had not breached the contract (as is the usual measure of loss for breach of contract,) it did not need to rely on actual underdeliveries to establish its claim or justify the remedy.

16. It further argued that clause 16.6 should be interpreted narrowly to only apply to claims where an actual underdelivery had to be proven to establish the claim or justify the remedy.

17. BP argued that clause 16.6 should be interpreted broadly to include all claims for damages for loss caused by an underdelivery, and remedies claimed under such claims could be considered remedies for an underdelivery.

18. At first instance, Leggatt J came to the conclusion that Article 16.6 was intended to dovetail with Article 16.1 so that whenever the loss for which compensation was claimed resulted from an underdelivery, and therefore attracted the remedy of Default Gas this was the sole remedy for loss. Scottish Power appealed.

Court of Appeal Decision

19. Lord Justice Christopher Clarke gave the only reasoned judgment, which upheld the first instance decision.

20. He stated that:

    a. Article 16 was intended to be a comprehensive contractual remedial regime in carefully drafted long-term contract.

    b. It would be odd if a breach of Article 7 entitled Scottish Power to an additional remedy beyond Default Gas. If Scottish Power's interpretation was right, the remedy of Default Gas was only

available in the case of a non-negligent accident or mishap or some natural cause, or possibly some deliberate decision not to supply gas that did not breach Article 7.1.

c. Scottish Power's argument involved a level of legal finesse that it is unlikely that commercial men would have contemplated.

d. It would be natural that where breach of separate articles (in this case, Articles 7.1, 3.1 and 6.12) resulted in the same loss, it would be natural for the parties' intentions to be that a contractually regime would apply to each, rather than to only some of them.

21. Scottish Power's appeal was made up of 3 further arguments:

a. There is a presumption that parties do not intend to give up rights or claims which the general law gives them: *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689. As Leggatt J accepted that there were 2 possible meanings of Article 16.6, he should have adopted the meaning which did not involve Scottish Power losing potentially valuable rights.

b. If Scottish Power's remedy for breach of Article 7.1 is Default Gas, then the Article has little purpose.

c. As soon as Scottish Power became aware of the BP's prospective breach of Article 7.1 and the likely length of outage it was reasonable for it to make forward purchases, which caused it to suffer loss. As such, the loss was not caused by the underdelivery but before the underdelivery occurred.

22. All 3 arguments were rejected:

a. The fact there were 2 possible meanings was the start of the enquiry, not the end. It was then necessary for the court to apply "*all its tools of linguistic, contextual, purposive and common sense analysis to discern what the clause really means*" per Briggs LJ in *Nobahar-Cookson v The Hut Group Ltd* [2016] EWCA Civ 128 [19]. If as a result of so doing the answer becomes clear the court should give effect to it even though the interpretation may deprive a party of a right at law which he might otherwise have had.

b. Whilst Article 16 being a comprehensive code did limit Article 7.1's relevance as a standalone provision, it was still of use if, for instance, BP was in repudiatory breach of the contract and Scottish Power accepted that breach and claimed damages.

c. A prospective breach did not give rise to a claim in damages. The breach found by the judge, namely a failure to operate the field, occurred on the first day of the shut-in and daily thereafter, meaning that Scottish Power's loss crystallised on a daily basis and the forward purchases were acts of prospective mitigation which it had no duty to carry out.

Analysis

23. This case underlines the basic principle of contractual interpretation, namely the objective intention of the parties. The Court of Appeal focused on what, objectively, Scottish Power and BP had intended, and in doing so, looked at the contract through the lens of commercial parties rather than lawyers.

24. Whilst Scottish Power's argument had appeal in its differentiation between causes of action where a calculation of remedy requires considering what did happen, such as tort, and causes of action where all that needs to be considered is would have happened, as in breach of contract, the Court preferred to reject such an argument in favour of a more realistic and common sense approach.

Anthony McGill v The Sports Entertainment Media Group and Others [2016] EWCA Civ 1063

25. This case relates to an appeal by one football agent, Mr McGill, against another, the Sports Entertainment and Media Group ('SEM') and against Bolton Wanderers Football Club, as well as against various individuals connected to both entities. The case revolved around the transfer of Gavin McCann from Aston Villa to Bolton Wanderers in June 2007.

26. Whilst the appeal covered a number of areas, this article focuses on the arguments relating to the quantification of a claim for loss of a chance.

Facts

27. In April 2007, McGill claimed to have entered into an oral contract with McCann in respect to the former acting as the latter's exclusive agent so that he could obtain for him either a new contract with Aston Villa or a transfer to another club.

28. Under the Football Agents Regulations made by the Football Association in 2006, for a football agency agreement to be enforceable in any forum governed by the FA, including any FA arbitration, it had to be in writing in a standard written form. McCann refused to sign any written agreement with McGill.

29. McGill claimed to have then put together a deal to take McCann to Bolton Wanderers, which SEM then took over by inducing McCann to breach his contract with McGill and switch to them.

30. After first bringing proceedings against McCann which were settled at the door of the court, McGill brought claims against SEM and Bolton Wanderers. These included claims for inducing breach of contract and unlawful means conspiracy against SEM and the individuals connected to it.

First Instance Decision

31. HHJ Waksman QC found that McGill had entered into an valid oral exclusive agency agreement with McCann, and SEM had induced him to breach that contract, before doing very little as the deal had effectively been sorted out by McGill.

32. However, he found that on the balance of probabilities, McCann would not have signed a written agreement with McGill in any event:

140. ...There is in fact no real evidence that he would have done so. He was certainly unwilling to do so when Mr McGill proffered him [a written agreement] on 6 April. There is no evidence (or plea) as to when it would have been that he would have signed such an agreement. But if left to the last moment, Mr McCann might have decided simply not to sign. He could have agreed his terms personally. Mr McGill would not have been on strong ground in (for example) saying that the club should not complete any paperwork in respect of Mr McCann until the issue was resolved because, contrary to the Regulations, he had not in advance obtained a written agreement. Having heard and seen Mr McCann I do not believe that it would have been beyond him to refuse to sign an agreement. After all, it is part of the reason why (according to Mr McGill's case and as I have found) ... he was seduced away from Mr McGill by Mr Sheron.

33. The judge further found that the case had not been put on the basis of loss of a chance, and so would fail in respect of causation and loss.

The Appeal

34. The Court of Appeal, where Henderson J gave the only reasoned judgment found that McGill's claim had been put on the basis of loss of a chance. The Particulars of Claim at trial relating to loss were as follows:

133. By reason of the matters aforesaid the Claimant has suffered loss and damage in the loss of the opportunity to be paid the agent's fee on the transfer. But for the acts complained of the Claimant would have received a commission for brokering the transfer deal. He would have received it by reference to his contract with Mr McCann under which he had been appointed as his exclusive agent. That contract would have been reduced to writing at the time that the deal was completed, for regulatory purposes, as part of the collation of the various documents to be lodged with the Football Association. Alternatively, if (which is denied) the agreement with Mr McCann reached on 6 April was not already legally binding it would have become so when it was reduced to writing which would have happened but for the fact that the Claimant was ousted. But for the acts complained of he would have participated in the completion of the formal documents surrounding the transfer and would have been declared to the Football Association as the agent who had acted in the transfer. He contends that but for the unlawful acts complained of he would have received a fee of up to £390,000 being 10% of the value of the guaranteed basic earnings under the playing contract with Bolton. No credit should be given against that figure for sums received from the Player in settlement of [the 2007 Action] because as against the sum being claimed from him and his liability for the Claimant's costs if he lost, which

were at the time of the settlement approximately £155,000, the Player paid and the Claimant accepted a net payment to him of £50,000 and it is not open to the Defendants to assume the such sum was only referable to the sum claimed and not the costs liability regardless of how any settlement terms were actually worded. But for the unlawful acts complained of the Claimant would have continued to represent the Player and he also lost the opportunity to earn further sums from his representation of him.

35. The Court of Appeal found that whilst McGill's counsel at first instance did not address loss of a chance, the first sentence of the paragraph above:

By reason of the matters aforesaid the Claimant has suffered loss and damage in the loss of the opportunity to be paid the agent's fee on the transfer.

was sufficient to retain a claim for loss of a chance even though the rest of the paragraph used the phrase 'would have' which suggested a claim based on the balance of probabilities.

36. Accordingly, the Court of Appeal considered the case law in respect of a loss of a chance which depended on the actions of third parties, and in particular the case of *Allied Maples Group Limited v Simmons & Simmons* [1995] 1 WLR 1602, where Stuart-Smith LJ gave the leading judgment. He stated:

In many cases the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case, does the plaintiff have to prove on balance of probability, as Mr Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?

Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr Jackson's submission is wrong and the second alternative is correct...

But, in my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.

37. The court held that this was the correct approach to take in this case, where McGill's loss of a chance was dependent on McCann signing the agreement. However, it refused to overturn the first instance judge's finding that McGill had failed to prove on the balance of probabilities that McCann would have signed the written agreement with him at any point.

38. It decided that appropriate approach was to remit the case to HHJ Waksman QC for him to determine the correct percentage chance of McCann signing with McGill, with the proviso that it could not exceed 50%. This hearing does not appear to have yet taken place.

Analysis

39. This element of the appeal (which also included other factual appeals and an appeal in relation to whether all the Defendants had a complete defence on the basis that McGill had previously settled with McCann under *Jameson v CEGB* [2000] 1 AC 455, all of which failed,) is interesting for 2 reasons.

40. Firstly, it bolsters the approach taken in *Allied Maples* as being the correct approach to damages for loss of a chance where a third party is involved, meaning that even unlikely actions by a third party may mean some damages awarded to a Claimant.

41. Secondly, it underlines the importance when claiming for future loss, of differentiating between claims for the loss of a chance and standard claims which rely on certain future events definitely taking place. In respect of claims which rely on the behaviour of third parties, Claimants will probably wish to consider at the least bringing a claim for a loss of a chance in the alternative.

CHRISTOPHER EDWARDS

Civil Procedure:

costs and security for costs:

Sarah Clarke

Proportionality and additional liabilities

1. The recent SCCO case of Murrells v Cambridge University NHS Foundation Trust [2017] EWHC B2 (Costs) considered the interplay between the new test of proportionality under CPR 44.3 and additional liabilities.

Facts

2. The matter arose out of a clinical negligence claim in which the claimant accepted an offer of £9,650 in damages plus costs on the standard basis. The offer was made after a defence denying liability had been filed and before the CCMC. The issue to be determined was the amount of costs payable by the Defendant.

3. The claimant's bill of costs was divided into two parts:

   - Part 1 sought £59,520.50 for work carried out prior to 1 April 2013, namely when the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force; and
   - Part 2 sought £81,048.55 for work carried out after 1 April 2013. This included an ATE premium of £22,737.

4. The claimant's solicitors acted under a CFA entered into in September 2012. The claimant also had the benefit of an ATE insurance policy taken out in September 2012. This was staged such that £5,506.80 was payable on settlement prior to issue, £22,737 following issue and £56,476 up to 45 days before trial. A success fee of 100% was claimed on all the profit costs.

5. At the detailed assessment hearing, it was agreed between the parties that Master Brown should firstly determine whether or not the Part 1 base costs (i.e. excluding additional liabilities) of £32,000 were disproportionate pursuant to CPR 44.4(2) as they were incurred before LASPO came into force. It was determined that they were disproportionate given that the claim was unlikely to exceed £25,000. Thus the test of necessity was applied and the sum of £16,000 allowed.

6. As to Part 2 base costs, the court applied the test of reasonableness set out in the new CPR 44.3(2) and reduced the sums claimed to £20,436. The success fee was reduced to 82%.

The issues

7. The hearing was to determine whether the Part 2 base costs after the earlier deductions were disproportionate. The issues were whether:

   (i) the new test of proportionality under CPR r.44.3 applied to additional liabilities, namely the costs of the ATE premium and the success fee;
   (ii) the part 2 base costs were disproportionate under the r.44.3 test of proportionality;
   (iii) the additional liabilities were disproportionate.

8. The Defendant's position was that the base costs should be aggregated with the additional liabilities when considering proportionality. They relied on the decision of Master Gordon-Saker in *BNM v MGN Ltd* [2016] EWHC B13 (which has been fast tracked for an appeal).

9. The matter was not finished in time and a further hearing was listed. In the period up to the adjourned hearing, Master Rowley handed down the decision in the case of *King v Basildon & Thurrock University Hospitals NHS Foundation Trust* which also dealt with the issue of proportionality and funding arrangements entered into before 1 April 2013.

The provisions of new CPR 44.3 and 44.4

44.3

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(Factors which the court may take into account are set out in rule 44.4.)

(5) Costs incurred are proportionate if they bear a reasonable relationship to –

(a) the sums in issue in the proceedings;

(b) the value of any non-monetary relief in issue in the proceedings;

(c) the complexity of the litigation;

(d) any additional work generated by the conduct of the paying party; and

(e) any wider factors involved in the proceedings, such as reputation or public importance.

(7) Paragraphs (2)(a) and (5) do not apply in relation to –

(a) cases commenced before 1st April 2013; or

(b) costs incurred in respect of work done before 1st April 2013,

and in relation to such cases or costs, rule 44.4.(2)(a) as it was in force immediately before 1st April 2013 will apply instead.

44.4

(1) The court will have regard to all the circumstances in deciding whether costs were –

(a) if it is assessing costs on the standard basis –

(i) proportionately and reasonably incurred; or

(ii) proportionate and reasonable in amount, or

(b) if it is assessing costs on the indemnity basis –

(i) unreasonably incurred; or

(ii) unreasonable in amount.

(2) In particular, the court will give effect to any orders which have already been made.

48.1

(1) The provisions of CPR Parts 43 to 48 relating to funding arrangements, and the attendant provisions of the Costs Practice Direction, will apply in relation to a pre-commencement funding arrangement as they were in force immediately before 1 April 2013, with such modifications (if any) as may be made by a practice direction on or after that date

Decision of Master Brown

10. It was held that additional liabilities were not subject to the new test of proportionality under CPR 44.3, or even if they were, they should not be aggregated with the base costs. Master Brown followed the decision in *King*, and disagreed with the decision in *BNM*. Master Brown found that:

    20. To my mind, it is relevant to have particular regard to the approach to the assessment of additional liabilities under the old pre-LASPO rules. That approach is summarised at paragraphs 40 and 41 of Coventry v Lawrence [2015] A.C. 106. In short, the Court does not ask itself whether the costs of an ATE premium or a success fee are proportionate to the importance of the case and what was at stake but looks at the litigation risk. If the premium is necessarily incurred, it is proportionate and it is proportionate even in the event that it is disproportionately high when compared with the damages reasonably claimed.

26. In Coventry it was observed that the application of the test of proportionality by reference to the amount at stake would imperil the viability of the Pre- LASPO scheme and the objective of improving access to justice, see the judgements of Lords Neuberger and Dyson (with whom the majority agreed). At paragraph 78 of their judgement it is stated: "In summary, if the basis upon which Mr. McCracken's attack on section 11.7 and 11.9 [of the Costs Practice Direction] was founded were to be accepted, it would have imperilled the whole scheme put in place by the 1999 Act because lawyers would have been unwilling to enter into CFAs for fear that, even if successful, the uplift which that had agreed on the basis envisaged by the system embodied in the 1999 Act would have been liable to be reduced or disallowed on the assessment because it would have been held to be disproportionate what was at stake in the litigation."

27. The guidance set out CPD 11.9, was held to be "necessary to make the scheme work" (see Coventry,paragraph77) and "integral to the scheme"(see Coventry, paragraph. 88).

11. Further, he found that CPR 48.1 made it clear that the intention of Parliament was to preserve the rules which related to the recovery of additional liabilities. Furthermore, the new CPR 44.3 makes no reference to additional liabilities. CPR 44.3(7) provides that for cases which have commenced after 1 April 2013, the new test does not apply to costs incurred in respect of *'work done before 1 April 2013'*. Master Brown found it difficult to see how taking out an ATE premium could be regarded as '*work done'*. He argued that if the Defendant were right (i.e. that the new test applied), and assuming it could not be regarded as work done, this would mean that all such liabilities, whenever incurred, for cases that commenced after 1 April 2013, would be caught by CPR 44.3(7), and it struck him as unlikely that the provision could be intended to have such wide reaching retrospective effect.

12. A further reason which supported his conclusion was that if the new proportionality test applied in the way contended for by the Defendant, it would have a considerable prejudicial effect upon litigants who had entered into pre-commencement funding arrangements. It would lead to a substantial, if not complete, disallowance of the recovery of the additional liabilities yet they would nonetheless remain liable to the ATE provider and their lawyers. This would inevitably lead to many meritorious cases being discontinued. He concluded that if the legislature had intended to move so dramatically away from the approach in assessing additional liabilities it would have been done expressly.

13. That being the case, he went on to consider the extent to which the old Costs PD (CPD) could be incorporated into a current costs assessment where there was a pre-commencement funding

arrangement. He disagreed with the approach taken in *BNM*, and found that the meaning of CPR 48.1 should be interpreted so as to incorporate the wider elements of the old CPD. Thus paragraph 11.9 CPD was to be applied which meant that the case costs and additional liabilities will be assessed separately in relation to proportionality.

14. Finally, in relation to the ATE premium, the Defendant argued that it should be reduced on the ground that it was disproportionate to the sums at stake. No issue was taken as to the reasonableness of the premium nor was it argued that it was disproportionate to the costs risks. Master Brown concluded that this was not the correct approach. He relied on the judgment in *Rogers v Merthyr Tydfil* [2007] 1 WLR 808, in which it was held that:

'for all but the more serious or specialised personal injury claims, ATE insurance is block rated rather than individually assessed. For block rating to work the insurer needs to be sure that it is receiving a full and fair selection of cases, ranging from those where liability is unlikely to be in doubt to those where it is contested. In order to avoid adverse selection it is standard practice for ATE insurers to require solicitors to insure all available cases with the ATE provider. In practice, therefore, claimants' solicitors cannot simply pick and choose from a variety of products and offer different policies to different clients'.

15. The fact that 2 SCCO Masters have now gone against the judgment in *BNM* indicates a change in the direction of travel and is no doubt a comfort to many claimant solicitors who have ongoing cases funded by way of a pre-1 April 2013 CFA with an ATE premium. However until the Court of Appeal determines the appeal in *BNM*, cases can still be argued either way.

Security for costs

1. The case of Premier Motorauctions Ltd (In Liqudiation) v Pricewaterhousecoopers LLP [2016] EWHC 2610 (Ch) considered the correct test to be applied in an application for security for costs in a situation where the party against whom the order was sought had an ATE insurance policy.

Facts

2. The claimant companies experienced a cash flow issue when a proposed sale fell through. It was their case that the defendants had advised them that they required significant borrowing, which was provided to them on the basis that the business was sold through an administration. They alleged, through their joint liquidators, that the defendants had breached various duties to them and conspired to cause them loss.

3. The defendants made an application for security for costs, alleging that there was reason to believe that the claimants would be unable to pay their costs if ordered to do so because they were insolvent and in compulsory liquidation. The claimants relied on the fact that ATE policies had been issued to them and their joint liquidators. They had been issued policies by QBE Ltd (the primary layer of £250,000 and a tertiary layer of £1,750,000 in excess of £1m) and by Elite (the secondary layer of £750,000 in excess of £250,000). A premium of £75,000 had been paid on inception of the QBE policy and a further £350,000 was payable within 4 weeks of disclosure.

4. The defendants sought details as to how the £350,000 was to be paid and also sought the provision of a deed of indemnity for its costs on the basis that the ATE policies were not adequate security since they could be avoided in certain circumstances. A deed of indemnity was refused and an application for security for costs was made, the total costs estimate being £7.2 million. The claimants then arranged further layers of insurance. These were a fourth layer with Elite (£750,000 in excess of £2,750,000), a fifth layer with Acasta (£500,000 in excess of £3.5 million) and a 6th layer with DAS (£1 million in excess of £4 million). In total therefore they had ATE insurance cover for £5 million.

5. The defendant's contention was that what is required by way of security is something equivalent to cash or a first-class bank guarantee. They argued that the ATE policies did not guarantee payment since there were significant risks attached to them, for example, the insurer could avoid payment and in this case, 2 of the providers were based in Gibraltar and could not be accepted as credit-worthy.

Issues

6. The question to be determined was what regard, if any, was to be given to the fact that a party defending a security for costs application had an ATE insurance policy when considering the test under CPR 25.13.

CPR 25.13

(1) The court may make an order for security for costs under rule 25.12 if,

(a) It is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b) (i) one or more of the conditions in paragraph (2) applies…

(2) The conditions are-…..

(c) *The claimant is a company….and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so.*

The decision of Mr Justice Snowden

7. It was found that the starting point of any analysis was to ask the threshold jurisdictional question posed by 25.13. In doing so, the court should have regard to the assets which the claimant company would have available to meet an adverse costs order. The fact that a company was in liquidation did not necessarily mean that it would have insufficient funds to meet an adverse costs order. Even insolvent companies could have substantial assets. There was no reason in principle why the existence of an ATE policy should not be taken into account. Where the party defending the application had an ATE policy, the question was whether, having regard to the terms of the policy, the nature of the allegations in the case and all the other circumstances, there was reason to believe that the ATE policy would not respond so as to enable the defendant's costs to be paid.

8. In relation to the specific policies taken out in this case, these had been arranged by joint liquidators who were independent professional insolvency office-holders. They had arranged the policies after having conducted an investigation into the case with the assistance of experienced solicitors and counsel, and had every incentive to ensure that the terms and conditions would be adhered to. In relation to the Gibraltarian insurers, the first one had an established track record and there was no reason to believe they would not pay. However in relation to the second one, there was little evidence about its history or current operations, and the lack of any recent financial information raised doubts as to its financial standing and ability to pay. If that insurer stood alone, the r25.14 threshold would have been crossed. However as they only provided one layer of insurance, which would not be reached until well after disclosure, it was not appropriate to order the provision of security for costs at that stage.

9. Reliance was placed on the judgment of Akenhead J in *Michael Phillips Architects v Riklin and another* [2010] BLR 569, and this particular passage:

"18. These three cases are not absolutely determinative as to whether ATE insurance can provide adequate or effective security for the defending party's costs. That is not surprising because it will depend upon whether the insurance in question actually does provide some secure and effective means of protecting the Defendant in circumstances where security for costs should be provided by the Claimant. What one can take from these cases, and as a matter of commercial common sense, is as follows:

(a) There is no reason in principle why an ATE insurance policy which covers the Claimant's liability to pay the Defendant's costs, subject to its terms, could not provide some or some element of security for the Defendant's costs. It can provide sufficient protection.

(b) It will be a rare case where the ATE insurance policy can provide as good security as a payment into court or a bank bond or guarantee. That will be, amongst other reasons, because insurance policies are voidable by the insurers and subject to cancellation for many reasons, none of which are within the control or responsibility of the Defendant, and because the promise to pay under the policy will be to the Claimant.

(c) It is necessary where reliance is placed by a Claimant on an ATE insurance policy to resist or limit a security for costs application for it to be demonstrated that it actually does provide some security. Put another way, there must not be terms pursuant to which or circumstances in which the insurers can readily but legitimately and contractually avoid liability to pay out for the Defendant's costs.

(d) There is no reason in principle why the amount fixed by a security for costs order could not be somewhat reduced to take into account any realistic probability that the ATE insurance would cover the costs of the Defendant"

10. In *Phillips*, it was found that there were various risks that the ATE policy would not pay out (e.g. might be avoided under a clause re fraudulent claims). Akenhead J went on to conclude that the ATE insurance was not sufficient as he did not see how it could be said that *'an insurance policy which does not provide direct benefits to the Defendants and under which they are not amongst the insured parties and which does provide for cancellation of the policy either for a large number of reasons or for no reason provides any appreciable benefit or raises any presumption or inference that the Claimant will be able to pay the Defendants' costs'*.

11. Mr Justice Snowden the the case of *Geophysical Service Centre v Dowell Schlumberger (ME) Inc* [2013] EWHC 147 (TCC), in which Stuart-Smith J was somewhat more positive about the effect of an ATE premium, concluding that:

"….it is also to be recognised in my judgment that the funding of litigation by ATE policies is, and has for some years now, been a central feature of the ability of parties to gain access to justice. In the absence of evidence to the contrary, the court's starting position should be that a properly drafted ATE policy provided by a substantial and reputable insurer is a reliable source of litigation funding…..<u>the question is not whether the assurance provided by an ATE policy is better</u>

security than cash or its equivalent, but whether there is reason to believe that the claimant will be unable to pay the defendant's costs despite the existence of the ATE policy…' [my emphasis]

12. In relation to these cases, Mr Justice Snowden noted that they tended to focus on the question of whether an ATE policy was a suitable alternative form of security to cash or a bank guarantee on the assumption that the court had already decided that security for costs should be provided. However, the question here was whether or not an application for security for costs should succeed. He found that the mere fact that the claimant was in an insolvency procedure was not sufficient in itself to get the defendants over the jurisdictional line. He could see no reason why the company's rights under an ATE policy should not be taken into account with their other assets at first stage of the test. He went on to find that:

"accordingly, I think that in a case in which a claimant has obtained an ATE policy specifically to cover the bringing of a claim, and relies upon it to resist an application for security for costs, the approach taken by Stuart-Smith J in paragraph 20 of Geophysical is correct. The question is not whether the ATE policy provides the same security as cash or a bank guarantee, or indeed whether the ATE policy provides the same security as might a deed of indemnity from the same or another insurer. It is whether, having regard to the terms of the ATE policy in question, the nature of the allegations in the case and all the other circumstances, there is reason to believe that the ATE policy will not respond as to enable the defendant's costs to be paid"

13. In relation to the question as to whether or not an insurer was likely to pay out, it was observed that it was unlikely that the insurers would '*fight tooth and nail'* to avoid the policy if called upon on the grounds that the ATE insurance market was sufficiently competitive that to do so could be seen as being against the insurers' commercial interests.

14. This is a helpful case for insolvency practitioners and their lawyers. Previous cases dealing with security for costs and ATE insurance had not involved companies in formal insolvency and the judge here made a point of relying on the professionalism of office-holders, their incentive to obtain credible and robust policies of insurance and the nature of the market of ATE insurance (specifically providing it to insolvency practitioners) as reasons to dismiss uncorroborated challenges to the policies.
15. Insolvency practitioners can rely on this case for assurance that, assuming that the policies they take out are standard form and obtained from reputable insurers, it will only be in unusual

circumstances that the court will determine that the ATE insurance policy is not sufficient to defeat an application for security for costs.

16. For defendants to claims by insolvency companies, the point to bear in mind is that it will not be sufficient simply to rely on the companies' insolvency in support of an application for security. They will need some evidence of a specific and real threat to the policy in question, and relying upon general clauses in the policy which *may* lead to the policy being avoided is unlikely to be enough to obtain security for costs.

Departing from costs budgets

1. In the recent case of Sony Communications International AB v SSH Communications Corp [2016] EWHC 2985 (Pat) the High Court considered whether or not a claimant, who had overspent on one phase of their budget and had not sought to vary the costs budget, could seek to take advantage of an underspend in another phase.

The facts

2. The trial involved an action for the revocation of a patent. It was found that the patent was invalid (the "invalidity" limb), but that if it was not it would have been infringed by one of the claimant's products (the "infringement" limb), and the issue to be determined was the costs to be awarded to the claimant.

3. The budgets were agreed between the parties. The claimant had apportioned the costs claimed in their budget between the "infringement" and "validity" issues, giving a % figure for each one.

4. Following budgeting, it transpired that the experts would need to consider a larger number of documents than initially anticipated. However the claimant did not seek to vary their budget and thus overspent on this phase (budget of £215k as against £580k spent). The defendant had in fact budgeted for a higher sum in the same phase (£323k).

5. The claimant overspent in their trial preparation stage (budget of £111k as against £164k spent), but underspent at the trial stage (budget of £380k as against £336k spent). They therefore sought to combine the 2 phases in order to balance them out. The claimant also incurred post trial costs of £80k due to obtaining a witness statement from their expert on costs (it being alleged that his first statement approached the issue on the wrong basis).

6. The claimant sought to argue that given the value of the counterclaim (in excess of £10m) and the fact that this was a case normally regarded as too large for budgeting, the court should be more indulgent to errors in estimating costs. Further, they relied on the fact that the estimate was *'impressively close'* to the actual costs and that it was not seeking an award above their total budget.

7. On the other hand, the defendant argued that the cost budget was a very important consideration, the claimant had failed to keep the court informed of variations and there was no good reason put forward to depart from the budgets.

8. Both parties agreed that the judge should make a summary assessment given that the budgets were agreed on the basis that the costs were reasonable and proportionate.

The issues to be determined

9. The following issues were considered:
   (i) Could a party combine phases when the overall result would mean that they had stayed within budget?
   (ii) In a situation in which a party had apportioned the costs at each phase according to different issues in the case, were they entitled to depart from this?
   (iii) In this particular case, was there 'good reason' to depart from the budgets?

CPR 3.18

In any case where a costs management order has been made, when assessing costs on the standard basis, the court will —

(a) *have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and*

(b) *not depart from such approved or agreed budget unless satisfied that there is good reason to do so. …*

Decision of Mr Roger Wyand QC (Deputy High Court Judge)

10. In relation to determining how the court should use its power to depart from the budget, reliance was placed on the case of *Henry v News Group Newspapers Ltd* [2013] EWCA Civ 19 From that case, the judge elicited the following principles (paragraph 14):

i) *The budget is not a cap but a guideline which the court has the power to depart from;*

ii) *Each phase of the budget is to be considered separately and it is not legitimate to combine two phases where one is overspent and the other is underspent;*

iii) *The court will only depart from the budget where it is satisfied that there is a good reason to do so;*

iv) *The parties have a duty to revise their budgets if significant developments in the litigation warrant such revisions;*

v) *The court can depart from the budget even if the parties have not revised their budgets as the litigation proceeds. The passage in the judgment of Moore Bick LJ set out above could be read as suggesting that it would be more difficult to establish 'good reasons' for departing from the budget if the parties have been assiduous in updating their budgets, however, that would be encouraging parties to ignore their duty to update;*

vi) *In considering whether there are good reasons for departing from the budget the court should take into account all the circumstances of the case;*

vii) *A particular consideration is the function of the budget in ensuring that the costs incurred are proportionate and reasonable. If the budget is being considered before the result of the trial is known, both parties have an interest in trying to ensure that both their own and the other side's costs are reasonable and proportionate. Once the result is known, the two parties have conflicting interests in that the winning party will seek to recover as much of their costs as possible and the paying party will seek to reduce the costs it has to pay. This makes it much more difficult for the court to assess what costs are reasonable and proportionate;*

viii) *A further function of the budget to be considered is the value to the opposing party to understand what is being done and what it is going to cost. Accordingly, a factor in the assessment is whether any requested increase in the budget, post-trial, will be whether the increase would take the paying party by surprise.*

11. In relation to the trial preparation and trial phases, the claimant suggested combining the 2, which would mean an overspend of £9,000, arguing that the split between them was arbitrary depending on whether the work is done in the period immediately before trial and the first day of trial. The

defendant disputed, this arguing that the rules are clear on this, and further argued that the post-trial costs of £80k should be added to the trial costs, giving a £36k overspend in trial costs.

12. The judge agreed that the 2 phases should not be combined as the rules were clear that phases ought to be considered separately.

13. As regards the post-trial costs, reference was made to the guidance notes to Precedent H which stated that the trial phase *'included dealing with draft judgment and related applications'* and it was found that it was correct to bundle them together. The judge concluded that a number of difficult and unforeseen issues arose regarding the assessment of costs such that there were good reasons to depart from the budget.

14. In relation to the apportionment issue, the claimant had given a % apportionment between "validity" and "infringement" under each phase. For instance, for the CMC for which the costs had already been incurred, they apportioned 50% under each head. The claimant sought 100% of their CMC costs on the basis that these cannot be apportioned and represent general costs which go to the overall winner. The defendant argued that the claimant was bound by the apportionment entered on the Precedent H.

15. Both parties relied on Practice Direction 3E paragraph 7.3 which provides that:

    If the budgets or parts of the budgets are agreed between all parties, the court will record the extent of such agreement. In so far as the budgets are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgets. The courts approval will relate only to the total figures for each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

16. The claimant argued that this indicates that it is only the total figure for each stage that is important, and that the workings out to reach a final figure were not binding (e.g. which solicitor would do the work, the hours taken by each of them and so on). The defendant accepted that court approval related only to the total figure, but pointed out that the PD distinguishes between budgets

which are *agreed* and those which are *approved*. It was submitted that where there is an agreement between parties, that is a contract that cannot be unilaterally varied. Further, by varying the percentages to increase the validity percentage, the claimant was in fact increasing their budget in respect of validity.

17. The judge found that:

> *…I do not believe that the Practice Direction intended any such distinction to be drawn between budgets which have been agreed and those which have been approved. The consequence of SSH's submission would be that if Sony's solicitors realised that their apportionment was wrong they would have to seek SSH's approval to change it and failing approval would have to apply to the court for approval. However, the court's approval only relates to the total figure for each phase. If it is only the apportionment that is being changed, that is outside the remit of the court's approval.*
>
> *…Where it is apparent that the allocated apportionment is wrong I believe it would be invidious if the court could not, with the assistance of the parties, make its own assessment*

18. In relation to the expert fees, it was found that as one of the functions of the budget was to avoid catching the opposing party by surprise, and it was clear that the defendant had believed expert costs would be higher than anticipated by the claimant, there was a good reason to depart from the budget and increase the claimant's budget to the level of the defendant's budget (paragraph 24).

19. This case provides helpful clarification on the fact that each phase needs to be considered *separately* and so even if there is an overspend in one phase and an under spend in another such that overall the costs remain within the total budget, parties must nonetheless vary their budget as they are bound by their initial budget unless there are good reasons to depart from it.

SARAH CLARKE

Implied Terms and Incomplete Contracts;
Wells v Devani [2016] EWCA Civ 1106

Tom Webb

Introduction

1. In this recent decision, the Court of Appeal has considered the question of whether terms can be implied so as to rescue a seemingly otherwise incomplete agreement. Despite a dissenting judgment from Arden LJ, the court found that fundamental terms could not be implied so as to complete the contract.

Legal Background

2. The law in respect of both incomplete agreement and implied terms, is lengthy. Where the two matters collide, there is further complexity still. A full rehearsal of the law is beyond the scope of these notes, but in summary:

Incomplete Agreements

3. The parties to a contract must agree upon the essential terms in order for there to be a binding agreement:

> *"…there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties."*[1]

4. It is a difficult test to define, but in general terms the absence of, or uncertainty as to the meaning of, a central term of a contract, gives rise to a real risk that a court will find that there is no concluded agreement.

5. That said, the courts have historically recognised that agreements are not always precisely drafted (particularly if lawyers are not involved) and so judges will be slow to strike down commercial agreements as incomplete. To use a somewhat antiquated quote, the courts will endeavour to give effect to such agreements so that:

[1] *May and Butcher Ltd v R* [1934] 2 KB 17n, HL per Viscount Dunedin at 21

"…the dealings of men may so far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains."[2]

Implied Terms

6. The law of implied terms was recently revisited in *Marks & Spencer PLC v BNP Paribas Security Services Trust Company (Jersey) Limited* [2015] UK SC 72. The test remains a relatively high one and a term may only implied if it is:

   i. Reasonable and equitable;

   ii. Necessary to give the agreement business efficacy;

   iii. Obvious;

   iv. Capable of Clear Expression; and

   v. The term must not contradict an express term.

7. The *M&S* case further adds that:

   i. The question of implication is not critically dependent on the actual intention of the parties at the time the contract was made – it is to be approached from the point of view of notional people in the position of the parties;

   ii. Fairness, and the fact that an officious bystanderwould have agreed to the term had it been suggested, are necessary, but not themselves sufficient to imply a term.

   iii. Whether the term is reasonable and equitable will rarely add anything to the consideration;

   iv. It is only a requirement that one of business efficacy or obviousness is satisfied;

   v. "Utmost care" is required in posing the question that the officious bystander would ask;

   vi. Business efficacy is not about 'absolute necessity' – it is a value judgment.

[2] *Hillas & Co v Arcos Ltd* [1932] All ER Rep 494 at 499.

8. *M&S* also confirmed that construing agreements and implying terms are different tasks (para 31).

Implying Terms into Incomplete Agreements

9. As to whether terms can be implied so as to complete an otherwise incomplete agreement, history would suggest that this is not acceptable: *Scancarriers A/S v Aotearoa International Limited* [1985] 2 Lloyd's Rep 419.

Factual Background

10. In the mid-2000's Mr Wells and a colleague undertook the development of 14 flats in Hackney. They engaged Shaw & Co. under a sole agency contract (on 3% commission) to sell them. By early 2008, only 6 of them had been sold.

11. Mr Wells took matters into his own hands and started to pursue alternative avenues in search of a sale. One such avenue was to contact Mr Devani, another estate agent. After a brief introductory email exchange, Mr Wells and Mr Devani spoke on the phone on 29th January. The trial judge found that when the discussion turned to fees, the following occurred:

"*Mr Wells asked Mr Devani about his fees, and (he) replied that his standard terms were 2% + VAT…*

"*Mr Devani did not inform Mr Wells (expressly) before the making of that contract of the circumstances under which he would be entitled to remuneration, but did tell him the manner in which it would be calculated*"

12. The trial judge expressly noted that there had been a "*failure to define the commission-entitling event*" ie the trigger that would entitle Mr Devani to payment of his commission.

13. Nonetheless, immediately following the conversation on the 29th, Mr Devani set about finding a buyer. Within a week he had facilitated a deal whereby Newlon Housing Association would purchase the remaining flats at asking price.

14. Only after Newlon's offer had been made and accepted did Mr Devani send a copy of his terms and conditions to Mr Wells. These contained terms as to the aforementioned "*commission-entitling event*".

15. It is not entirely clear as to why Mr Wells did not thereafter make payment, but needless to say matters ended up in court with Mr Devani suing for his £42,000 + VAT commission.

The Decision – First Instance

16. At trial Mr Devani appears to have made his case on the basis that the t's and c's sent on 5th February represented the contractual terms. Mr Wells denied that these terms were incorporated as they were only sent post-performance. He argued that there was no completed agreement and no sum owing.

17. There was also an argument as to the effect of the Estate Agents Act 1979 but that is not relevant for present purposes.

18. At first instance HHJ Moloney QC decided that:

    i. The binding agreement was concluded during the 29th January telephone conversation;

    ii. There had been no express agreement as to a "*trigger event*" for commission during that conversation;

    iii. However, the answer was to imply "*the minimum term necessary to give effect to the parties' intentions. In the context of estate agents' commissions, the term least onerous to the client, and the one which nobody would dispute if an officious bystander were to suggest it, is that payment is due on the introduction of a buyer who actually completes the purchase*";

    iv. Commission was therefore due to Mr Devani as Newlon had gone on to purchase the flats;

    v. That commission was however reduced by 1/3 for a failure to comply with the Estate Agents Act.

19. Mr Wells appealed to the Court of Appeal against the finding of liability. Mr Devani cross-appealed the decision giving rise to the reduction of his commission.

The Decision – Court of Appeal

20. At the CoA, Lord Justice Lewison (who gave the leading judgment) and Lord Justice McCombe allowed Mr Wells' appeal. Lady Justice Arden dissented. All 3 agreed that Mr Devani's cross-appeal should in any event fail.

21. Lewison LJ was firmly of the view that:

    "*It is not legitimate, under the guise of implying terms, to make a contract for the parties*" (para 19).

22. He went on to quote *Scancarriers*:

> *"…the first question must always be whether any legally binding contract has been made, for until that issue is decided a court cannot properly decide what extra terms, if any, must be implied into what is ex hypothesi, a legally binding bargain, as being both necessary and reasonable to make that bargain work. It is not correct in principle, in order to determine whether there is a legally binding bargain, to add to those terms which alone the parties have expressed, further implied terms upon which they have not expressly agreed and then by adding the express terms and the implied terms together thereby create what would not otherwise be a legally binding bargain."*

23. The learned judge noted that there are myriad ways in which an estate agent's commission can be calculated and/or triggered. As such, it is an example of a term about which certainty is paramount. In other words, the identification of the trigger-point was too important a term to leave out of a legally binding agreement.

24. It was alternatively argued that the words used on 29th January had in fact been sufficient so as to establish that payment would fall due on completion by the identified buyer. Therefore the crucial term was in fact agreed. LJ Lewison disagreed:

> *"If one is to interpret a contract, the first question (where the contract is oral) must be: what words were spoken? The judge made a clear finding of fact that nothing was said about the trigger event. Thus in my judgment this route entails the interpretation of words that, on the judge's findings, were never spoken."* (para 38)

25. As a result there was no binding contract and no fee fell due.

26. Arden LJ dissented, taking the view that in fact the findings at first instance were that Mr Devani had agreed to find a buyer for the flats and that his fee would be 2% + VAT if successful (ie a unilateral contract for the time being lacking obligation upon Mr Wells). The contract would become bilateral (ie Mr Wells would be obliged to pay) if and when Mr Devani completed performance (by finding a buyer). This, in Arden LJ's view, was a concluded and binding agreement.

27. Arden LJ agreed that *Scancarriers* was authority for the proposition that terms could not be implied to as to conclude a unilateral contract, but as the instant agreement had crystallized and become bilateral, the case was of no application. The learned judge was of the view that once the buyer had been found, there was a completed agreement and so the trial judge had been entitled to address the 'trigger-event' question as one of interpretation or implication of terms.

28. However, Arden LJ's was the minority judgment and therefore of academic interest only.

29. There does not appear to have been any application for permission to appeal to the Supreme Court.

Discussion

30. The decision appears to be largely in line with the well-established principle that the courts will not create a contract where none existed previously. The parties must at least get over the hurdle of creating a legally enforceable agreement before the courts will step in and deal with questions of interpretation or implying terms.

31. However, does this decision sit comfortably with the fact that courts are generally reluctant to find that there has been no agreement between commercial parties? After all, is it really sensible / just to find that there was no agreement at all in these circumstances?

32. There are also further questions:

    i. Could there have been a quantum meruit claim in the alternative?

    ii. What about potential incorporation of the t's and c's by reference on the 29th January? This would be similar to the "*see website for t's and c's*" cases such as *Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resouraces (Singapore) PTE Ltd* [2015] EWHC 25 (Comm).

    iii. Would the result have been different in the context of an industry with a more standard trigger-event for the commission payment?

Notes for Practice

33. Wells is a useful reminder that real care is required when drafting agreements. Do not simply take the client's word for it when they say that everyone will know what an agreement means! If a key term is not sufficiently (or at all) addressed, then the contract may be unenforceable.

34. Terms pertaining to bonuses or commission require particular care.

35. When litigating, remember to keep the questions of completion of the agreement, interpretation and implication of terms separate. Each can be attacked in different ways. interpretation and implication separate. Each can be attacked in different ways.

TOM WEBB

Civil Procedure:

Limitation defences and underpaid court fees

[*Wells v Wood* [2016] Lexis Citation 676]

Olivia Ford

INTRODUCTION

1. Solicitors will no doubt be familiar with two issues – limitation and payment of court fees. However, solicitors may not be aware that there has been a string of cases in recent years linking the two issues together.

2. The most recent of these cases is *Wells v Wood* [2016] Lexis Citation 676, an unreported case at Lincoln County Court where judgment was handed down on 09 December 2016 by HHJ Godsmark QC.

3. The issues raised in *Wells v Wood* and previous cases require careful consideration. This is by virtue of the fact that incorrect payment of a court fee is an easy, and innocent, mistake to make however the suggestion by defendants is that this can be fatal to a claim where limitation is involved.

4. It is therefore crucial that those drafting and issuing claims are aware of the potential arguments so as to avoid an unfortunate situation where the claim is struck out or summary judgment is granted on limitation grounds.

FACTS

5. *Wells v Wood* is a claim concerning personal injuries suffered by a cyclist however it is the chronological and procedural background which is most important.

6. On 27 September 2012, the claimant cyclist was hit by a car driven by the first defendant. The cyclist was emerging from a hedgerow onto the road and the first defendant later added the local authority as a party on the basis that the hedgerow was overgrown and therefore obstructed the first defendant's view of the cyclist.

7. As this was a claim for personal injuries, the claim had to be brought before the expiration of three years from the date of the accident under section 11 of the Limitation Act 1980 ("the 1980 Act"). Accordingly, limitation expired on 27 September 2015.

8. The claim was issued online by solicitors on 05 September 2015 therefore prior to the expiry of the limitation period. It was not accompanied by the Particulars of Claim and the value of the claim was

expressed to be "not more than £15,000 including a claim for personal injuries of more than £1,000". The reason for this statement of value was by reference to the JC Guidelines for general damages. It did not seem to take into account the large special damages claim that the claimant would be bringing.

Fees

9. As all will be aware, pursuant to the Civil Proceedings Fees Order 2008, a court fee is payable upon issuing a claim.

10. The legislation relating to payment of court fees was amended in March 2015 by the Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015. This was rather topical due to the way in which a percentage of the claim value over £10,000 was used to calculate fees rather than the previous fixed fees.

11. The claimant's claim was issued online therefore the relevant provisions were as follows:

    11.1. Where the sum of money claimed exceeds £5,000 but does not exceed £10,000, the fee is £455; and

    11.2. Where the claim exceeds £10,000 but does not exceed £100,000, the fee is 4.5% of the value of the claim.

12. The fee paid by the claimant's solicitors was £455 however on the basis of £15,000 being the value of the claim, the correct fee was £675 (being 4.5% of £15,000).

13. The Particulars of Claim and a Schedule of Special Damages were filed on 04 January 2016. The Particulars of Claim indicated an expectation of damages exceeding £25,000 and the Schedule included a claim for loss of earnings in the sum of £21,000 plus further unquantified claims for special and general damages.

14. The first defendant filed a Defence on 22 January 2016 pleading the following:

    14.1. That limiting the claim form to £15,000 was an abuse of process as it was or ought to have been known by the claimant that his claim was worth in excess of that sum; and

    14.2. That as the appropriate court fee had not been paid, the claim was not properly brought in time and was statute barred.

15. The claimant was permitted to amend the claim form to £25,000 in June 2016 on the basis that the correct, higher court fee was paid. However, by virtue of the pleading within the Defence, a preliminary issue arose as to whether the claim was time barred under the 1980 Act.

THE JUDGMENT

16. HHJ Godsmark QC approached his judgment in two parts:

    16.1. First, he gave his own reasons for why he disagreed with the defendant's submission.

    16.2. Secondly, he summarised the relevant case law relied upon by the defendant and distinguished it from the instant case.

17. In my view, the crucial part of this judgment is the way in which it was distinguished from the previous cases. Whilst HHJ Godsmark QC outlined further policy and procedural reasons for why incorrect court fees should not cause a claim to be time barred, the case should be perceived as a significant departure from earlier High Court and Court of Appeal decisions.

18. However, *Wells v Wood* turns on its own facts and is distinguished on the basis of when the claim was issued. In order to understand this point, one needs to first understand the earlier authorities and therefore I will deal with these first and the additional reasons behind the judgment second.

CASES

19. Below is a summary of all the cases relied upon by the first defendant and the principles stated within them.

***Aly v Aly* (1984) 81 LSG 283**

The Facts

20. Passengers travelling in the defendant's car were injured in a collision. Under the old rules relating to civil procedure, the writ was issued just before the expiry of the three-year limitation period. An extension of time was then granted extending the time for service of the writ.

21. The defendant applied to set aside the extension of time order and for a summons. The defendant had 14 days in which to make the application and it made the application within that period. However, the court did not stamp and issue the application until after the 14 days had elapsed.

The Issue

22. Whether the defendant had made an application to the court within the 14-day period.

The Decision

23. "Apply to the court" meant "doing all that is in [the claimant's] power to do to set the wheels of justice in motion according to the procedure that is laid down…" (per Eveleigh LJ).

24. Therefore, the application had been made as it was the court's error which caused the delay – the defendant had done all that it had needed to by sending the documents to the court within the 14-day period.

***Barnes v St Helen's Metropolitan Borough Council* [2006] EWCA Civ 1372**

The Facts

25. In a personal injury claim against the local authority, the claimant delivered the claim form to the County Court with a request to issue one day before the limitation period expired. The court did not issue the claim form until 4 days later when the limitation period had expired.

The Issue

26. Whether there was a difference between "bringing" and "starting" proceedings, and when a claim was "brought".

27. The local authority argued that proceedings started when the claim form was issued and that was the same date on which proceedings were "brought" under the 1980 Act.

The Decision

28. To "bring" a claim did not mean the same as "to start" in a limitation context. Under the 1980 Act and the CPR, "a claim is brought when the claimant's request for the issue of a claim form (together with the court fee) is delivered to the court office" (per Tuckey LJ at paragraph 16).

***Page v Hewetts (No 1)* [2012] EWCA Civ 805**

The Facts

29. The claimants were beneficiaries under a will and the first defendant was the solicitors firm acting in the administration of the estate. The claimants issued a claim for breach of duty and negligence, including a claim for secret profits.

30. Limitation started running on the secret profits claim on 06 February 2003 and expired on 06 February 2009. The claimants contended that they had sent the claim form and cheque along with a

request to issue in December 2008 however the court had lost the documents. The claimants therefore made a second request to issue on 06 February 2009.

31. The claim form was not sealed and issued until 17 February 2009 therefore the defendant applied for summary judgment on the basis that the claim was out of time. Summary judgment was awarded however the claimants appealed.

The Issue

32. Whether the claim had been properly "brought" in time.

The Decision

33. Lewison LJ first set out the policy behind the decision in *Barnes*. This was that it would be unjust to place the risk of a court making an error or failing to process the claim in time at the feet of the claimant.

34. As a result, "if the claimants establish that the claim form was delivered in due time to the court office, accompanied by a request to issue and the appropriate fee, the action would not be statute barred" (per Lewison LJ at paragraph 38).

***Page v Hewetts (No 2)* [2013] EWHC 2845 (Ch)**

The Facts

35. The facts were as above however it is clear from the second decision that the defendant had raised the fact that the incorrect court fee had been paid for the claim for secret profits. The matter came for a preliminary hearing.

The Issue

36. Whether the claim had been properly "brought" in time, in light of payment of the incorrect court fee.

The Decision

37. Hildyard J held that under the first decision of *Page*, the following requirements had to be established by the claimant in order for a claim to have been "brought":

    37.1. The claim form was delivered in due time to the court office;

    37.2. The claim was accompanied by a request to issue; and

37.3. The claim form was accompanied by the appropriate fee.

38. As the wrong fee had been paid for the remedies sought, the claimants had not "done all that was required of them" (per Hildyard J at paragraph 57).

***Lewis v Ward Hadaway* [2015] EWHC 3503 (Ch)**

The Facts

39. 31 claimants issued a claim against a property group. All claimants were represented by the same solicitor and the solicitor deliberately undervalued the claims in order to avoid or defer payment of the correct court fees. The value of the claims as stated on the claim forms was £15,000 however the solicitor knew that the claims were going to be amended to claim damages of more than £300,000.

40. 11 claims were delivered to the court before the expiry of the limitation period however they were not issued by the court until after it had expired.

41. The defendant applied to strike out the claim on the basis that the undervalue was an abuse of process and in the alternative, the defendant applied for summary judgment on the basis of limitation grounds.

The Issues

42. Whether the undervalue was an abuse of process and whether the limitation defence was available.

The Decision

43. The undervalue was found to be an abuse of process however the Deputy High Court Judge declined to strike out the claims given the potential liability of the defendant.

44. On the summary judgment application, as the claimant's conduct in relation to the value was an abuse of process and by virtue of the underlying policy of the previous case law, the Judge found that the claimants had not done "all that was in their power to set the wheels of justice in motion" – they could only have done that by paying the correct fee.

***Bhatti v Asghar* [2016] EWHC 1049**

The Facts

45. The claimants brought claims against a solicitor and his firm for breach of trust or contract, and averred that they had been induced to make investment payments through misrepresentation. The claimants paid the appropriate court fee however it later transpired that this was an underpayment.

46. No limitation defence was pleaded within the Defence however one month before the trial, the defendant applied for strike out and/or summary judgment. The premise of the application was not clear from the application however appeared to be that the claims had not been "brought" for limitation purposes as the court fees were underpaid.

The Issue

47. Whether the claims had been "brought" by virtue of the underpaid court fees.

The Decision

48. Warby J rehearsed the aforementioned authorities and summarised the law as follows:

> *"A claim is only brought for these purposes when the party concerned has done all that is in his power or to set the wheels of justice in motion…Doing all that is in one's power often, and perhaps ordinarily, involves proffering the correct fee to the court office at the same time as presenting the claim form and the applicable particulars of claim…It is however possible in principle that a failing on the part of the court at that stage of the process might lead to the claim being brought for limitation purposes, even though the correct fee was not paid. If, for instance, the court assumed the burden of calculating the appropriate fee and made an error, it might be said that the claimant had done all that he reasonably could do to bring the matter before the court in the appropriate way."*

49. Warby J therefore envisaged a situation where, even though the correct court fee was not paid, the claim had still been "brought" if the responsibility for the incorrect court fee lay with someone else, i.e. the court.

50. Warby J found that there had been an underpayment of the court fee but declined to enter summary judgment on the basis that the limitation defence had not been pleaded, the premise of the application was not clear until service of the skeleton argument, and the claimants had not had a fair and reasonable opportunity to respond to the issues being advanced. This was therefore a rather different case to those previously.

***Glenluce Fishing Company Limited v Atermota Limited* [2016] EWHC 1807 (TCC)**

The Facts

51. The claimant claimed damages for defective engineering works. The limitation period expired in March 2016 and the claim form was issued on 15 February 2016 stating a claim of £69,694.06 but

that the sum was likely to increase once it had been fully quantified by the claimant. The issue fee was paid upon that valuation.

52. Particulars of Claim were filed and served on 08 June 2016 stating a claim of £162,132.06 together with a request to amend the claim form to reflect the value of the claim. As the defendant would not agree to the amendment, an application was made.

The Issues

53. Whether the principles in the aforementioned cases applied to applications to amend a claim.

The Decision

54. The Deputy High Court Judge summarised the previous law and found the following:

> *"From those appellate cases has developed a somewhat hard edged principle as those cases have been applied at first instance whereby a claimant whose lawyers miscalculate the fee due, or absentmindedly pay the wrong amount, may cause a claimant to lose his or her right to bring an otherwise meritorious claim to court."*

55. The Judge then went on to state that those decisions should be limited in their application to the circumstances in those cases, namely applications to strike out claims on the basis that those claims were not "brought" within the applicable limitation period. This appears to be in the context that the application before the court was one of an application to amend.

THE DECISION

56. The defendant's argument in *Wells v Wood* appears to have been that, whilst proceedings had been "started" within the limitation period as the claim form had been issued; the claim had not been "brought" as the incorrect court fee had been paid.

57. HHJ Godsmark QC disagreed for the following reasons:

    57.1. The earlier authorities concerned instances where the claim form had been issued after the limitation period expired. There was nothing within the authorities to say that where a claim was issued within the limitation period, this was not effective to "stop the limitation clock" (paragraph 54).

57.2. The authorities did however provide what was necessary to bring a claim before a claim form has been issued – the claimant must do everything in its power to set the wheels of justice in motion, including payment of the appropriate court fee (paragraph 54).

57.3. However, whilst there was a difference between bringing and starting proceedings, the two are still linked – one cannot start a claim without also having brought it. Bringing involves getting the wheels of justice to move however the wheels of justice are moving once the claim form is issued. It is therefore inherent that by the time the claim is issued, the claim has been brought (paragraphs 56 and 57).

57.4. As a result, as the instant claim had been issued within the limitation period, it had also been brought regardless of the fact that the incorrect court fee had been paid. The situation may have been different if the underpayment was an abuse of process, but that would be a separate issue to limitation (paragraph 59).

57.5. Any incorrect payment of the court fee then becomes an issue between HMCTS and the paying party (paragraph 60).

57.6. The above point is supported by a similar recent decision, *Dixon & Dixon v Radley House Partnership* [2016] EWHC 2511 (TCC) whereby Stuart-Smith J stated the following at paragraph 46:

> *"In a case where (a) abusive conduct is not present and (b) the court sets the wheels of justice in motion by issuing proceedings but (c) the Claimant has not paid and the court has not required the correct fee, I reject the submission that an action is not brought for the purposes of the Limitation Act 1980 at the moment of issue."*

58. The distinguishing feature between *Wells v Wood* and previous cases is thus that the claim was issued within the limitation period. It accordingly does not mean that payment of the incorrect court fee no longer affects limitation.

POLICY REASONS

59. The further policy reasons underlying this judgment are as follows:

59.1. In the instant claim, it was only alleged that the claim was invalid for limitation purposes rather than void from the outset. Accordingly, to allow the defendant's argument would mean that proceedings issued with the incorrect court fee would be valid unless limitation was

pleaded i.e. voidable at the defendant's option. This would not align with the position where there were multiple defendants and only some pleaded the limitation point (paragraph 19).

59.2. Limiting a claim for tactical reasons (other than abuse of process) is permissible. However, if the economics of the claim then change, for example a counterclaim is issued for a higher amount, the defendant's suggestion would mean that the claimant would be barred from seeking to amend the claim form and pay a higher fee (paragraph 20).

59.3. Solicitors often have to issue proceedings without the full details of the claim when limitation is about to expire. The defendant's suggestion would mean that in those instances where the full value of the claim is not yet known, the proceedings would be invalid (paragraph 23).

59.4. There is no mention of payment of court fees under CPR Part 7 in order to "start proceedings" (paragraphs 25 to 26).

59.5. Under CPR r. 3.7A, there is a sanction in place for defendants who do not pay the appropriate counterclaim fee – service of a notice and in default of payment, strike out. This would mean that a counterclaim without the appropriate fee stops time running but a claim does not (paragraph 29).

60. I state that these are "further" policy reasons as the original underlying policy was to avoid a claimant suffering as a result of the court's failure to issue the claim in time. It is clear that in *Wells v Wood* and *Dixon*, there has been a shift to applying the CPR to the idea that an incorrect fee does not stop time from running and this seems to be to stop satellite litigation on this point.

CONCLUSION

61. As stated at the outset, it is important for those involved in drafting and issuing claims to be mindful of circumstances where the date of issue and the payment of the court fee is detrimental to the validity of the claim.

62. In summary:

62.1. If the claim form is delivered to court with a request to issue and the appropriate court fee before limitation expires and the court issues the claim after limitation expires, the claim has been brought and is not time barred.

62.2. If an inappropriate court fee has been paid, the claim has not been brought and is liable to be struck out for being time barred.

62.3. Further, if an inappropriate court fee has been paid and is deemed to be an abuse of process, regardless of the date of issue, this may mean that the claim has not been "brought" for limitation purposes.

62.4. However, these kinds of arguments need to be pleaded by defendants in their Defence or an application needs to be made at the outset bringing it to the court's attention.

62.5. On the other hand, if the inappropriate court fee has been paid but the court has still issued the claim before limitation expires, the claim has still been brought and is not time barred.

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