Mitchell and merits

IN *AL SAUD V APEX GLOBAL MANAGEMENT LTD* [2014] 1 WLR 4495 THE SUPREME COURT HAS, FOR THE FIRST TIME SINCE *MITCHELL* AND *DENTON*, CONSIDERED THE CORRECT APPROACH TO APPLICATIONS FOR RELIEF FROM SANCTIONS.

The appeal arose in the context of a hotly contested shareholder dispute involving two unfair prejudice petitions. The appellant Prince had been debarred from defending the claim against him as a consequence of his failure to comply with an unless order.

One of the questions for the Supreme Court was the extent to which the merits of a claim or defence are of relevance to an application for relief from sanctions. The Prince argued that his defence to the claim was *"very strong"* and that this should have been taken into account by the courts below. Lord Neuberger, with whom Lord Sumption, Lord Hughes and Lord Hodge agreed, stressed the importance of compliance with court orders and held at [28] that *"the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues"*. His Lordship tentatively suggested at [31], however, that *"there is force in the argument that a party who has a strong enough case to obtain summary judgment should, as an exception to the general rule, be entitled to rely on that fact in relation to case management decisions"*.

> *Al Saud* will not be the court's final word on relief from sanctions

Presumably as a consequence of the court's view that issues such as those raised in *Al Saud* are primarily for the Court of Appeal to resolve (see [39] and [79]), Lord Neuberger left open the question of how this tentative exception is to work in practice. In particular, *Al Saud* leaves unclear whether, in a case which would be strong enough to obtain summary judgment, the grant of relief will now be a foregone conclusion.

The relevance of merits arose again in the Court of Appeal's recent decision in *R (on the application of Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, which involved applications for extensions of time to file notices of appeal. Having confirmed that the principles in *Mitchell* and *Denton* are applicable to such applications (see [36]), Moore-Bick LJ observed at [46] that: *"Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play"*. One wonders whether the use of the phrase *"very strong"* amounts to a dilution (at least in the context of applications for extensions of time to file notices of appeal) of the rather more robust approach suggested by the Supreme Court in *Al Saud.* Helpfully, however, his Lordship appears to confirm at [46] that merits, where relevant, will not necessarily be a determinative factor but rather one of many to be balanced at stage three of the *Denton* process.

In November 2014, the Supreme Court granted permission to appeal in *Thevarajah v Riordan*. *Al Saud* will not, therefore, be the court's final word on relief from sanctions but it remains to be seen whether the court will use *Thevarajah* as an opportunity to clarify matters left open in *Al Saud*.

EMMA HARGREAVES has a broad commercial chancery practice with particular emphasis on domestic and offshore trust litigation, civil fraud, and commercial and company disputes.

Daniel Lightman and Thomas Elias appeared for the successful Apex Respondents in *Al Saud*.

serle**speak**

ISSUE NO.14

I am very pleased to introduce this new edition of Serlespeak, covering topics in civil procedure. In my lead article, I review recent developments in the fast-developing law of interim remedies. Elizabeth Jones QC then considers the proper role of expert evidence on foreign law when construing foreign contracts. Elsewhere, Timothy Collingwood discusses the place of additional claims in company and insolvency proceedings, and Jonathan McDonagh explores the law of discontinuance and its interaction with waiver of sovereign immunity. Finally, Emma Hargreaves examines the relevance of merits on applications for relief from sanction since *Mitchell* and *Denton*. **Richard Walford**

Interim remedies: further developments

ONE MIGHT HAVE THOUGHT THAT THE PRINCIPLES GOVERNING THE VARIOUS JURISDICTIONS FOR THE GRANT OF INTERIM REMEDIES WOULD BE WELL SETTLED BY NOW.

For example, it is already some 40 years since the *American Cyanamid* case established the fundamental principles applicable to interim injunctions. Yet the courts are continuing to refine the jurisdictions, and practitioners need to be on top of these new developments.

Notable examples from 2014 include:

Modifying standard form of freezing order to reflect corporate ownership of assets: The standard form freezing order does not restrain disposal of the assets of a company where the claimant cannot demonstrate that the defendant is their beneficial owner.

Lakatamia Shipping Co. v Su [2014] EWCA Civ 2014 demonstrated the need, assuming good reason, to modify the standard wording to prohibit causing or procuring the relevant company to dispose of or dissipate its assets other than in the normal course of business e.g. by restraining until at least the return date or after assets disclosure, transactions diminishing the value of the company's shares.

Fortification of the cross undertaking: In *Energy Venture Partners v Malabu Oil and Gas* [2014] EWCA Civ 1295, the Court of Appeal considered for the first time the test to determine whether a cross-undertaking in damages should be fortified. It held: (1) The defendant may be entitled to fortification if it can show it has a good arguable case that it will suffer loss. (2) An intelligent estimate is required of the likely amount of any loss which may be suffered by the applicant for fortification. (3) The court needs to ascertain whether there is a sufficient level of risk of loss to require

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fortification. (4) The loss must or may be a consequence of the injunction (but not of the proceedings): the making of the injunction must be a cause without which the relevant loss would not be or have been suffered.

Applications to enforce dispute resolution clauses: In *Emirates Trading Agency LLC v Prime Mineral Exports Private* [2014] EWHC Civ 2104 (Comm), a contract contained a clause requiring that *"the Parties shall first seek to resolve the dispute or claim by friendly discussion"* and which went on to provide that if no solution could be arrived at within 4 weeks, the non-defaulting party could invoke arbitration. The claimant contended that this was a condition precedent which had to be satisfied before the arbitrators would have jurisdiction.

Teare J held that: (1) The 4 week period must pass before arbitration could be commenced, even if the discussions may have failed before that time. (2) Where commercial parties have agreed a dispute resolution clause which prevents them from launching arbitration or other proceedings without first seeking to resolve the dispute by time-limited discussions, the court should seek to give effect to such clause, which must import an obligation to discuss in good faith: (3) Such an obligation should be enforceable because the agreement is not incomplete, the standard required of each party was identifiable as fair, honest and genuine discussions aimed at resolving the dispute, and the parties had voluntarily if temporarily fettered their positions as negotiating parties. If discussions could resolve a dispute without the need for arbitration or other proceedings, it was in the public interest. This would suggest that an injunction would be granted in such cases.

Applications for an order for inspection of computer hard drives: In *McLennan Architects v Jones* [2014] EWHC 2604 (TCC), Akenhead J listed non-exhaustively, the factors to be considered on an application for access to an opponent's hard drives: (a) The investigation must be proportionate and limited to what is reasonably necessary in the context of the case. (b) Regard should be had to the likely contents (in general) of the device, so that any search authorised should exclude possible disclosure of privileged documents and also of confidential documents which have nothing to do with the case in question. (c) Regard should be had to the human rights of people whose information is on the device especially where such information has nothing or little to do with the case. (d) Only rarely would it be appropriate to authorise a complete copy of the hard drive of a computer which is not dedicated to the contract or project to which the particular case relates. (e) The court will usually require confidentiality undertakings from any expert or other person who is given access.

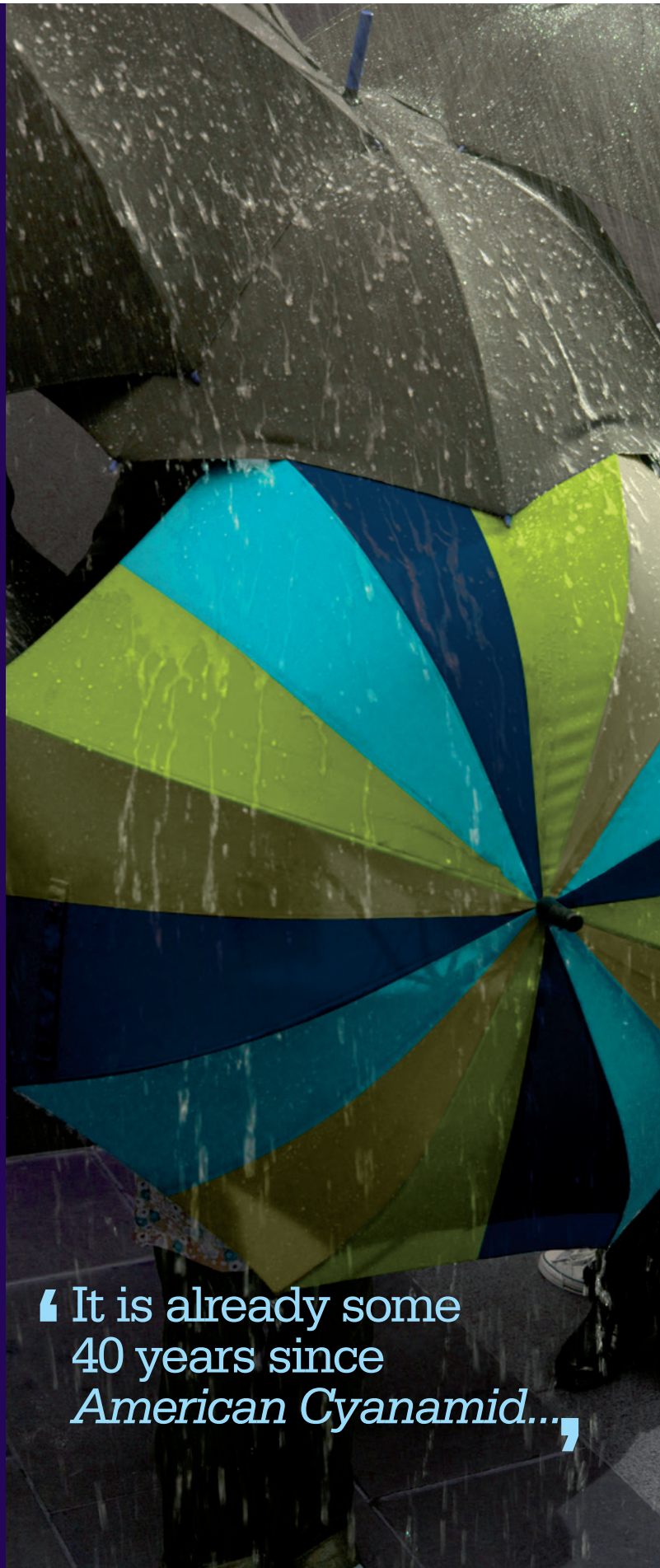
This authority has important implications for future Search Order applications, which until now have normally included provisions allowing access to computers.

Developments in the Norwich Pharmacal *order ("NPO") jurisdiction:* The English court granted a NPO against Italian banks which had branches in England, even though all relevant activity about which information was sought had been in Italy: *Credit Suisse Trust v Intesa Sanpaolo Spa* [2014] EWHC 1447 (Ch).

Where a NPO is made against a non-party, it is more-or-less automatic that the person made subject to the order is entitled to his costs of compliance. However, that part of the order is subject to variation or revocation if it turns out that the non-party does not engage in the NPO process, or is himself closely mixed up in the primary wrongdoer's activities: *JSC BTA Bank v Tyschenko* [2014] EWHC 2019 (Comm).

RICHARD WALFORD is the Specialist Editor of Sweet & Maxwell's *Civil Procedure* ("the White Book") for Part 25 (Interim Remedies) and Section 15 (Interim Remedies). He appeared for the successful applicant in *Credit Suisse Trust v Intesa* above.

John Machell QC appeared in *JSC BTA Bank v Tyschenko.*



Putting expert evidence in its place

WHEN AN EXPERT IN FOREIGN LAW GIVES EVIDENCE IN RELATION TO A CONTRACT GOVERNED BY FOREIGN LAW, WHAT SHOULD HIS EVIDENCE GO TO? SHOULD IT GO TO THE MEANING OF THE CONTRACT UNDER THE FOREIGN LAW, OR SIMPLY THE RULES OF CONSTRUCTION UNDER THAT FOREIGN LAW?

In *Alhamrani v Alhamrani* [2014] UKPC 37 the Privy Council has clearly stated that the expert's evidence is relevant only to the rules of construction, and that evidence as to the meaning of the contract is inadmissible.

The issue in that case concerned the interpretation of a contract governed by Saudi law. The trial judge had decided the interpretation of the contract by deciding which expert's evidence as to the interpretation he preferred. The Privy Council held that *"The question for decision is what is the true construction or interpretation of the [contract]. The correct approach to that question is the same in England and in the BVI. The court will receive expert evidence of the foreign law, here the law of Saudi Arabia, which includes the correct approach to interpretation and the relevance or otherwise of particular types of evidence. It is then for the BVI (or English) court to decide for itself what the contract means."*

The court distinguished the case of *A/S Tallinna Laevauhisus v Estonian State Shipping Line* (1947) 80 LL Rep 99 (CA), at pp 107-108, in which the Court of Appeal stated that it is primarily the function of the expert witness called to interpret the legal effect of a document to convey to the court hearing the case the meaning and effect which a court of the foreign country would attribute to it if it applied correctly the law of that country to the questions under investigation.

That case, said the Privy Council, was about foreign statutes and did not apply to foreign law contracts. In the case of contract, the Privy Council held that *"the distinction between the role of the expert witnesses and that of the judge, the [Court of Appeal] and indeed the Board, is that the evidence of the experts is relevant and admissible in order to identify what questions should be asked and what evidence is relevant to answer the questions but is not admissible on questions of interpretation".*

The Privy Council also held that an appellate court was in as good a position as the trial judge to decide the meaning of the contract, notwithstanding that the meaning of the contract, being a matter of foreign law, was technically a matter of fact.

> "expert evidence… is not admissible on questions of interpretation"

ELIZABETH JONES QC, Simon Hattan and Gareth Tilley acted for the successful Respondent in *Alhamrani v Alhamrani* [2014] UKPC 37.

A procedural splice is no longer a vice?

EVEN 15 YEARS AFTER THE INTRODUCTION OF THE CPR, THE COMPANIES COURT RETAINS ITS OWN PROCEDURAL SCHEMES IN INSOLVENCY PROCEEDINGS AND IN CERTAIN COMPANY MATTERS (IN PARTICULAR UNFAIR PREJUDICE PETITIONS) IN THEIR RESPECTIVE STATUTORY CONTEXTS.

There are separate prescribed forms for insolvency proceedings and unfair prejudice petitions. Pleadings (such as Points of Claim) are the subject of a direction (if appropriate) rather than being automatic. Prior to the CPR it was impermissible to bring third party proceedings (which had to be commenced by writ) in the Companies Court (*Re A Singer & Co (Hat Manufacturers) Ltd* [1943] Ch 121) or to counterclaim a writ action in an unfair prejudice case. However, there may be cases where there are tactical or practical benefits for a respondent to bring an additional claim in the same proceedings as the original insolvency application or unfair prejudice petition. To what extent is this now permissible under the CPR?

The CPR apply to insolvency proceedings (Insolvency Rules 1986, rule 7.51A) and to unfair prejudice petitions (the Companies (Unfair Prejudice Applications) Proceedings Rules 2009 (the "Unfair Prejudice Rules"), rule 2(2)) save insofar as inconsistent with the respective particular procedural regimes; namely the Insolvency Rules, the Companies Act 2006 and the Unfair Prejudice Rules. The Companies Court had already shown itself amenable in principle in certain circumstances to permitting additional claims to be brought by a respondent. For example in *Re International Championship Management Ltd* ([2007] BCC 95) Richard Sheldon QC (sitting as a deputy high court judge) was prepared to countenance contribution proceedings against third parties in an action for misfeasance if properly pleaded. However, often the procedural issue concerning the interrelation of the CPR and the procedural schemes of the Companies Court was not expressly addressed.

Now, in *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd* ([2014] EWCA Civ 1106, unsuccessfully appealed on other grounds: see the article by Emma Hargreaves) the Court of Appeal has confirmed that a respondent to an unfair prejudice petition can in principle make a counterclaim or other additional claim under CPR Part 20, even for relief outside of sections 994-996. Arden LJ found nothing in the Unfair Prejudice Rules to prevent such a counterclaim for monies due to the shareholder respondent (as opposed to the company). The decision confirms a new approach under the CPR. The possibility of bringing an additional claim (which would otherwise need to be commenced as a Part 7 Claim) in response to proceedings in the Companies Court may offer an attractive option for a respondent in appropriate cases.

TIMOTHY COLLINGWOOD frequently appears in the Companies Court in company and insolvency matters, including proceedings involving additional claims.

Chambers news

Directories

The latest editions of the two major legal directories have now been published. In the Legal 500 directory we have 114 individual recommendations across 20 different practice areas. This year Kuldip Singh QC, Dominic Dowley QC, Lance Ashworth QC, John Machell QC, Hugh Norbury QC, Andrew Moran, Dakis Hagen and Matthew Morrison all received new recommendations. As a set we continue to be recommended in 10 practice areas: Banking and finance, Civil fraud, Commercial litigation, Company, Insolvency, Partnership, Private client: trusts and probate, Professional negligence, Property litigation and Sport.

In Chambers & Partners we have an equally impressive 103 individual recommendations placing us 11th in the "recommendations per member" table, and as a set we are recommended in 11 practice areas: Banking & Finance, Chancery: Commercial, Chancery: Traditional, Company, Commercial Dispute Resolution, Fraud: Civil, Offshore, Partnership, Professional Negligence, Real Estate Litigation and Restructuring/Insolvency. Other highlights include: being top-ranked as a set in four practice areas: Chancery: Commercial, Fraud: Civil, Offshore, and Partnership; Alan Boyle QC, Philip Jones QC and Paul Chaisty QC all being ranked as "stars at the bar"; and recommendations for Alan Boyle QC, Frank Hinks QC, William Henderson and Dakis Hagen in the new Trusts practice area.

Awards

We have been short-listed for and received a number of awards:

- We received 3 nominations for the Chambers & Partners Bar Awards: Chancery Set of the year, Philip Marshall QC for Chancery Silk of the year and Dakis Hagen for Chancery Junior of the year. We were delighted when Dakis Hagen was named as Chancery Junior of the year.
- We won Chambers of the year for Private client: trusts and probate at The Legal 500 UK awards. 4 members were shortlisted in other categories: Alan Boyle QC and John Machell QC as Silk of the year in Private client: trusts and probate; Philip Jones QC as Silk of the year for Insolvency; and Philip Marshall QC as Silk of the year in Commercial litigation.
- We were one of only 6 chambers shortlisted for Chambers of the Year at the British Legal awards.

Conferences and seminars

We ran two very successful conferences at the end of 2014: a full-day litigation conference in London, and a half-day trusts and commercial litigation conference in Cayman. Thank you to all of our clients who attended and gave us such positive feedback.

This year we are again sponsoring and speaking at two major conferences: the Legal Week Trusts and Estates Litigation Forum in Provence in March and the IBC Trusts & Estates Litigation Forum in Jersey in April.

Books

The 5th edition of *Minority Shareholders: Law, Practice and Procedure* was published in January. The authors are Victor Joffe QC (now of Temple Chambers, Hong Kong), David Drake, Giles Richardson, Daniel Lightman and Timothy Collingwood. In April Andrew Francis will be launching the 3rd edition of his jointly written *Rights of Light: The Modern Law* and Conor Quigley QC will be launching the 3rd edition of his *European State Aid Law and Policy*.

LinkedIn

We have 4 discussion groups on LinkedIn to enable Serle Court members and clients to discuss topical issues in Partnership and LLP Law, Fraud and Asset Tracing, Contentious Trusts and Probate, and Competition Law; please join us.

Edited by JONATHAN FOWLES

Sovereign immunity waived in the Hyderabad funds case

PAKISTAN HAS FAILED TO PRESERVE SOVEREIGN IMMUNITY IN RESPECT OF A CLAIM TO FUNDS HELD BY ITS HIGH COMMISSIONER IN LONDON SINCE 1948.

In *High Commissioner for Pakistan v National Westminster Bank* [2015] EWHC 55 (Ch), Henderson J set aside a notice of discontinuance designed to preserve immunity, finding that Pakistan's actions constituted an abuse of process. Proceedings relate to a fund, now worth almost £35m, which has hitherto been the subject of a celebrated legal stalemate. In September 1948 a transfer was made of £1m from HEH the 7th Nizam of Hyderabad to Mr Ibrahim Rahimtoola, then High Commissioner for Pakistan in the United Kingdom. The transfer occurred without the Nizam's consent in the context of the annexation of Hyderabad by the state of India. Upon learning of the transfer of funds, the Nizam sought repayment. Pakistan, which now held legal title to the fund, did not oblige. The Nizam's subsequent claim against Pakistan went to the House of Lords, which upheld Pakistan's immunity (*Rahimtoola v Nizam of Hyderabad* [1958] AC 379), and concluded that the matter must be stayed until such time as Pakistan itself elected to sue the Bank.

In June 2013 Pakistan took just that course and issued proceedings against the Bank. Without any claim to beneficial ownership itself, the Bank sought interpleader relief and notified known interested parties of Pakistan's claim. These interested parties had previously asserted ownership of the fund, but were powerless to force an adjudication of their claims in circumstances where Pakistan's sovereign immunity prevailed. Once Pakistan had issued proceedings several of the interested parties (namely HEH the 8th Nizam, and Prince Muffakham Jah - both grandsons of the 7th Nizam – and at a later stage, India) applied to be joined. A hearing was listed for 27 November 2013 to determine the interpleader and joinder applications, but just as the hearing bundles were being lodged at court, Pakistan served a Notice of Discontinuance ("NoD").

Pakistan's position was that by bringing proceedings to an end before the interested parties were joined, any waiver of its sovereign immunity was limited to waiver as against the Bank alone. Pakistan had served its NoD pursuant to CPR 38.2 in circumstances where it did not require permission to discontinue, and it relied on its right to do so.

The Bank and the interested parties applied under CPR 38.4 to set aside the NoD. Deciding first that the NoD did not have the effect of automatically terminating proceedings in the manner claimed by Pakistan, Henderson J exercised the court's discretion under CPR 19.2(2) to add the new parties.

The test under CPR 38.4 is not the same as the pre-CPR test at common law. The common law test requires an applicant to show that service of a NoD is an abuse of process. CPR 38.4, on the other hand, provides the court with a *sui generis* discretionary power to set aside a NoD; and this discretion should be exercised with the aim of giving effect to the overriding objective.

Notwithstanding this distinction, it was held that Pakistan's actions had in fact been abusive: its NoD had been designed to secure a tactical advantage which would place Pakistan in a better position than that to which it had already voluntarily submitted by bringing the action against the Bank. Sovereign immunity had afforded Pakistan an advantage over the other parties in that it allowed it to dictate access to the adjudicative process. But once Pakistan had submitted to the jurisdiction of the English court by starting proceedings, it would not be permitted to frustrate the future conduct and completion of the same. The waiver was irrevocable and extended to procedural steps properly taken in the conduct of the relevant proceedings as well as to any final determination.

JONATHAN MCDONAGH represents *Prince Muffakham Jah.*

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