serlespeak
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I am pleased to introduce this new edition of Serlespeak. The focus this time is on fraud. I begin the newsletter by considering recent cases on best practice in pleading fraud, an area fraught with pitfalls. Subsequently, Lance Ashworth QC examines developments in the law governing civil remedies for victims of bribery. In addition, Simon Hattan considers the scope of the fraud exception to legal professional privilege, while Ruth den Besten discusses the court's approach to appeals from findings of contempt in fraud proceedings. Finally, Sophie Holcombe explains the circumstances in which civil fraud proceedings may be heard in private to protect the integrity of parallel criminal proceedings. **HUGH NORBURY QC**

Ring-fencing domestic fraud proceedings

INDIVIDUALS SUBJECT TO PARALLEL DOMESTIC CIVIL AND FOREIGN CRIMINAL FRAUD PROCEEDINGS WILL NOT NECESSARILY BE GRANTED THE PROTECTION OF HAVING THE DOMESTIC CIVIL PROCEEDINGS HEARD IN PRIVATE.

The issue was recently addressed by Burton J in *Access Bank v Eratus Bankole Oladipo Akingbola and Ors* [2012] EWHC 1124 on day one of a six week trial. The defendant was the CEO of Intercontinental Bank Plc, which merged with the claimant Bank; he is alleged to have defrauded the Bank, and is currently subject to on-going criminal proceedings in Nigeria.

To avoid prejudice to the defendant in the criminal proceedings an application was made for the civil proceedings to be heard in private ("ring-fenced") on the grounds that it was necessary in the interests of justice.

Failure to ring-fence proceedings would, it was submitted, provide the prosecution in the Nigerian proceedings with advance notice of Dr Akingbola's defence, from which they could tailor their case against him (reference was made to Millett J's decision in *Re DPR Futures Ltd* [1989] 1 WLR 778). Further, it would put the defendant at potential risk of self-incrimination, infringe his right to silence, and potentially deter witnesses from giving evidence.

It is well established that where domestic civil and criminal proceedings take place in parallel the court will impose *"stringent steps"* to ensure the civil proceedings do not interfere with the criminal proceedings (see *Taylor v The Government of the USA* [2007] EWHC 2527 at 9 per Simon J).

In *Access Bank v Akingbola* reliance was placed on *Attorney General of Zambia v Meer Care and Desai and Ors* [2005] EWHC 2102; upheld [2006] 1 CLC 436, in which Peter Smith J refused a stay of domestic civil proceedings but ordered that they be *"ring-fenced"*, since this was sufficient to prevent any prejudice being caused to parallel criminal proceedings taking place in Zambia. This decision was upheld by the Court of Appeal.

In *Access Bank* Burton J held the application had been made too late; it ought to have been made at the outset of the civil proceedings, prior to any witness evidence being placed in the public domain. The difficulty in *Access Bank* was that by the time the defendant's legal team were instructed substantial witness evidence was already in the public domain as a result of freezing injunction proceedings.

It was common ground that the overriding principle, as established in *Scott v Scott* [1913] AC 417, that hearings should always take place in public, yields only if the interests of justice require otherwise. Burton J held the test was one of necessity; that *"the alleged prejudice must be "proved strictly" and "to such a standard" as justifies the "unusual procedure"*. He was not satisfied the test had been met.

Burton J expressed concern regarding the difficulty the claimant would face in enforcing its judgment abroad if proceedings were to remain private until the determination of the Nigerian criminal proceedings.

Following Burton J's decision, it is essential that an application to hear domestic civil proceedings in private is made at the earliest possible opportunity, before any interim hearings in which evidence is relied upon by the defendant (such as those relating to freezing injunctions) take place. This is despite the real risk that subjecting a defendant to intensive cross-examination in English civil proceedings will compromise the fairness of foreign criminal proceedings.

SOPHIE HOLCOMBE has a broad chancery and commercial practice and assisted counsel, Paul Chaisty QC, in *Access Bank v Akingbola*.

Pleading fraud

THE LAW ON PLEADING AND PARTICULARISING FRAUD REMAINS A BANANA SKIN CAUSING PRACTITIONERS TO SLIP UP TIME AND TIME AGAIN.

A recent example came in the case of *Seaton v Seddon* [2012] EWHC 735 (Ch). The dispute concerned an agreement entered into in 1984 by various parties interested in the intellectual property in a series of songs including "Pass the Dutchie", the massively successful single released by Musical Youth in September 1982. At paragraph 39, Roth J summarised the requirement as follows (its being common ground between the parties):

"In order to be sustainable, an allegation of fraud in a pleading must be clearly expressed. If the facts pleaded are consistent with innocence, it is not open to the court to find fraud unless an allegation of fraud or dishonesty is expressly made. Thus an allegation that a defendant "knew or ought to have known" is not a clear and unequivocal allegation of actual knowledge and will not, without more, support a finding of fraud: Armitage v Nurse [1998] Ch 241, per Millett LJ at 256-57, citing Buckley LJ in Belmont Finance Corp Ltd v Williams Furniture Ltd [1979] Ch 250, 268."

However, it was argued on behalf of the claimants in *Seaton v Seddon* that the CPR had changed the position under the RSC. It was clear under the RSC, through an express requirement in Order 18, rule 12 that a pleading must include particulars of any fraud pleaded as well as particulars of fact underlying the allegation of a fraudulent condition of mind. Under the CPR, there is some room for doubt arising from the wording of CPR rule 16.4(1), which states only that particulars of claim must include a concise statement of the facts on

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which the claimant relies and (so far as is relevant) such other matters as may be set out in a practice direction. Paragraph 8.2 of PD16 provides that a claimant must specifically set out in his particulars of claim *"any allegation of fraud"* and *"notice or knowledge of a fact"* (amongst other things). So the argument ran that specifically setting out an allegation of fraud was not the same as particularising the facts upon which the fraud allegation was based.

Roth J had little difficulty dismissing the claimants' argument. He conceded that the drafting of PD16 could be improved, but found that in the context of CPR rule 16.4(1) and the overriding objective to deal with a case justly, which includes ensuring so far as is practicable that a case is dealt with fairly, there was no real doubt that the requirement to particularise the relevant facts fully survived the introduction of the CPR.

From the judgment it is not entirely clear how the fraud claim was put, but it was found to have passed the pleading test notwithstanding the use of the phrase *"knew or ought to have known"* in paragraph 18 of the particulars of claim. In normal circumstances, that would be sufficient to render an allegation of knowledge inadequate to form the basis of a claim in dishonesty (as is clear from the extract from Roth J's judgment at the start of this article). Context is everything, so no doubt Roth J had a valid basis for rejecting the criticism of the pleading in this respect. In another recent case involving an alleged fraud *(Group Seven v Rejniak & Ors)*, an application to strike out the particulars of claim led to the reformulation of the claim so as to remove the offending words – *"ought to have known"*.

Whereas it is acceptable to plead fraud and then plead negligence in the alternative, it is not acceptable to plead fraud on the basis that a defendant knew or ought to have known an incriminating fact. In those circumstances, one common route is to take the course adopted in *Seaton v Seddon* of pleading that someone *"knew or must have known"* (it appears from the summary of the brief details of claim provided in the judgment). This is a dangerous approach; the better approach where the essence of the claim is that it is not conceivable that a defendant could not have known a particular fact is to plead knowledge without qualification and then to set out the basis of the inference.

Having apparently got the form of the pleading right, what scuppered the claimants in *Seaton v Seddon* was that the pleaded case, based as it was on an inference from the impossibility of a grossly negligent interpretation of the law by a solicitor experienced in the field of copyright, had no realistic chance of success. Although this was not part of Roth J's analysis, his reasoning was consistent with Lord Millett's statement at paragraph 186 of his dissenting judgment *Three Rivers District Council v Bank of England (No. 3)* [2001] UKHL 16, [2003] 2 AC 1:

"There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

Although dissenting on the application of those facts to the pleading before him, this extract reflects the views of the majority on the law. In other words, on top of the strict pleading requirements, there must be something to take the matter out of the ordinary. According to Roth J, a negligent lawyer, even a grossly negligent lawyer, is (at least in the circumstances of *Seaton v Seddon*), not such a circumstance. It would be interesting to know whether Roth J would have said the same about a barrister in similar circumstances.

When pleading fraud, instead of pleading that a defendant *"must have"* or *"ought to have"* known, what the claimant should do is plead knowledge of the relevant facts before spelling out in as much detail as possible the basis of the inference (such as, in the *Seaton* case, that every professional solicitor would have known the law on copyright). Not only will this help defeat any challenge to the pleading, it will help in any assessment of the strength of the case.

HUGH NORBURY QC is instructed in *Group Seven v Rejniak* on behalf of a defendant and was all ready to use the *Seaton v Seddon / Three Rivers / Armitage v Nurse* line of authority when the claimants amended their pleading and agreed to pay the defendant's costs of the strike out application.

Bribery
Civil recoveries

MUCH HAS BEEN WRITTEN IN THE PRESS AND ELSEWHERE ON THE ADVENT OF THE BRIBERY ACT AND THE CRIMINAL SANCTIONS THAT HAS BROUGHT INTO EFFECT. BUT IF YOUR EMPLOYEE OR AGENT IS THE ONE WHO HAS BEEN BRIBED, WHAT CIVIL REMEDIES ARE AVAILABLE TO YOU TO OBTAIN SOME FORM OF MONETARY REDRESS?

English law takes a broad view of what constitutes a bribe for the purposes of civil claims. It considers that a bribe (or "secret commission") has been paid where (i) the person making the payment (A) makes it to the agent (B) of another person (C) with whom he is dealing; (ii) A makes it to that person (B) knowing that that person (B) is acting as the agent of the other person (C) with whom he is dealing; and (iii) A fails to disclose to the other person (C) with whom he is dealing that he has made that payment to the person (B) whom he knows to be the other person's agent.

When B receives or arranges to receive a bribe or secret commission in the course of his agency from A who deals or seeks to deal with his principal, C, the agent (B) is liable to his principal (C) jointly and severally with A:

(1) in restitution for the amount of the bribe or secret commission; or

(2) in tort for any loss suffered by the principal from entering into the transaction in respect of which the bribe or secret commission was given or promised.

C may also require either B or the briber A to give an account of profits.

Until *Sinclair Investments (UK) Ltd v Versailles Trade Finance* [2011] EWCA Civ 347, it had generally been held that B held the bribe on trust for his principal, C, but it is now the law of England and Wales that the claim by C against B is (in most cases) a personal one. This has a significant impact on the remedies available to trace the proceeds of the bribe.

It is not necessary for C to show that the bribe was either paid or received dishonestly. It is irrelevant whether either A or B knew what they were doing was wrong.

English law presumes corruption and fraud in such circumstances. It also presumes that A intended that B would be influenced by the bribe and was in fact induced to act in favour of A in relation to transactions between A and C. It does not assist either A or B to show that B acted in C's best interests.

In assessing damages and equitable compensation, there is a presumption that the amount of loss is at least as great as the amount of the bribes.

Therefore it is possible for C to bring an action against B for the amount of the bribe and/or for the loss suffered as a result of the bribe, which will be at least the amount of the bribe. It is then possible for C to bring a further action against A on the same basis. This is very useful where B no longer has any money. Of course, if C makes any recoveries from B, it cannot obtain double recovery and will have to give credit for those sums in the claim against A.

LANCE ASHWORTH QC appeared on behalf of the claimant in *Dyson Ltd v Curtis* [2010] EWHC 3289 (Ch) successfully obtaining judgment for in excess of £6m against the bribed employee (and his wife). Subsequently he successfully pursued one of the bribing suppliers without having to go to trial.

The privilege of advising on fraud

IT IS OFTEN SAID THAT ‘FRAUD UNRAVELS ALL’. IN THE RIGHT (OR, PERHAPS I SHOULD SAY, WRONG) CIRCUMSTANCES, THAT IS TRUE IN RELATION TO LEGAL PROFESSIONAL PRIVILEGE BY VIRTUE OF THE SO-CALLED ‘FRAUD EXCEPTION’. THE QUESTION IS: WHAT ARE THE CIRCUMSTANCES IN WHICH THE USUAL RULES OF PRIVILEGE WILL BE UNRAVELLED?

The basic principle is that there can be no privilege in documents or communications which were brought into existence for the purpose of furthering a crime or a fraud or for seeking or receiving legal advice for that purpose. So far, so easy. But what, in this context, qualifies as ‘fraud’? It is long established that the term covers not just criminal, but also civil fraud. But perhaps predictably, in the face of inevitable attempts by inventive lawyers to extend the scope of the exception, the courts have been reluctant to provide a precise definition of the type of conduct that might bring it into play. Neither do the cases speak with one voice.

In *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* [1980] 124 SJ 276, Goff LJ said that in order to breach privilege: *“...the court must in every case, of course, be satisfied that what is prima facie proved really is dishonest, and not merely disreputable or a failure to maintain good ethical standards”.*

By contrast, in *Barclays Bank plc v Eustice* [1995] 1 WLR 1238, the defendant was alleged to have entered into transactions at an undervalue within the meaning of s423 of the Insolvency Act 1986. In the course of proceedings brought by the bank, it sought disclosure of communications between the defendant and his solicitor in relation to the impugned transactions. Schiemann LJ regarded Mr Eustice’s attempts to find a way of taking his assets out of Barclays’ reach *“...as being sufficiently iniquitous for public policy to require that communications between him and his solicitor in relation to the setting up of those transactions be discoverable”*, thereby avoiding the rigidity of the test set out by Goff LJ in *Gamlen*.

The decision has been the subject of significant criticism, including by Lord Neuberger in the splendidly named *Re McE* [2009] 1 AC 908 (HL) in which he expressly left open the question whether the Barclays case was correctly decided.

Despite those doubts, however, *Barclays v Eustice* continues to be applied. Recently, for example, it was engaged by Norris J in *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] 2 Ch 296 to justify a finding that a breach of a director’s duty of fidelity in failing to disclose various matters to the remainder of the board of directors was sufficient to engage the *“iniquity principle”*.

As a result, until the issue is finally resolved, presumably by the Supreme Court, lawyers advising in the area are left with the potentially difficult task of having to gauge whether a course of conduct in which a client is seeking to engage amounts to behaviour which the court might regard as iniquitous in the *Barclays v Eustice* sense.

SIMON HATTAN has extensive experience of and acts regularly for both claimants and defendants in cases involving allegations of fraud and other forms of dishonesty.

Chambers news

People

We are delighted to announce that since our last Serlespeak Lance Ashworth QC has joined us as a tenant and that Sir Raymond Jack has joined our ADR panel.

Lance was called to the Bar in 1987 and took silk in 2006. He has practised for almost 24 years in Birmingham, where he headed a 44 strong commercial team of barristers. His chancery commercial practice dovetails completely with Serle Court and includes commercial, insolvency, company, chancery and civil fraud law. He is highly recommended in the legal directories; Chambers & Partners describes him as *""a ferocious cross-examiner," who attracts high praise among clients as "down-to-earth, approachable and willing to pick up the phone at any time of the day.""*

Sir Raymond was called to the bar in 1966 and took silk in 1982. He was a member of 1 Hare Court, which later joined with Serle Court and he had a wide commercial practice. His book, *Documentary Credits* was first published in 1991 (4th edition, 2009). Between 1994 and 2001 he ran the Bristol Mercantile Court. He was appointed to the High Court, Queen's Bench Division in 2001. He retired in 2011 but continues to sit on a part-time basis hearing business cases.

We are also very pleased that our present pupils Adil Mohamedbhai and Jonathan McDonagh have both been offered tenancy and have accepted. They will become members of Chambers in October 2012 when they have completed their pupillages.

Congratulations to John Machell QC and Hugh Norbury QC who were both appointed as Queen's Counsel in March.

Directories

We were delighted that the 7th edition of the Citywealth Leaders List recommended 11 Serle Court members as prominent barristers in the field of trusts: Alan Boyle QC, Kuldip Singh QC, Frank Hinks QC, Dominic Dowley QC, Philip Jones QC, William Henderson, Daniel Lightman, Jonathan Adkin, Giles Richardson, Dakis Hagen and Robin Rathmell. Further in the Citywealth Magic Circle Awards Jonathan Adkin was 1 of only 2 barristers short-listed for the Lawyer of the Year award.

Conferences and Seminars

Serle Court jointly hosted a very successful Offshore Litigation conference with Appleby in London in July. The conference provided an in-depth look at issues encountered by solicitors in England engaged in multi-jurisdictional asset tracing claims. The conference covered a number of jurisdictions, including Bermuda, BVI, Cayman, Guernsey, Isle of Man and Jersey; and three main general topics: finding your targets, securing the assets, and enforcing judgment. The Serle Court speakers were: Patrick Talbot QC, Hugh Norbury QC, Richard Walford, Jennifer Haywood, Ruth Jordan, Matthew Morrison, Prof Jonathan Harris and Robin Rathmell.

Our autumn seminars and conferences will include Partnership and LLP law for funds, private equity and financial services lawyers and commercial litigators on 27 September and 18 October, Property Litigation: Recent Developments on 3 October, and a Trusts and Commercial Litigation conference in the Cayman Islands on 29 November.

LinkedIn

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

Edited by Jonathan Fowles

A contemnor's right of appeal

THE JSC BTA BANK PROCEEDINGS CONCERN ONE OF THE LARGEST FRAUD ACTIONS PENDING BEFORE THE COMMERCIAL COURT. MUKHTAR ABLYAZOV, THE BANK'S FORMER CHAIRMAN AND PART OWNER OF THE BANK, STANDS ACCUSED OF HAVING STOLEN SOME $5BN FROM THE BANK IN NINE SETS OF PROCEEDINGS, THREE OF WHICH ARE TO GO TO TRIAL THIS AUTUMN.

During the course of proceedings, Ablyazov has committed serial breaches of the court's orders. Most recently, he has been found to be in contempt by failing to disclose his assets in breach of disclosure orders, and sentenced to 22 months' imprisonment. He has reportedly fled the jurisdiction (in further breach of the court's orders), has refused to provide an affidavit verifying his asset disclosure, and has declined to disclose his contact details, save under the aegis of legal professional privilege to those currently representing him (a right upheld by Teare J; see [2012] EWHC 1252 (Comm.)).

Given the well-established authority of the court to enter judgment following default of its orders (*CIBC Mellon Trust Co v Stolzenberg* [2004] EWCA Civ 827; *Marcan Shipping (London) Ltd v Kefalas* [2007] 1 WLR 1864) and likewise to impose conditions upon the hearing of any appeal (*Hammond Suddards Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065), it is perhaps surprising that, in the circumstances, debarring orders made against Ablyazov have been suspended pending the substantive hearing of his appeal against the committal judgment, and also that the court has declined to impose conditions upon hearing this appeal, in particular that Ablyazov surrender himself to custody. Why, in the circumstances, has the court been so cautious?

The answer is not as simply that, following his committal, Ablyazov's liberty is at stake, or that he has an absolute right to appeal the order finding him to be in contempt (an analysis described in *X Ltd v Morgan Gampian (Publishers) Ltd* [1991] 1 AC 1 as *"too facile"*). Rather: first, as a matter of practical case management, the court did not wish to derail the trial of the Bank's claims if a debarring order took effect, only to be revoked if Ablyazov's appeal were to succeed. Accordingly, it stayed the effect of its debarring order so that trial preparation might continue. Second, the court will only make an order which might invariably lead to the dismissal of an appeal or application if to do so is in the best interests of justice (*Hadkinson v Hadkinson* [1952] P 285). Even though the court held that there were strong grounds for believing that Ablyazov was in wilful and contumacious default of the court's orders, this did not justify an order that Ablyazov surrender to custody since, if his appeal were to succeed, this would not be an available means by which to secure his compliance with the court's orders: [2012] EWCA Civ 639.

The reluctance to impose conditions upon the hearing of Ablyazov's appeal, raises a real question as to whether the jurisdiction to do so in contempt cases is more theoretical than real. Nonetheless, in delivering the court's judgment, Moore-Bick LJ noted that if Ablyazov's appeal failed, *"it may at that stage be appropriate to require him to surrender to custody as the price of being allowed to contest the claim…"*. Whether such an order is necessary where debarring orders have already been made (but are suspensory) remains to be seen.

RUTH DEN BESTEN is instructed as junior counsel (led by Philip Marshall QC) for the Bank in the *Granton* proceedings. She was recently named by Legal Week as a future *Star at the Bar*.

serle court

6 New Square, Lincoln's Inn, London WC2A 3QS
T: +44 (0)20 7242 6105 F: +44 (0)20 7405 4004
www.serlecourt.co.uk