3 HARE COURT

The City Lawyer

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THIS MONTH'S CONTRIBUTOR

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Welcome to the latest edition of the City Lawyer - the business law update from 3 Hare Court.

In addition to the new format, we have set up a **short survey** so you can tell us how we're doing!

This month we review:-

- a 3 Hare Court case which asks whether a director acts in breach of duty for repaying company debts owed to third parties
- costs budgets and relief from sanctions in the Jackson age, in Andrew Mitchell MP's libel claim against The Sun over 'plebgate'
- a Court of Appeal decision on apparent judicial bias and wasted costs ordered against solicitors over defects in expert evidence

3 Hare Court in Practice: Can a director act in breach of duty if he repays a company debt owed to a third party?

***Hellard and Patel (Liquidators of HLC Environmental Projects Limited) v Carvalho* [2013] EWHC 2876 (Ch)**

Thomas Roe and **Alexander Halban** appeared in this claim for breach of fiduciary duty brought by liquidators against the former director of a company which operated substantial environmental PFI contracts. The director was a Portuguese entrepreneur. The company had developed waste recycling plants for local councils in Neath Port Talbot and Wrexham in Wales.

The Neath project was partially financed by the Spanish bank Caixa. The company entered into an option with Caixa, to purchase its interest in the project at a fixed price seven years after its start (even if the project failed) After technical and financial problems with the project, the company sold its interest, two years before the Caixa option was exercisable. Crucially, the sale proceeds were used to repay loans owed to group companies and to the director himself.

The Wrexham project was partially financed by a German bank, Nord LB. The company later sold its interest in this project too. The company

repaid the Nord LB loan in full, although Caixa had already exercised its option and the company therefore owed it £1.5 million.

On the company's subsequent insolvency, the director was accused of making preferences to group companies, to himself and to Nord LB, by repaying those debts instead of the option debt to Caixa. The liquidators relied on the director's duty to consider the interests of creditors when a company is near insolvency. The director had not realised that Caixa could obtain a fixed price for its shares even if the project failed. John Randall QC (sitting as a deputy judge) disbelieved his evidence and held that he had acted in breach of duty. He was ordered to repay £2.8 million, the total value of the payments, to the company.

The director argued that he could not be held liable for repaying a genuine debt owed to a third party.In a claim for breach of duty, either the principal has to suffer loss (for which he is compensated) or the fiduciary has to make a profit (for which he must account to the principal). Where a genuine third party debt is repaid, neither of these occurs and there is no wrong of which the principal can complain. The judge disagreed and preferred the liquidators' argument that that, in the case of the principal's insolvency, the repayment of one debt in preference to others was a misapplication of the principal's assets and the fiduciary could be ordered to restore them. However, he accepted that both positions were supported by authority and the question of law was properly arguable. This case provides one answer, but it remains to be seen whether a different answer finds favour with other courts and in other cases.

Costs, budgets and relief from sanctions in the Jackson age

Andrew Mitchell MP v News Group Newspapers Limited **[2013] EWHC 2355 (QB)**

In this case, part of Andrew Mitchell MP's libel claim against The Sun over 'plebgate', Master McCloud considered an application for relief from sanctions imposed for a failure to discuss cost budgets and for filing a costs budget late.

The new CPR, r.3.14 provides that "Unless the court otherwise orders, any party which fails to file a budget ...will be treated as having filed a budget comprising only the applicable court fee". However, that general rule did not apply in the particular case, which was governed by Part 51 (on pilot schemes) and the Master's power to impose sanctions was part of her case management powers in Part 3. Nonetheless the Master thought it appropriate to look to r. 3.14 for guidance as to what sanction to impose. Accordingly, it was ordered that the claimant's costs be restricted to the relevant court fees. The claimant applied for relief.

Seminars and Workshops

3 Hare Court members regularly provide seminars and workshops to individual firms or groups of practitioners. If you have a request for a seminar or lecture, or would like further information then please do not hesitate to contact our marketing manager, Carolyn Harris.

Conferences

We are often invited to speak at conferences in the UK and abroad. If you have a query concerning a conference then please get in touch with our marketing manager, Carolyn Harris.

Clerks

We have an experienced and approachable clerking team who will be happy to assist with recommendations, fees, our service protocol or general enquiries. Please contact the clerks on 0207 415 7800. Alternatively please contact our Senior Clerk, James Donovan

Feedback

As always at 3 Hare Court, we welcome your feedback.

In this edition, we have included a short survey. It will take only a minute to complete, but help us to shape the content for future editions.

About us

The claimant argued that r. 3.14 did not apply where the budget was filed late, only when none was filed at all. The Master rejected that submission, noting that r. 3.14 followed on logically from r.3.13 which provides that costs budgets must be filed no later than 7 days before the CMC and the two rules must be read together.

The application for relief engaged "old fashioned concepts of fairness, access to justice including Art.6, and the requirements for proportionality of response, in addition to adherence to the new overriding objective". However, the overiding objective now expressly incorporates the need to ensure compliance with rules, orders and practice directions. The Master interpreted that as requiring a "shift of emphasis towards treating the wider effectiveness of court management and resources as a part of justice itself". It is about "the right of other litigants to have a fair crack of the whip". The Master referred to the 18th Jackson implementation lecture (which she suggested "all professionals in the law should read") which stated that "parties should no longer expect indulgence if they fail to comply with their procedural obligations". These comments are not judgments but the court will take note of the policy behind them.

The Master refused relief from sanctions. The claimant's solicitors had complained that, as a small firm, they were overloaded dealing with a number of significant claims at the same time. Considerable work had to be done in preparation for other hearings before the High Court in the same period as the claim against News Group. The court fees would be around £2,000, compared with around £500,000 costs claimed in recent libel cases. The Master held that these excuses were insufficient and were to be accorded "less weight in the post Jackson environment" than previously. Furthermore there was no real prejudice to the claimant who had the benefit of a CFA agreement with his solicitors. The Master concluded that the emphasis under r. 3.9 and the overriding objective was on rule compliance.

The Master clearly recognised the potential hardship that could be caused by interpreting the rules too strictly, and for that reason granted permission to appeal. We will update our readers as to the result on the appeal in due course. For now, the approach is firmly against granting relief unless lawyers come to the court armed with a good excuse and can show real prejudice to their client.

Apparent judicial bias and wasted costs against solicitors for defects in expert evidence

***Mengiste v Endowment Fund* [2013] EWCA Civ 1003**

This case considered the proper role of experts in civil proceedings, the power to make wasted costs orders against solicitors in relation to their expert witnesses, and the principle of apparent bias by the judge who hears the wasted costs application.

The claimants had brought and lost proceedings against the defendants in Ethiopia. Following execution of the Ethiopian judgment

the claimants discovered fresh evidence which fundamentally undermined the defendants' case as presented to the Ethiopian court. The claimants brought a claim for compensation in England. England not being the natural forum, the claimants needed to show that the claim ought nonetheless to be heard here, on the basis that they would not receive a fair trial in Ethiopia.

Mr Jones was engaged to provide expert opinion on the law of Ethiopia. Peter Smith J heard the challenge on jurisdiction. He made serious criticisms of Mr Jones's evidence, rejecting most of what he said. The evidence did not comply with Part 35. Mr Jones often arrived at final conclusions on matters properly reserved for the judge. He was held to have "repeatedly strained into the argumentative" as well as making unsustainable criticisms, aimed at bolstering the claimants' case. It was clear to the judge that Mr Jones simply did not understand his duty to the court or the proper role of an expert in civil legal proceedings. The judge went on however to make it clear that the blame for this fell on the claimants' solicitors. They had, he said, failed to explain these crucial matters to their expert. Mr Jones had only begun to realise his duties once they had been explained to him in court by the judge. That fault "lies entirely with the claimants' lawyers".

Following that hearing, the defendants applied for a wasted costs order against the claimants' solicitors. There are two stages to such an order. At Stage 1 the applicant must show cause that there is a strong prima facie case to answer for negligent, unreasonable or improper conduct and that that conduct caused loss. At Stage 2 the court decides whether the grounds are made out. The judge was asked to recuse himself from hearing the application, based on the open criticisms that he had made of the claimants' solicitors at the previous hearing. It was suggested that an observer might conclude that there was a real possibility of bias on the part of the judge. The judge refused to recuse himself and made a Stage 1 wasted costs order. The claimants' solicitors appealed to the Court of Appeal.

Arden LJ gave the lead judgment. She noted that in almost every case the judge who heard the substantive claim or application would be the right judge to consider the issue of costs, even if he or she had made adverse findings against one of the parties. There will however be exceptional cases, of which this was one. In criticising the claimants' solicitors in the way he did, the judge went beyond that necessary to evaluate Mr Jones' evidence. Furthermore those views were expressed in strong terms, on a number of occasions and without the qualification that they were preliminary views. That would have created an impression of bias in the eyes of an informed observer. The criticisms were of high gravity when made against a solicitor and would have appeared somewhat unbalanced. On the facts the test in *Porter v Magill* was met and the judge ought to have recused himself.

The Court of Appeal refused to hold that a Stage 1 costs order was not appropriate. The order made by the judge was however set aside and it would be up to a different judge to consider if the order ought to be remade.

The judgment offers a timely reminder of the proper role of

experts: their duty is to the court, they must only give evidence of those matters falling within their own expertise, and they must refrain from offering opinion on matters of ultimate fact. Many of us will have been confronted with expert reports which stray into the argumentative, as the judge put it. This can be a severe own-goal for litigants hoping to rely on the report, as it calls into question the independence if not also the integrity of the expert. As demonstrated here, it may also bring solicitors into the frame for failing to inform the expert of his or her duties clearly. Finally, the case reflects upon the developing law of apparent bias. It offers a realistic assessment of how the process would have looked to a member of the public who might have observed the case. It is a reminder of the over-quoted but still important principle that justice must be done and be seen to be done.

Your views

Do you find the City Lawyer useful? Are there any features or topics that you would like us to include in future? Please complete the attached short survey **and let us know**.

Get in touch

We hope you have enjoyed this issue of the City Lawyer. If you are dealing with a similar case or wish to discuss any area of commercial law, please **get in touch** to arrange a short informal discussion.

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