



The City Lawyer

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THIS MONTH'S CONTRIBUTOR

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March 2014

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

This month we look at: -

- The powers of the Court to place restrictions on the use of confidential information disclosed in litigation
- The ability of a company to rely on a misrepresentation made to its agent before its incorporation
- The correct approach to the assessment of damages for breach of contract where the party in breach was unwilling or unable to perform

3 Hare Court in Practice: The Court's powers to restrict the use of confidential information

Re the Estate of Platon Elenin, a.k.a. Boris Berezovsky [2014] EWHC 70 (Ch)

Simon Davenport QC and **Aidan Casey** appeared in this dispute over the estate of the late Boris Berezovsky, which concerned whether a party can rely on confidential information in the hands of third parties.

The dispute was between the Russian airline, Aeroflot, an alleged creditor of the estate, and Mr Berezovsky's daughter, Ekaterina Berezovskaya ("EB"), as to who should administer the estate. Aeroflot argued that it would be inappropriate for EB to represent the estate, primarily because the estate is insolvent and it therefore ought to be administered in the best interests of the creditors. The receivers already appointed by the court would be more appropriate to act as administrators for that purpose. EB's case was that the estate is solvent and that she should be appointed as its representative.

EB sought permission to rely on a compromise agreement entered into between Mr Berezovsky and the Third to Sixth Respondents, the family of another oligarch, also deceased ("the AP Family"), which contained a confidentiality clause. The information in the compromise agreement

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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](#)

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was highly material to the solvency of the estate, because under it, large payments were to be made to the estate. The AP Family opposed disclosure of the agreement to Aeroflot on the grounds that the information contained within the agreement was likely to come into the hands of the Russian Government, which would use the information to carry out attacks on its assets and financial interests.

The Court accepted that the confidential information was probably highly material to the question of solvency and that it was necessary to dispose fairly of the application. It also accepted that there was some risk of damage to the AP Family if the confidential information were freely available to all parties, without restriction.

On a review of the authorities, the Court accepted that an order for restrictions emanated from the Court's inherent jurisdiction to prevent an abuse of its own process, such as where information is used to harass third parties. It was unlikely that the court had jurisdiction to order that only a party's lawyers (and not the party itself) could have access to confidential information. The Court could impose restrictions, both at the disclosure stage and at trial, so long as they did not conflict with natural justice.

In this case, the Court imposed restrictions to help prevent the misuse of confidential information for collateral purposes: (i) disclosure would be restricted to certain named persons within Aeroflot who were reasonably needed to give instructions, (ii) disclosure was to be by way of single hard copy of the confidential information to each named person, (iii) the copy was not to leave a specified office, (iv) the copy could only be inspected by the named persons and could not itself be copied, (v) each named person should undertake to maintain the confidentiality of the information and only use it for the purpose of the proceedings, (vi) the parties and the AP Family could apply as to how the information would be dealt with at the substantive application and whether the hearing or part of it should be heard in private, and (vii) the parties could also apply as to terms to be imposed as to the destruction or return of the confidential information.

This case illustrates that the Court will scrutinise very carefully a request to use (or withhold use) of confidential information. As the Court has wide powers to place restrictions on the use of such information, it is likely to be a truly rare and exceptional case in which the Court would disallow the use of confidential information completely.

Misrepresentation where the representee is only incorporated subsequently

Cramaso LLP v Ogilvie-Grant, Earl of Seafield and ors [2014] UKSC 9

In this case, the Supreme Court considered the scope of the duty of care for



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representations made in pre-contractual negotiations, particularly where the representee is not the same as the contracting party.



Cramaso LLP (“Cramaso”) was incorporated to enter into a commercial tenancy with the Respondents, the owners of a Scottish grouse moor over which commercial shooting took place. Mr Erskine was the controlling mind of Cramaso. Soon after entering into the tenancy, Mr Erskine discovered that the grouse population was smaller than he had been told and considered that the Respondents had deliberately misled him in an email to induce Cramaso to take the lease. Cramaso sought reduction (setting aside) of the contract and damages for fraudulent or negligent misrepresentation. The problem for Mr Erskine and Cramaso was that the email in question was received prior to Cramaso’s incorporation.

The issue was whether there had been a continuing representation, which was capable of remaining in effect until the contract was concluded, notwithstanding that the prospective contracting party had changed after the representation had been made.

The Supreme Court held that it was possible to impose a continuing responsibility on the maker of a pre-contractual representation, where there was an interval between its making and the conclusion of a contract in reliance on it. Where the representation had a continuing effect, the representor had a continuing responsibility for its accuracy. The representation contained in the Respondents’ email was undoubtedly of a continuing nature.

The question then arose as to whether the representation continued after the identity of the prospective contracting party changed, and, if so, whether the Respondents had assumed a responsibility towards Cramaso for the accuracy of the representation. The negotiations between Mr Erskine and the Respondents, in the course of which the email was sent, continued after it had become apparent that an LLP was to be used as a vehicle for Mr Erskine’s investment. In continuing and concluding the contractual negotiations with Cramaso without having withdrawn the representation earlier made to Mr Erskine its agent, the Respondents had implicitly asserted to Cramaso the accuracy of the representation. It had continued to be foreseeable that the representation would induce the other party to the negotiations to enter into a contract. The Respondents had therefore assumed a responsibility towards Cramaso for the accuracy of the representation, and had breached their duty of care.

Surprisingly, this was the first decided case where the recipient of the statement relied on a statement made to another party, who later became the recipient’s agent (as opposed to the case where the maker of the statement later became the agent for another party).

Assessing damages where the contract-breaker was unwilling or unable to perform the contract

**S.C. Compania Nationala de
Transporturi Aeriene
Romane Tarom S.A. v
Jet2.com Limited [2014]
EWCA Civ 87**



When a party who had agreed to perform services renounces its obligations under the contract, are damages assessed on the assumption that it would have performed those obligations or on the basis of its declared intention that it would not do so?

The Court of Appeal considered this question in a case concerning aircraft maintenance. Jet2.com Limited (“Jet2”) was an English budget airline. It required its aircraft to undergo regular maintenance checks and entered into a three-year maintenance agreement with D. As time went on, D found it increasingly difficult to retain competent labour and perform services at the agreed price. It also became more advantageous to Jet2 to send its aircraft to the Defendant and Jet2 exercised its contractual right to extend the contract for a further three years. It also entered into another maintenance agreement with a different provider, at much higher rates. D then informed Jet2 it was no longer able to perform its obligations under the contract. The Defendant eventually terminated the agreement for Jet2’s failure to pay an invoice on time.

The Judge found that D had renounced the agreement when it terminated for failure to make prompt payment, but since the time for payment of the invoice was not of the essence of the contract, the non-payment was not a repudiatory breach and Jet2 was entitled to damages.

The Judge held that in assessing damages, he had to assume that D would have performed the contract. He found that Jet2 would have continued to place aircraft with it in order to take advantage of the low hourly rate and therefore, D would have serviced a certain level over the remaining contract period.

On appeal, D argued that the Judge should have instead assessed damages on the basis that it had indicated an unwillingness to perform and that Jet2 was not minded to employ it in future

The Court of Appeal dismissed the appeal. The Judge’s assumption was necessary in order to compensate Jet2 for the lost benefit of the agreement. Valuing its loss required an assessment of the number of aircraft Jet2 would have sent to D had the agreement not been terminated and that depended on what assumptions were to be made as to D’s performance had the agreement continued. To accept D’s argument would be to enable a contract-breaker to escape liability by relying on its own breach to argue that the innocent party would not have engaged him in any event.

This decision makes it clear that when assessing damages for

repudiation of a contract, the innocent party will have the benefit of the assumption that the contract-breaker would have been willing and able to perform the contract for the remainder of the period, even if there is evidence to the contrary.

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.

The next edition of the City Lawyer is due in April. Until then!

Chambers of Peter Knox QC

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