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THIS MONTH'S CONTRIBUTOR

Helen Pugh

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Seminars and Workshops

3 Hare Court members regularly provide seminars and workshops to

THE CITY LAWYER - August 2013

The business law update from 3 Hare Court

3 Hare Court continues to lead the field in providing practical advisory and advocacy services to business clients. In these monthly updates we outline recent developments in litigation ranging from general contract law, to injunctions, to specialist areas such as banking and finance. In addition, we will provide either a commentary piece or a feature on a recent 3 Hare Court case.

This month we are delighted to welcome our new Marketing Manager, Carolyn Harris, to 3 Hare Court. Carolyn will be happy to answer any questions about seminars, conferences or marketing in general. We wish her all the best in her new role.

We hope you enjoy this August edition.

JSC BTA Bank v Mukhtar Ablyazov [2013] EWCA Civ 928 (CA)

In this case, part of the long-running claim by the Kazakh bank against its former director, the Court of Appeal considered the meaning of 'asset' in the context of the standard form commercial court freezing injunction.

JSC BTA Bank ("the bank") had obtained a freezing injunction against its former director, MA. At paragraph 4 the freezing injunction prevented MA from disposing of, dealing with or diminishing the value of his assets. Paragraph 5 defined assets to include any asset which MA had the power, directly or indirectly, to dispose of or deal with as if it were his own.

Subsequent to the injunction MA entered into 4 loan facility agreements up to a total borrowing limit of £40m. MA directed that the entire £40m be paid directly to third parties to, amongst other things, fund MA's legal and living expenses.

The bank applied for a declaration that MA's rights under the loan agreements were 'assets' for the purposes of the freezing injunction. It argued that all 'choses in action' should be

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 particular, any feedback or suggestions on this and forthcoming updates will be gratefully received.

Please contact our marketing manager, Carolyn Harris with any queries.

construed as assets otherwise the effectiveness and repute of the freezing injunction would be undermined.

The Judge and the Court of Appeal refused the declaration. MA's rights under the agreements were not 'assets'. Unlike a debt, this chose in action comprised a personal, cancellable, non-assignable loan facility and MA was under no obligation to avail itself of it. The standard form injunction was to be given a strict meaning. The defendant and third party must be able to know where they stand. A party wishing to avoid this strict construction could apply for a freezing order with specifically drafted, clear and unequivocal wording to cover this situation.

This case is a further example of the principle that the terms of freezing injunctions will be strictly construed by the courts. Having found MA in contempt of court and considered him to have acted with "cynicism, opportunism and deviousness towards court orders", it is difficult to see a stronger case for applying a wide meaning.

Menelaou v Bank of Cyprus UK Ltd [2013] EWCA Civ 1960 (CA)

In this matter the Court of Appeal considered whether subrogation to an unpaid vendor's lien over property applied where, although no sum of money had been advanced, value had been given by the bank releasing its charge over other property.

M's parents owned property ("the Hall") which was subject to two legal charges in the name of the Bank of Cyprus UK Ltd ("the bank"). M's parents wished to sell the Hall and purchase another property ("Oak Court") in M's name. The bank agreed on condition, amongst other things, that M granted a new charge over Oak Court. The legal charge granted to the bank was defective and M successfully applied to have the charge removed from the register. The bank counterclaimed on the basis that they had an equitable charge arising out of subrogation to an unpaid vendor's lien over Oak Court.

The Judge held that M had been enriched and there was no reason of policy to deny the bank a remedy. However, the Court held that the crucial factor of enrichment at the bank's expense was absent. The purchase monies for Oak Court were not paid in part or at all by the bank and this was fatal to the bank's claim. The bank appealed.

The Court of Appeal allowed the appeal. There was a sufficiently close causal connection between the bank's agreement to release its interest in the Hall and M's enrichment because the agreement to release the charge over the Hall released the funds to pay for Oak Court. The transfer of value began with the bank's agreement. Accordingly M had been enriched at the bank's expense.

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Further, as a matter of economic reality the bank was the source of the monies used to purchase Oak Court and therefore there was no reason in principle why the bank should not be entitled to the remedy of subrogation.

This case will be analysed in more detail in a forthcoming article written by **Peter Knox QC** and **Helen Pugh** in the October edition of the Journal of International Banking and Finance Law.

Lupofresh Ltd v Sapporo Breweries Ltd (A company incorporated under the laws of Japan) [2013] EWCA Civ 948 (CA)

Head of Chambers, **Peter Knox QC**, was instructed in this international sale of goods contract involving an English distributor (D) and Japanese supplier (S).

In March 2005 D contracted with S for the supply of a fixed amount of hops at a fixed price in subsequent crop years. D alleged that it agreed to an extremely unfavourable renegotiation of the contract for the 2008 crop year only under considerable economic pressure. Subsequently S brought an action for the price and D counterclaimed by relying on the developing doctrine of economic duress, amongst other grounds.

The key issue was the applicable law. Whereas English law recognised a developing concept of economic duress, Japanese law did not (or so held the Judge). At first instance the Judge held that Japanese law applied.

D appealed on the basis that (1) the characteristic performance of the negotiated contract was the release of more favourable contractual rights by D and (2) that under Article 8 of the Rome Convention the issue of consent fell to be determined by English law and economic duress negated consent.

The Court of Appeal dismissed the appeal. The applicable law fell to be determined by Article 4 of the Rome Convention incorporated into English law by the Contracts (Applicable Law) Act 1990. The characteristic performance of the contracts was the supply of the hops and the performer's habitual residence was Japan. Accordingly Japanese law applied.

Further, Article 8 only related to the existence and not validity of consent. Its aim was to prevent parties being bound by a contract by silence where there was no intention to consent to a contract. In any event, the Court of Appeal reserved its

view on whether duress vitiated consent as a matter of English law.

This case is a reminder of the importance of researching, negotiating and agreeing an applicable law in advance. In default of agreement, the Court will apply the default EC conflict of law rules rigidly irrespective of any perceived hardship in the result.

3 Hare Court
Temple
London EC4Y 7BJ

T: 020 7415 7800

e: clerks@3harecourt.com
w: www.3harecourt.com