3 HARE COURT

The City Lawyer

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THIS MONTH'S CONTRIBUTORS

Simon Davenport QC

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Sarah Ramsey

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

This month we consider:-

- will the court grant relief from sanctions under the new r. 3.9 when it has already refused a previous application?
- what is a 'reasonable' disclosure search?
- a landmark jurisdiction case from the Supreme Court on Articles 27 and 28 of the Brussels Regulation

3 Hare Court in Practice: Guidance on the new CPR r.3.9

***Thevarajah v Riordan & Others* [2013] EWHC 3179 (Ch)**

Simon Davenport QC and **Daniel Lewis** appeared for the applicant defendants in this application for relief from sanctions under CPR r.3.9. This case provides important guidance on how the courts will approach applications for relief under the new CPR r.3.9.

The underlying claim arose out of the alleged sale of one public house and purchase of shares in another such property. The respondent had commenced substantive proceeding and had obtained a worldwide freezing order against the applicants and a further disclosure order in the form of an unless order.

At a previous hearing on the 9th August 2013, the applicants had been struck out for failure to comply with their disclosure obligations as set out in an unless order. The court had refused to grant the applicants relief from sanctions.

The applicants applied again under CPR r.3.9, submitting that they had now complied with the disclosure requirements, that the breach of the unless order had been remedied, and that failings in disclosure were partly due to their former solicitors. The respondent submitted in turn

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The general editors of this bulletin are Helen Pugh, Asela Wijeyaratne and Alexander Halban. Please

that this second relief application was an abuse of process as it sought to litigate issues that had already been determined.

The application was granted. Although the applicants had brought the application under the new r.3.9, the matters in the old r.3.9 remained relevant. Relief would not be refused if that would be a disproportionate response. The new rules had been brought in to counter the culture of deliberate delay, but the principle was justice between the parties, and minor errors could not be exploited for tactical gain. It was appropriate to grant the applicants relief from sanctions; the fact that the applicants had now complied with disclosure obligations which were significant and wide-ranging and the fact there was no evidence of wilful non compliance amounted to a material change in circumstances. The second application was not an abuse of process and was successful.

What is a 'reasonable' disclosure search?

***Atrium Training Services Ltd (In Liquidation)* [2013] EWHC 2882 (Ch)**

Simon Davenport QC and **Daniel Lewis** appeared for the respondent liquidators in this matter regarding the obligations under an unless order requiring disclosure.

The liquidators had brought actions against the former company directors in respect of alleged fraudulent trading and trading whilst insolvent. There had been many documents that were potentially relevant for disclosure. The liquidators had thus proposed an e-disclosure method, to which the applicants had not objected. An e-disclosure document provider (U) scanned and uploaded hard copy documents into a database which was subsequently searched for relevant documents. U's paralegals then produced a list of relevant documents. The court made an unless order requiring disclosure by a certain date, and the disclosure lists were served on time.

It then transpired that two categories of relevant documents were mistakenly missing from the liquidators' disclosure list. The liquidators produced a supplementary list after the disclosure date.

The Court refused the company directors' application to strike out the claim. It held that the primary obligation imposed on the liquidators by the order had been to conduct a reasonable search and list the relevant documents, namely those complying with CPR r.31.6, found in that search. That was to be done in a reasonable manner, reasonableness depending on the factors in r.31.7(2). Although a search not carried out in good faith would not be reasonable, a search conducted in good faith which was fair and proportionate given the number of documents, the nature and complexity of the case, the ease and expense of retrieval and the significance of any document likely to be located, would be reasonable and compliant.

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To show that a disclosing party was in breach, it was not enough merely to show that it had within its control relevant documents which were not mentioned in the list. It would have to be established that no reasonable search had taken place. The deficiencies relied on had to be significant enough to support this conclusion.

The Court also rejected the applicant's contention that PD31B did not apply because the documents were in fact hardcopies uploaded for an e-search. Whilst a document held as a piece of paper was not an electronic document, here the applicants had not objected to e-disclosure or the method used. PD31B applied.

This case provides welcome clarification on when the courts may find that a disclosing party in its breach of its disclosure obligations. It also provides guidance on the application of CPR Practice Direction 31B regarding disclosure of electronic documents.

A landmark jurisdiction case on Articles 27 and 28 of the Brussels Regulation

***Re 'The Alexandros T'* [2013] UKSC 70**

The Supreme Court allowed an appeal by English insurers and declined to stay English proceedings under the Brussels Regulation pending the resolution of proceedings in Greece.

The facts of *Re 'The Alexandros T'* [2013] UKSC 70, were as follows: In August 2006, Starlight Shipping Company (Starlight) issued English court proceedings against various insurers in relation to an insurance claim for the total loss of its vessel. The case settled shortly before trial, and the court proceedings were stayed on the terms of the settlement agreements, which contained exclusive jurisdiction clauses in favour of the English courts.

In 2011, Starlight launched a fresh case against the same insurers in Greece, although these were expressed as torts actionable in Greece. In response, the insurers sought to enforce the earlier settlement agreements in the English High Court. Starlight applied for a stay of those English proceedings in favour of the Greek proceedings under either Article 27 or Article 28 of the Brussels Regulation.

The High Court granted summary judgment to the insurers, but the Court of Appeal reversed that ruling on the basis that it was bound to stay the English proceedings under Article 27. The insurers appealed to the Supreme Court.

The Supreme Court noted that Article 27 would apply if the claims in England involved *the same causes of action* as the claims in Greece and if the English Court was second seised. In those circumstances, an English Court would be obliged to order a mandatory stay of its own proceedings pending the outcome in Greece. The question was whether the two claims were mirror images of one another, and thus legally irreconcilable. It held that the legal basis of the claims in tort in Greece was different from the legal basis of the contractual claims in

England, and so the two claims were not a mirror image. Article 27 did not apply.

The Supreme Court then noted that Article 28 would apply if the proceedings in England *were related to* those in Greece and the English Court was second seised, in which case the English Court would have had discretion to stay the English proceedings pending the outcome in Greece. However, the Supreme Court held that the English court was first seised for the purposes of Article 28 because the Greek claims had been brought subsequent to the stay of the original English proceedings. In any event, even if the English court was second seised, it would have refused discretion to stay its proceedings because the English High Court was the 'natural' forum in which to consider the issues raised: Not only did the matter raise contractual questions governed by English law, but it was at least arguable that the parties had agreed that they should be decided by the High Court.

This important ruling clarifies the operation of Articles 27 and 28 of the Brussels Regulation and safeguards the effectiveness of settlements reached in England.

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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