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Butterworths Corporate Law Update

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RECENT DEVELOPMENTS

Deferred Prosecution Agreements

Commencement, Code of Practice, Sentencing Guidelines

The provisions of the Crime and Courts Act 2013, s 45 and Sch 17, giving effect to deferred prosecution agreements (DPAs) came into effect on February 24, 2014: SI 2014/258.

These provisions allow companies (and partnerships and unincorporated associations, but not individuals) to reach an agreement with prosecutors whereby a prosecution is suspended provided the company agrees to comply with certain conditions (including paying compensation, penalties, disgorging profits etc) as to its future conduct.

The SFO and CPS have also issued a DPA Code of Practice which can be found at http://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf.

In conjunction with these developments, the Sentencing Council has published definitive guidelines for sentencing corporate offenders convicted of fraud, bribery and money laundering offences which are available at http://sentencingcouncil.judiciary.gov.uk/guidelines/forthcoming-guidelines.htm and which will apply to all corporate offenders sentenced on or after 1 October 2014.

The Takeover Panel

Commitments by shareholders who are also directors

The Takeover Panel has issued a Practice Statement to remind practitioners of the way in which the Executive interprets and applies Rule 21.2 of the Takeover Code in relation to irrevocable commitments and letters of intent given by offeree company shareholders who are also directors of the offeree company.

The key point is that the Panel Executive considers that the Takeover Code permits an offeree company shareholder who is also a director of the offeree company to enter into an irrevocable commitment or letter of intent to accept an offer (or to vote in favour of a scheme of arrangement) with respect to the shares in the offeree company held or controlled by the individual concerned (Rule 21.2(b)(iv)). However, the Executive considers that that rule does not permit an offeree company shareholder who is also a director of the offeree company to enter into other kinds of offer-related arrangements with the offeror or any person acting in concert with the offeror.

For more details, see Takeover Panel, Practice Statement No 27, Rule 21.2 – Directors' Irrevocable Commitments and Letters of Intent, available at http://www.thetakeoverpanel.org.uk/statements/practice-statements.

CASES

'Constructive trustees' and limitation periods

Supreme Court opts for narrow approach

The Supreme Court has considered the meaning of s 21 of the Limitation Act 1980 which is an important provision with respect to claims where the statutory limitation period has expired. Section 21 provides that no period of limitation shall apply to (a) an action by a beneficiary under a trust, in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy or (b) recovery from the trustee of trust property or the proceeds of trust property.

The claimant had deposited $6m with his solicitor in London to be held in trust for the claimant on terms that it should not be released until certain conditions were met. The allegation was that the solicitor paid the money into an account held by the Nigerian Central Bank though the conditions were not met. The events occurred in 1986.

The claimant wished to pursue a claim against the Central Bank which, he alleged, had dishonestly assisted the claimant's solicitor by receiving the money, knowing it represented trust funds paid to the bank in breach of trust.

The question was whether permission should be given for service out of the jurisdiction which turned on whether there was a serious issue to be tried which turned on whether the claim was statute barred.

As Lord Neuberger explained the questions before the Supreme Court were:

- Is a stranger to a trust who is liable to account on the grounds of knowing receipt of trust assets and/or on the grounds of dishonest assistance in a breach of trust, a "trustee" for the purposes of section 21(1)(a) of the 1980 Act?
- Does an action "in respect of" any fraud or fraudulent breach of trust to which the trustee was a party or privy (s 21(1)(a)), include an action against a party which is not itself a trustee?

By a majority, the Supreme Court opted for a narrow interpretation of s 21 holding that the answer to each question was 'No':

(i) The section is concerned only with actions against true trustees and the Central Bank is not a true trustee. A constructive trust of the kind alleged against the Bank (the dishonest assisting/knowing receipt cases) is not a true trust but merely a basis for granting equitable relief. Persons who are under a purely ancillary liability are in a different position to that of a trustee. Their acts and their receipt of the assets are at all times adverse to both the true trustees and the beneficiaries. They are liable to account in equity, but as wrongdoers, and not as true trustees.

(ii) Therefore, a stranger to the trust, who dishonestly assists in a breach of trust or knowingly receives trust property paid out in breach of trust, is not a trustee for the purposes of the Limitation Act 1980.

(iii) Nor was the Central Bank a party sued "in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy" for the purposes of Limitation Act 1980, s 21(1)(a). The section is concerned only with actions against trustees on account of their own fraud or fraudulent breach of trust (to which they are 'party or privy').

Dissenting, Lord Mance considered that Parliament intended to treat dishonest assisters as in the same position as regards limitation as the dishonest trustees they assist and therefore the claim was not statute barred. Lord Clarke dissented in part. He agreed with the majority that the Central Bank was not a trustee within the meaning of s 21(1)(a), but he considered that an action against the assister did fall within the ordinary meaning of the language of s 21(1)(a), as an action in respect of a fraudulent breach of trust to which the trustee was party or privy.

By a majority, then, the appeal was allowed and permission to serve the claim out of the jurisdiction was set aside: *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] 2 WLR 355, [2014] All ER (D) 172 (Feb).

Negligent Misrepresentation

LLP not in existence at time of misrepresentation

An issue before the Supreme Court was whether respondents could be liable in negligent misrepresentation when the misrepresentation was made to A though the contract was subsequently entered into by B and B did not exist at the time of the misrepresentation.

A negligent misrepresentation was made to A concerning the numbers of grouse on a commercial grouse moor which A intended to lease. A decided subsequently to use a limited liability partnership (LLP) as the vehicle to hold the lease and it entered into the lease. The lower courts concluded that the LLP had no grounds for claiming as it did not exist at the time of the misrepresentation, or that no duty of care was owed by the representor (L) to the LLP as there was insufficient proximity between them.

The Supreme Court, in allowing an appeal, considered that the lower courts had approached the issue essentially on the wrong basis. The issue was whether there was a continuing representation by L which resulted in an ongoing obligation on the part of L to ensure the accuracy of the representation.

The Supreme Court held that, in continuing and concluding the contractual negotiations with the LLP, through its agent, A, without having withdrawn the representation earlier made to A as an individual, the respondents, by their conduct, had implicitly asserted to the LLP the accuracy of that representation; and they had done so in a situation where it had continued to be foreseeable that the representation would induce the other party to the negotiations to enter into a contract. They had, therefore, assumed a responsibility towards the LLP for the accuracy of the representation and owed it a duty of care, which they had failed to fulfil: *Cramaso LLP v Ogilvie-Grant* [2014] UKSC 9, [2014] All ER (D) 106 (Feb).

Fining large companies

Achieving the statutory purpose of sentencing

In an interesting judgment, the Court of Criminal Appeal has considered the level of fines to be imposed on very large companies for breaches of health and safety and environmental protection legislation. Sellafield Ltd had been fined £700,000 for offences concerning the disposal of radioactive waste (essentially some waste had been classified as not-radioactive when it was and therefore should have been disposed of differently). Network Rail had been fined £500,000 for offences relating to the safety of a level crossing where a child had been very seriously injured.

The companies appealed on the basis that the fines were manifestly excessive.

The appeals were dismissed.

(1) With respect to Sellafield, there had been, in effect, no harm, but the failures had been easily avoidable, and could and should have been detected very quickly; there had been the clearest negligence. A fine of the size imposed would, in the circumstances, achieve the statutory purposes of sentencing by bringing home to the directors of Sellafield and its professional shareholders the seriousness of the offences committed, and provide a real incentive to the directors and shareholders to remedy the failures which the judge had found had existed at the site at Sellafield, particularly the practices within the company which had been too lax and to a degree complacent.

Having upheld the amount of the fine, the Court of Appeal noted that a financial penalty directly affecting the (three) shareholders would mean that the shareholders would be incentivised to hold the directors to account and remedy the failures which resulted in criminal convictions. The court went on to say that, if the sentence did not have that incentivising effect, the sentence for any further culpable failures would have to take into account that this fine of £700,000 had not achieved some of the statutory purposes of sentencing.

(2) With respect to Network Rail, the actual harm caused had been serious; much greater harm had been foreseeable. As to the level of culpability of Network Rail, there had been no evidence of specific senior management failures. The failures, serious and persistent though they had been, had been at lower operational levels. The fine of £500,000 imposed on a company the size of Network Rail could only be viewed as representing a very generous discount for the mitigation advanced. If the judge had imposed a materially greater fine, there would have been no basis for criticism of that fine.

In relation to Network Rail, which is a company limited by guarantee, and therefore does not have shareholders, with profits being re-invested in the business, while a fine might be said to harm the public, it would nonetheless serve three other purposes, if it reduces offending by Network Rail, reforms and rehabilitates Network Rail as an offender, and protects the public. Interestingly, the court then drew the following three issues to the attention of the members and directors of Network Rail:

(i) The responsibilities of the members must include appointing executive and non-executive directors who put at the forefront of their duties compliance with responsibilities for the safety of people's lives.

(ii) All of the directors of Network Rail must pay greater attention to their duties in respect of level crossing safety given the prevalence of accidents at crossings.

(iii) The court noted that the bonuses of the executive directors should have been very significantly reduced because of the poor level crossing safety record of the company, though they were only reduced to a minor, inadequate, extent. In future cases, the court will look to see the response of the board to the statutory purposes of sentencing in a case where a fine imposes no direct punishment on anyone.

It would seem very clear from this judgment that the court has very clearly marked the cards of both companies (and similar type enterprises) and indeed marked the cards of the directors and shareholders/members in each company as well: *R v Sellafield Ltd, R v Network Rail Infrastructure Ltd* [2014] EWCA Crim 49, [2014] All ER (D) 111 (Jan).

Share purchase agreement

Default provisions amounting to unenforceable penalty clauses

M sold 60% of his shares in a company to C on terms which included restraint of trade provisions binding M. The share sale agreement provided that, in the event of breach of these restraints, M would no longer receive his share of the remaining two deferred consideration payments on the sale and would be liable to have all his retained shares in the company purchased by C at a net asset value excluding any allowance for goodwill (though goodwill made up a major part of the consideration) and M would be deprived of a put option in his favour.

M being in breach of the restraint provisions, C sought a declaration that these provisions on breach applied, but M argued that the clauses were unenforceable because they were penal. The judge found that the clauses were not penal clauses. The defendant appealed and the Court of Appeal allowed the appeal.

The case has attracted a good deal of comment because of the implications it has for the drafting of these types of clauses across a wide range of commercial agreements, but especially share sale agreements and also employment contracts. It is possible that the case will proceed to the Supreme Court.

In deciding whether a clause was penal, the court held that (i) it was for the party who claimed that it was penal to establish that; (ii) the contract had to be examined as a whole in the circumstances and context in which it was made; (iii) so the court would have regard to the fact that the clause was contained in a commercial contract but the fact that the clause had been agreed between parties of equal bargaining power who had competent advice could not be determinative.

The court noted that the question whether a clause is a penalty habitually arises in commercial contracts, which enjoy no immunity from the doctrine on penalties. The fact that a payment on breach may not really be a pre-estimate of loss does not mean that it must be penal. If there is a good commercial justification for the provision, then that will take the provision outside the law of penalties. Equally, if clauses are genuinely pre-estimates, they can scarcely be penal, the court said.

In the instant case, the effect of the clauses was that, upon the first and any breach by the defendant, whether material or not, he became a defaulting shareholder and no further payment of consideration in respect of the goodwill attaching to the shares purchased was to have been made. The whole of what otherwise would have been payable was forfeited. There was no proportionate relationship, even a rough and ready one, between the breach which triggered the operation of the clause and the amount withheld. The range of losses that might have followed from a breach was likely to have been very large and dependant on a number of circumstances. The provision that the defendant should forfeit the totality of the outstanding price as soon as he became a defaulting shareholder was an extravagant one, likewise with respect to the provisions requiring M to sell his shares at a low value and depriving him of the right to exercise a put option.

Accordingly, the clauses, taken in the context of the agreement as a whole, had not been genuine pre-estimates of loss. On the contrary, they had been extravagant and unreasonable.

C argued that the clauses were commercially justified and had been agreed between commercial parties, with high-level legal advice, and after extensive negotiations. The court disagreed, finding that the predominant function of the particular clauses went way beyond compensation for breach and into the territory of deterring non-performance.

The court did point out that, had the price adjustment clause been drafted differently, to make the later payments conditional on M's compliance with the restraint provisions, then the doctrine of penalties would not have been engaged, but that was not how the clause was drafted in this case.

The appeal was allowed: *Makdessi v Cavendish Square Holdings BV* [2013] EWCA Civ 1539, [2013] All ER (D) 290 (Nov).

Service on a director at a registered address

CA 2006, s 1140, a parallel code to the CPR

The claimants issued proceedings against the defendant who had previously been the sole director of each of the claimants. They purported to serve the claim on the defendant on 13 September 2013 at two addresses in Romford and in Barking. The defendant submitted that he had moved to the United Arab Emirates (UAE) before that date and could not be served in this way. He sought a declaration that the claim form had not been served on him.

The claimants submitted that they were entitled to rely upon Companies Act 2006 (CA 2006), s 1140 and did not have to rely on the provisions of the CPR. That section provides for service on a director, inter alia, of any document, by leaving it at, or sending it by post to, the director's registered address, meaning the service address provided by the director to the company in accordance with s 163 (contents of a company's register of directors) and available for public inspection (see s 162(3), (5)).

The court noted that this appeared to be the first time that CA 2006, s 1140, a new provision in the CA 2006, had come before the courts. The section was drafted, the court said, in clear and unambiguous language and provided explicitly for service on a director at his registered address, whatever the purpose of the document in question (s 1140(3)), but subject to s 1140(8) which provides that the section is subject to any enactment or rule of law under which permission is required for service out of the jurisdiction.

There was no requirement that a service address had to be an address in the UK and, equally, it was not necessary that the address be a residential address. It followed, therefore, that a director of an English company who was resident abroad was at liberty to specify an address, business or residential, that was outside the jurisdiction. In that case, s 1140(8) precluded reliance on s 1140. However, whether he was normally resident outside the jurisdiction or not, if the director provided an address for service that was within the jurisdiction then he might be served at that address.

In the instant case, the defendant had been at liberty to specify what his service address was. If the director failed to change his registered service address at a time when he claimed to have changed residence from England to the UAE, he had no one to blame but himself. Relying on CA 2006, s 1140, service had been properly effected on the defendant on 13 September 2013 and a declaration would be made to the effect: *Key Homes Bradford Ltd v Patel* [2014] All ER (D) 69 (Jan).

Enforcement of bad leaver provision in shareholder agreement

Unfairly prejudicial petition

M was removed from office as a director and excluded from management of the respondent company. The company had four ordinary shareholders (M held 30% of the shares), three of whom were directors (M was an executive director). The articles and a shareholders' agreement provided that a 'bad leaver' would be required to transfer his shares to the other members at par value. Following his removal, M petitioned pursuant to CA 2006, s 994 (unfairly prejudicial conduct) on the grounds that his exclusion and the threatened expropriation of his shares would be unfairly prejudicial to his interests as a member of the company.

Hildyard J considered that the prime issue was whether M had been guilty of gross misconduct and the court concluded that, in the light of breaches of his service agreement and fiduciary duties as a director of the company, M was justifiably characterised as a 'bad leaver'. Further, there was no basis for the court's intervention to modify the contractual agreements the parties had made when the company was formed, even if this produced a 'harsh, even draconian, result' for M under the provisions requiring him, as a 'bad leaver', to transfer his shares for a nominal consideration.

Although originally founded on personal relationships, the relationships within the company and between the shareholders and the company were governed by bespoke and detailed legal agreements. So, even if there was an understanding between the parties of continued management participation, it must have had some limit, Hildyard J said, and the contractual limit (governing bad leavers) was an entirely fair and reasonable one. Hildyard J went on to note that 'neither equity nor the jurisdiction under s 994 sweeps away contractual arrangements; at most, the exercise of contractual rights is subjected to equitable restraint if it would be unconscionable or unfairly prejudicial. If the exercise of the legal right would not be unconscionable, the consequences of its exercise must be permitted to follow'. There was no intention or understanding between the parties here that the contractually agreed consequences (of being a bad leaver) should not follow.

The 'bad leaver' provisions were not offensive to the nature of the company as a small body corporate based on personal relationships or indeed inconsistent with any understandings as to continued participation in management, especially so when profits had been distributed each year, so it is not a situation, the court noted, where the deemed transferor loses all the intermediate benefit of his participation in the company.

There was therefore no overriding reason not to give effect to the arrangements for removal of the director and the sale of his shares, albeit that the powers should be strictly interpreted, exercised in good faith and not permitted to be used 'for unworthy purposes'.

As a bad leaver, his dismissal and enforced transfer of his shares could not be said to be unfair and therefore there was no jurisdiction under CA 2006, s 994, to interfere with the consequences contractually prescribed. An application has been made for permission to appeal this decision: *Moxon v Litchfield* [2013] EWHC 3957 (Ch), [2013] All ER (D) 133 (Dec).

Shareholder remedies

Winding up on the just and equitable ground

Mrs Justice Rose recently had before her a salutary tale of family deadlock which resulted in the winding up of a farming business incorporated in 1955. Essentially, the dispute was between three sisters, all shareholders and directors of the company (their infirm mother and a family trust were also shareholders, but inactive and not party to the disputes). The farm business was operated quite successfully on a contract arrangement with a manager, while the disputes between the sisters related to the management of the company.

The sisters had been given their shares in 1996 and became directors in 2002. The court found that the company was a quasi-partnership. Initially, the disputes related to the appointment of the company's accountant (whether to appoint an outsider or the husband of one of the sisters) and access to the company's records (the company's registered office was at the home of one of the sisters) with, in each instance, the two petitioners opposing the third sister. Finally, the third sister attempted (unsuccessfully) on several occasions to remove the petitioners from the board and appoint her husband to the board. Rival shareholder meetings were purportedly called and resolutions passed with the protagonists refusing to attend the other camp's meetings. The petitioners sought the winding up of the company on the just and equitable ground (Insolvency Act 1986 (IA 1986), s 122(1)(g)).

Applying *Ebrahimi v Westbourne Galleries* [1973] AC 360, the *locus classicus* on the just and equitable jurisdiction, Mrs Justice Rose had little difficulty in finding that the company was 'truly deadlocked', that there had been a complete breakdown in the mutual trust and confidence between the sisters, and that the company was being improperly managed because the personal hostilities between them seriously impeded the taking of proper decisions in the interests of the company.

The court is also required to consider whether there is an alternative remedy available, other than a winding up, which the petitioners were being unreasonable in not pursuing (IA 1986, s 125(2)). On this issue, while the court found that the petitioners might be prepared, with great reluctance, to sell their shares to the third sister, there was no agreement as to the valuation of the shares. Also, problems would recur in the future as, on the death of their mother, her shares and those held by the family trust would be divided among the sisters. The position, Mrs Justice Rose said, was that the third sister was not entitled to expunge the petitioners from the company and the petitioners were not prepared to trust her to act in the best interests of the company. Therefore, there was no alternative remedy in this case and it was just and equitable to order the winding up of the company: *Re Brand & Harding Ltd* [2014] EWHC 247 (Ch), [2014] All ER (D) 136 (Feb).

Derivative claim

Director approved accounts showing dividends and remuneration

In *Singh v Singh* [2013] EWHC 2138 (Ch), [2013] All ER (D) 155 (Aug), at first instance, permission to continue a derivative claim under CA 2006, Pt 11, was refused on the basis that the conduct complained of had been authorised. The allegations related to unjustified dividends and excessive remuneration, but all the sums paid had been disclosed in the company's accounts which had been approved each year by all the directors who were also all the shareholders, and therefore, in the court's view, the mandatory bar on a derivative claim (see CA 2006, s 263(2)(c) – authorisation or ratification by the company) applied.

The case has again come before the courts with Vos LJ refusing permission to appeal and in the process making some interesting comments on the effect of the accounts having been approved by the board and filed at Companies House. He considered such approval provided a complete answer to the question of whether the dividends and remuneration had been ratified by the company.

He said that the 'purpose of the filing of companies' accounts is to represent to the world the true state of the company's affairs. The company cannot at the behest of its directors be heard to say that 'a different state of affairs prevailed'. The approval may be a breach of duty by a director or directors and may be a matter to be addressed in that context or by shareholders in unfairly prejudicial proceedings, but the company cannot deny that the transactions in the accounts (filed on its behalf and purporting to give a true and fair view of the company's affairs) have been approved or ratified by the company. Vos LJ also agreed with the lower court that in this case the more appropriate remedy was an unfairly prejudicial petition under CA 2006, s 994. Permission to appeal was refused: *Singh v Singh* [2014] EWCA Civ 103, 27 January 2014.

Multiple derivative claim

No benefit to alleged wrongdoer, claimant lacked standing

A parent company ('HK') had two 50% shareholders, W and A, who were also the directors. The parent company had two wholly owned subsidiaries ('UK' and 'Switzerland'). A was the managing director of 'UK' (there was one other non-executive director) and was the sole director of 'Switzerland'.

W sought permission to bring a derivative claim with regard to alleged wrongdoing by A in respect of 'UK'. The allegations centred on payments by 'UK' to 'Switzerland' (A maintained these payments were loans repayable with interest by 'Switzerland') and also the diversion of a contract initially intended to be entered into between 'UK' and a third party, but in fact entered into by the parent company and the third party and then assigned to 'Switzerland' which had yielded payments of $829,000 to 'Switzerland'.

The facts were unusual in that the allegations, if true, resulted in assets shifting from company A to company B but as each company was owned by the same parties, there was no loss to the shareholders.

Mr Justice David Richards refused permission to bring the derivative claim. In a wide-ranging judgment, he came to the following conclusions:

(i) The claim was governed by the common law and not by CA 2006, Pt 11, endorsing the judgment of Briggs J in *Universal Project Management Services Ltd v Fort Gilkicker* [2013] 3 All ER 546, that Pt 11 did not abolish the common law multiple derivative claim brought by a shareholder of a parent company in respect of wrongdoing in a wholly owned subsidiary where the parent company is under the same wrongdoer control as the subsidiary company.

(ii) At common law, for a derivative claim, it is necessary to establish a prima facie case that the company is entitled to the relief claimed and that the action falls within the proper boundaries to the rule in *Foss v Harbottle,* namely that there is a 'fraud' and that the wrongdoers are in control of the company; even then, the court has discretion as to whether to grant permission to commence or continue the claim.

(iii) There was a prima facie case that the company (UK) was entitled to relief in respect of the loans and the diversion of the contract, but 'fraud' while broader than dishonest and ultra vires acts, requires loss to the company and benefit to the wrongdoer. On loss to the company, David Richards J said that financial or other loss to the shareholders, albeit of a reflective character, is essential to give a claimant shareholder sufficient interest in the proceedings to make the shareholder an appropriate claimant. Here there was no loss to the shareholders and no benefit to the alleged wrongdoer, the court specifically noting that there was no basis for suggesting that 'Switzerland' was used as a conduit to pass funds taken from 'UK' to the defendant.

(iv) Further, it was clear, the court said that the real purpose of the derivative claim was to advance the interests of the claimant as a creditor of 'UK'. In other proceedings, the claimant was seeking to recover sums allegedly lent by him to 'UK' prior to the issues raised in this derivative claim and the court said the claimant's concern was to ensure that 'UK' would be able to meet any judgment which he might secure in those proceedings. It was not appropriate, as an exercise of discretion, to permit a derivative claim to be continued in these circumstances.

(v) There was an unresolved issue as to whether, in fact, the claimant was still a shareholder at all, there being evidence of a transfer by him of his share to A, leaving him at most as a nominee shareholder for A, as the beneficial owner, but the court did not need to resolve this issue.

(vi) Permission to continue the proceedings as a derivative claim was refused: *Abouraya v Sigmund* [2014] EWHC 277 (Ch), [2014] All ER (D) 208 (Feb).

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