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LITIGATION AND DISPUTE RESOLUTION

SUPREME COURT HOLDS THAT ACCOUNTANTS' TAX ADVICE IS NOT PROTECTED BY PRIVILEGE

In *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another* [2013] UKSC 1, the Supreme Court held that legal advice privilege (LAP) does not apply to communications between a client and an accountant seeking and giving legal advice on tax law. As a result, tax advice, when given by accountants, will not be privileged – even though the same advice would attract legal advice privilege if given by a solicitor.

The Supreme Court accepted that it is now common for people to seek and rely on professional advice on tax law from accountants and there is no principled reason for LAP to be restricted to cases where the adviser happens to be a member of the legal profession as opposed to a qualified accountant. Nevertheless, the Supreme Court (by a majority of 5:2) identified the following three reasons why accountants' advice should not attract LAP:

1. A reformulation of LAP would carry the risk of a clear and well understood principle becoming uncertain. There would be scope for confusion and inconsistency about which professions this applies to. Would it apply to architects and surveyors, for example, and would it apply to all of their advice or just some of it? At the moment, there is a strong presumption that LAP applies to any communications with members of the legal profession because lawyers normally only give legal advice. Such a presumption would not apply in other professions.

2. Given the significant consequences of extending the understood limits of LAP, it is more appropriate that the matter is left to Parliament to debate and deal with through the legislative process. Parliament may conclude that extending LAP to other professions is only appropriate on a conditional or limited basis.

3. Parliament has legislated in this field on a number of occasions on the assumption that LAP only applies to advice given by lawyers. It would be inappropriate for the Supreme Court to depart from this assumption.

This is a pragmatic decision, which preserves what was generally accepted to be the status quo. It confirms that advice given by accountants (and other non-lawyers) will only be privileged when litigation privilege applies (broadly where documents are created for the dominant purpose of actual or contemplated litigation).

IMPLIED TERM OF GOOD FAITH

In *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QBD), the claimant successfully argued that a duty to act in good faith should be implied into an agreement for the distribution of certain "Manchester United" branded products.

The judge recognised that there is a widely held view amongst legal commentators that there is no general principle of good faith in English contract law. However, he thought if this view were correct, it would mean that the English Courts were "swimming against the tide". A general principle of good faith is recognised in many civil law jurisdictions, such as Germany, France and Italy, and is gaining ground in many common law jurisdictions, particularly the United States. References to good faith have also entered English law via EU legislation, such as the Unfair Terms in Consumer Contracts Regulations 1999.

Whilst the judge doubted that English law was ready to recognise a requirement of good faith as a duty implied by law into all commercial contracts, he saw "nothing novel or foreign to English law" in implying such a term where it reflects the presumed intentions of the parties, by using the established methodology for the implication of terms in fact.

The judge described the requirements of a duty to act in good faith as being "sensitive to context". In other words, this would depend on the other terms of the contact and the factual background. The duty includes a core value of honesty, but in other circumstances it might extend to correcting misapprehensions of a contractual counterparty or disclosing relevant information to it. The duty is likely to be more onerous in long term contracts because of the need for the parties to co-operate with one another. The test is objective in the sense that it depends not on either party's perception of whether particular conduct is improper, but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people.

COURT OF APPEAL GUIDANCE ON AGREEMENTS TO AGREE

In *MRI Trading AG v Erdenet Mining Corp LLC* [2013] EWCA Civ 156, the Court of Appeal held that a contract for the sale of copper concentrates, which left certain charges and the delivery schedule to be agreed by the parties at a later date, was enforceable (and not an unenforceable agreement to agree). This was because the language used showed that the parties intended their agreement to be binding and the contract was an integral part of a wider overall transaction. In such a situation, the Court should strive to preserve parties' bargains, rather than destroy them – if appropriate by implying terms and/or reaching its own conclusions on any outstanding matters by reference to what is fair or reasonable.

The case demonstrates that it is possible for parties to commercial contracts (particularly long term ones) to preserve a degree of flexibility by leaving some issues to be decided at a later date. The Court will not allow a party to use the rules on agreements to agree as an excuse to escape from its contractual obligations. However, in order to reduce the scope for future disputes, it is a good idea to be as prescriptive as possible about the mechanism by which any outstanding issues will be resolved, if the parties cannot reach agreement between themselves. For example, it may be appropriate to provide for any such issues to be referred to expert determination, which will be quicker and cheaper than litigation or arbitration.

DEFECTIVE NOTICES

In *Siemens Hearing Instruments Ltd v Friends Life Ltd* [2013] All ER (D) 188 (Jul), a tenant sought to exercise a break right under its lease. However, the break notice served by the tenant was not, as the lease required, expressed to have been given under s 24(2) of the Landlord and Tenant Act 1954. Nevertheless, the tenant successfully argued that this error did not invalidate its break notice.

The judge reviewed the authorities on non-compliant notices and held that there is no strict and inflexible rule that non-compliance with the terms of an option is fatal to the exercise of that option. In order to determine the consequences of a failure to comply with notice provisions, the Court must assess the intentions of the parties by the usual objective criteria, including the background and purpose of the provision, and the effect if any of non-compliance. In this case, the failure to use the required wording made no difference at all and the parties could not have intended that this failure would invalidate a break notice.

It is common for parties to seek to save defective notices by relying on the rule, derived from *Mannai Investment Co. Ltd. v Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749, that an obvious mistake will not invalidate a notice if the reasonable recipient of the notice would not have been misled by that mistake. However, the judge held that the *Mannai* decision did not help the tenant in this case because it was not obvious on the face of the notice that the person drafting it had made a mistake. This decision was made on a different basis, namely the judge's finding that not all notice provisions are mandatory. The decision has been appealed and will be heard by the Court of Appeal in spring 2014 but, if it is upheld, it may open up a new way of saving defective notices.

PIERCING THE CORPORATE VEIL

In *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5, Lord Neuberger said that the argument that it is not possible to pierce the corporate veil (at all) was *"worthy of serious consideration"* but said the issue should be decided on another occasion. That occasion turned out to be the case of *Prest v Petrodel Resources Ltd & Ors* [2013] UKSC 34, where the Supreme Court confirmed (albeit obiter) that the corporate veil can in principle be pierced – but only in very limited circumstances.

Lord Sumption identified two relevant principles as follows:

1. The concealment principle: Lord Sumption described this as being "legally banal" and said that it does not involve piercing the corporate veil at all. All it means is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the Courts from identifying them, assuming that their identity is legally relevant. In these cases the Court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing.

2. The evasion principle: this applies where a person is subject to an existing legal obligation or liability which he deliberately evades by interposing a company under his control. In such a situation, the corporate veil can be pierced – but only for the limited purpose of depriving the company or its controller of the advantage they would otherwise have obtained as a result of the company's separate legal personality.

The advantage of this formulation of the rules is that it provides a degree of clarity in an area of the law which was, in Lord Sumption's words, previously *"characterised by incautious dicta and inadequate reasoning."* Lord Sumption's approach is restrictive and his evasion principle will only apply in unusual circumstances. However, of the seven judges sitting in the Supreme Court in *Prest*, only Lord Neuberger was prepared to accept Lord Sumption's evasion principle as a complete description of the rules on piercing the corporate veil. The other members of the Supreme Court considered that there might be other (rare) situations where it is possible to pierce the corporate veil. Therefore, uncertainty remains.

PARTIES HELD TO "CONTRACTUAL CONVENTION" THAT FACTS WERE TRUE – EVEN THOUGH THEY WERE FALSE.

In *Prime Sight Ltd v Lavarello* [2013] UKPC 22, Mr Marrache assigned his interest in a property to a company. The deed of assignment contained the following clause:

"In a consideration of the sum of £499,950 now paid by the Assignee to the Assignor (receipt and payment of which the Assignor hereby acknowledges) the Assignor as beneficial owner hereby assigns under the Assignee all and singular the Premises…to hold the same unto the Assignee for the unexpired residue of the Term …"

(emphasis added)

Mr Marrache was subsequently declared bankrupt and his official trustee sought to recover the £499,950 (the purchase price) from the assignee company. It was common ground at trial that the purchase price had never in fact been paid. However, the assignee company argued that the official trustee was estopped by the terms of the deed of assignment from asserting that the purchase price had not been paid (see the underlined words above).

The Privy Council accepted this argument, saying that parties are ordinarily free to contract on whatever terms they choose and the Court's role is to enforce those terms. This includes where the parties have agreed to contract on an assumed set of facts which, to both parties knowledge, are untrue. Such an agreement would give rise to a "contractual convention" and neither party would subsequently be able to resile from the agreed set of facts (absent misrepresentation, mistake, fraud or illegality). The contractual convention in this case was embodied in a deed but the outcome would have been the same if it had been included in any form of valid contract.

THE IMPORTANCE OF STIPULATING THAT NEGOTIATIONS ARE SUBJECT TO CONTRACT

In *Newbury v Sun Microsystems* [2013] EWHC 2180 (QB), the defendant argued that an offer to settle proceedings was "in principle" only and that a binding contract could not be formed until further terms had been agreed and a formal contract had been signed. It supported this argument by referring to a statement, in the offer letter, that the settlement was to be "recorded in a suitably worded agreement".

The judge rejected this argument and held that a binding contract was formed when the claimant replied later the same day accepting the defendant's offer. The statement, in the defendant's offer letter, that the settlement was to be recorded in a suitably worded agreement was not sufficient to "negative" an intention to create legal creations and was not a pre-condition of a contract being formed. Objectively, those words did no more than reflect an intention to record in writing a contract that had already been finalised. The position would have been different if the offer letter had been expressed to be "subject to contract".

The case demonstrates the importance, when negotiating the terms of any contract (not just settlement agreements), of identifying the status of any "offer". If the offer does not contain all of the terms on which the offeror is prepared to be bound, the letter or email should make this clear. Using the phrase "subject to contract" may be a convenient shorthand method of achieving this, although it should be remembered that the Court will look at the substance, and not the form, of a communication and the application of a particular label may not be decisive.

FAILURE TO RESPOND TO AN OFFER TO MEDIATE AMOUNTS TO AN UNREASONABLE REFUSAL TO MEDIATE

In *PGF II SA v OMFS Company 1 Ltd* [2013], the Court of Appeal considered, for the first time, whether a failure by a party to respond to an invitation to mediate should be treated as an unreasonable refusal to mediate – previous cases having focused on situations where there had been an express refusal to do so. The Court of Appeal held that silence in the face of an offer to mediate is of itself unreasonable (even if circumstances exist which would justify an express refusal to mediate) and may therefore be penalised in costs.

The case sends a clear message that the Court will expect parties to enter into a serious and meaningful discussion about the possibility of participating in mediation or using another form of ADR and will penalise any failure to do so in costs. On a practical level, a party who wishes to decline an invitation to mediate should explain in detail why it does not consider mediation to be appropriate at that time. The Courts are unlikely to be sympathetic to refusals to mediate in the majority of cases. In many cases, the best approach will be to identify further steps that need to be taken (such as the provision of further information by the other side) before mediation is likely to succeed or to suggest another method of ADR which is more appropriate in the circumstances.

COURT OF APPEAL CONFIRMS TOUGH NEW APPROACH TO NON-COMPLIANCE WITH PROCEDURAL RULES

In *Andrew Mitchell MP v News Group Newspapers Limited* [2013] EWCA Civ 1526, the Court of Appeal held that Mr Mitchell should be treated as having filed a costs budget

comprising only the applicable court fees because his solicitors had failed to file the budget on time. This means that, even if Mr Mitchell wins his defamation claim against News Group Newspapers (arising out of the way in which the Sun reported the "Plebgate" incident), he is likely to be able to recover only a small proportion of the estimated cost (£506,425) of taking the case to trial.

The Court of Appeal took the opportunity to send a *"clear message"* that the Courts will follow Jackson LJ's recommendation that compliance with rules, orders and practice directions should be enforced more strictly than before. This will include a tougher approach to relief from sanctions which will only be granted, in broad terms, where the breach is trivial or resulting from factors outside the control of the party in default.

As well as having significant consequences for Mr Mitchell and his solicitors, the decision forces home the point made in the 18th implementation lecture on the Jackson reforms (and quoted by the Court of Appeal in this case) that:

"…the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations."

GUIDANCE ON THE INTERPRETATION OF EXPRESS AND IMPLIED TERMS

In *Dear & Griffith v Jackson* [2013] EWCA 89, the parties had entered into an agreement which provided for the defendants to procure the appointment of the claimant, Mr Jackson, as director of a company and to procure his re-appointment at each subsequent AGM, unless and until there occurred one of five specified "Termination Events". However the agreement did not deal with the company's articles, which gave the defendants, who were also directors of the company, the power, acting together with the other directors, to remove Mr Jackson from the board.

Pursuant to the articles, notice was served upon Mr Jackson to vacate office. Mr Jackson sought specific performance of the agreement and an order that the defendants procure his re-appointment as director of the company. At first instance, Mr Jackson successfully argued that it was an implied term of the agreement that he would not be removed as a director of the company between AGMs for as long as he wished to remain a director and no termination event occurred. However, that decision was overturned by the Court of Appeal because, to give Mr Jackson extra protection beyond that which the parties had expressly agreed, would involve an impermissible re-writing of the parties' contract.

The case is of general interest because, although the appeal was allowed, the Court of Appeal adopted the first instance judge's summary of the law on the construction of contracts (which McCombe LJ described as being *"sufficient and helpful…for present purposes"*). This is worth repeating in full:

"Objective Process

(i) Construction (or as I would prefer to call it interpretation) is, in relation to any point at issue, the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(ii) For that purpose, even though the point in issue may be a narrow one, the interpretation of the relevant provision depends upon an understanding of its context within the agreement as a whole.

(iii) The Court's function is to ascertain the meaning of the agreement rather than to seek to improve upon it, or put right any inadequacies of meaning. Nonetheless the Court recognises that draftsmen may make mistakes, may use occasionally inappropriate language and may fail expressly to address eventualities which may later occur.

Implied terms

(iv) The implication of terms is no less a part of the process of ascertaining the meaning of an agreement than interpretation of express terms. Implication addresses events for which the express language of the agreement makes no provision.

(v) In such a case the usual starting point is that the absence of an express term means that nothing has been agreed to happen in relation to that event. But implied terms may be necessary to spell out what the agreement means, where the only meaning consistent with the other provisions of the document, read against the relevant background, is that something is to happen.

(vi) Although necessity continues (save perhaps in relation to terms implied by law) to be a condition for the implication of terms, necessity to give business efficacy is not the only relevant type of necessity. The express terms of an agreement may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what [any] reasonable person would understand the contract to mean. In such a case an implied term is necessary to spell out what the contact actually means.

Commercial common sense

(vii) The dictates of common sense may enable the Court to choose between the alternative interpretations (with or without implied terms), not merely where one would "flout" it, but where one makes more common sense than the other. But this does not elevate commercial common sense into an overriding criterion, still less does it subject the parties to the individual judge's own notions of what might have been the most sensible solution to the parties' conundrum."

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