



BUSINESS & COMMERCIAL GROUP BULLETIN



Welcome to the inaugural edition of the Tanfield Chambers Business & Commercial Group Bulletin. These are confusing and difficult times for the commercial community, with messages of economic gloom alternating with bullish forecasts of recovery. Litigation is often said to be a barometer of commercial problems, yet in this recession alternative dispute resolution (both arbitration and mediation) has a central role. The need for clear, responsive and cost-effective legal advice is greater than ever before; we at Tanfield are working hard to provide exactly that, whatever the forum. In this issue we cover two themes which are immediately relevant: Nic Scampion looks at recent cases touching on cost-effective disclosure, in particular electronic disclosure, reflecting the potential burden due to widespread internet and data use, and Andrew Butler considers a significant Privy Council decision on how the implication of contractual terms can address unforeseen situations – particularly pertinent at a time when the only thing the commercial world might reliably expect is the unexpected. We are here to help.

Mark Hoyle, Head of the Business and Commercial Group

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DISCS AND DISCLOSURES

When giving standard disclosure, a party is required to make “a reasonable search” for “documents”. A “document” means anything in which information of any description is recorded (e.g. the hard disk of a computer, including deleted files, or a mobile phone). Most documents are never printed. What is a reasonable search?

Recent cases have highlighted the importance of being alert to electronic disclosure. In **Digicel (St. Lucia) Ltd v Cable & Wireless Plc** [2008] EWHC 2522 (Ch), Morgan J reminded parties that a party may be obliged to re-do disclosure (this can be a significant exercise: the disclosure exercise carried out by the defendants in **Digicel** was said to have cost £2.2 million and to have taken 6,700 hours) and be compelled to co-operate as to that which had not been done. This led to a substantial increase in costs (**Digicel** at 47, 53, and 93-95). In **Hedrich v Standard Bank London Ltd** [2008] EWCA Civ 905, a solicitor faced a large wasted costs claim for failing to get on top of electronic disclosure. Even though the order was overturned by the Court of Appeal, **Hedrich** demonstrates that it's important to get it right.

The obligations under CPR 31 are defined by broad notions of proportionality (“... the rules do not require that no stone should be left unturned. This may mean that a relevant document, even “a smoking gun” is not found ...”: **Digicel** at para 48). The rules provide a set of factors, whose weight is ultimately a matter for the court’s discretion.

The factors relevant in deciding the reasonableness of a search include the number of documents involved, the nature and complexity of the proceedings, the significance of any document which is likely to be located during the search, and the ease and expense of retrieval of any particular document (as to which consider, for example, the

DISCS AND DISCLOSURES

GAGGING THE OFFICIOUS BYSTANDER

CONTINUED OVERLEAF



NIC SCAMPION

Nic regularly appears in the High Court and County Court. His experience includes contractual disputes, tort and fiduciary duty claims, emergency injunctions to restrain breaches of contract, and partnership disputes. He has advised and represented a wide range of clients from government departments to sports agencies. He has a growing interest in mediation. Before coming to the bar, Nic worked in the Commercial Group at the Treasury Solicitor. He dealt with cases involving matters of political sensitivity, public interest and legal importance. When not at work, Nic enjoys playing football, the piano, and with his one-year old son, although not necessarily all at the same time.



ANDREW BUTLER

Andrew Butler joined Chambers in 1995 primarily as a property barrister but has expanded his practice to such an extent that he is now Deputy Head of Chambers' Business and Commercial Group. Andrew's practice now encompasses both property and commercial work, with many of his cases involving elements of both. A deft courtroom operator, he was once paid an unusual compliment by the Court of Appeal after a mix-up over the time of a judgment hand-down, the presiding lord justice observing (after ruling in his favour) that his clients do better when he is not present than when he is. Outside work, Andrew enjoys competitive sports, but has reluctantly had to disband the chambers' cricket team after a series of shocking umpiring decisions by his colleagues reduced his batting average to single figures.

accessibility of electronic documents or data, their location, the likelihood of locating relevant data, and the cost of recovering and disclosing any electronic documents). The Practice Direction to CPR31 suggests that the parties, prior to the first CMC, discuss any issues that may arise regarding searches for and the preservation of electronic documents, and refer the matter to a judge at the earliest opportunity in the case of difficulty or disagreement.

Digicel gave some guidance as to what constitutes a "reasonable search" for electronic documents, and how far parties should co-operate. It draws attention to a few things which may have been neglected, and reminds parties of their obligations and the consequences of not complying with them. The Defendant's primary position was that the question of what was 'a reasonable search' should be decided by the solicitor in charge of the disclosure process, and this decision should only be interfered with if it fell outside the band of permissible reasonable decisions. The Claimant said that the court should have regard to all the circumstances, including the factors identified in the CPR, and make up its own mind as to what was required by way of a reasonable search. The court took the Claimant's straightforward line, and held that the task of deciding what was a "reasonable search" was one which fell on the court. There was no certainty as to how easy or difficult it would be to get at all the data and as to what the costs would be. The parties were ordered to meet to discuss how to go about it.

So how should parties now go about the exercise? The thrust of **Abela (& others) v Hammonds Suddards (& others)** 2/12/08 (Ch) is that parties should ensure that the court has enough information, derived from the evidence of suitably skilled people and from co-operation between the parties, to make an appropriate and proportionate order. Think about using disclosure statements to provide more information (beyond the mere tick-box approach which its form encourages). Attend CMCs equipped to explain what a client's electronic sources comprise, and what will be the costs of collecting / reviewing / exchanging them, and what will be the value of the exercise to the court. If instructing Counsel or another representative, ensure that they are similarly equipped. There is plenty of scope in the rules to argue that the expense does not warrant the task, provided that does not just rely on bare assertion – expert opinion on what it would cost to handle documents of this kind can be obtained at relatively little expense. In short, assess what the problem is and how best to tackle it, and back it up with adequate and credible evidence.

NIC SCAMPION

GAGGING THE OFFICIOUS

In the 1939 case of *Shirlaw v Southern Foundries (1926) Ltd.*, between the contracting parties and an officious bystander. The exasperated negotiators with hypothetical situations which they succeeded where many of these parties have failed. They have f

The case which has silenced the officious bystander is **Attorney General of Belize and others v Belize Telecom Ltd and another**. [2009] UKPC 10. The dispute concerned the articles of association of a company which had been formed during the privatisation of the Belize Telecommunications Authority, the monopoly provider in that country. The Government of Belize had wished to sell its financial interest in the Authority to private investors, while retaining some degree of control over the new company's operations. To this end, they created, by means of the share structure and articles of association, a number of different levels of shareholding (a "special shareholding", B shareholders and C shareholders), each with different powers of appointment of directors.

The exercise of implying a term, like the exercise of construing express terms, requires objective analysis of what the document means. The term to be implied may not be obvious; it may be obscure. But if the intention of the parties, objectively ascertained, requires that it be included, the fact that it is obscure, or that the contract can work perfectly well without it, is no bar to that.

The problem which arose was that the articles made provision for a person holding the special share, and more than 37.5% of the C shareholding, to be able to appoint and remove two of the four C directors. However, they did not make clear what was to happen if, such appointments having been duly made, the appointing shareholder ceased to fulfil those criteria. That was exactly the situation which came about. In 2004, Belize Telecom Ltd. (BT) acquired the special share, and more than 37.5% of the C shareholding. They appointed two C directors. Thereafter, they defaulted on the borrowing from the Government which had enabled them to acquire those shares. The borrowing having been secured on the C shares, the Government took back a significant number, leaving BT without the 37.5% shareholding required in order to have the

TTC



BYSTANDER

The Court of Appeal famously postulated a test for the implication of a contractual term based on a hypothetical conversation that bystander has become a familiar figure to law students, and an integral part of contract law, repeatedly confronting them they have not considered – his constant questions receiving the testy answer “oh, of course”. The Privy Council have recently finally shut him up.

power of appointment and removal of the two directors.

The question then arose: what, in those circumstances, was the status of the directors? The only other provision of the articles which dealt with the removal of directors was a standard clause providing for vacation of office in such events as bankruptcy, lunacy, profiteering and the like, none of which applied. BT contended that in those circumstances their appointed directors were irremovable. The Government contended that there was to be implied into the articles a term requiring that a director appointed by virtue of a specified shareholding must lose office in the event that the appointing shareholder relinquished the specified share.

At first instance, the contention of the Government prevailed; on appeal, by a majority, BT succeeded in overturning that decision. The Government appealed to the Privy Council, who unanimously allowed the appeal and restored the decision at first instance.

The judgment of the Board was delivered by Lord Hoffmann. He began on familiar territory, citing his own decision in **Investors Compensation Scheme v West Bromwich BS** [1998] 1 WLR 912-3, a case generally regarded as the leading modern authority on contractual interpretation. By adopting this starting point, the judgment suggests that the process of implication is little more than an extension of the exercise of contractual interpretation, the objective in each case being simply to ascertain the meaning which the instrument would convey to a reasonable person having available all relevant background knowledge. Implication, Lord Hoffmann said, occurs where the reasonable person would conclude that, although the document does not expressly say so, in given circumstances something must happen. This does not, he said, add to the document. It only spells out what it means.

Against this background, he visited many of the leading cases

on implied terms, and many of the well-known formulations of the test to be satisfied. He adverted to the dangers of allowing these to develop “a life of their own”; for example, the phrase “necessary to give business efficacy” should not be interpreted as requiring, as a condition of implying a term, that the contract be incapable of operation without it. It merely means that something must be implied, as Lord Steyn had put it in **Equitable Life Assurance Society v Hyman** [2002] 1 AC 408, “to give effect to the reasonable expectations of the parties”.

It was in the course of this exercise that Lord Hoffmann gave particular consideration to the role of the officious bystander. Invoking this test, he said, “carries the danger of barren argument over how the actual parties would have reacted to the proposed amendment”. That, he said, was irrelevant. The exercise of implying a term, like the exercise of construing express terms, requires objective analysis of what the document means. The term to be implied may not be obvious; it may be obscure. But if the intention of the parties, objectively ascertained, requires that it be included, the fact that it is obscure, or that the contract can work perfectly well without it, is no bar to that.

The final case considered by Lord Hoffmann was **BP Refinery (Westonport) Pty Ltd. v Shire of Hastings** (1977) CLR 266, in which Lord Simon of Glaisdale articulated a well-known five stage test to be satisfied before a term could be implied: paraphrasing, these tests were reasonableness, business efficacy, obviousness, clear expression and consistency with express terms. Lord Hoffmann commented that Lord Simon’s test was best regarded as “a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract means”. If, Lord Hoffmann said, a proposed implication failed to satisfy any of these criteria, that would be a good reason for concluding that a reasonable man would not have understood that to be the document’s meaning.

The result was that the Government succeeded in contending that the articles must be read as requiring the removal of the directors appointed by virtue of the level of shareholding which BT had subsequently ceased to hold. The outcome is a satisfactory one in that it accords with common sense; if confronted with the situation, most people would probably have agreed that the parties must have intended this to be the outcome, even if they had not said as much. In no sense was the implication necessary to make the articles of association work; they worked perfectly satisfactorily without it. But it was necessary to give full expression to what the parties must have intended would happen, if only they had addressed their minds to the situation.

In truth this development has been in the pipeline for a while. In a case not referred to in the **Belize Telecom** case, **Crossley v Faithful & Gould Holdings Ltd.** [2004] IRLR 377, Dyson LJ described the test of necessity as having a "somewhat protean" quality, and stated:

"It seems to me that, rather than focus on the elusive concept of necessity, it is better to recognise that, to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations."

While it is doubtful whether Lord Hoffmann would entirely approve, in this context, of reliance on such concepts as reasonableness and fairness – indeed he expressly stated at para.16 of **Belize Telecom** that it is *not* for the Court to introduce terms which make a contract fairer or more reasonable – the test articulated by Dyson LJ did herald a growing judicial awareness that the test of necessity was an unsatisfactory one. **Belize Telecom** has undoubtedly laid that one to rest – or at least clarified it.

But questions remain: for example, it is hard to accept, in any literal sense, Lord Hoffmann's insistence that the process of implication "is not an addition to the document", still less that the implication of a term (such as that requiring the removal of the directors) is simply "what the instrument means". On no view could the articles of association in the **Belize Telecom** case be said to "mean" that the directors needed to be removed once their appointing shareholder had gone; they didn't say anything about it. If "means", in Lord Hoffmann's phrase, is treated as synonymous with "intends", then his test is workable enough. But implying terms because that is what we think the instrument intends, seems dangerously close to improving upon the instrument, which Lord Hoffmann also made clear was not something the Court could do.

The lesson commercial lawyers can certainly take from **Belize Telecom** is that, in contending for implied terms, we should not feel paralyzed by tests such as necessity, business efficacy or obviousness. The key is to ascertain, from the document, what the parties' intention was, and to consider whether the implied term contended for accords or does not accord with that intention, in the circumstances which have arisen. As for the officious bystander, he no doubt still serves a purpose, mulling over what it is the parties want to achieve, and dreaming up ingenious ways in which their contract falls short of expressing them. But he's no longer allowed to say anything.

ANDREW BUTLER

WHAT'S NEW

Smith & Monkcom: The Law of Gambling was published by Tottel in March 2009. It is a new edition of the work formerly entitled **Smith & Monkcom: The Law of Betting, Gaming and Lotteries**, and provides a comprehensive treatment of the law governing gambling in England and Wales at the close of 2008. The book was edited by Stephen Monkcom of Tanfield Chambers, and two of the Contributing Editors, Christopher Bamford and Philip Rainey, are also from Tanfield Chambers.

Dr Mark Hoyle will be speaking at the forthcoming CIARB Lecture, 'Arbitration within the world of Shari'a Law', which will be held on the 12 May 2009 at the Islamic Cultural Centre, London Central Mosque, 146 Park Road, London, NW8 7RG at 6.00pm for 6.30pm.



For further information or to instruct a barrister, please contact **David Wright**, Principal Commercial Clerk or **Kevin Moore**, Senior Clerk on +44 (0) 20 7421 5300 or clerks@tanfieldchambers.co.uk

BUSINESS & COMMERCIAL BARRISTERS

- Geraint Jones QC
- David Berkley QC
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- Stephen Monkcom
- Paul Staddon
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