Fountain Court

Quarterly Commercial Crime Newsletter:

RECENT CASE UPDATES

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Introduction

This section of our quarterly commercial crime newsletter includes:

- *ZXC v Bloomberg LP* [2022] UKSC 5
- *FCA v Former Redcentric Executives*
- The Economic Crime (Transparency and Enforcement) Act 2022
- SFO Disclosure Headaches Continued: *R v Bond* [2021] EWCA Crim 1879 and *G4S*
- SFO Bribery convictions: Glencore Energy (UK) Ltd
- *ENRC v Dechert LLP* [2022] EWHC 1138 (Comm)

ZXC v Bloomberg LP [2022] UKSC 5:[1] Suspects in criminal investigations have a reasonable expectation of privacy.

ZXC, the CEO of a publicly listed company operating overseas ('X'), brought proceedings against Bloomberg for misuse of private information over its publication of an article based on information contained in a confidential letter of request (the "LoR") sent by a UK legal enforcement body to a foreign state. ZXC, who had not been charged with any offence, claimed he had a reasonable expectation of privacy in relation to information that the agency was investigating him, and details of that investigation (the "**Information**"). He brought a claim against Bloomberg for misuse of private information and was successful both at first instance and in the Court of Appeal.

The central issue for the Supreme Court was whether the Court of Appeal had been wrong to hold that there was a general rule that a person under criminal investigation had, prior to being charged, a reasonable expectation of privacy in respect of the Information. That question was relevant to the first of a two-stage test by which a claim of misuse of private information is determined, namely: (1) whether the claimant objectively has a reasonable expectation of privacy in the relevant information; if so, (2) whether that expectation is outweighed by the publisher's right to freedom of expression. Stage 2 involves balancing the claimant's Article 8 right to privacy with the publisher's Article 10 right to freedom of expression. [26]

In addressing the primary issue (relevant to stage 1) the Court explained that the function of a "legitimate starting point" or "general rule" is not to operate as a legal presumption: determining whether there is a reasonable expectation of privacy in the relevant information is a fact-specific enquiry. [67] A general rule does not obviate the need for the claimant to establish objectively a reasonable expectation of privacy.[2] It merely operates such that:

> *"Once it is established that the relevant information was that a person, prior to being charged, was under criminal investigation then the correct approach is for a court to start with the proposition that there will be a reasonable expectation of privacy in respect of such information and thereafter consider by reference to all the circumstances of the case whether the reasonable expectation either does not arise at all or was significantly reduced."*[70][3]

The Court recognised the rationale for the starting point to be the harm caused to individuals by the publication of the Information. [71] As Simon LJ noted in the Court of Appeal:

… those who have simply come under suspicion by an organ of the state have, in general, a reasonable and objectively founded expectation of privacy in relation to that fact and an expressed basis for that suspicion. The suspicion may ultimately be shown to be well-founded or ill-founded, but until that point the law should recognise the human characteristic to assume the worst (that there is no smoke without fire); and to overlook the fundamental legal principle that those who are accused of an offence are deemed to be innocent until they are proven guilty.

Ultimately the Court held that a person who has not yet been charged does have a

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[1] Lord Reed PSC; Lord Sales; Lord Hamblen; Lord Stephens JJSC; Lord Lloyd-Jones.

[2] At first instance, Nicklin J gave the example of an armed bank robber who held hostage a number of customers during a televised three-day siege; he could hardly claim a reasonable expectation of privacy.

[3] It was common ground that if someone is charged with a criminal offence, there can be no reasonable expectation of privacy [77]. The Court considered that to be a rational boundary given the open justice principle.

reasonable expectation of privacy over information that they are the suspect of an investigation and details of that investigation. A key element in its reasoning was the *"growing recognition that as a matter of public policy the identity of those arrested or suspected of a crime should not be revealed to the public"* which is reflected in a uniform general practice by state investigatory bodies; the College of Policing;[4] the Independent Office for Police Conduct; and the government. In doing so it noted the narrowness of its decision, which is confined to the impact of information derived from an investigation of a person by an organ of the state and not, for example, an investigation conducted by a journalist.

An important element in the Court's reasoning under Stage 2 (pursuant to which it ultimately held that the expectation of privacy was not outweighed by Bloomberg's competing right to freedom of expression) was that the Bloomberg article was based on the LoR, and that LoRs have long been recognised to be confidential documents because Courts are *"…anxious to assist the requests of friendly foreign countries for mutual legal assistance, both as a matter of comity and on the very practical basis that it is only by furnishing such assistance that international crime and large-scale corruption can be combated. In many cases, there will be very good reasons for maintaining the confidentiality of such requests… such as national security…"* (*per* Gross LJ in *NCA v Abacha* [2016] 1 WLR 4375).

The effect of the decision is already being heeded by the media; on 16 May 2022 a Conservative MP was arrested on suspicion of a number of criminal offences. He was not, however, named in the press: *The Times* has directly attributed this reticence on behalf of the press to name the suspect to the decision in ZXC: see here.

FCA v Redcentric Executives

In November 2021, after a five-year investigation, the trial commenced in the FCA's first ever prosecution under s. 89 Financial Services Act 2012[5] against three former Redcentric executives for making misleading statements to the market.[6]

Facts

Redcentric Plc is an AIM-listed IT services provider. In November 2016 the Company announced that its audit committee had uncovered misstatements in the company's accounts and that an internal forensic review would be launched, causing the company's share price to plummet. The FCA's investigation commenced shortly thereafter, and in 2019 the FCA charged three of the company's former officers: Ms Croft, its former Finance Director; Mr Coleman, its former CFO; and Mr Fisher, the former CEO.

The FCA's prosecution was based on Redcentric's statements as to its cash and net debt in its unaudited interim results for the six months ending in September 2015, and its audited results for the year-end to March 2016. A comparison of the balances in the company's bank accounts with its ledgers and management accounts revealed a consistent pattern of cash inflation and debt suppression. The FCA's

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[4] In 2017 the College of Policing published guidance on Media Relations which expressly recognises that reputational risks are the reason for not disclosing the names of suspects prior to the point of charge.
[5] Which largely restates the effect of s.397(2) Financial Services and Markets Act 2000.
[6] That offence is committed where:

- A person P makes a statement;
- Which P knows to be false or misleading in a material respect; or
- As to which P is reckless as to whether it is false or misleading; or
- P dishonestly conceals material facts; and
- P intends, by doing so, to induce (or is reckless as to inducing) another person to enter into, or refrain from entering into, a relevant agreement.

case was that this had been achieved by implementing improper "cash in transit" policies and back-dating invoices. The company itself was publicly censured for market abuse in 2020.

There was no dispute at trial that misleading statements had been made, nor as to the materiality of those statements. The FRC had sanctioned PwC (Redcentric's auditors at all material times) and two audit partners in 2019, finding that *"The breaches…were numerous and in certain cases were of a basic and/or fundamental nature, evidencing a serious lack of competence in conducting the statutory audit work. A number of the breaches relate to the auditors' failure to exercise professional scepticism, which is at the heart of auditors' work."* The key questions at trial turned on the involvement and knowledge of each of the defendants.

Ms Croft had pleaded guilty to all the charges against her prior to trial (these included the s.89 offence; charges of misleading an auditor;[7] and false accounting[8]). She was sentenced to 3 years in prison.

Mr Coleman faced 11 charges, which in addition to the s.89 offence included false accounting; fraud by false representation; and misleading an auditor. The FCA claimed that Mr Coleman and Ms Croft had worked knowingly together and operated *"hand in glove"*: while Ms Croft was principally responsible for the falsification of the company's ledger and the management accounts, Mr Coleman had falsified the board reports. Mr Coleman denied the allegations; he pointed to Ms Croft's singular control over the company's finance function and stated that he relied upon the management accounts that she drafted, believing them at all times to be a true reflection of the company's affairs.

Mr Fisher faced two pairs of alternative counts on the s.89 offence based on two RNS announcements of 9 November 2015 and 16 June 2016. As at the date of the first RNS, Mr Fisher had been in office as CEO for less than a day. Mr Fisher denied that he had any knowledge of the misstatements: he was not financially qualified and had relied upon the picture presented to him by the finance department, the assurances of PwC, and the support of the company's internal audit committee.

The Verdict

The trial commenced on 1 November 2021 and lasted for 14 weeks before HHJ Beddoe at Southwark Crown Court. On Monday 7 February 2021 and after four days of deliberation, the jury returned their verdicts. Mr Coleman was found guilty of 5 out of 11 charges, including the two s.89 offences of knowingly making misleading statements to the market. He was later sentenced to 5 and a half years in prison.

Mr Fisher was unanimously acquitted of all counts.

The verdict represents at least a partial success for the FCA given the convictions of both Ms Croft and Mr Coleman, and may well signal that s. 89 will be invoked more frequently in the future. The facts of the case are a good illustration of a common theme emerging in misstatement cases: the combined failure of a company's internal governance structures, poor oversight by its audit committee, and the complacency of external auditors.

Richard Lissack QC and Leonora Sagan of Fountain Court Chambers acted for Mr Fisher.

The Economic Crime (Transparency and Enforcement) Act 2022

The Economic Crime Act, the stated aim of

[7] Contrary to s.501 Companies Act 2006.

[8] Contrary to s.17(1)(a) Theft Act 1968.

which is to *"crack down on dirty money in the UK and corrupt elites"*[9] received royal assent on 14 March 2022. Part 1 of the Act (not yet in force) introduces requirements for the registration of overseas entities that control property and land in the UK. Part 2 of the Act (now in force) expands the Unexplained Wealth Order regime; and Part 3 of the Act (now in force) addresses sanctions. We look at each section in turn.

Part 1: Register of Overseas Entities ("ROE")

The ROE is intended to prevent the use of UK land for money laundering purposes by increasing the transparency of beneficial ownership.[10] The provisions will operate by requiring UK Companies House to keep a public register[11] of overseas entities.[12] Key features of the regime include:

- Establishing a duty on the overseas entity to take reasonable steps to identify any registrable beneficial owners[13] (s.12) and to obtain the requisite information in respect of each of them for the purposes of registration.
    - Overseas entities are given enhanced information powers under s.13 to require persons or entities who may have the requisite knowledge or information to supply it.
    - A failure to comply with section 12 is an offence (s.15). It is also an offence for a person served with an information notice to knowingly or recklessly make false statements in respect of a material particular in response (s.15(2)).
- Setting out the information required in respect of beneficial owners according to whether they are overseas entities, individuals, governments and public authorities, or trusts (Schedule 1).
- Establishing an annual "updating duty" in respect of any changes to beneficial ownership (s.7), failure to comply with which is a criminal offence (s.8).
- Establishing a "false statement" offence (s.32) which is committed where a person, without reasonable excuse, delivers to the registrar any document or makes a statement that is misleading, false or deceptive in a material particular.[14] The offence is "aggravated"[15] if, when the document or statement is delivered, the person knows that it is misleading, false or deceptive in a material particular (section 32(2)).
- Creating an exemption to the registration requirements of Part 1 where it is necessary in the interests of national security or for the purposes of preventing or detecting serious crime, to do so.

Part 2: Expands the Unexplained Wealth Order Regime[16]

The amendments to the UWO regime are intended to *"enable law enforcement to take more effective action against kleptocrats and serious and organised criminals' who launder*

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[9] https://www.gov.uk/government/news/new-measures-to-tackle-corrupt-elites-and-dirty-money-become-law

[10] Explanatory Notes, p.5.

[11] Provision is made for sensitive information such as dates of birth and residential addresses to be kept confidential – s. 22.

[12] An "overseas entity" is defined by section 2 of the Act to mean *"a legal entity that is governed by the law of a country or territory outside the United Kingdom"*.

[13] A beneficial owner is one:

- holding, directly or indirectly, more than 25% of the shares in the foreign entity;
- holding, directly or indirectly, more than 25% of the voting rights in the foreign entity;
- holding the right, directly or indirectly, to appoint or remove a majority of the board of directors of the foreign entity; and

who exercises, or has the right to exercise, significant influence over the foreign entity.

[14] A person guilty of the standard offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale (unlimited fine).

[15] A person guilty of the aggravated offence is liable on summary conviction to imprisonment for the maximum summary term for either-way offences or a fine (or both), or on conviction on indictment, to imprisonment for a term not exceeding two years or a fine (or both).

[16] Implemented by the Criminal Finances Act 2017 which amended the Proceeds of Crime Act 2002.

funds in the UK." The explanatory notes also recognise a need to counter the inability of *"kleptocratic foreign states"* to provide reliable support to enforcement authorities:

- Section 45 amends the Proceeds of Crime Act 2002 to expand the application of the UWO regime to "*responsible officers*" of corporate defendants who are property holders. "*Responsible officers*" includes any director; any member of a body equivalent to the board of directors; managers, secretaries or similar; a partner; and *"any person in accordance with whose … instructions the board of directors or equivalent … are accustomed to act.*
- s.47 now permits a Court to grant a UWO where there are reasonable grounds for suspecting that property has been obtained through unlawful conduct (in addition to the Income Requirement in s.362B(3) POCA 2002).
- s.49 extends the maximum time a court can allow property to be frozen pursuant to a UWO.
- By section 51 the Secretary of State must publish annual reports setting out the number of UWOs made by the High Court.
- Section 52 limits the circumstances in which a costs order can be made against the agency seeking the UWO only to cases where the authority acted unreasonably, dishonestly, or improperly. This section was likely enacted in response to *NCA v Baker* [2020] EWHC 822 (Admin) in which the NCA faced a claim for costs of £1.5m after three UWOs were discharged.

Part 3: Expanding the breadth of UK Sanctions

Part 3 of the Act came into effect on 15 June 2022:

- It streamlines the process by which sanctions regulations can be made pursuant to the Sanctions and Money Laundering act 2018; and
- s. 54 amends OFSI's sanctioning powers by introducing a strict liability offence for sanctions breaches by removing the requirement that OFSI must prove that a person had knowledge, belief, or reasonable cause to suspect that their activity breached sanctions.

SFO: Continued Disclosure Headaches in *Unaoil* and *G4S*

On 24 March 2022 the Court of Appeal quashed the convictions of Paul Bond, who had been charged together with Basil Al Jarah ("BAJ"), Ziad Akle, and Stephen Whiteley in the SFO's Unaoil probe, finding that the SFO's disclosure failings in that prosecution had prevented Mr Bond from presenting his case in its best light and that the convictions were therefore not safe.[17]

Mr Bond had been convicted of two offences of conspiracy to give corrupt payments (contrary to s. 1 of the Prevention of Corruption Act 1906) in respect of lucrative contracts to be awarded by the Government of Iraq for the export of crude oil. He was ultimately sentenced to three years and six months' imprisonment.

He appealed against his conviction in reliance on the Court of Appeal's decision to quash the convictions of Ziad Akle. His ground of appeal asserted that *"the SFO fundamentally failed to comply with its duties of disclosure in relation to material that would have permitted the defence on behalf of Mr Bond"* to mount, among others, a successful opposition to the SFO's application to adduce the guilty pleas of BAJ as evidence to prove the existence of conspiracies, or to attack the credibility of those pleas if and when admitted.

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[17] We reported on *R v Akle (Ziad)* [2021] EWCA Crim 1879 in our Third Edition of the Commercial Crime Newsletter for 2022 which you can find here.

The SFO resisted the appeal on the basis that the matters which led to the quashing of Mr Akle's convictions had little bearing on the issues in Mr Bond's case, so that the disclosure failings did not prejudice Mr Bond. That was in part because it was said that unlike Mr Akle's defence, Mr Bond's (at his retrial) admitted the conspiracy but claimed that he had not been a party to it. [24]-[25]

The Court (Holroyde LJ, Jay J and Bennathan J) noted at the outset that Mr Bond's original defence did not admit that the alleged conspiracies existed, put those matters squarely in issue by way of his defence statement, and that therefore it was incumbent upon the SFO to prove that element of the charges. It chose to do that by adducing BAJ's convictions. Once they had been admitted into evidence, it was unsurprising that Mr Bond had tacitly accepted that the argument that there were no conspiracies had been taken away from him and sought to focus his arguments on other issues in the case:
"the important point, for present purposes, is that the applicant took that course in ignorance of the existence of the new material that should have been disclosed to Akle and, it is accepted that if it had been, it would also have been disclosed to the applicant. … the failure of disclosure…caused a handicap to the presentation of the Applicant's case. ***We are bound to say that it is an unattractive stance for the SFO first to fail in their disclosure obligations and then to seek to rely on decisions as to the conduct of the case which were all made by the defence on the basis of incomplete information."*** [29]

The decision will come as a further blow to the SFO which has recently been beset by criticism, and at a critical juncture: the agency was, at the time of this judgment, expecting the findings of the Independent Review into Unaoil that was being conducted by Sir David Calvert-Smith. That review, published in July 2022, identified "fundamental failures" in the agency's conduct of the Unaoil matter that resulted from serious cultural issues.[18] On 21 July 2022 the convictions of the third defendant (Stephen Whiteley) were also quashed. The SFO did not contest his appeal.

G4S

In late April 2022 the SFO announced that after an 8-year investigation into G4S and an adjournment to the trial for the purposes of managing disclosure, the agency was planning to outsource the process to an e-discovery specialist.

The move is perhaps unsurprising given notable historic failures on the part of the SFO arising from disclosure mismanagement, including in *Unaoil* and during the prosecution of former Serco executives in 2021. However, it represents a volte-face from the SFO's position before the Public Accounts Committee in February 2022 which was that outsourcing disclosure would be both costly and risky.

The SFO has long criticised the Criminal Procedure and Investigations Act 1996 (the "**CPIA**") which governs disclosure in criminal cases, citing the "anachronistic" regime it creates as a factor contributing to the difficulties it has faced with disclosure. The SFO has written to the Attorney General's Office with a proposal for a specific CPIA Code of Practice to manage the large volume of data and material it collects during its investigations.

An interesting question arises as to

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[18] The Review was commissioned in December 2021. It seeks to answer, among others, the following questions (see here for the terms of reference):

What happened in this case and why? What occurred as regards SFO contact with third-parties and why; Why did the SFO disclosure failures identified in the Court of Appeal judgment occur?

What implications, if any, do the failings highlighted by this case have for the policies, practices, procedures and related culture of the SFO?

What changes are necessary to address the failings highlighted by the judgment and any wider issues of SFO policies, practices, procedures or related culture identified by the reviewer?

whether the SFO can properly outsource disclosure under the CPIA, which creates duties for the prosecutor and disclosure officers that are not obviously delegable. A lot will depend on the extent of the outsourcing and whether it is limited to processing, hosting, and corralling the data, or whether it seeks to trespass into substantive duties to consider and review the material.

SFO Successes

On 21 June 2022, the SFO secured seven convictions of Glencore Energy (UK) Ltd for bribery under the Bribery Act 2010 (five under the substantive bribery offence in s.1 and two under the *"failure to prevent"* offence in s.7) after the company admitted to multiple counts of paying bribes to secure access to oil in several African countries between 2012 and 2016. Glencore will be sentenced in November 2022.

Highlights from *ENRC v Dechert LLP* [2022] EWHC 1138 (Comm)

On 16 May 2022 Waksman J handed down this long-awaited judgment, in many ways compounding a difficult period for the SFO.

The Facts

ENRC is a mining conglomerate with substantial operations in Kazakhstan. In 2011 it retained Dechert LLP, acting primarily through its partner, Neil Gerrard ("Gerrard"), for the purposes of investigating the activities of one of its subsidiaries operating in Pakistan. The immediate catalyst for Mr Gerrard's involvement was an anonymous whistle-blower's email sent on 20 December 2010, which alleged acts of bribery and corruption within the subsidiary [66] [77]. In August of that year, an article highly damaging to ENRC was published in *The Times* which appeared to be based in part on privileged documents; that was followed in short succession by a letter to ENRC by the SFO, inviting the corporate to discuss its governance and compliance programs with, among others, the SFO's then director, Mr Richard Alderman.

On Gerrard's advice, ENRC wrote to the SFO in November 2011 to say that it wished to engage with the SFO. As a result, the investigation work to be undertaken by Dechert significantly increased.

Between 2011 and 2013 ENRC and the SFO met formally on 8 occasions. But in addition to those open meetings, there were 30 other contacts between the SFO on the one hand and Mr Gerrard on the other. No representative of ENRC was present at those meetings (the "Disputed Contacts" or "DCs").

In December 2011 and March 2013 further articles were published about ENRC which contained confidential leaked information. In June 2013 the SFO also received an envelope of confidential papers relating to ENRC, some of which were privileged. On 27 March 2013 ENRC terminated Dechert's retainer, and one month later the SFO announced a criminal investigation into ENRC. That investigation is presently ongoing, but no charges have yet been brought.

The Claims

ENRC brought proceedings against both Gerrard and Dechert (in 2017), and in 2019, the SFO. As against Dechert it alleged that Gerrard acted in gross breach of his duties as solicitor by acting contrary to ENRC's interests in, among others, deliberately disclosing clearly confidential or privileged material to the SFO and intentionally expanding the scope of ENRC's investigations in order to generate legal fees. ENRC alleged that Gerrard was the instigator of the August Leak, that he facilitated the two further leaks, and was the sender of the June 2013 material (in each case acting without the company's knowledge or consent). It also claimed that the 30 DCs were unauthorised or that the information conveyed in them by Gerrard to the SFO was against ENRC's interests.

Finally, it alleged that Gerrard wrongly advised the company in several respects. [9]

As against the SFO, ENRC claimed that it actively participated in Gerrard's breaches of duty and was therefore liable for the tort of inducing breach of contract or fiduciary duty. ENRC also claimed that several of its officers were guilty of misfeasance in public office. The judge noted that in respect of these claims, it had to be shown that SFO officers were either dishonest, reckless, or guilty of bad faith [11].

Both the SFO and Dechert robustly denied all the allegations.[19]

The Relief Sought

ENRC claimed as against both Dechert and the SFO unnecessary Dechert Fees of £11.5m; unnecessary third-party fees of £11m; and loss of employee time of £250k. Those fees would not have been incurred but for Gerrard's wrongful expansion of ENRC's investigation. From the SFO, ENRC also sought exemplary damages for oppressive conduct. Finally, it sought declarations to prevent the SFO from making any use of the material received from Gerrard in breach of duty, as well as the removal from its criminal investigation team of individuals who had reviewed it [14].

The Issues

The judge noted that most issues to be decided were ones of fact, not law. Matters of causation and loss were to be deferred to a subsequent judgment.

Dechert Breaches

ENRC claimed that Gerrard had breached his duties by:

- leaking confidential information to the press;
- making other unauthorised disclosures; giving ENRC wrong advice;
- failing to establish the scope of the SFO's concerns;
- unnecessarily expanding the scope of ENRC's investigations;
- failing to protect ENRC's privileged material; and
- supplying privileged material to the SFO.

Dechert denied the breaches; in addition, it sought to rely on a limitation of liability clause; an argument that the claims were time-barred; and alleged contributory fault on the part of ENRC.

SFO Breaches

The case against the SFO alleged two torts: (a) inducement of breach of contract and of fiduciary duty by Gerrard; and (b) misfeasance in public office.

For the first, the SFO alleged that Gerrard's breaches of duties were so obvious that experienced SFO officers involved either knew that Gerrard was acting improperly or turned a blind eye to his misconduct. Worse still, the SFO was said to have encouraged or assisted Gerrard to act improperly and assisted in keeping that misconduct secret from ENRC. The DCs represented secret meetings between the SFO and Gerrard during which the SFO willingly received prejudicial confidential information, which it then used to inform its decisions.

Misfeasance in public office was said to have been committed by the SFO in breaching its duties to be independent; by failing to properly record evidence (and to destroy evidence or keep it 'off the books'); and in breaching its duty not to make use of LPP material.

The Law - Inducing Breach of Contract

The judge outlined the necessary elements of this tort as follows:

1. A breach of contract by B;
2. A must know[20] that by his acts they will put B in breach of contract;
3. A must have induced B to break the contract by persuading, encouraging or assisting him to do so (the Inducement

[19] Save for in respect of one incident, the 'Depel Interview', which Dechert admitted involved a reckless breach of duty by Gerrard [15].

[20] Knowledge here includes reckless indifference [160].

Requirement);
3. A must intend to procure the breach either as an end in itself or as the means by which he achieves some further end (the Intention Requirement).

The Inducement Requirement

The judge held that although paradigm examples of this element concerned active persuasion or encouragement, knowingly assisting B to break the contract was sufficient (especially where, without A's assistance, the breach cannot be committed) [163]. The judge cited *Lictor v Mir Steel* [2011] EWHC 3310 where David Richards J noted that *"in circumstances where the defendant's involvement or cooperation is necessary to the breach intended by the contract breaker, then the defendant who participates in this way with the relevant knowledge is liable. … in such circumstances the defendant is sufficiently instrumental in causing the breach to be liable. Active persuasion by the defendant is not required."* It follows that assisting in breach can be sufficient (at least where the breach cannot otherwise be committed).

The Intention Requirement

This requirement must be proved in addition to knowledge by the defendant that he is inducing a breach. In determining what counts as intention, the judge relied upon Lord Hoffman's judgment in *OBG v Allan* [2008] 1 AC 1: what must be shown is either that the breach by B is itself the end in question, or that the breach is a means to some other end. It does not suffice for the breach to be merely a foreseeable consequence [169]-[170].

Misfeasance in Public Office

The elements of this tort are met where:
1. D is a public officer engaged in carrying out public functions;
2. D acts unlawfully;
3. D knows he has acted unlawfully;
4. D knows that his acts will probably injure the Claimant (or is recklessly indifferent to those facts); and
5. D's acts cause loss to the Claimant.

It was common ground between the parties that the knowledge of individuals could not be aggregated for the purposes of establishing the fourth requirement. For each alleged act of misfeasance in public office, ENRC had to show that the particular SFO officer involved knew that his acts would probably injure ENRC. The judge noted however that the allegations of misfeasance centred around the DCs and that three individual SFO officers had each conducted between nine and eleven DCs. In those circumstances, it would be artificial to consider knowledge of loss for each of those incidents in isolation; the only sensible way to conclude on the fourth requirement in respect of those officers would be to consider whether it had been established after each of the meetings had been considered individually [194].

SFO Duties: Does the SFO have a duty to preserve evidence?

One particularly interesting aspect of this case arises from the discussion of the SFO's duties. While the agency accepted that it had a duty to act strictly in accordance with its powers (the Powers Duty), to act independently, objectively and in good faith (the Independence Duty), and to protect the LPP and confidentiality of any third party (the LPP Duty) it did not accept that it had an "Evidence Duty" to preserve documents, evidence, information and intelligence received by it in relation to the carrying out of its functions, on the basis that it could not be shown to be subject to a legal duty to preserve documents per se. [197] The only potentially relevant duty, it said, arises from the Criminal Procedure and Investigations Act 1996 (the "CPIA"). s.1(4) of that Act applies where a person has been charged with an offence, and

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[21] s.1(4) For the purposes of this section a criminal investigation is an investigation which police officers or other persons have a duty to conduct with a view to it being ascertained—

(a)whether a person should be charged with an offence, or

(b)whether a person charged with an offence is guilty of it.

defines "criminal investigation" by reference to that charge.[21] Similarly, the SFO's investigatory powers under s.2 of the Criminal Justice Act 1987 apply only once a criminal investigation has commenced.[22] But the criminal investigation into ENRC did not commence until some time after the many breaches alleged by ENRC, in April 2013.

The judge concluded that "criminal investigation" in the 1987 Act should be construed consistently with the definition appearing in the CPIA [203]. It followed that preliminary investigatory work did not amount to an "investigation" for the purposes of the CPIA, and the SFO was not subject to an Evidence Duty prior to the investigation into ENRC commencing.

Waksman J did however note a "wrinkle" in this analysis posed by s. 2A of the 1987 Act, which gives the SFO coercive powers to obtain information *prior* to the start of any criminal investigation [205]. As to that, the judge noted, *obiter*, that *"while, in my judgment, the CPIA duty still does not apply here, there may well be an implied duty to preserve and record the information obtained. That would be a necessary consequence of these powers because, otherwise, there would be no need to record the process of the interview or of obtaining other information pursuant to the exercise of the powers which would be relevant as to whether they were exercised properly or not"*. [205]

Findings

Waksman J found that Gerrard acted deliberately and in gross breach of duty to ENRC: he was the instigator of all three leaks to the press, and routinely engaged with Mr Alderman without any authority. He also found Gerrard to have been in breach of duty in respect of 22 out of the 30 DCs; to have wrongly advised ENRC on key risks connected to engaging with the SFO; that he deliberately and unnecessarily expanded the scope of ENRC's investigation in order to generate fees; that he failed to protect ENRC in respect to privilege; and that he was the sender of the June 2013 material. In relation to the allegation that Gerrard recklessly expanded the scope of ENRC's investigation, Waksman J held that:

> *In my judgment, no reasonable specialist solicitor in the position of Mr Gerrard would have allowed the exercise to become as unwieldy and large as it ultimately did. Mr Gerrard was therefore negligent in expanding the investigation unnecessarily….**The next question is whether Mr Gerrard was reckless. I think that he was, in the sense that as the documents show, he just kept going and going and did not appear to weigh up in any real sense to proportionality of what he was doing….He simply did not care."*** [1243][1244]

None of Dechert's defences or claims to mitigation succeeded (contributory fault; limitation of liability; time-bar).

As for the SFO, the judge held that it acted in serious breach of duty in relation to half of the DCs, in many of which it had acted through Mr Alderman. The tort of inducing a breach of contract by Gerrard was therefore established. Inducement took the form of encouraging Gerrard to speak with the SFO whenever he wanted and was cumulative [883]: *"Without the SFO's willingness to listen, there would be no breach on [Gerrard's] part since it required an audience"*. [879]

In discussing the intention requirement for the tort of inducement, Waksman J found intention on the part of the SFO in the form of what he called *"bad faith opportunism"*: the SFO's officers *"were prepared to receive the information which he should not have given them on the basis that it might prove useful … going forward… SFO individuals were prepared – again and again - to act as Mr*

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[22] *2 Director's investigation powers.*

(1) The powers of the Director under this section shall be exercisable, but only for the purposes of an investigation under section 1 above, in any case in which it appears to him that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person.

Gerrard's willing audience when his client was not present and when he might well disclose unauthorised information … [because]… they saw there was some value in continuing to receive it. If so, then their aim was continued receipt of information. But if so, almost by definition, the means to that aim was Mr Gerrard's very breach of contract…They could not have got that information without his breach which was an essential part of it. This squarely satisfies the Intention Requirement here. The breach of Mr Gerrard's retainer was not a mere by-product; it was the very means of providing the information". [894][895]

Turning to the misfeasance claim, Waksman J held that although many of the elements of the tort were also made out, the fourth element (that the officer in question should know that his acts will probably injure the claimant) was not. It followed that none of the misfeasance torts were made out [872] [877].

The Declarations Sought by ENRC

Waksman J held that he did not have the power to issue the declarations sought by ENRC by reason of the decision of Goff J in *Butler v Board of Trade* [1971] 1 Ch 680.[23] In that case, Goff J declined to grant a declaration restraining the defendant from tendering in its prosecution of the claimant a letter protected by the claimant's LPP by drawing a distinction privilege and admissibility. The former was a private right of the individual, whereas the latter was necessary for the state's interest in apprehending and prosecuting criminals. [1731]

Waksman J considered that he was bound by *Butler* and *R v K* to hold that *"the recognition of LPP as a fundamental right does not affect the question of admissibility in criminal proceedings if the material has been obtained."* [734] He rejected ENRC's arguments that *Butler* had to be disregarded in light of more recent developments in the law of LPP as reflected, among others, in the *Three Rivers* cases [1734].

The judge concluded that he would have refused the declarations as a matter of discretion even if it had been open to him to grant them: the wording of the declarations was unworkably wide; and since they were not merely sought in respect of prospective use and the investigation is now 9 years old it would be impossible to isolate instances of historic use of the relevant material in order to enforce the declarations. [1738]

Conclusion

Although none of ENRC's misfeasance in public office claims were established on the facts, the judgement itself contains scathing criticisms of the SFO's regime under Mr Alderman's tenure: *"it cannot be seriously doubted that in the course of his Directorship, a number of events occurred which were at best ill-considered or naïve so far as he was concerned, and at worst plainly unlawful"* [289]. Among these, the judge included (a) the settlement agreement with BAE Systems; (b) judicial criticisms of the settlement with Innospec; (c) the dawn raid conducted on the homes of Robert and Vincent Tchenguiz, which had been based on an "inadequate and unfair" account of the facts presented to the judge and which Waksman J held was *"a case betraying a serious lack of propriety on the part of Mr Alderman"*; and (d) the payment of improper redundancy and severance payments for SFO executives.[24]

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[23] Approved by the Court of Appeal in *R v Tompkins* (1977) CrAppR 181, *R v Cottrill* [1997] Crim LR 56 and *R v K (A)* [2010] QB 343.

[24] In cross-examination, Sir David Green (SFO Director between 2012 and 2018) said that under Mr Alderman's watch *"the SFO was known colloquially as "Nightmare on Elm Street" and the "Serious Farce Office"* [304]. As to his personal approach to cases, Mr Alderman was said to be a fan of "dangerous" informal "fire-side" chats, and that Mr Alderman's personal records of the cases he had supervised were *"inconsistent, incomplete, and poorly kept such that it was extremely challenging to find information"* [317].

As for Gerrard, the judgment could scarcely have been expressed in stronger terms. On 6 July 2022 it was announced that the SRA had taken preliminary steps into opening an investigation into Dechert and Gerrard's conduct in advising ENRC.

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