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In Dispute

News from Dechert's London Dispute Resolution Practice

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Protecting Corporate Reputations

If their reputation is attacked, should companies have the right to sue for libel in exactly the same way as an individual? The millions spent on brand protection, advertising and sponsorship show the value placed on corporate reputations. But does such a right place a chilling effect on the freedom to criticise bodies which, in the case of major multi-nationals, wield enormous and growing power?

These issues were considered recently by the House of Lords in *Jameel v Wall Street Journal Europe* which held that a trading company is entitled to sue for libel and claim damages without the need to prove actual financial loss as a result of the libel.

Trading companies (the Lords were not looking at non-trading companies such as charities) therefore remain in the same position as individuals in that there is a presumption of general damage arising from publication of a defamatory statement, enabling them to sue as of right.

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The Court recognised that a damaging libel could have severe implications for a company as it may "lower its standing in the eyes of the public and even its own staff, making people less ready to deal with it, less willing or less proud to work for it".

The Court also recognised the difficulties which would be placed on businesses if they had to prove specific loss. Not least because specific losses arising from defamatory statements can be notoriously difficult to quantify, as the dispute between Collins Stewart and the *Financial Times* demonstrated.

Collins Stewart

In this case, Collins Stewart had found itself the subject of allegedly defamatory articles in the *Financial Times* concerning allegations of misconduct made by a former employee in relation to insider trading and breaches of the FSA rules. Collins Stewart claimed special damages arguing that it had suffered a specific financial loss arising from the alleged defamation.

The Court ruled that Collins Stewart could not recover the diminution in the value of its share price which it claimed resulted from the allegations. While the diminution in value could be taken into account in ascertaining general damages such as the loss of goodwill, market capitalisation was influenced by a variety of factors, and a reduction in the share price was far too uncertain to be acceptable as a legal principle for assessing special damages. At a later hearing, the Court also held that companies cannot recover aggravated damages for libellous statements as they do not experience emotions and feelings.

Implications

The *Jameel* ruling means that companies with a trading reputation in the jurisdiction do not have to surmount the hurdle of proving special damages. As of right they can bring a claim for general damage to their reputation. Accordingly the ruling maintains libel as an important means of corporate brand protection, confirming that England will continue to remain a key jurisdiction for corporate bodies to defend robustly their trading reputation.

Jameel v Wall Street Journal Europe Sprl [2006] UKHL 44
Collins Stewart Ltd and another v The Financial Times Ltd [2004] EWHC 2337 (QB)
Collins Stewart Ltd and Collins Stewart Tullet PLC v The Financial Times [2005] EWHC 262 (QB)

FSA Ordered To Pay Costs of "*The Plumber*"

The Financial Services Authority (FSA) was ordered for the first time by the Financial Services and Markets Tribunal (the Tribunal) to pay the legal costs of a Tribunal hearing. The payment was ordered in favour of Paul "the Plumber" Davidson and Ashley Tatham who successfully challenged the FSA's fines, of £750,000 and £100,000 respectively, for market abuse.

There is no assumption that the FSA automatically pays a successful applicant's costs in the Tribunal. The award of costs is governed by paragraph 13 of schedule 13 of the Financial Services and Markets Act 2000 (the 2000 Act) which provides that if:

> "the Tribunal considers that a decision of the Authority which is the subject of the reference was unreasonable it may order the Authority to pay to another party to the proceedings the whole or part of the costs or expenses incurred by the other party in connection with the proceedings".

The Tribunal found in this case that the FSA's decision was unreasonable. In reaching that decision, the Tribunal focussed on the following three areas:

- **Was the FSA's Approach to the Evidence and the Facts Reasonable?**

  The FSA was held to have been unreasonable in preferring the evidence of one party above that of Mr. Davidson, despite knowing that there were significant conflicts of evidence and also evidence which had the potential to damage the other party's credibility. The FSA should have considered compelling Mr. Davidson to attend an interview and delaying matters while they obtained full evidence of relevant telephone records. The Tribunal found a "complete lack of direct evidence of either collusion or concealment" by Mr. Davidson.

- **Was the FSA's Approach to the Law Reasonable?**

  A lack of independent legal advice caused inaccurate conclusions to be drawn from insufficient evidence. There was inadequate exploration of the "regular user" concept in what was brand new and untested legislation and also a lack of analysis of the application of the relevant AIM rules and the Code of Market Conduct.

- **Were the Levels of Penalties Reasonable?**

  It was not reasonable for the FSA to decide against criminal proceedings just because

higher penalties could be imposed by a civil penalty. The imposition of a higher penalty on Mr. Davidson because he was not an approved person (and so could not be subject to a prohibition or withdrawal of approval) was incorrect as section 56 of the 2000 Act (prohibition orders) did not solely apply to approved persons. The penalties imposed on an approved person should in principle be higher. In relation to Mr. Tatham, it was unreasonable of the FSA not to form the view that he had reasonably believed that his behaviour did not amount to market abuse. Consequently, they did not have the legal power to impose the penalties.

It was also unreasonable to ignore the various mitigating factors, including the fact that there appeared to be no loss or risk of loss to other market users.

Conclusion

The implementation of the recommendations in the FSA Enforcement Process Review and Report of July 2005 will hopefully avoid a repeat of many of the shortcomings identified. Nonetheless, this benchmark case provides useful guidance as to the approach of the Tribunal in awarding costs and will provide some comfort to those considering the expensive process of challenging the FSA in the Tribunal.

Costs Decision of Paul Davidson and Ashley Tatham v Financial Services Authority

Available at: http://www.financeandtaxtribunals.gov.uk

Recovering Mistaken Tax Payments

Various U.K. corporation tax provisions have in recent years come under sustained challenge as infringing E.U. law. The latest test case arising from these challenges decided by the House of Lords is *Deutsche Morgan Grenfell Group PLC v H.M. Commissioners of Inland Revenue and another* which decided that tax payments made under a mistake of law could be recovered.

This was one of many cases resulting from the European Court of Justice's earlier decision that U.K. revenue law, which had allowed companies whose parents were resident in the U.K. to elect to pay dividends free of ACT, had discriminated unlawfully against companies with parents resident in other member states.

Mistakes of Law

Following the case of *Kleinwort Benson v Lincoln City Council* it is now possible to recover payments made under a mistake of law. The question to be decided was whether the Kleinwort mistake of law principle applied to tax cases and if so whether Deutsche Morgan Grenfell (DMG) had in fact made a mistake of law when making payments of ACT.

The advantage to DMG of being able to claim that it had made a payment under a mistake of law is that the time limit for bringing the claim would not have begun to run until the mistake was discovered or could with reasonable diligence have been discovered.

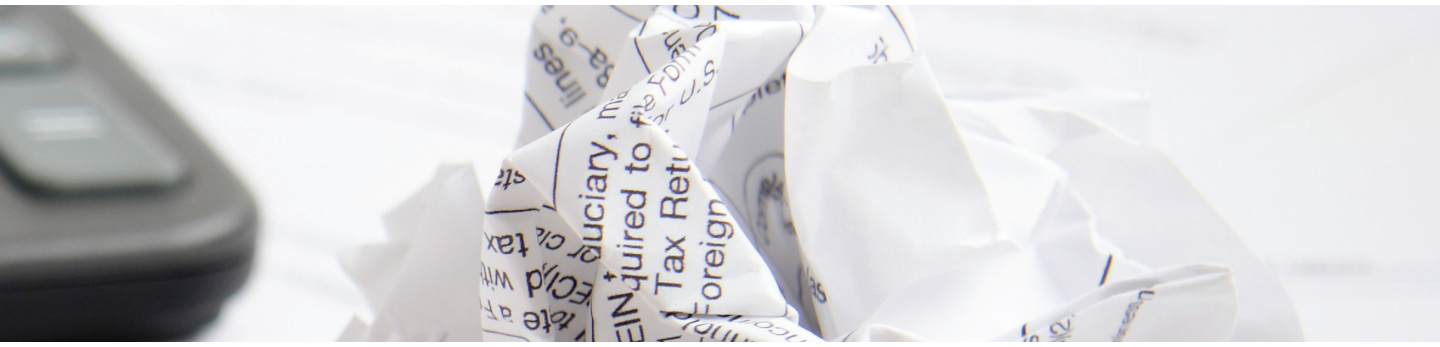
The Decision

By a majority the House of Lords decided that DMG could recover payments made under a mistake of law because:

- The right of restitution for payments made under a mistake of law applies to tax payments. A party who had mistakenly paid tax was not limited to statutory remedies or common law remedies for recovery of tax unlawfully demanded (both of which have six-year time limits);
- DMG had made a mistake of law: While DMG knew from 1995 onwards that the relevant provisions were subject to legal challenge, the evidence of DMG's Head of Taxation was that he was not in doubt that DMG was bound to comply with the law as it then was and considered it irrelevant that another taxpayer was challenging the law; and
- The mistake was not reasonably discoverable until after the relevant ECJ judgment had been delivered.

Consequences

As a result of the decision, DMG can make claims in relation to payments made as far back as 1993 and the door is now open for other claims stretching back



to the introduction of the offending provisions in the 1970s. The hefty bill for the Treasury will increase further if the House of Lords decides in favour of wronged parties being able to recover compound interest on their repayments.

Gordon Brown has announced that next year's Finance Act will contain retrospective provisions to limit the financial consequences of the decision. Claims involving mistakes of law in tax cases brought before 8 September 2003, by parties not bound by the DMG decision, will be subject to a six-year limitation period from the date of payment, regardless of when the mistake was discovered. This move is likely to prove as controversial as the existing statutory measure (currently subject to challenge), introduced after the first instance decision in this case, which imposed a similar strict time limit for cases brought after 8 September 2003.

The case also suggests that the issue of what constitutes a mistake of law is likely to be the source of further controversy and litigation.

Deutsche Morgan Grenfell Group PLC v H M Commissioners of Inland Revenue and another [2006] UKHL 49

Kleinwort Benson v Lincoln City Council and other appeals [1999] 2 AC 349

Loss of Confidentiality – Public Access To Court Documents

Statements of Case (pleadings) filed at court after 2 October 2006 are no longer confidential and can be accessed as of right by the public or the media. This change to the court rules, which follows lobbying by the media, is a significant widening of access. Previously only the claim form and certain orders were available as of right to the public. Although parties or anyone else identified in Statements of Case can apply to court to restrict access, there is currently no guidance as to how the court will consider such applications, but no doubt exceptional circumstances will need to be shown (such as, for example, reference to trade secrets).

Following legal action by the Law Society, it has been confirmed that the new rule will not apply retrospectively to Statements of Case filed before 2 October 2006.

In the past, details of cases which settled before trial would normally never become public. This has now changed. This widening of public access may in appropriate cases prompt parties to consider more confidential methods of dispute resolution such as arbitration.

Freezing Orders - Banks Owe No Duty of Care To The Applicant

A bank notified of a freezing order does not owe any duty of care, and therefore cannot be liable for negligence, to the person who has obtained the order. This was the recent House of Lords decision in *Customs and Excise Commissioners v Barclays Bank PLC* which held that freezing orders are enforceable only by the Court's power to punish as a contempt of court anyone who knowingly assists or allows a breach of the order.

The Facts

Freezing orders prohibit a party from disposing of their assets where it is feared that these assets will be dissipated to defeat any adverse judgment. The orders can be served on anyone who appears to be in control of assets, frequently banks.

In this case, the Commissioners obtained freezing orders against two companies they feared would remove their assets from the jurisdiction to avoid VAT liabilities. The orders were served on Barclays, which held accounts for the companies. However, on the same day, as a result of operator errors and internal freezing arrangements not yet having been put in place, Barclays allowed payments out of these accounts. This money was never recovered by the Commissioners and the judgments subsequently obtained against the two companies remained unsatisfied.

The Commissioners sued Barclays for negligence. Did Barclays owe a duty of care to the Commissioners? No.

No Duty of Care

As the court made clear, there is no single hard and fast rule to determine whether a duty of care exists. Various factors were cited by the different Law Lords as the basis for the decision that there was no duty of care. These factors included:

- Barclays did not voluntarily assume responsibility to the Commissioners. The Bank was bound to comply with the orders and therefore it would be unreasonable to impose any duty of care on them when it had had no chance to resist the order and received no reward;
- The Commissioners could not be held to have relied on the bank, because even if they had known that Barclays would not comply with the orders, they could not have acted any differently. They had followed the only available course of action;
- A non-consensual court order has never, without more, been held to give rise to a duty of care to the party obtaining the order;

- The liability of Barclays "was in this case for a few million pounds only, but might in another case be for very much more"; and
- If this duty were imposed on banks it must also be imposed on any other person affected by notice of a freezing order which often would be unfair and unreasonable.

Conclusion

The decision, of course, does not absolve banks of the need to comply with any freezing order given the serious sanctions for any contempt of court. However it does free them from the threat in such cases of potentially substantial claims for negligence from third parties if there are shortcomings in bank procedures.

The facts of the case also emphasise the importance of banks having systems in place to notify all payment centres of the order (i.e. not just the relevant branch) and what the Court recognised was the usual practice of serving the order on the banks before the defendant to allow time for the banks to put restrictions in place on the relevant accounts.

Customs and Excise Commissioners v Barclays Bank PLC [2006] UKHL 28

Dechert's London Dispute Resolution Practice

Dechert's London Dispute Resolution practice consists of a team of experienced and tested solicitors and solicitor-advocates, including qualified arbitrators and mediators. Our work frequently involves the coordination of large multi-party actions, international litigation and arbitration, as well as matters before the U.K. courts, administrative tribunals and regulatory bodies. Members of the team are recognised in the *Chambers Guide to the Legal Profession* and the *Legal 500* directories as leaders in their fields of practice. Our cases are frequently the subject of commentary in the legal and national press.

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