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C H A N C E

Client briefing
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Contentious Commentary
A review for litigators

Contract

Fraud guaranteed

Guarantees can be rectified.

The Statute of Frauds 1677 may not be the oldest piece of legislation on the statute book (according to *Halsbury's Statutes*, it lies 51st in the list, 410 years adrift of the Statute of Marlborough, though two others above it in the list are of doubtful validity and date), but if you were to multiply age by frequency of use, it would surely come out on top.

In 1677, "An Act for prevention of Frauds and Perjuryes", as the Statute of Frauds should be called, was passed requiring evidence of a whole host of things to be in writing and signed if they were to be enforced in the courts. At that time, there was, apparently, a lot of trouble with perjurers persuading gullible judges and juries that oral undertakings had been given to them. Never happens now, of course. Parliament in restoration England was concerned that the wrong people were believed too often, and wished to remedy the position.

Nothing beside section 4 (or IV) of the Statute of Frauds remains (though much of what was in the Statute of Frauds is now in other legislation, notably the Law of Property Act 1925). Section 4 provides that "Noe Action shall be brought... whereby to charge the Defendant upon any speciall promise to answere for the debt default or miscarriages of another person... unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writeing and signed by the partie to be charged therewith..." In approaching 334 years, one might have thought that all the issues with this section would have been identified and resolved. But no (or noe). In *Fairstate Ltd v General Enterprise & Management Ltd* [2010] EWHC 3072 (QB), the issue arose as to the relationship between the Statute and, first, the correction of mistakes through construction and, secondly, rectification.

The judge decided that the approach to the construction of guarantees is the same as to any other contract (*Investors Compensation Service v West Bromwich Building Society* etc etc). As a result, obvious mistakes can be corrected as a matter of construction (*Chartbrook v Persimmon Homes* [2009] 1 AC 1101), including a mistake in the identity of the beneficiary of the guarantee. In *Fairstate*, the face of the guarantee provided that the guarantor was guaranteeing to himself the obligations of the party that was intended to receive the guarantee. How does correcting this mistake square with the policy of the Statute? If the mistake really is obvious, it might be squeezed within the policy. Interpretation is the ascertainment of the meaning a reasonable person would attach to the document. As long as the document is signed, the guarantor may not be able to object too strongly if the document is given the meaning that a reasonable person would draw from it.

But what about rectification? This allows the court to correct a document that does not set out the true intention of the parties. Oral evidence can be admitted in order to rectify a document. If a guarantee is rectified, where is the signed memorandum recording all the terms of the guarantee? Nevertheless, in *Fairstate*, the judge considered that a guarantee can be rectified.

However, the judge decided that rectification was not appropriate on the facts of *Fairstate*. The guarantee was a complete mess. Not only were the parties wrongly described, but the form followed that of a typical bank guarantee without any amendment to reflect the fact that the obligations being guaranteed had

Key Issues

- **Rectification of guarantees**
- **Guarantor's claims lie in damages**
- **Expert evidence admissible to construe a contract**
- **Closing out (or not) ISDA Masters**
- **Apparent authority and vicarious liability**
- **Loss of chance affects causation, not quantum**
- **Unfair prejudice claims not unarbitrable**
- **A release of one co-debtor releases all**
- **Pensioners scoop the insolvent pool**
- **Companies cannot recover cartel fines from their directors**
- **Discontinuance may, or may not, reverse earlier costs orders**
- **Jackson slams grotesque costs arrangements**
- **Case management cannot circumvent the rules on security for costs**
- **Freezing injunctions cover trust assets**

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nothing to do with banking arrangements. Many of its terms were redundant, inapposite or just plain wrong.

The judge decided that he could not identify a sufficient agreement between the parties as to all the terms of the guarantee to allow rectification. He was being asked to write a form of guarantee that the parties might have agreed had they approached the matter reasonably. That, he thought, was beyond his role. So rectification was refused, and the policy of the Statute of Frauds upheld, though was if for one might query whether it was for the right reasons.

Assuming the worst

A claim on a guarantee can be a claim in debt.

A traditional guarantee is an obligation owed by one party (G) to another (B) to see to it that a third party (T) performs obligations that T owes to B. If T fails to perform its obligations to B, B's claim against G is in breach of contract for G's having failed to see to it that T performed its obligations. B's claim against G is therefore in damages, even if B's claim against T is for a debt and the quantum of B's losses is entirely obvious. This is clear from the fact that a claim on a guarantee was historically a claim in special assumpsit; if a claim on a guarantee were a claim in debt, it would have been brought in indebitatus assumpsit (see *Moschi v Lep Air Services Ltd* [1973] AC 331).

So why the (second) history lesson? Who cares whether a claim on a guarantee is a claim in debt or in damages? Forms of action were removed from the English legal landscape by the Common Law Procedure Act 1852 and the Judicature Act 1873.

Some people do care. In particular, in *McGuinness v Norwich & Peterborough Building Society* [2010] EWHC 2989 (Ch), D hoped to postpone bankruptcy because of the distinction. D had guaranteed his brother's debt to C. His brother failed to pay. C presented a bankruptcy petition. D pointed out that a bankruptcy petition can only be presented on a debt for a liquidated sum (section 267(2) of the Insolvency Act 1986), and a claim in damages is not liquidated until a court gives a judgment upon it (*Hope v Premierpace (Europe) Ltd* [1999] BPIR 695). D was, he said, indubitably, but not indebitatusly, liable to C for the money.

Briggs J thought it would be absurd if a bankruptcy petition could not be presented on a guarantee for a debt without first obtaining judgment against the guarantor. He was sure that guarantors had been bankrupted on many occasions in the past without a prior judgment. So he found a way round the problem via the construction of the guarantee. Traditional guarantees may not give rise to claims in debt, but traditional guarantees are seldom found alone. In this case, the guarantee also provided that D was liable as a principal. This enabled Briggs J to say that not only did the guarantee give rise to a claim in damages, but it also gave a debt claim.

This conclusion meant that Briggs J could avoid deciding whether Rimer J's decision in *Premierpace* was wrong. He indicated however, that he thought it absurd to say that a claim on a guarantee could never be a claim for a liquidated sum. Why should it only become liquidated when a court pronounced upon it? Anyway, he side-stepped the technicality by construing the guarantee widely.

The dark side of the wall

Expert evidence is admissible on points of construction.

In *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429, the Court of Appeal enriched Pink Floyd whilst preserving their artistic integrity. The Court of Appeal declared that, under a licensing agreement, Pink Floyd is entitled to royalties from EMI calculated as a percentage of the sums paid by the public to, eg, iTunes rather than a percentage of the sums paid by iTunes to EMI under the licence from EMI to iTunes. The Court of Appeal also decided that only whole albums could be sold online, not individual tracks from albums, thus retaining the album's integrity.

On the first point, EMI accepted that this was what the wording said, and failed to persuade the Court of Appeal that the wording was an obvious mistake that could be corrected as a matter of construction. The Court of Appeal set the test high to establish that there was an obvious mistake (the outcome must be "arbitrary" or "irrational"), but admitted expert evidence designed to show what the reasonable person in the position of the parties would have known at the time the contract was entered into. Having admitted the evidence, the Court of Appeal then disregarded it.

In *Crema v Cenko Securities plc* [2010] EWCA Civ 1444, the Court of Appeal addressed more fully the admission of expert evidence on issues of construction, and again concluded that expert evidence of market practice is admissible. Agreements are to be construed against the background reasonably known to the parties or to the reasonable addressee of the contract. If market practice is part of that background, the court should receive expert evidence of that market practice. The width of the enquiry now necessary when construing contracts is therefore considerable.

It does what it says on the tin

Section 2(a)(iii) of the ISDA Master Agreement suspends a payment obligation until the transaction's ordinary termination date, when the payment obligation ceases.

Insolvency concentrates the mind. The ISDA Master Agreement is one of the most used form of contract in the financial world. The twain were bound to meet in Lehman's failure. Lehman Brothers International (Europe) alone was party to some 2000 derivatives transactions subject to the ISDA Master Agreement, of which 1693 have been closed out. But it was 5 of the 307 or so transactions that are still extant that concentrated the court's mind in *Lomas and others (Administrators of Lehman Brothers International (Europe)) v JRB Firth Rixson, Inc* [2010] EWHC 3372 (Ch).

Section 2(a)(iii) of the Master Agreement makes it a condition precedent to any payment due in the normal

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course of a transaction that the recipient has not been subject to an Event of Default, such as insolvency. When LBIE collapsed, its counterparties were therefore no longer obliged to make any payments to LBIE, nor would they receive any payments from LBIE.

A counterparty also has the right to close out transactions under section 6, which would lead to a single sum due, to LBIE if it was in the money or to the counterparty if the market had moved in its direction. If close-out would result in a sum due to LBIE, close-out is not be an attractive option. Section 2(a)(iii) meant that the counterparty had no obligation to pay LBIE. Why take a step that would generate a payment obligation?

The four counterparties in *JRB Firth Rixson* were in this position. They had entered into swaps to hedge interest rate risk, but the swaps became out of the money as far as they were concerned. LBIE claimed that the counterparties' failure to close out the transactions led to a loss to LBIE's estate of over £60 million. To recoup this sum, LBIE's administrators argued that section 2(a)(iii) did not lead to an indefinite suspension or, if it did, it was unenforceable.

The first issue for the judge was whether the effect of section 2(a)(iii) was to suspend the payment obligation or to extinguish it entirely. The parties were agreed that the 2002 form of ISDA's Master Agreement provided for suspension because section 9(h)(i)(3) expressly requires interest to be paid from the date on which payment would have been due, but for section 2(a)(iii), to the date on which the payment actually becomes payable. Even though it did not contain this interest provision, the judge decided that the 1992 Agreement should be construed in the same way, declining to follow the contrary decision of Flaux J in *Marine Trade SA v Pioneer Freight Futures Co Ltd* [2009] EWHC 2656 (Comm).

If the effect of section 2(a)(iii) is only suspensory, how long does the suspension last? LBIE argued that it should be implied that suspension lasted only long enough for the counterparty to decide whether to exercise its right to close out under section 6 or, alternatively, until the transactions had run their normal course. In either case, close-out netting should take place when the suspension ended. ISDA, which intervened in the case, argued that suspension was indefinite.

The judge rejected these arguments. Section 9(c) provides that, without prejudice to section 2(a)(iii), the obligations of the parties survive the termination of any transaction. This meant that a payment obligation suspended by section 2(a)(iii) could never arise after the scheduled termination date if the Event of Default had not been cured by that time. Briggs J saw no basis for implying an earlier end to the suspension, still less an obligation to terminate transactions.

LBIE then argued that if this was the effect of the contract, it was unenforceable because of the anti-deprivation principle. This principle, brought to the fore by *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* [2009] EWCA Civ 1160, is based on the proposition that parties cannot contract out of insolvency legislation, which governs the way assets are dealt with in a liquidation.

The judge decided that the principle had no application to the interest rate swaps he was considering. Even if the effect of section 2(a)(iii) was to deprive LBIE of an asset because of its insolvency, that asset - a payment stream - was granted to LBIE in return for LBIE's continuing obligation to make payments to its counterparties. Since insolvency prevented LBIE from doing so, the contract could allow termination or adjustment of what would otherwise be a relationship with an insolvent company.

Briggs J stressed that this did not mean that section 2(a)(iii) could never breach the anti-deprivation principle. If an insolvent company had no further obligations to perform, the outcome might be different.

The judge added that if all the parties, including LBIE, had not agreed that LBIE's counterparties could not claim the gross sums due to them, he might also have come to a different conclusion on the anti-deprivation principle. LBIE was the floating rate payer on the interest rate swaps, but its gross payment would normally have been netted off under section 2(c) against the fixed rate payments due from its counterparties. In *Marine Trade*, the court decided since the counterparty's obligation to make a payment to the party in default was removed by section 2(a)(iii), there was nothing to net, leaving the gross sum payable by the defaulting party. Since all the parties were agreed that *Marine Trade* was wrong on this point, the judge was content to proceed on that basis without deciding whether or not the parties were correct in their agreement.

Conscious of the standing and importance of the ISDA Master Agreement, the judge in *JRB Firth Rixson* therefore resisted arguments that he should imply terms into the Agreement. The Agreement should be interpreted in a way that served the objectives of clarity, certainty and predictability. If the Agreement did not provide for what was to happen if a particular event occurred, the answer was that nothing was to happen. A party faced with an insolvent counterparty is entitled to decide in its own interest whether to close out the Agreement, crystallising a termination payment one way or the other, or to do nothing, relying on section 2(a)(iii).

Clifford Chance LLP acted for BEIG Midco Ltd, one of LBIE's successful counterparties, in *Lomas v JRB Firth Rixson, Inc.*

Cutting the bootstraps

Even chief executives don't have apparent authority to do everything.

Apparent authority is a species of estoppel by representation, which requires reliance on a representation as to an agent's authority. How daft can the reliance be? Pretty daft, according to Lord Neuberger, moonlighting in the Hong Kong Court of Final Appeal in *Thanakharn v Akai Holdings Ltd* (8 November 2010). The relier must believe that the person concerned has authority, but as long the belief is not irrational (including recklessness and blind-eye

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ignorance), a genuine belief is enough. But the representation that the agent has authority must be by someone with authority. A representation by the agent that he has authority will not be enough, save in very unusual situations (confining cases like *First Energy (UK) Ltd v Hungarian International Bank* [1993] 2 Lloyd's Rep 194 to their facts).

But on the facts in *Akai Holdings*, Lord Neuberger considered that a bank had been irrational in its belief that a crooked chief executive, chairman and major shareholder had apparent authority to bind a company to a loan. The purpose of the loan was to allow a company associated through the crooked chief exec to repay to the bank another loan (effectively, transferring the loan from one company to another). There was no benefit to the borrower, which was publicly quoted, but huge benefit to the bank and the other party.

Another case on apparent authority, *Quinn v CC Automotive Group Ltd* [2010] EWCA Civ 1412, shows the close relationship between apparent authority and vicarious liability in some circumstances. It involved an employee of a used car dealer who indulged in fraud for personal gain, leaving the eternal question of which of two innocent parties should bear the loss. The Court of Appeal analysed the case (albeit somewhat loosely) either as a case of vicarious liability for the employee's fraudulent representations or as a case of the employee's apparent authority to act as he did on behalf of the garage. But the Court of Appeal really saw it as a matter of policy that if you employ and present a crook to the public, it is better for you to take the consequences of his crooked acts than for the public to do so. The Court wasn't fussed how it got there.

Last chance saloon

Loss of chance concerns causation, not quantum.

In *Vasiliou v Hajigeorgiou* [2010] EWCA Civ 1475, the Court of Appeal reiterated the warning given in *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486 that the loss of chance doctrine should not be allowed to spread too far. It concerns causation, not quantum. Thus, once the judge had decided that a landlord's breach of covenant prevented a restaurant from opening, there was no doubt that the tenant suffered a loss. The determination of the loss requires a counter-factual investigation of what would have happened had the breach not occurred and is therefore necessarily speculative, but it does not require the damages to be discounted in the same way as when there is doubt, because of a third party's actions, as to whether the breach would have caused any loss at all.

Arbitration

Premier League 1 Fulham 0

Unfair prejudice claims can fall within an arbitration clause.

Arbitrability features arbitration books but rarely troubles practitioners. It concerns whether certain disputes must by their nature be resolved by courts and are therefore incapable being arbitrated. For example, if legislation gives "the court" power to do something, can arbitrators do it? Arbitration usually involves contractual disputes, where this issue doesn't arise, but there are some areas where it can be significant.

One such area is a shareholder's petition for unfair prejudice under section 994 of the Companies Act 2006. In *Fulham Football Club (1987) Ltd v Football Association Premier League Ltd* [2010] EWHC 3111 (Ch), Fulham presented a petition against the Premier League claiming unfair prejudice as a result of the activities of the Premier League's chairman regarding the transfer in July 2009 of Peter Crouch from Portsmouth to Tottenham Hotspur and, more particularly, not to Fulham. Fulham sought an injunction to restrain the Chairman from acting in breach of the Premier League's rules and an order that he cease to be the Chairman.

The catch for Fulham was that the Premier League's rules, which bind all member clubs, include an arbitration clause. The Premier League applied to stay the proceedings in favour of arbitration. Vos J faced two conflicting first instance decisions: *Re Vocam Europe Ltd* [1998] BCC 396, in which the judge decided that unfair prejudice claims were arbitrable, and *Exeter City v Football Conference* [2004] 1 WLR 2910, in which the judge rejected that conclusion, deciding that the Companies Act gave shareholders an inalienable right of recourse to the courts for unfair prejudice.

Vos J decided that he was required to follow the later of two conflicting first instance decisions (in this case, *Exeter*), leaving the Court of Appeal to resolve the conflict, unless he was convinced that the second decision was wrong (eg because relevant authorities had not been cited). He concluded that *Exeter* was clearly wrong. The dispute fell, he thought, within the scope of the Premier League's arbitration clause, and, more significantly, it was conceded that the relief sought by Fulham was relief that could be granted by arbitrators. The Companies Act 2006 establishes a complex statutory regime for the birth, life and death of companies, but there are very few steps within that regime that only courts can take. The Arbitration Act 1996 enshrines party autonomy, and the Companies Act rarely overrides that. So the dispute was sent off to arbitration.

Settlement

Flying free

Releasing one co-debtor can release all.

When settling with one co-debtor, beware of the risk of inadvertently releasing the rest. The rule is that if debtors are jointly and severally liable for the same debt, a release of one releases all. There is only one debt, so it can't exist against one co-debtor but not against the others. To avoid this, any settlement contract must be clear that the creditor remains entitled to pursue the co-debtors (this is usually done by drafting it as a covenant not to sue rather than as a release). The creditor's failure to do this in *Chelsea Building Society v Nash* [2010] EWCA Civ 1247 lost it the right to pursue the other debtor. The problem, of course, is that if a creditor settles with one co-debtor while retaining the right to sue

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the other, it leaves the settling co-debtor at risk of being ordered to pay more because the other co-debtor can later come after him for a contribution. An indemnity from the creditor is usually required to buy off this risk.

Insolvency

Age concern

Pension liabilities can have super-priority in insolvency.

Insolvency legislation is complicated. Pensions legislation is lamentably complicated. When the two combine, the outcome is likely to be impossibly complicated, not to say absurd. And that was the conclusion that Briggs J came to in *Re Nortel GmbH* [2010] EWHC 3010 (Ch), in which he decided that the liabilities of a final salary pension scheme can obtain priority over most other creditors. The position, according to the judge, is as follows (in simplified form).

First, if there is a shortfall on an occupational pension scheme, the employer can be liable to make up the shortfall. The liability creates a debt, which can be proved in the employer's administration or liquidation, whether the debt arises before or after the commencement of the insolvency process (section 75 of the Pensions Act 1995).

Secondly, the Pensions Regulator can in certain circumstances make a Financial Support Direction (FSD) against companies associated with the employer, which requires them to take measures to prop up the pension scheme (this is to overcome staff being employed by a service company, but all assets being in other, operating, companies). If the associates fail to do so, the Regulator can issue a Contribution Notice (CN), which requires them to pay a specific sum. (Sections 43 to 51 of the Pensions Act 2004.)

Thirdly, if the Pensions Regulator issues an FSD, but the subject of that FSD then goes into administration or liquidation, any sum due under the FSD or a subsequent CN (whether the CN is issued before or after the commencement of the insolvency) is provable as a debt in the insolvency under Insolvency Rule 13.12 because the debt arose prior to the insolvency.

Fourthly, if the Pensions Regulator issues an FSD and, later, a CN against a company already in administration or liquidation, the sum due cannot be proved in the insolvency because the debt only arose after the insolvency commenced, and thus falls outside Insolvency Rule 13.12.

Fifthly, if the sums due on an FSD/CN cannot be proved in the insolvency, what happens to them? They either disappear into a black hole or they are an expense of the insolvency to be paid in priority to ordinary creditors and those with a floating charge. Briggs J considered that in *Re Toshoku Finance plc* [2002] 1 WLR 671, the House of Lords had decided that where Parliament imposes a financial liability on a company in insolvency that is not provable in its insolvency, it will be an expense of the insolvency. The Pensions Act allows the Pensions Regulator to impose a financial liability on companies, whether or not those companies subject to an insolvency process, and so the liability must be an expense. As an expense, sums due on a CN take super priority, even over the fees due to administrators and liquidators.

Sixthly, if the Pensions Regulator issues an FSD to a company in administration, which then goes into liquidation, any subsequent CN creates a debt that can be proved in the liquidation. This is the result of a quirk in some transitional regulations.

Briggs J did not claim that thirdly onwards above represented a satisfactory outcome. He recognised that

Tort

Undirectors' liability

A company cannot recover from its directors a fine for its involvement in a cartel.

The ex turpi causa maxim is, like the anti-deprivation principle, hard to apply (you know that problems lie around the corner when courts retreat to maxims, principles and policies rather than good old-fashioned rules). It comes in two forms: a party cannot recover in damages a sentence imposed on it for a criminal act; and a party cannot recover in damages the consequences of its own criminal act.

Whether either form of the maxim applies to strict liability offences is not clear, but in *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472 the fine in question could only be imposed for intentional or negligent wrongdoing by an undertaking. Strict liability did not come into it. The Court of Appeal had to address whether the fact that only the undertaking could commit the offence necessarily engaged the first form of the maxim - could the undertaking say that it wasn't really the guilty party, its employees were, with the result that the maxim was irrelevant?

The issue arose following Morrisons' takeover of Safeway. Morrisons discovered that Safeway had been a party to a milk cartel, for which it would be fined. Morrisons sued the directors and employees allegedly responsible for the illegal activities to recover the fine. The directors argued that ex turpi causa maxim prevented Morrisons from doing so.

Flaux J declined to grant summary judgment to the directors, deciding that the fact that Safeway was personally liable under competition law did not mean that the fine arose from Safeway's personal criminal acts for the purposes of ex turpi causa.

The Court of Appeal disagreed. Safeway was not vicariously liable for its employees' wrongs. Safeway was personally liable because it had acted with intent or negligence. The legislation made the directors' and employees' acts those of Safeway for these purposes. That being so, the ex turpi causa applied. It was not possible to say that competition legislation made Safeway personally liable, but the ex turpi causa rule did not. That would lead to inconsistency between the civil and criminal courts, which the maxim was designed to avoid. As Pill LJ put it, the policy of the legislation was to protect the public by imposing obligations on undertakings. That policy would be undermined if liability could be passed on to the directors' D & O insurers.

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there is not a shred of logic in the difference between the positions of employers and of associated companies. Further, having a large and uncertain liability hanging over insolvent companies was not consistent with the rescue culture that is supposed to infuse insolvency law. He wanted to reach the conclusion that any sum due under an FSD/CN could be proved in the insolvency. However, the legislation, the previous case law and his lowly position as a first instance judge meant that he felt unable to do so.

Thus the decision in *Re Nortel* means that the Pensions Regulator can ensure that the liabilities of a final salary pension scheme trump all other creditors of companies associated with the employer (though not creditors of the employer itself or creditors with fixed charges). The only redeeming feature is that in making a decision to issue an FSD/CN, the Regulator must take into account the interests of other creditors, though quite what that means is less than clear. It is possible to appeal against the Regulator's decision to the Upper Tribunal (Tax and Chancery), in which case the Tribunal, presided over by a Chancery judge, will take the decision afresh. Not the sort of decision that judges are equipped to take or like taking.

Costs

Undoing orders

Discontinuance may, or may not, reverse previous costs orders.

Safeway Stores Ltd v Twigger [2010] EWCA Civ 1472 (see above) raised, but failed to resolve, a point about the costs consequences of discontinuance. C sued lots of Ds, who applied for summary judgment but lost. Costs of the summary judgment application were ordered to be paid by the Ds. All the Ds appealed. C then discontinued the claim against D8 (for whom Clifford Chance acted) but not the other Ds. What happens to the costs order against D8?

C argued that it could keep the costs order against D8, even if the Court of Appeal reversed the first instance decision against all other Ds (and would have done so against D8 but for the discontinuance). In fact, the Court of Appeal allowed D8 to continue the appeal, notwithstanding discontinuance, in order to deal with costs. C lost the appeal, the costs order below was reversed, and the Court of Appeal decided that it was right also to reverse the costs order against D8.

But in general terms, what is the effect of discontinuance on prior costs orders in favour of the party discontinuing? Longmore LJ considered that prior costs orders remain enforceable. D's remedy is to apply to the court under CPR 38.4 for a reversal of any previous orders if it so wishes. Pill LJ took the opposite view. Discontinuance, he thought, automatically reverses any previous costs orders in favour of C, the onus being on C to apply to the court if it wishes to keep the benefit of prior orders (eg if D's conduct had been vexatious). Lloyd LJ sat on the fence. It was all obiter anyway, but the score draw in the Court of Appeal leaves the point entirely open. Someone else will have to sort it out.

Prior warning

Jackson LJ takes a pot shot at "grotesque" fee arrangements.

We know that Sir Rupert Jackson considers that a claimant is insufficiently rewarded for making a Part 36 offer and that a defendant is insufficiently penalised for rejecting one. He said so in his review of civil costs a year ago. Whether or not you agree that rewards for seeking settlement and penalties for rejecting settlement represent the right philosophy in litigation, it is no surprise that Jackson LJ should take the same view in *Pankhurst v White* [2010] EWCA Civ 1445.

He wanted to award C the high rates of interest set out in CPR 36.14(3) because C beat his Part 36 offer, but felt prevented from doing so by *McPhilemy v Times Newpapers* [2002] 1 WLR 934. *McPhilemy* declined to award high interest on libel damages because interest is not payable at all on libel damages. CPR 36.14(3) offers additional interest, not interest when none would otherwise be due. *Pankhurst* concerned damages covering future care, upon which interest is again not awarded. The same result must follow as in *McPhilemy*, it being for rules makers and legislators to change it.

Jackson LJ was not amused by the funding arrangements in *Pankhurst*. C suffered major injuries. Summary judgment on liability was obtained, leaving contributory negligence and quantum the only issues. C then entered into a conditional fee agreement with his lawyers under which success was defined as any recovery - success prior to trial would result in a success fee of 22.5%, and success at trial 100%. C was obviously going to get something, so C's solicitors were taking no risk. Jackson LJ regarded this as a "mockery" of the justification for the CFA regime, and the arrangements as "grotesque". As the Chancellor, agreeing, put it, where else "may an investor (or punter) obtain a short term, risk-free return of between 22.5% and 100% of his investment (or stake). The facts of this case appear to show that access to justice for one party may well lead to a substantial denial of justice to the other."

Back door closed

The security for costs rules cannot be circumvented by the use of the court's case management powers.

In *Huscroft v P&O Ferries* [2010] EWCA Civ 1483, C sued D for personal injury. D wanted security for costs, as it didn't think C would be able to pay any costs at the end of the proceedings. But C lived in Portugal, which meant that an application under CPR Part 25 was going to be difficult. An individual claimant who is resident within a member state of the EU cannot be required to provide security for costs just because he is impecunious.

CPR 3.1(3) appeared to provide another route to security. It states that, when the court makes an order, it may "make it subject to conditions, including a condition to pay a sum of money into court." D persuaded a District Judge to order that C pay £5,000 into court as security for costs. On appeal, that decision was upheld.

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But on a second appeal, the Court of Appeal said the rules didn't work like that, and that "it would be wrong… to encourage litigants to regard rule 3.1(3) as providing a convenient means of circumventing the requirements of Part 25 and thereby of providing a less demanding route to obtaining security for costs… [W]hen the court is asked to consider making an order under rule 3.1(3) or 3.1(5) which is, or amounts to, an order for security for costs, or when it considers doing so of its own motion, it should bear in mind the principles underlying rules 21.12 and 25.13."

On a broader note, the Court of Appeal said that before attaching conditions to any order under the power given by CPR 3.1(3), "the court should identify the purpose of imposing a condition and satisfy itself that the condition it has in mind represents a proportionate and effective means of achieving that purpose having regard to the order to which it is to be attached."

Injunctions

Don't trust in me

Freezing injunctions cover assets held as a trustee.

In *Federal Bank of the Middle East v Hadkinson* [2000] 1 WLR 1695, the Court of Appeal decided that the then standard form of freezing injunction did not cover assets held by the subject of the injunction in trust for third parties. In 2002, the standard form of injunction was amended. It now applies to assets "whether the Respondent is interested in them legally, beneficially or otherwise." That appears to apply the injunction to assets held in trust. And so the Court of Appeal decided, though with much mithering, in *JSC BTA Bank v Kyreotis* [2010] EWCA Civ 1436. The Court of Appeal added that if an application in this form is obtained, the undertaking in damages must cover beneficiaries of trusts that are affected.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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