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Contentious Commentary
A review for litigators

Tort

The contract and only the contract

A contractual duty will not necessarily provide an assumption of responsibility in tort.

We know that, unlike in some other jurisdictions, there can be concurrent liability in contract and tort in England because the House of Lords told us so in *Henderson v Merrett* [1995] 2 AC 145. But in *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9, the Court of Appeal indicated that it wasn't too enthusiastic about this as far as economic loss is concerned. It therefore confined *Henderson* to situations where professionals give advice.

Like *Henderson*, *Robinson* really concerned limitation periods. A house buyer had a claim against the builder, from whom he bought the house in the footballer belt of Cheshire. The claim was out of time under contract, but in time in tort if there was liability in tort. It arose from badly constructed chimney flues. The flues caused no damage to anything else, and rebuilding them was therefore pure economic loss. For the builder to have liability for pure economic loss, it must have assumed responsibility to the buyer for its construction of the flues.

Jackson LJ thought that there may have been liability in the "heroic age" of the law of negligence (the 1970s and 1980s), when liability was expanding (*Anns v Merton* etc), but the reassertion of the need for an assumption of responsibility (and the overruling of *Anns*) meant that there was now no liability. The parties' rights and remedies were set out in their contract, which represented the parties' allocation of risk. There was no assumption of liability outside the contract. The only tortious liabilities assumed were for personal injury and physical damage to other items.

The Court of Appeal was reinforced in this conclusion by the terms of an industry standard NHBC agreement, which the buyer signed. This gave him certain rights - extended in some respects, restricted in others - but excluded all other remedies. That confirmed the absence of any assumption of responsibility outside its terms, and was, so far as relevant, reasonable under Unfair Contract Terms Act 1977.

The most difficult feature of the judgment was the attempt to distinguish *Henderson v Merrett,* in which there was concurrently liability for economic loss. Jackson LJ said that the position of professionals was different because they give advice, produce plans and similar, and expect clients and others to act in reliance on their work. One might wonder whether house buyers rely on builders to construct the chimneys properly. Stanley Burton LJ added that solicitors, architects and other professionals were not liable because their advice was wrong, but because their advice was relied on with a resulting diminution in the value of other assets if the advice turned out to be wrong. Not obviously a sound basis for distinction.

The real policy issue may be why there should be a longer limitation period for claims against professionals than against others. If, on the facts in *Robinson*, there had been a claim against both the architect and the builder, why should the claim against the architect have a longer limitation period?

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If you would like to know more about the subjects covered in this publication or our services, please contact:

Simon James +44 (0)20 7006 8405

Susan Poffley +44 (0)20 7006 2758

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance LLP, 10 Upper Bank Street, London, E14 5JJ, UK
www.cliffordchance.com

Norwegian wood

Determining the scope of duty of care in negligence is difficult.

Norwegian lawyers advise a bank that a Norwegian local authority has power to enter into a disguised loan. They also advise that judgments cannot be enforced against the authority should it fail to pay. The lawyers are wrong on the former point, but right on the latter. The contract is ultra vires the local authority and, as a result, cannot be enforced as such, but the bank secures judgment in restitution against the local authority (which is tantamount to an order for repayment of the principal amount of the "loan"). The local authority, having earlier asserted that it would honour any judgment, now decides that it does not have the money to do so. Is the bank entitled to recover from the lawyers in damages the whole of its loan, leaving the lawyers to recover such as they can from the local authority, or is the bank restricted to recovering the difference between the sums that would have been due to it had the contract been enforceable and the sum due to it in restitution? According to *Haugesund Kommune v Depfa ACS Bank* [2011] EWCA Civ 33, the latter.

A claimant with a claim for the same losses against two different parties can choose which of those two to sue. It is then for the defendants to work out the contribution between them. But that assumes that there is liability for the loss in the first place. The issue raised in *Haugesund Kommune* was the extent of the lawyers' initial liability to the bank.

South Australia Asset Management Corp v York [1997] AC 191 brought to the fore the concept of the scope of a duty of care in negligence. A tortfeasor is only liable for losses within the scope of its duty, which was analysed into category 1 and category 2 cases: category 1 was where the defendant provided information relevant to the claimant's proposed course of action, in which case the defendant was only liable for the consequences of the information being wrong; category 2 was where the defendant advised on the course of action, in which case the defendant was liable for all the foreseeable loss arising from the claimant carrying out the transaction. Gross LJ pointed out in *Haugesund Kommune* that this distinction is easier to state than to apply in practice, as the subsequent confusing and inconsistent attempts to do so show.

Nevertheless, in *Haugesund Kommune*, Rix and Gross LJJ, for slightly different reasons, concluded that the lawyers were not liable to the bank for the whole loan. The lawyers provided information as to the local authority's powers, but the bank decided on the credit risk for itself, knowing that it could not enforce any judgment against the local authority directly. The reason that the restitutionary judgment had not been met was not because the lawyers' advice on the local authority's powers was wrong but because the local authority chose, for economic, political and other reasons, not to pay. That was the credit risk coming to fruition, rather than the legal risk, and so the lawyers were not liable.

If the local authority would have paid a contractual claim but chose not to pay a restitutionary claim because it was a restitutionary claim, the position might arguably have been different. But the local authority protested until the last minute that it would meet any judgment against it, and so the bank didn't lead evidence on that point. The local authority's change of mind may have left the bank up the creak without any means of propulsion.

Duty denying

The police do not owe a duty of care to people who apply for Enhanced Criminal Record Certificates.

In *Desmond v Chief Constable of Nottinghamshire* [2011] EWCA Civ 3, C applied for an ECRC, which was necessary for his job as a teacher. The Criminal Records Bureau made enquiries of, inter alia, D, which wrote back saying that C had been arrested in 2001 on suspicion of indecent assault on a female and attempted rape. The ECRC then contained this information. In fact, D's notes of the investigation carried out at the time of the attack recorded that "It is apparent [C] is not responsible for the crime."

C sued, on the basis that D had been negligent in providing the information about his arrest to the CRB. The Court of Appeal agreed that D's behaviour would indeed have been negligent had a duty of care been owed, but found no duty of care: "Not only is there no proper basis for concluding that the chief officer is to be taken to have assumed responsibility to [C] in the performance of a responsibility imposed by statute, but the structure and purpose of the statute strongly suggests that there should be no duty of care. If there were, there would be a plain conflict between the chief officer's putative duty to [C] and the statutory purpose of protecting vulnerable young people." Another factor influencing the Court of Appeal's decision was the existence of other heads of claim open to C (eg data protection and human rights), which he had chosen not to argue.

Contract

Not what it says on the tin

Just because it is called a guarantee doesn't mean that it is a guarantee.

If a contract requires one party to provide a "guarantee", and the document so provided says that it is a guarantee and that the party giving it "irrevocably and unconditionally guarantees" a particular payment, you might be forgiven for thinking that a guarantee has in fact been provided. In *Meritz Fire & Marine Co Ltd v Jan de Nul NV* [2010] EWHC 3362 (Comm), Beatson J thought otherwise.

The argument as to whether the obligation was, technically, a guarantee was, as usual, raised because guarantees, which are secondary obligations, are surrounded by ancient rules that enable guarantors readily to escape their liabilities. Other categories of obligation (notably those in, or akin to, documentary credits) do not have such rules. In this case, the rules in question related to an alleged amendment to the underlying obligation and dicta (albeit contradicted by

others) that said that guarantees should be construed strictly in favour of the guarantor.

The prime factors that influenced Beatson J against the document being a guarantee were that it was issued by an insurance company in return for a fee and that it incorporated the ICC's Uniform Rules for Demand Guarantees. The Uniform Rules are directed to situations where a financial institution (in this case, an insurance company) is obliged to pay on presentation of documents rather than on proof of the underlying liability. There were counter-indications in the document, but the moral is that all may not be what it seems. If it matters, don't accept that just because it says it's a guarantee, even if it says it in several places, that it is in law a guarantee.

Show and tell

A bank that rejects documents under a letter of credit must not only say that it will return the documents but it must actually return the documents.

Article 16 of UCP 600 says that if a bank rejects documents presented under a letter of credit, it must state within five days that it is doing so and that it is holding the documents to the presenter's order or returning the documents. If it fails to give this notice, the bank is precluded from claiming that the documents do not comply. Article 16 therefore deals with the notices required, but nowhere does it say that the bank must actually return the documents, whether immediately or if requested to do so, nor does it identify the consequences of a failure to return the documents.

In *Fortis Bank v Indian Overseas Bank* [2011] EWCA Civ 58, the Court of Appeal upheld the first instance decision that not only is there an obligation to say that the documents are being returned, but there is also an obligation to return the documents. A failure to return the documents with reasonable promptness prevented the bank from alleging that the documents did not comply. It was not just a breach of contract sounding in damages, but went further. Banks must, therefore, act with considerable haste if they want to reject documents.

The Court of Appeal also emphasised that in construing UCP 600, courts must avoid a "literalist and national" approach but rather "interpret it in accordance with its underlying aims and purposes reflecting international practice and the expectations of international bankers and international traders so that it underpins the operation of letters of credit in international trade." The Court of Appeal accepted that expert evidence was admissible for this purpose, but considered that the evidence had gone too far in this case, reflecting the expert's subjective view rather than the indisputable intention of those behind UCP 600

Regulation

Consulting generalities

There are no strict rules about what a body must do by way of consultation in order to be procedurally fair.

If you invest money with an institution covered by the Financial Services Compensation Scheme, you will get the first £85,000 back if the institution fails. The Scheme recoups the money from a levy on other institutions whose activities fall within the same sub-class of business as the activity of the failed business which has given rise to the claims.

In *R (ABS Financial Planning Limited) v Financial Services Compensation Scheme Limited* [2011] EWHC 18 (Admin), D had paid out compensation to investors in an insolvent firm, K, and sought to impose an interim levy of £32 million on the Cs, who were 217 companies and partnerships involved in financial and investment business. There are five classes of business activity for the purposes of levies, including class D, investment. Class D has two sub-classes: D1 (fund management) and D2 (investment intermediation).

The FSCS decided that K's activities giving rise to the claims were "investment intermediation" or, in other words, fell within sub-class D2. The Cs were other members of this sub-class. They argued that K's relevant activities were correctly categorised as D1, and that the levy should be met by members of that class, and not the D2 class. Much of Beatson J's decision examines the differences between D1 and D2, and concludes that, unfortunately for the Cs, K was in the D2 business. However, the judge also considered the extent to which FSCS was under a duty to consult the Cs before imposing the levy.

The Cs argued that, although there was no statutory requirement on FSCS to consult, a duty arose because of (1) the importance of the decision to impose a large levy on D2 members; (2) the strong concerns expressed by trade bodies that had relevant expertise; and (3) FSCS's decision to conduct what appeared to be a consultation exercise, even if it initially had no duty to consult.

The Cs argued that FSCS's decision to impose the levy had been made in December 2009, when it announced in its newsletter that a levy would be necessary. (This was a risky argument given the fact that there is a three-month limitation period in judicial review proceedings, and the claim form was not filed until 30 April 2010.) The Cs also pointed to a press release issued on 12 February 2010, which they said confirmed the decision. The consultation, such as it was, took place later than that, and was in any event inadequate.

Beatson J doubted whether there was a full-blown duty to consult all members of the relevant class of authorised persons. In addition, there were approximately 5,000 members of the D2 sub-class, so consultation would place a significant burden on FSCS. Further, if FSCS had to consult the D2 class, perhaps it should also have consulted those in D1.

His Lordship also found that in fact FSCS had given conscientious consideration to the points raised by the Cs' solicitors and trade bodies. The announcement in the newsletter of a levy was not the final decision, and D's position was refined in light of its further consideration of the matter and the representations received. His Lordship approved the statement by Michael Fordham in his "Judicial Review Handbook" that "Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the case."

Unrepresented

An organisation subject to a Financial Restrictions Order under the Counter-Terrorism Act has no right to make representations before the Order is made.

If you are a bank, and the Government enacts an Order such as the Financial Restrictions (Iran) Order 2009, effectively excluding you from the UK financial market, that is an interference with your rights under Article 1 of the First Protocol to the European Convention on Human Rights, which protects property rights. Just such a thing happened to C in *Bank Mellat v HM Treasury* [2011] EWCA Civ 1. C argued that the Order was not proportionate to the harm sought to be avoided, and also challenged the Order on procedural grounds, arguing that it should have been able to make representations prior to the making of the Order. The claim failed.

The Counter-Terrorism Act 2008 confers powers on the Treasury to act against terrorist financing, money laundering and certain other activities. One of the conditions under which it can give a direction is where it reasonably believes: "(a) the development or production of nuclear, radiological, biological or chemical weapons in the country, or (b) the doing in the country of anything that facilitates the development or production of any such weapons, poses a significant risk to the national interests of the United Kingdom."

Paragraph 9(6) of Schedule 7 to the Act states that "the requirements imposed by a direction must be proportionate having regard to… the risk mentioned [above] to the national interests of the United Kingdom." The Court of Appeal held that the proportionality test involved a three-stage test of whether the legislative objective was sufficiently important to justify limiting a fundamental right, whether the measures designed to meet the objective were rationally connected to it and whether the means used to impair the right or freedom were no more than was necessary to accomplish the objective. Their Lordships answered all three questions in the affirmative.

The majority also held that there were no procedural shortcomings and, in particular, that the procedure for making the Order did not provide for the affected person to make representations before it was made, as the provisions of the Act operated to exclude such a right. C had also argued that Article 6 of the Convention was engaged at the time the Order was made (right to a fair trial on determination of civil rights), but the Court of Appeal found that it was not.

Companies

Plus ça change

The new law on derivative claims hasn't changed much.

The Companies Act 2006 introduced new procedures for derivative claims, ie claims by shareholders in the name of the company against third parties (often directors). There were concerns that this would lead to a flood of aggressive shareholders taking action against directors for every minor infraction of their fiduciary duties. It hasn't happened. Derivative claims remain rare and, in particular, have not (yet) been pursued against directors of large companies, despite some speculation in the recent troubles. The courts have not been encouraging either.

An example is *Cinematic Finance Ltd v Ryder* [2010] EWHC 2287 (Ch), in which a majority shareholder sought to bring a derivative claim against directors. There is nothing in the Act that prevents a majority shareholder doing so. But Roth J clung to the old law, namely that derivative claims are really a cure for minority oppression. If the majority could remove the current directors, appoint new directors and cause the company to bring the claim itself, there was no need for a derivative claim, and permission to bring one should be refused.

It was also alleged that the company in question was insolvent. If so, said Roth J, appoint a liquidator or administrator, and he or she could then decide whether the company should sue its former directors. Another reason to refuse permission to bring a derivative claim.

Courts

Court wrapping

Mediation settlements can be enforced by the court.

As from 6 April 2011, it will be possible to obtain a "mediation settlement enforcement order" under Section III of CPR Part 78, even if there are no extant court proceedings. This will, it appears, be an order that is enforceable in the same way as other court orders. This follows from The Civil Procedure (Amendment) Rules 2011's implementation of the EU's Mediation Directive (2008/52/EC). However, a mediation settlement enforcement order can only be obtained with the consent of all the parties to the settlement agreement, which, in practice, will need to be included in the mediation agreement itself (no one will agree subsequently). Probably of little relevance in most cases but it might, for example, be possible, as an alternative to a Tomlin Order, to provide in the settlement agreement for consent to a mediation settlement enforcement order but also that no application should be made if payment (or whatever) is made by a particular date.

The new CPR 78.26 and 78.27 also put express restrictions on obtaining "mediation evidence", ie evidence arising out of or in connection with a mediation process. This can only be obtained if all parties agree, if it is necessary for overriding considerations of public policy, or if it is necessary to implement or enforce a mediation settlement agreement. This last exception

probably adds little, but the others could have a curious effect. Previously most mediation evidence would have been covered by the without prejudice rule, and therefore inadmissible for that reason. Does the new rule mean that the court can now order the production of evidence if either of these conditions is met even if it is without prejudice? If so, can the CPR do that?

Single shot

Res judicata applies to disciplinary proceedings.

R (Coke-Wallis) v Institute of Chartered Accountants of England and Wales [2011] UKSC 1 is an unhappy tale for the ICAEW. One of its members, who operated a trust company in Jersey, was ordered by the Jersey Financial Services Commission to wind down the company's business and not to remove any records from the company's offices. He was caught at St Helier docks with a car load of the company's files, and duly fined in Jersey for disobeying the JFSC's direction.

The ICAEW then charged him with the accountancy equivalent of bringing the game into disrepute, relying on the conviction as evidence of what he had done. The ICAEW's rules provide that a conviction is conclusive proof of the underlying facts, but only, for non-English convictions, if the conviction is for an offence corresponding to one in England. The disciplinary tribunal could no offence in England that corresponded to the Jersey one. The conviction was not, therefore, proof of the facts. The ICAEW had no other evidence to hand, and so the charge was dismissed.

Not content, the ICAEW charged the accountant with substantially the same offence again, this time not relying on the conviction. The Supreme Court decided that the principle of res judicata applied. The first charge had been dismissed on the merits, so the second charge had to be dismissed too. The ICAEW was only entitled to one shot at getting it right.

Danish pastries

It is an abuse of process to challenge in England an adverse finding in Denmark.

A sues B in the Danish courts for breach of contract. A loses, the Danish court deciding that there was no breach of contract. A sues C in England for inducing breach of that same contract. Can A contend in England that B breached the contract B when the Danish courts have already decided against him on that very point?

No, according to *Irish Response Ltd v Direct Beauty Products Ltd* [2011] EWHC 37 (QB). It would be an abuse of process for A to mount a collateral attack on the decision of the Danish court by, in substance, challenging it in England, even though the defendant in England was different. The correct course is to appeal in Denmark.

What this seems to mean is that if A loses in Denmark against B, it loses against everyone else for whom the same point is relevant. But just because A wins against B can't stop C (or D or E) arguing that there has been no breach of contract because C was not a party to the Danish judgment. A therefore faces a multiple whammy.

Evidence

Who said that?

A deponent required to indicate the source for "matters of information or belief" must identify people by name.

The Practice Direction to CPR Part 32 states, at para 4.2, that: "An affidavit must indicate: (1) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief, and (2) the source for any matters of information or belief." The rules for witness statements are the same.

In *Consolidated Contractors International Company SAL v Masri* [2011] EWCA Civ 21, the Court of Appeal held that the requirement to "indicate" means that, "save in exceptional cases, the deponent must identify the source of the relevant information or belief. If the source is a person, that person must, save in exceptional cases, be identified with sufficient certainty to enable the person against whom the affidavit is directed to investigate the information or belief in accordance with the rules of court or other relevant legal principles." This means that people must be identified by name rather than, as had happened in this case, identified simply as "enquiry agents", with no details given about who they were.

Costs

All or nothing

A Part 36 offer must include the other side's costs.

In *London Tara Hotels Ltd v Kensington Close Hotel Ltd* [2011] EWHC 29 (Ch), D made what purported to be a Part 36 offer in its capacity as counterclaimant. D offered, amongst other matters, to pay 10% of C's costs. At trial, D beat its offer, and duly claimed indemnity costs from the date of the offer, the normal reward for beating a Part 36 offer. However, Roth J reminded D that if a party accepts a Part 36 offer, it is entitled to all its costs to the date of acceptance. By seeking to vary that term, the offer ceased to be a Part 36 offer, and thus the near-automatic costs consequences no longer applied.

No matter, said D, CPR 44.3(4)(c) allows non-Part 36 offers to be taken into account, and D had clearly beaten its offer comfortably. Roth J harshly refused to take into account the offer, suggesting that something out of the norm was required to justify indemnity costs if Part 36 didn't apply, and an offer was not on its own enough.

Success fee is unsuccessful

The European Court of Human Rights has decided that success fees in defamation cases are a potential infringement of the right to free expression.

The risk of being sued by supermodels may have declined slightly following the ECtHR's decision in *MGN Limited v United Kingdom* (18 January 2011). This application arose from the case in which the model Naomi Campbell sued the Daily Mirror over an article titled "Naomi: I am a drug addict". The article gave details of her treatment at Narcotics Anonymous and was illustrated with photographs of her outside a NA

meeting, and captioned as such. The case went all the way to the HL, which upheld the first instance decision in her favour, awarding £3,500 in damages plus costs.

The proceedings in the High Court and Court of Appeal had been paid for by Miss Campbell on a normal hourly rate basis, but her lawyers acted on a conditional fee agreement in respect of the House of Lords appeal, and a separate House of Lords hearing on whether the success fee was a breach of the paper's Article 10 rights (freedom of expression). The costs bill in total topped £1 million, with around £350,000 of that sum the success fee.

The paper complained that the total costs order against it was excessive because it included success fees in both appeals to the House of Lords, which amounted to double the base costs of those appeals in a situation where domestic courts were expressly precluded by paragraph 11.9 of the Costs PD from reducing the success fee because the overall costs, including the success fee, were disproportionate. In addition, the paper argued that the total costs, including success fees, were excessive in that they bore no relationship of proportionality to the damages recovered by Miss Campbell (£3,500), it being inconceivable that even wealthy claimants would pay that sum in costs for the small damages obtained.

The ECtHR held that the requirement to pay these fees was an interference with the paper's Article 10 rights. However, Article 10 does not give an absolute right to freedom of expression. It can be qualified in certain circumstances. The first qualification is where an interference is "prescribed by law". In this case, the various CFA legislation satisfied that test. The second requirement is that the interference has a "legitimate aim". The ECtHR found that that the scheme of CFAs with recoverable success fees sought to achieve the legitimate aim of the widest public access to legal services for civil litigation funded by the private sector and thus the protection of the rights of others within the meaning of Article 10 §2 of the Convention.

The third requirement is that the interference is "necessary in a democratic society" or, in other words, proportionate to the aim in question. While there is a broad "margin of appreciation" given to States to decided what is or is not necessary for their particular countries, the ECtHR held that the requirement on the paper to pay the success fee was disproportionate to the aim sought to be achieved by the introduction of the CFA regime, and thus a breach of the paper's Article 10 rights. On this point, the court relied heavily on the Jackson report on costs, as well as the former Government's intention to reduce success fees in defamation cases.

CFAs are, of course, available in all proceedings, and not just those described as "publication proceedings", which typically involve the media. However, the ECtHR did not opine on the regime as a whole. Rather, it concentrated on publication proceedings, noting that complaints had been raised by media defendants from the very beginning and the number of consultation exercises that had taken place to try and correct what appeared to be accepted problems in these proceedings rather than with CFAs as a whole. The wider implications of the decision are therefore obscure.