C L I F F O R D
C H A N C E

Client briefing
September 2011

Contentious Commentary
A review for litigators

Contents

Arbitration

Equal before the law

Provisions requiring arbitrators to belong to a religious community do not offend anti-discrimination legislation.

The Court of Appeal's decision in *Jivraj v Hashwani* caused profound concern. It concluded that arbitrators were "employed" by the parties and, as a result, that anti-discrimination legislation applied to their selection. In *Jivraj*, this meant that a requirement that the arbitrators be members of the Ismaili community was unenforceable as religious discrimination, but it was the implications for LCIA and ICC nationality requirements that caused greater concern in the arbitration pond.

The Supreme Court's decision, [2011] UKSC 40, has calmed the waves. The relevant legislation, now in the Equality Act 2010, applies to employees, namely (so far as relevant) those who enter into a "contract personally to do any work". Following EU case law, the Supreme Court considered that the definition required the "employee" to perform services for and under the direction of another person in return for remuneration and, in particular, to be in a relationship of subordination to the person receiving the services. Arbitrators might provide personal services under a contract, but they do not perform their services under the direction of the parties, still less under the parties' control. Arbitrators are not, therefore, employees for the purposes of the legislation. As a result, the Equality Act does not apply to the selection of arbitrators.

If arbitrators had been employees, the next question would have been whether the religious qualification for the arbitrators was a "genuine occupation requirement" and was proportionate; if so, nationality and other similar requirements are acceptable. The Court of Appeal considered that since the arbitrators were required to apply English law, being members of the Ismaili community could not be a genuine occupational requirement. Again the Supreme Court disagreed. Arbitrators have complete power over all procedural and evidential matters, including assessing the probabilities and the credibility of the witnesses. The parties (both Ismailis) could properly regard arbitration before three other Ismailis as likely to involve a procedure in which the parties could have confidence and likely to lead to conclusions of fact in which they could have particular confidence.

So the tsunami alarms set ringing by the Court of Appeal can be turned off. The LCIA and ICC provisions about the nationality of arbitrators can be applied with impunity. Reservations can be removed from legal opinions.

Clifford Chance intervened in the appeal on behalf of His Highness Prince Aga Khan Shia Imami Ismaili, International Conciliation and Arbitration Board.

4-0

Shareholders' complaints of unfair prejudice are arbitrable.

"A member of a company may apply to the court…" So starts section 994 of the Companies Act 2006, dealing with petitions for unfair prejudice. But if the articles of association of the relevant company include an arbitration clause, does section 9 of the Arbitration Act 1996 require the court to stay any section 994 petition?

In *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, the Court of Appeal was very clear that it did. The Court of Appeal could find no reason

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why section 9 of the Arbitration Act should not require it to stay an unfair prejudice petition in the same way that section 9 required it to stay every other form of legal action.

The Court of Appeal recognised that arbitrators cannot order that the company be wound-up, a possible remedy under section 994, but considered that an arbitration agreement would operate as an agreement not to present a petition seeking that remedy unless and until the underlying dispute had been determined by arbitration. The arbitrators could authorise a shareholder to seek a winding-up if they thought that an appropriate remedy. If a remedy would affect other shareholders (as in this case, the removal of the chairman), the arbitrators could "canvass" other shareholders before making the order. The Court of Appeal even thought that a petition to wind-up a company on the just and equitable ground (section 122(1)(g) of the Insolvency Act 1986) should be stayed in favour of arbitration.

Should other companies now consider including an arbitration agreement in their articles?

Insolvency

Flipping heck

"Flip" clauses do not offend the anti-deprivation principle.

A body of investors put up money in order to provide credit protection to Lehman under an ISDA Master Agreement. The Master Agreement terminated early, which resulted in a payment becoming due to Lehman. However, Lehman will not be paid because its only right to payment was out of the money staked by the investors, and the money will instead go back to the investors. So the very people who provided Lehman with the credit protection and should, ultimately, have funded the payment to Lehman get their money back; Lehman is left with nothing. Surely some mistake.

That is how Lehman sees the transaction in *Belmont Park Investments PTY Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38. But it is not how the Chancellor at first instance, the Court of Appeal, the Supreme Court and virtually the whole of the English legal establishment see it. The flip clause that achieved this result was valid in English law, and should be upheld. Party autonomy rules.

Despite Lord Mance's description of the transaction as one of "purgatorial complexity", the bones of the transaction are simple. Investors bought bonds issued by an SPV, which invested the proceeds in high grade securities. These securities were put into the hands of a trustee. The SPV entered into a limited recourse credit default swap with Lehman, under which Lehman paid the SPV a return 1.3% higher than the SPV/investors would otherwise have received in return for credit protection against a basket of reference entities. If a credit event (eg insolvency) occurred with regard to a reference entity, Lehman was paid from the assets held by the trustee and, ultimately, the investors received less back. If, however, the credit default swap terminated with Lehman as the defaulting party, the trustee was required to use the assets to repay the investors; anything left over was to be used to meet the sum due on termination of the swap.

Lehman, of course, went bust, leading to the termination of the credit default swap. The termination calculation resulted in a sum being due to Lehman (hardly surprising since the tremors causing and caused by Lehman's demise heaped financial pressure on a large number of institutions, creating losses for those who sold credit protection). But Lehman will receive nothing because the termination of the swap with Lehman as the

Public international law

Don't cry for me, shortly

Argentina has no immunity in respect of proceedings to enforce a New York judgment.

A separate client briefing on *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31 was published in July summarising the Supreme Court's view that: a judgment given on a commercial transaction is not itself a commercial transaction for the purposes of the State Immunity Act 1978; section 31 of the Civil Jurisdiction and Judgments Act 1982 gives a ground for taking jurisdiction over a sovereign in addition to those set out in the State Immunity Act; and Argentina had in any event submitted to the jurisdiction of the English court. A US judgment against Argentina could therefore be enforced in England.

The point skated over in the client briefing was whether or not C could take any of the points decided by the Supreme Court in its favour. When it applied for permission to serve the claim form on Argentina, C had relied on two grounds for asserting that Argentina had no immunity. At the inter partes stage, C accepted that neither of those two grounds was correct. So C produced other, better, arguments as to why Argentina had no immunity. Argentina relied on *Parker v Schuller* (1901) 17 TLR 299 to contend that C could not introduce new grounds essential to its case for service out at the inter partes stage.

The majority (all except Lord Phillips) thought that this point did not arise. *Parker v Schuller* concerned a statement of the grounds for service out, not grounds for immunity. CPR 6.37(1)(a) (like its antecedents) requires a claimant to identify the grounds for service out it relies on, but there is no comparable provision about sovereign immunity. However, the majority agreed that, if the point had arisen, they would have followed Lord Phillips in restricting the application of the doctrine. Quite what precedent value the decision has is less than clear. But since the Court of Appeal had already restricted the doctrine in (the unmentioned) *AES UST-Kamenogorsk Hydropower Plant LLP v UST-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647 (see July), it might not make much difference.

defaulting party meant that the assets held by the trustee ceased to be available to Lehman, reverting to their source, the SPV/investors. Lehman argued that this offended the anti-deprivation principle. The Supreme Court disagreed.

The Supreme Court distinguished the anti-deprivation principle from the rule that requires an insolvent's assets to be distributed pari passu, though recognising them both as sub-rules of the general principle that parties cannot contract out of insolvency legislation. The anti-deprivation principle is that parties cannot agree that on a party's insolvency, that party's assets should be transferred to someone else and not be used for the benefit of creditors. But it is established that leases can be terminated on insolvency, similarly intellectual property licences. Contracts can be terminated on insolvency (at least as long as there are outstanding mutual obligations: *Folgate London Market Ltd v Chaucer Insurance plc* [2011] EWCA Civ 328). Assets linked closely to professional or commercial activities for which insolvency is a disqualification can also be removed on insolvency (*Money Markets International Stockbrokers Ltd v London Stock Exchange Ltd* [2001] 1 WLR 1150). So where are the limits to the principle?

The seven person Supreme Court found the result in *Belmont Park* easy, but the reasons harder. The Supreme Court leaned in favour the approach that a transaction entered into in good faith for sound commercial reasons would not offend the principle. Only if there is an "intentional or inevitable evasion of the principle that the debtor's property is part of the insolvent estate" (Lord Collins) will the anti-deprivation principle be relevant. Beyond this, there were only hints as to what might pass muster and what might fall by the wayside, but the direction of travel was clearly that if there is some commercial logic for the deprivation, the court will be reluctant to strike it down. Party autonomy rules, particularly in complex financial transactions that the Supreme Court feels it might not quite understand.

The Supreme Court rejected the idea that the principle would not be offended if an asset always had the inherent property that it would disappear on insolvency. This flawed asset approach would, they thought, make it too easy to evade the principle. But the fact that, as in *Belmont Park*, the asset in question came originally from the party to whom it is to return will be "an important, and sometimes decisive, factor in the conclusion that the transaction was a commercial one entered into in good faith and outside the scope of the anti-deprivation principle" (Lord Collins; Lord Mance dissented on this point).

The Supreme Court also confirmed that if the deprivation takes place for reasons other than insolvency, the anti-deprivation principle does not apply.

Overall, the decision is the right one, and a relief to many. Party autonomy is generally to be respected. But this is not the last word. For example, later this year the appeal in *Lomas v JFB Firth Rixson Inc* [2010] EWHC 3372 (Ch) will have to consider it again, but the Supreme Court has given a strong hint that the first instance decision was right on this point.

Contract

Touché

More first instance decisions on section 2(a)(iii) of the ISDA Master Agreement.

The collapse of Pioneer Freight Futures is competing with Lehman's demise to see which can play the greater role in developing the jurisprudence on the ISDA Master Agreement. Pioneer might have sunk after Lehman, but it is currently ahead on the numbers. Similarly, Flaux J remains ahead of Briggs J in judicial contributions, with Gloster J in third, but each had another say in July.

Pioneer Freight Futures Company Ltd v Cosco Bulk Carrier Company Ltd [2011] EWHC 1692 (Comm), again centred on section 2(a)(iii). Pioneer and Cosco entered into eleven freight forward contracts under FFABA's terms, which incorporate the 1992 ISDA Master Agreement. In October 2008, Pioneer failed to make a payment due. This was an event of default, and, whilst it continued, Cosco had no further payment obligations as a result of section 2(a)(iii). Accordingly, Cosco did not pay sums that would otherwise have fallen due to Pioneer. Pioneer failed to pay further sums that actually fell due to Cosco.

In December 2009, Pioneer went into liquidation, which brought about the automatic early termination of "all outstanding Transactions". It was therefore necessary to calculate the sum due on termination, applying section 6 of the ISDA Master Agreement and the definition of Loss. The problem was that in the fourteen months between the event of default and the termination, eight of the eleven forwards had expired through the effluxion of time. Pioneer argued that the sums that would have been due to it on those eight transactions but for section 2(a)(iii) should still be taken into account in the calculation of Loss. Cosco argued that once time ran out on a transaction, payments suspended by section 2(a)(iii) vanished for ever (see Briggs J's decision in *Lomas v JFB Firth Rixson* [2010] EWHC 3372 (Ch)); there was therefore nothing to bring into the calculation.

Flaux J followed *Firth Rixson*. A payment might be suspended by section 2(a)(iii), but the suspension is not eternal. It ceased when the transaction had run its intended course and, as a result, was irrelevant to a calculation made after that time. Flaux J cited a derivative that required delivery of, say, a security rather than a payment. Could it be supposed that, if the condition precedent in section 2(a)(iii) was met years after the event, an innocent party was required to buy the security at an unknowable, and possibly hugely disadvantageous, price?

Flaux J also thought that the definition of Loss only required the termination and valuation of "outstanding" transactions. A transaction that had expired was not outstanding.

(Flaux J could also have reached the same conclusion on the basis of the obiter view he offered in *Marine Trade SA v Pioneer Freight Futures Company Ltd* [2009] EWHC 2656 (Comm), namely that section 2(a)(iii) was a once and for all condition precedent to payment - it was fulfilled on the day or not at all. He offered comments to suggest that he still thought that there was something in this argument (even though it was subsequently rejected by Briggs and Gloster JJ), but was content to decide the case on the more mainstream line in *Firth Rixson*.)

This meant that Pioneer owed money to Cosco on closed transactions, but those debts fell outside the calculation of Loss due on termination. The judge was satisfied that those sums could still be set-off by Cosco against anything otherwise due to Pioneer as a result of the Loss calculation. Section 6(e) expressly provides that the sum due under that section was subject to set-off, and the definition of set-off was sufficiently wide to allow accrued but unpaid debts to be taken into account.

The next question was how to calculate the sum due to Cosco: gross or net? In *Marine Trade*, Flaux J said that a payment suspended by section 2(a)(iii) was not available for netting under section 2(c) as far as the defaulting party was concerned. As a result, if the party in default and the innocent party were both obliged to pay separate sums on the same day and, absent the default, those payments would be netted under section 2(c), the effect of section 2(a)(iii) was that the defaulter was obliged to pay its gross sum and the innocent party was not obliged to pay anything. In *Cosco*, Flaux J quoted observations by commentators that his decision to this effect in *Marine Trade* was "remarkable", "astonishing" and "bizarre". However, he indicated that he still clung to his view, and that it was those who criticised him who had misread both the ISDA Master Agreement and what he said in *Marine Trade*. Flaux J therefore followed the same line he had taken in *Marine Trade*.

In *Pioneer Freight Futures Company Ltd v TMT Asia Ltd (No 2)* [2011] EWHC 1888 (Comm), Gloster J reiterated her resolute disagreement with Flaux J on this point (adding that, "perhaps", she did not share the adjectival hyperbole of Flaux J's other critics). Gloster J considered that there was no sensible commercial justification or rationale for allowing a party to claim sums on a gross basis; it emasculated the netting provision and conferred a wholly unmerited benefit on the non-defaulting party. Nor, she thought, was Flaux J's conclusion required by the wording.

Not content to allow Pioneer a freehold on the courts, another Lehman case, *Anthracite Rates Investments (Jersey) Ltd v Lehman Brothers Finance SA* [2011] EWHC 1822 (Ch) (in which Clifford Chance acted for the claimant), went before Briggs J. The case largely turned upon the particular documents in question, but did touch upon the definition of Loss. The judge refused to strike down as unreasonable a Loss calculation because of the arguable impact of other parts of the structured transaction outwith the four walls of the ISDA Master Agreement. The Loss calculation was to be done in accordance with the Master Agreement, and extraneous factors were irrelevant.

The cases on the ISDA Master Agreement are not at an end yet. *Firth Rixson* is due in the Court of Appeal at the end of this year, and an appeal has been lodged in *Cosco*. Watch this space.

Times past

Contractual conditions can only be excluded by using the right words.

The Hoffmannite approach to the construction of contracts is broad: never mind the words, just sniff the breeze blowing over the page, imbibe the general ambiance. But there remain, hidden in cobwebbed footnotes, some strict rules of construction developed in olden times from which the courts cannot quite bring themselves to break free. A seller came close to falling foul of one in *KG Bominflot v Petroplus Marketing AG* [2011] EWCA Civ 1145, though in fact it didn't affect the outcome of the case.

"There are no guarantees, warranties or representations, express or implied, of merchantability, fitness or suitability for the oil… beyond the description of the oil set forth in this agreement" ran the contract. As the Court of Appeal accepted, this was intended to exclude liability for all implied terms, and would normally be read as so doing. But there are a number of old cases, from the House of Lords downwards, that say that if you want to exclude a condition, as opposed to a warranty, you must say so expressly. Sale of goods law even now clings more tightly to the distinction between conditions and warranties than other areas of contract law because of the legislative background, and the old cases treated it as obvious that the parties would know the difference between the two (for those who need a reminder, a breach of a warranty only gives a right to claim damages, while breach of a condition also gives the right to terminate the contract). If the parties had wanted to exclude conditions, they would have said so; they only referred to warranties, so that was all that was excluded.

Rix LJ was torn as to whether he should look to the future, or kowtow to the past. He went for the comforting certainties of the latter. Surely the Supreme Court, even after Lord Hoffmann's retirement, would not agree.

Cable stitch

An agreement to agree is not enforceable.

"In consideration of you agreeing [something], the Purchaser hereby agrees that… we shall offer you the opportunity to invest in the Purchaser on the terms to be agreed between us which shall be set out in the Investment Agreement and we agree to negotiate the Investment Agreement in good faith with you." The agreement was stated to be governed by English law, and set out that price would be not less than a certain figure for a 10% stake in the Purchaser.

Is this an enforceable obligation? In *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2011] EWHC 1560 (Comm), Blair J decided that it was not. It represented an agreement to agree, or an agreement to negotiate, which is unenforceable because: it is too uncertain; it is too hard to say whether negotiations have been ended in good or bad faith; and, since it cannot be known whether negotiations would have led to an agreement, damages cannot be assessed. Even though there was reference to the price, it was "not less than" the price given, which indicated that negotiations were to continue over the fundamentals. Objectively, the parties simply had not displayed enough intention to be bound immediately.

Teare J reached a similar conclusion, for slightly different reasons, in *Dhanani v Crasnianski* [2011] EWHC 926 (Comm). This concerned a term sheet to set up a private investment fund. The fact that the term sheet had been signed by the parties was, the judge thought, sufficient to show that they intended to create legal relations. However, the judge then concluded that the terms were too uncertain to be legally enforceable. This was not a case where it was for one party to decide, for example, where the partnership should be domiciled but where the parties expected to agree on this (cf *Maple Leaf Macro Volatility Fund v Rouvroy* [2009] EWCA Civ 1334). An agreement to agree is, as in *Barbudev*, too uncertain to be enforceable.

In both *Barbudev* and *Dhanani*, the judges applied the general statement of the law in *RTS Ltd v Molkerei Alois Müller GmbH* [2010] UKSC 38. In *RTS*, the Supreme Court strove hard to find, or to invent, a contract because it thought that was what commercial people would expect of it. In *Barbudev* and *Dhanani*, the judges trotted out all the usual stuff about meeting the reasonable expectations of reasonable businessmen, striving to give effect to what the parties have agreed, not being too astute in finding defects etc, but still concluded that the parties had done insufficient to conclude a contract. An engagingly old-fashioned approach, adhering to the view (as in *Bominflot*, above, too) that the common law may still include some fixed rules.

Private international law

Re-writing history

A foreign judgment is refused recognition for human rights violations.

The English courts are more ready to question foreign courts than they used to be. Comity has in many cases been replaced by criticism. Russian courts in particular have not fared well, but in *Merchant International Company Ltd v Natsionalna Aktsionierna Komaniya "Naftogasz Ukrayiny"* [2011] EWHC 1820 (Comm) a judgment by the Supreme Court of another part of the former Soviet Union was rejected.

Merchant International involved an attempt by the assignee of a debt originally owed by a Ukrainian energy company to Gazprom to enforce that debt. C obtained judgment in the Ukraine in 2006, but could not enforce the judgment because Ukrainian law prevents the enforcement of judgments against energy companies.

In 2010, C started proceedings to enforce its judgment in England, and got a freezing injunction that bit on D's substantial shareholding in a UK listed company. This prompted D to apply to the Ukrainian Supreme Court to have the judgment against it set aside because D claimed to have discovered new evidence that questioned whether C had the capacity to be an assignee and also queried the signatures on the assignment. The Supreme Court granted the application on the first ground, not mentioning the second, and referred the case to a lower court. At the hearing before the lower court, D could raise any point it wanted, and was not confined to C's capacity.

D argued that there was no longer a Ukrainian judgment in C's favour; there was, therefore, nothing for the English court to enforce. David Steel J disagreed. The Ukrainian Supreme Court's judgment setting aside the earlier Ukrainian judgment should not be recognised because it was contrary to public policy and, more particularly, section 6 of the Human Rights Act 1998 (public authorities, including courts, must not act in a manner incompatible with the ECHR). Since the judgment setting aside the earlier judgment was not recognised, the earlier judgment still stood.

The problem with the Ukrainian Supreme Court's judgment was that it ignored the principle of legal certainty required by article 6 of the ECHR (fair hearing) and the ECtHR's decision in *Pravednaya v Russia* (30 March 2005). Once a court has decided an issue, the ruling should not be called into question, at least unless fresh evidence, not previously available with the exercise of due diligence, would lead to a different outcome. In this case, the Ukrainian Supreme Court had allowed the whole case to be re-opened, and had made no finding as to whether the new evidence was available earlier. This offended the ECHR, and the decision doing so should not be recognised.

So not only can arbitration awards exist even though the courts of the seat have set them aside (*Yukos v Rosneft* [2011] EWHC 1461 (Comm)), but court judgments can also be afforded recognition even though set aside by a higher court in the relevant country. Judgments and awards really can float in an ether of their own, held aloft without visible support.

Costs

Securing a counterclaim

Security for costs is unlikely to be awarded where it would give the defendants security for the costs of their counterclaim.

In *Anglo Irish Asset Finance Plc v Riddell* [2011] EWCA Civ 799, C sued D to recover £35 million under guarantees D had given to support loan agreements made to their companies. D counterclaimed for rescission of the guarantees, or, in the alternative, damages for misrepresentation and for losses caused by C's repudiation of a loan agreement. D sought security for costs, on the basis that C was virtually insolvent, and only supported by its parent bank. The judge held that there was a risk of insolvency, but that it would not be just to make an order for security because the counterclaim raised substantially the same issues as the claim.

On appeal, the Court of Appeal accepted that C's financial position had changed for the better since the original order was refused, and there was now no ground for it to be ordered to provide security. However, the Court of Appeal also looked at whether security should generally not be ordered where it would give D security for its counterclaim, holding that "If the claim and counterclaim raise the same issues it may well be a matter of chance which party is the [C] and which a counterclaiming [D] and in such a case it will not usually be just to make an order for security for costs in favour of the [D], although the court must always have regard to the particular circumstances of the case." The Court of Appeal held that this was a case in which security would have meant security for D's counterclaim, and said that it would have agreed with the judge on that point.

Quite uninteresting

Interest on costs runs from the costs order, but the court can vary the date.

Senior Costs Judge Hurst has written a long judgment on the subject of the date from which interest on costs should run. Though, perhaps, a judgment of considerable tedium to all but the costs fraternity, it mattered in *Motto v Trafigura Ltd* (29 June 2011) because interest under the Judgments Act 1838 runs at 8%, and the costs claimed by the solicitors were over £100 million, including success fees. The interest was therefore worth having. (The underlying case concerned the alleged dumping of toxic waste in Côte d'Ivoire, and was settled for some £30 million.)

The Judge decided that the general rule remained that interest on costs runs from the date of the costs order (the so-called incipitur rule), not the later date on which the costs are actually quantified. Any interest awarded would, however, go to the solicitors' clients because the solicitors failed to provide otherwise in the Conditional Fee Agreement with its clients, and the judge refused to imply a term to that effect. It was a no win, no fee CFA, so the clients had paid nothing, and had no need of interest to compensate them for being out of pocket. As a result, the judge decided to use the power in section 17 of the Judgments Act, as amended in 1998, to vary the date from which interest should run. He decided that interest should only run from the date when costs were quantified. As a result, neither the solicitors nor their clients will receive any interest on their costs.

Bad for the solicitors, and it could get worse. The CFAs between the solicitors and the barristers they instructed provided that the solicitors would use their best endeavours to recover interest on the barristers' costs and would account to the barristers for the barristers' share of interest. The barristers had no agreements with the lay clients, and the solicitors did not provide as against the lay clients for the lawyers to keep the interest. Will the barristers decide to push the point?

Courts

Expert abuse

The Court of Appeal asserts its right to decide the jurisdiction of an expert determiner.

Expert determination has been on the up since at least *Jones v Sherwood Computer Services Ltd* [1992] 1 WLR 277, and quite possibly since *Campbell v Edwards* [1976] 1 WLR 403. In those cases, the Court of Appeal accepted that if parties had agreed that a dispute should be determined by an expert, that was what should happen. As long as the expert did what he was asked to do, the courts would not intervene even if the expert got it wrong. The court would not even intervene if the expert made a mistake of law (*Nikko Hotels v MEPC plc* [1991] 2 EGLR 103).

Barclays Bank plc v Nylon Capital LLP [2011] EWCA Civ 826 may mark the beginning of a reversal of the trend of two decades and more. The contract in question required an accountant, acting as an expert, to determine certain categories of dispute. The contract even provided that the expert was to determine "any dispute concerning the interpretation of any provision of this Agreement or his jurisdiction to determine the dispute". However, the Court of Appeal decided that it, and not the expert, should determine whether the expert had jurisdiction to determine the dispute, and the Master of the Rolls hinted that any mistake of law by an expert might allow the court to intervene.

The first issue was whether expert determination clauses should be interpreted with the same latitude as arbitration and jurisdiction clauses. Answer: no. The justification for the wide interpretation of jurisdiction and arbitration clauses (eg *Fiona Trust v Privalov* [2007] UKHL 40) is that businessmen are presumed to want all disputes to be resolved by the same tribunal at the same time. Expert determination clauses invariably apply only to a specific category of disputes, and so fall outside this logic. The normal rules of construction therefore apply to expert determination clauses, with no presumptions.

The next issue was whether the court should decide the expert's jurisdiction or whether it should leave it to him to do so. Answer: the court should do so. The Court of

Part 36 offers

Withdrawal symptoms

A Part 36 offer that has been withdrawn will still generally have costs consequences.

C v D [2011] EWCA Civ 646 (see July's edition) held that an offer cannot be a Part 36 offer if the offer is time-limited (even if, after 21 days, the court may have to deal with the costs consequences of acceptance). A Part 36 offer can be withdrawn after 21 days but, if that is done, the offer ceases to have the automatic costs consequences that flow from Part 36 (CPR 36.14(6)). If an offer is withdrawn, the offeror must appeal to the court's general discretion under CPR 44.3 to take into account non-Part 36 offers when considering costs.

So what should the costs consequences be if a Part 36 offer is made, withdrawn, and then beaten? In *Samco Europe v MSC Prestige* [2011] EWHC 1656 (Admlty), Teare J considered that the consequences should be exactly the same as if the offer had not been withdrawn. Following the approach of *Stokes Pension Fund v Western Power Distribution* [2005] 1 WLR 3595 (which led to the abolition of payments into court), he considered that, unless the offeree had acted reasonably in refusing the offer, the subsequent proceedings only took place because the offer had been declined. In those circumstances, why should the offeree not pay the costs? As Teare J pointed out, if the offeree wishes subsequently to protect itself in costs, it can make its own offer on the same terms.

Appeal was firmly of the view that since the issue between the parties went to the expert's jurisdiction to make a determination, whatever he decided would inevitably end up before the courts. Nothing would be gained by wasting time and money in allowing the expert to have first shot at the issue. This conclusion may have been influenced by the Court of Appeal's view that it was obvious that the expert had no jurisdiction.

Lord Neuberger MR in particular took aim at experts in general (Thomas and Etherton LJJ could "see force in his observations" but did not express a concluded view). The MR resuscitated the view that any error of law will take an expert outside his jurisdiction to act and thus render a decision susceptible to challenge in the courts (the MR questioned *Nikko Hotels*). He muttered about it all depending upon the language (though the language before him was as wide as it could be) but added that it was questionable as to whether the parties would ever intend an accountant to decide a point of law. He thought that parties would be well advised to refer any point of law to the court: experts can crunch numbers and count bricks, but should leave law to the lawyers.

(The MR also revealed that the parties had settled their dispute, and did not want the Court of Appeal to give judgment. The main judgment had already been written by the time the Court of Appeal was informed of the settlement, and the issues were of general significance. The parties wish for commercial privacy counted for nothing.)

Disobedience

A claim will only be struck out for failings in disclosure if it makes a fair trial impossible.

Automatic deletion of emails, limits on mail box sizes, warehouse fires… All these make disclosure an uncertain exercise. Can any party ever really say that it has disclosed everything it ought to have disclosed? Probably not, but at least *Bilta (UK) Limited v Nazir* [2010] EWHC 3227 (Comm) makes it clear that a claim will in general only be struck out for failures in disclosure if the conduct has been an abuse of the process of the court, possibly an attempt to pervert the course of justice, and would render a fair trial impossible. A claim will not be struck out as a punishment for not complying with the rules. What this means in practice is that, in order to merit the ultimate sanction, the destruction of documents must generally have taken place after proceedings were contemplated and must seriously compromise the court's ability to do justice.

In *Bilta*, the court refused to strike out a claim because of possible failings in disclosure. Lewison J was not satisfied that there had really been failings in the disclosure process or that a fair trial was no longer possible, but he also pointed out that the documents that had been destroyed would have helped the destroyer's case rather than hindered it.

Unless the court allows you in

The court should not necessarily be slow to grant relief for breach of an unless order made by consent.

In *Chiu v Waitrose Limited* [2011] EWHC 1356 (see July's edition), the High Court confirmed that the court can extend the time for compliance with a court order and exercise the power under CPR 3.8 to grant relief from sanctions, even where the order had been made by consent. However, Ramsey J held that the parties will "generally" be held to the terms of a consent order and that the circumstances must be sufficiently unusual for relief to be granted.

In *Pannone v Aardvark Digital Ltd* [2011] EWCA Civ 803, the Court of Appeal said that Ramsey J's approach was over-prescriptive. C was suing D for unpaid fees, and had agreed, in an unless order, to file and serve its Reply and Defence to Counterclaim by 1pm on a certain day, failing which its claim would be struck out. The document was sent by email at 12.58 although a second email attaching the statement of truth was sent at 13.02. Unfortunately no agreement had been obtained that email could be used for service. The document was filed with the court by fax, in a transmission started at 12.59, perhaps not the wisest course of action for a 26-page document. Transmission was completed two minutes and forty seconds later, but a second, longer fax was sent at 13.06. D contended that the order had not been complied with.

At a CMC, the judge decided to deal with the issue in a "pragmatic" way and move the matter on. D appealed. On the email point, the judge held that the parties must be taken to have contemplated email service as they were in different cities, and refused permission to appeal further. On the filing point, he decided to "season justice with mercy", noting that C had made a genuine attempt to comply with the consent order and that if relief was not granted, it would give D a windfall "for which there is no warrant in terms of any corresponding prejudice that it has suffered to weigh against the undoubted detriment to [C]." D appealed to the CA, but the appeal was dismissed.

Tomlinson LJ said that the weight to be given to the fact that an order is agreed will vary according to the nature of the order and thus the agreement. "Where… the agreement is no more than a procedural accommodation in relation to case management, the weight to be accorded [to the agreement] as to the consequences of non-compliance whilst still real and substantial will nonetheless ordinarily be correspondingly less [than the settlement of a substantive dispute], and rarely decisive." The Court of Appeal also held that it was not necessary to identify unusual circumstances before granting relief, as Ramsey J had said in *Chiu*.

Remember, however, that the two appeals could all have been avoided by faxing the document ten minutes earlier, and sorting out the issue of email service at the beginning of the proceedings.

Open and shut

The court has no common law power to adopt a closed material procedure in a claim for damages.

In *Al Rawi v The Security Service* [2011] UKSC 34, the Cs sued for damages over their alleged ill-treatment and detention by foreign authorities at various locations, including Guantanamo Bay. The Ds filed an open defence, but said that they had material which they wished the court to consider, but which they would be obliged in the public interest to withhold from disclosure. They asked for parallel open and closed proceedings, and parallel open and closed judgments. At first instance, the judge held that the court could indeed adopt a "closed material procedure", allowing a party to comply with his pleading and disclosure obligations without disclosing material to other parties if and to the extent that disclosure would be contrary to the public interest. The Court of Appeal disagreed, holding that the court has no such power in an ordinary claim for civil damages.

The Supreme Court upheld the Court of Appeal's decision (but only by a majority). Lord Dyson noted that "the court's power to regulate its own procedures is subject to certain limitations. The basic rule is that (subject to certain established and limited exceptions) the court cannot exercise its power to regulate its own procedures in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice."

When will there be good news?

The Government has started the process of implementing the Jackson reforms.

The Government has snuck into the Legal Aid, Sentencing and Punishment Offenders Bill provisions that start to implement the Jackson reforms. Specifically, clauses 41 to 44 of the Bill will, if enacted, amend sections 58, 58A and 58AA of the Courts and Legal Services Act 1990 by removing the ability to recover success fees and ATE insurance premiums, and by allowing lawyers to enter into contingency fee agreements (or "damages based agreements", as they are more decorously called). DBAs are already permitted in employment matters (by section 58AA, but, before that, because a claim in an employment tribunal was, curiously, not "contentious business" within the Solicitors Act 1974), and the change is effected by removing the employment restriction in section 58AA. Regulations are still required as to the form of a DBAs and in order to cap the sums chargeable on CFAs and DBAs.

Sir Rupert Jackson's quid pro quo for the non-recovery of success fees and ATE premiums was an increase in general damages of 10%. The Ministry of Justice reports that "the senior judiciary have agreed to look at how this can be taken forward". Similarly, the Civil Justice Council is looking at how to implement qualified one way costs shifting and the 10% bonus for beating a Part 36 offer.

The MoJ has made one concession to Jackson's critics in its Bill, namely to allow ATE premiums to be recoverable for clinical negligence claims. It has evidently been persuaded that the disbursements on clinical negligence claims (principally expert evidence) are such that claimants should be able to secure funding for them through ATE premiums. Once one exception is allowed, however, it may be difficult to prevent others passing through the crack. On the other hand, the MoJ might be happy to offer more minor concessions in order to draw the sting from the vociferous campaign by The Law Society and others to reject Jackson's proposals in their entirety