CLIFFORD CHANCE

Newsletter November 2011

Contentious Commentary

A review for litigators

Contract

Raindrops keep falling

The Supreme Court emphasises the relevance of the commercial background when interpreting contracts.

The Supreme Court has looked again at how to interpret contracts and has, as usual in the higher courts, favoured the approach that offers the greatest flexibility to reach the conclusion the judge wants to reach. In the light of this and other similar decisions, it is clear that it is now seldom enough simply to argue that a contract means such and such because that is what the words say; it is invariably necessary also to explain why that interpretation makes immaculate commercial sense.

Rainy Sky SA v Kookmin Bank [2011] UKSC 50 concerned a bank guarantee given pursuant to a shipbuilding contract. The operative clause (clause 3) said that "[i]n consideration of your agreement to make pre-delivery instalments under the Contract… we… undertake to pay you… all such sums due to you under the Contract…" The builder became insolvent, which entitled the buyer to the repayment of its instalments. The builder failed to pay and so the bank was obliged to do so. Straightforward, surely.

The bank, however, argued that clause 3 was affected by clause 2. Clause 2 recited that the buyer was entitled on termination of the contract to the repayment of its instalments. Thus, said the bank, the "such payments" that the bank was obliged to pay under clause 3 were the payments due on termination of the contract referred to in clause 2. The buyer's claim was triggered by insolvency, not termination, and therefore fell outside clause 3.

The Supreme Court accepted that both the buyer's and the bank's interpretations were possible on the wording. The issue was the extent to which commerciality could be brought into play to aid the choice between them. The Supreme Court rejected the argument that unless the most natural meaning of the words produces a result so extreme that it cannot have been intended, the court must give effect to that meaning. Instead, the Supreme Court said that where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation that is most consistent with business common sense.

In *Rainy Sky*, the Supreme Court could have got home even on the basis of the approach it rejected. Clause 3 is pretty clear, and it is implausible that the parties (objectively) intended that the buyer could not call on the guarantee in the event of the builder's insolvency. The real question, begged by the Supreme Court, is how far wording can be stretched in order to find that there is more than one possible interpretation. The Supreme Court's demeanour suggested that courts will readily find that words are unclear and therefore that the court has (in substance, though not in form) a discretion as to which interpretation to pick. And what if both sides can come up with a commercial justification for their interpretations? *Rainy Sky* does not advance matters greatly, though the decision (unlike *Sigma*) is probably right.

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Mistakes again

In which Vos J takes a strict approach to the correction of mistakes through interpretation.

If *Rainy Sky* is typical of the highest court's approach to contracts, *Deutsche Trustee Co Ltd v Fleet Finance Three plc* [2011] EWHC 2117 (Comm) is typical of the lower courts' approach. The lower courts are much more reluctant than the higher courts to depart from the parties' wording or to conclude that the wording has an obvious mistake even though the words are not, on their face, nonsense.

Fleet Finance concerned a commercial mortgage backed security under which noteholders took an interest in a number of underlying loans. The notes were tranched, with monies received by the trustee being paid out pari passu until certain events happened, when they were to be paid to senior creditors first, and so on down the waterfall. This flip away from pari passu distribution occurred if the following happened: "(i) in respect of the GSW Senior Loan, a Loan Event of Default (based on the GSW Facility Agreement as at the Issue Date and without regard to any subsequent amendments…) (ii) in respect of the… Saxony Senior Loan, a Material Senior Default (as defined in the relevant Intercreditor Agreements based on the terms of such Intercreditor Agreements as at the Issue Date…" A Material Senior Default was defined in the Intercreditor Agreement as a payment default, which in turn pointed to non-payment under the Saxony Facility Agreement.

The payment date on the Saxony loan was extended by agreement, but this only involved an amendment to the Saxony Facility Agreement, not to the Intercreditor Agreement. Was the passing of the original payment date under the unamended Saxony Facility Agreement a Material Senior Default? If so, the senior noteholders took priority; if not, junior noteholders still got something.

Vos J concluded that he could not say that this was an obvious mistake. The judge could understand that there may have been a mistake and that the draftsman may have intended to refer to the Saxony Facility Agreement rather than the Intercreditor Agreement, but it was not sufficiently clear that this was so. Nor, he felt, was the amendment required to correct the mistake sufficiently clear. So in the lower courts, a strict interpretation relying on the wording is more likely to prevail. Higher up it is all more difficult.

Time and tide

The appearance of an available market some time after breach does not make it the necessary measure of damages.

Everyone knows that if there is an available market for goods or other choses, damages for repudiatory breach of a contract for the sale of those goods are the difference between the market price and the contract price at the date of breach (or, at least, as soon thereafter as the innocent party could reasonably have gone into the market). This applies whether or not the innocent party in fact goes into the market. If the innocent party does not go into market, it is taking a commercial risk on price movements. This risk is independent of the breach of contract and does not affect the innocent party's damages.

So far so good. But what if, as in *Glory Wealth Shipping Pte Ltd v Korea Line Corporation* [2011] EWHC 1819 (Comm), there is no available market in three year charters at the time of breach but, a year or so later, there is an available market in two year charters? For the intervening year, damages are assessed by reference general principles - basically, what loss did C actually suffer on the fixtures it secured, subject to mitigation etc - but when the two year market reappears, does that instantly become the measure of damages from that point onwards?

Blair J decided that if there was no available market at the time of breach, quantum was to be measured by actual loss; there was no presumption that C should go into the two year market when it emerged from the financial fog. The re-emergence of an available market might be relevant to mitigation, but the starting point throughout was what loss had C actually suffered. The market is either there at breach or it's not.

Time and again

Making time of the essence is not easy.

The time at which obligations must be performed raises difficult issues (indeed, Stannard's *Delay in the Performance of Contractual Obligations* takes almost 400 pages to deal with the topic), but a vital thing is to avoid thinking that merely serving a notice making time of the essence entitles the non-defaulting party to terminate. In *Multi Veste 226 BV v NI Summer Row Unitholder BV* [2011] EWHC 2026 (Ch), Lewison J emphasised that even after the reasonable time given by a notice to make time of the essence has passed, the non-defaulting party must still show that the breach goes to the root

of the contract if it wishes to terminate. The difference that a notice makes, according to Lewison J, is that on considering the question after expiry of the time given by a notice, the court assumes that performance would never have taken place rather than merely that there has been a delay in performance.

Paying pain

Unjust enrichment is not a defence for paying without authority.

A bank paid out under a letter of credit on non-conforming documents, debiting its customer's account with the amount of the payment. The customer sued for the return of the money on the basis that its account had been debited without authority. The customer succeeded, but the bank went on to argue that repayment would unjustly enrich the customer because the customer had received the goods covered by the letter of credit and had not paid the supplier. In *Swotbooks.com Ltd v Royal Bank of Scotland plc* [2011] EWHC 2025 (Comm), the judge gave the bank short shrift. The bank's payment to the supplier was unauthorised by the customer, and so the supplier could still sue the customer, and doubtless would have done so if the bank had joined the supplier to the proceedings on the basis that the bank had paid the supplier by mistake and was entitled to restitution. There was no unjust enrichment of the buyer at the expense of the bank.

Guaranteed misbehaviour

A guarantor's conduct can lose it the guarantee.

Dubai Islamic Bank PJSC v PSI Energy Holding Company BSC [2011] EWHC 2718 (Comm) involved an unsuccessful application for summary judgment on a guarantee. The judge decided that a surety may be discharged from its liability to a creditor where the creditor causes a default on the underlying debt or acts in bad faith towards the surety, or positively acts so as to prejudice the surety in an unfair way. C argued that this did not apply to an indemnity, but the judge said that since D alleged that C's conduct caused the default on the underlying debt, the agreement to indemnify might not apply because of the lack of the required causal link.

Behind the curtain

A bank is not required to disclose the names of employees who suspected money laundering.

A transaction failed to go ahead because a bank reported money laundering suspicions to Serious Organised Crime Agency in accordance with Proceeds of Crime Act 2002, and could not therefore move the money as instructed by its customer. The customer sued the bank for breach of mandate. In *Shah v HSBC Private Bank (UK) Ltd* [2010] EWCA Civ 31, a rather limp Court of Appeal refused to grant summary judgment to the bank, saying that it was for the bank to demonstrate in the normal way that it really did have the suspicions it claimed to have had. If the bank proved that it held the suspicions (a possibility, more than fanciful, that the relevant facts existed, perhaps of a settled nature), then it was obliged to notify SOCA, and would have a defence to the claim. The normal way of proof includes disclosure, but the bank redacted the names of its employees who reported various matters. A less limp Court of Appeal ([2011] EWCA Civ 1154) decided that the names of the individuals were irrelevant to the claim as put, and therefore did not have to be disclosed. The names might have been relevant on *Peruvian Guano* discovery, but that form of disclosure was, in general, no more. The Court of Appeal was thus able to duck the issue of whether there was any public interest immunity from disclosing the names.

Jurisdiction

Top trumps

An arbitration under one agreement prevents court proceedings under another agreement.

A bank entered into two agreements with a customer engaged in gold mining. The first was a loan facility, entered into through the bank's Bangkok branch. The second was an export contract, entered into with the bank's London branch, under which the bank agreed to buy gold on a monthly basis in order to provide the customer with the means to repay the loan. A state of emergency in Thailand caused the miner difficulty, and led to a series of waivers under the two agreements. The miner then started mumbling that the agreements were unfair and in breach of Thai law, and the bank called the loan and terminated the export contract, asserting claims under both.

So far, so normal. Both agreements contained identical jurisdiction clauses, conferring jurisdiction on the English courts but giving the bank the right to opt for arbitration. The bank started arbitration under the export contract but launched proceedings in the Commercial Court under the facility agreement. The explanation was that different divisions of the bank were responsible for the different contracts, and they took different views as to the best way to resolve the dispute. The miner, however, applied to stay the court

proceedings under section 9 of the Arbitration Act 1996 on the basis that the matter had been referred to arbitration, and thus the Commercial Court was obliged to stay its proceedings.

In *Deutsche Bank AG v Tongkah Harbour Public Co Ltd* [2011] EWHC 2251 (Comm), the miner succeeded. Blair J regarded the fact that the two contracts were closely related and that the breaches alleged were essentially the same as meaning that the two actions were aspects of the same matter. Since the bank had referred one aspect of that matter to arbitration, the court was bound to stay its proceedings under section 9. The fact that no claim was made in the arbitration for repayment of the sum due under the facility agreement made no difference.

An unusual approach by the bank leading to, perhaps, an eccentric decision. The implications may not, however, be that great. The miner's parent company also guaranteed its subsidiary's obligations, but the guarantee had no option for arbitration. The bank started court proceedings on the guarantee alongside the proceedings on the facility agreement. The issues raised were the same, but the guarantee was given by a different party in a contract not providing for arbitration. There was no reason to stay it. It is always prudent to keep dispute resolution clauses in related contracts aligned, as they were in this instance, but also to use the clauses in a consistent manner.

Something for the weekend

A claim form can only be served in England on a director of a foreign company if the company carries on business in England.

CPR 6.5(3)(b) provides that a claim form may be served personally on a corporation by "leaving it with a person holding a senior position within the company". Does this mean what it says or is there a limitation on the ability to serve a director of a foreign company by this method if the director happens to be in England? In *SSL International plc v TTK LIG Ltd* [2011] EWCA Civ 1170, the CA decided that CPR 6.5(3)(b) means a good deal less than it says.

SSL concerned a severe threat to the supply of condoms in the UK and, indeed, the world as a result of the breakdown in the relations between C and the Indian joint venture company through which C manufactured condoms. C served a claim form on the joint venture company by leaving the claim form with one of C's nominee directors of the joint venture company, who had attended C's offices in England for that very purpose. This avoided the need for the claim to fall within one of the gateways for which permission to serve a claim form outside England can be given. The Court of Appeal decided that this did not constitute good service because CPR 6.5(3)(b) could only be used if the company otherwise carried on business in England. For these purposes, occasionally holding board meetings in England was not carrying on business in England.

In reaching this conclusion, the Court of Appeal followed pre-CPR authority, itself dating from a time when the rules for service out looked very different from their current incarnation. The Court of Appeal rejected the submission that the subsequent invention of forum non conveniens meant that there was no need to imply restrictions into the rules. Foreign companies (outside the EU) which don't carry on business here can only be brought before the English courts if it is possible to obtain permission to serve the claim form out of the jurisdiction and if the forum non conveniens test is passed. Contrived means of effecting service within the jurisdiction cannot be used to get round these rules (this contrasts with the position of an individual defendant, who can be served in, eg, an airport transit lounge in England even if resident elsewhere).

The problem for the Court of Appeal was *Rolph v Zoltan* [1993] 1 WLR 1305 and its post-CPR embodiment, *City & County Properties Ltd v Kamali* [2006] EWCA Civ 1897. These permit service of a claim form on a defendant's last known address in England, even if the defendant is not in England at the time of service (and, in the case of *Rolph*, had emigrated from England some years earlier). The Court of Appeal implied that Rolph was wrong, but couldn't say so expressly because it is a Court of Appeal decision. In *Kamali*, the Court of Appeal applied *Rolph* and rejected the idea that limitations should be implied into the wording of the CPR. In *SSL*, the Court of Appeal decided that the decision in *Kamali* that there were no implied limitations in the wording of the CPR was subject to the implied limitation that the decision only applied if the defendant was temporarily outside England when service was effected at his last known address.

So rules (like contracts) don't always mean what they say. One for the Civil Procedure Rule Committee: should the rules be amended to bring them into line with the decision in *SSL*, or should *SSL* be overruled in order to bring it into line with the rules?

Fronting up

A declaratory arbitration award can be enforced in the courts.

The fallout from *The Front Comor* (aka *West Tankers*) continues as parties strive to find ways to navigate around the English courts' inability to restrain proceedings in other EU member states brought in breach of an arbitration agreement. In *African Fertilizers and Chemicals NIG Ltd v BD Shipsnavo GmbH* [2011] EWHC 2452 (Comm), this involved an application to "enforce" under section 66 of the Arbitration Act 1996 a declaration by the arbitrators that they had jurisdiction to determine a dispute. Despite this arbitral declaration and an interim declaration by the English court, D continued with proceedings in the Romanian courts.

D argued that a declaration could only be recognised, not enforced; section 66 therefore had no application. Beatson J disagreed. The Act did not draw such a stark distinction and, in any event, a declaration could in exceptional circumstances be enforced by sequestration proceedings.

C's cunning plan is that by converting its arbitral award into a judgment, any judgment by the Romanian court in D's favour will not be capable of enforcement in England because article 34(3) of the Brussels I Regulation prevents enforcement of a Romanian judgment that is "irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought." D argued that this plan would not work in any event because article 34(3) only applies to substantive judgments on the merits by a court, not a procedural decision to enforce a substantive decision given by arbitrators.

Beatson J did not agree with D on this point either. His decision echoed (and went a bit further than) Field J's decision in *The Front Comor* itself, where a similar scheme is being followed ([2011] EWHC 829 (Comm)). An appeal to the Court of Appeal is under way in that case, so watch this space.

Tort

Humpuss rumpus

Helping someone become judgment proof does not make you liable for the underlying debt.

Piercing the corporate veil is difficult. It is generally sought to be done in order to render a party other than the obvious one liable for some wrong - the contract was a sham with an unnamed person the real party etc. In *Linsen International Ltd v Humpuss Sea Transport PTE Ltd* [2011] EWHC 2339 (Comm), C set itself an even harder task, and failed.

D1 had failed to pay sums due to C on various charterparties. C secured arbitration awards against D1, and converted the awards into judgments in London, New York and Singapore. D1 still failed to pay anything. Further, shortly before the awards, D1's assets were transferred to other Ds (companies within the same group), which paid nothing for the assets, leaving D1 a mere shell. The purpose of those transfers was to make it more difficult to enforce any judgment against D1, and the Ds' conduct was, the judge accepted, an abuse of corporate structure.

C argued that the other Ds' involvement in this abuse of corporate structure rendered them liable on the charterparties or the arbitration awards. C's problem was how the transfer of D1's assets well after the charterparties had been entered into could retrospectively render the other Ds liable on those contracts. There might be arguments to set aside the transfers, but that was not enough retrospectively to render the other Ds liable on the contracts. Similarly, should C have relied on one of the economic torts instead of seeking to pierce corporate veils?

So C lost on that. C also lost on its attempt to hold on to freezing injunctions granted against the other Ds. C tried to do so under the *Chabra* principle, which allows a freezing injunction to be granted in certain circumstances against a person even though the claimant has no cause of action against that person. However, Flaux J limited the *Chabra* jurisdiction. He concluded that it could only be used where the party against whom there was a claim could be compelled to cause the assets of the other to be used to meet the claim or there was some other means of enforcement by which C could obtain recourse to assets held by the other. Neither applied in this case, so C was left with awards and judgments against a shell company.

The unforeseen crash

Losses arising from the chaos following Lehman's demise are too remote to recover in damages.

One of the casualties of Lehman's collapse was AIG, which had to be rescued in the US. But AIG's tentacles reached to these shores in

that it sold in considerable volumes a Premier Access Bond. The PAB was, in substance, an investment pool that placed its money in highly rated bonds and, as a result, offered a better rate of interest than bank accounts while still promising to be safe. On Lehman's demise, rumours spread of AIG's bankruptcy, with the result that investors wanted their money out in a rush. This required AIG to sell the investments in the PAB, which it couldn't do at sufficient speed or at sensible prices, so it suspended redemptions for three months (as its rules allowed). When redemptions resumed, payments were less than 100%. C claimed to have lost about £180k of the £1.25m he invested three years or so earlier. Some might have been relieved that the loss was so relatively small, but C (a solicitor married to an investment banker) sued the bank through whom he had made the investment. In *Rubenstein v HSBC Bank plc* [2011] EWHC 2304 (QB), he won on liability, but the judge then decided that his losses were too remote.

The case involved much debate as to whether the bank had given C advice or only information. The judge decided that it was advice because the bank had made a recommendation. The bank also breached the FSA's rules. The judge decided, with reluctance, that the advice had been negligent because it did not pay sufficient heed to C's desire for capital protection - there were a number of funds within the PAB, and the bank recommended the wrong one.

But C lost because, the judge considered, it was not reasonably foreseeable (whether for tortious or contractual purposes) in 2005 that there would be a run on AIG, and, as such, the bank's advice was not the cause of C's loss, which was also too remote.

Other cases arising from investments in AIG's PAB are, apparently, in the pipeline. Each will depend upon its facts, but all those who put clients in this investment will be comforted by *Rubenstein*; those who made the investment, less so. But investors may be buoyed by the FSA's decision to fine another bank, Coutts, £6.3 million for breach of the FSA's rules in selling AIG products. Coutts must review all its sales and compensate investors where sales are found to be unsuitable.

Assignment

Champerty's alive!

A claim for damages for personal injury cannot be assigned.

"Despatch war rocket Ajax to bring back his [Flash Gordon's] body" go the lyrics to Queen's well-known ditty, to be followed (after a bit of mercurial warbling) by a stunned "Gordon's alive!" Many, including this organ, shared the view of the baddies in Flash Gordon that the judicial and legislative weapons targeted upon champerty similarly meant that only a corpse could possibly now remain. But the Court of Appeal, first in *Sibthorpe* [2011] EWCA Civ 25 and now in *Simpson v Norfolk & Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149, has shown that champerty has the same tenacious hold on life as Flash Gordon.

Sibthorpe said that champerty applies to lawyers unless legislation provides otherwise. *Simpson* says that champerty applies to personal injury claims, at least unless the assignee has a sufficient interest to justify assignment.

Simpson involved the assignment of a claim for damages for personal injuries arising from an MRSA infection allegedly contracted at a hospital. The person who contracted MRSA assigned his claim to C. C was the widow of a man who had died of cancer in the same hospital but whose last days had, she said, been made more difficult as a result of his contracting the same infection. C settled her husband's claim without any admission of liability on the part of the hospital, but she wished to pursue the hospital further using C's claim.

The Court of Appeal accepted that a personal injury claim was a chose in action and, as such, was prima facie a property right capable of assignment under section 136 of the Law of Property Act 1925. Further, the Court of Appeal considered that the chose in action was not so personal in its nature as to be incapable of assignment. The obligation to pay compensation arises by operation of law, and is not personal in the sense that it depends on the identity of the claimant. Nor did the Court of Appeal think that the fact that a claim for personal injury does not pass to a trustee in bankruptcy (*Ord v Upton* [2000] Ch 352) affected the position.

But having taken a contemporary approach to that point, the Court of Appeal then turned the clock back. The rules on champerty prevent the assignment of a bare right to litigate (an obscure phrase, but apparently encompassing this claim) unless the assignee has a sufficient interest in taking the assignment. The time-worn "wanton and officious intermeddler" in litigation was one who lacked that sufficient interest. Public policy might change over time, but the Court of Appeal decided that it

had not moved enough to give C a sufficient interest in this case. In particular, there was no access to justice issue of the sort that has concerned the courts in other cases. Essentially, the Court of Appeal thought it unfair on the hospital that C should pursue it further having settled her earlier claim. The Court of Appeal rejected the idea that this interfered unlawfully with a property right, contrary to article 1, Protocol 1 to the ECHR.

Equitable rules

An equitable assignee can take action in its own name.

An equitable assignee can sue the debtor, but it must join the assignor to the proceedings. Is that a procedural requirement or is it substantive? Does it prevent an equitable assignee from voting at a creditors' meeting on a proposal for an individual voluntary arrangement, leaving only the assignor (the legal owner) to do so?

In *Kapoor v National Westminster Bank* [2011] EWCA Civ 1083, the Court of Appeal decided that the equitable assignee could vote in its own right. Rejecting all academic criticism to the contrary, the Court of Appeal confirmed that well over a century on from the merger of equity and law, an equitable assignee should be recognised as the person entitled to the debt. The requirement to join the assignor was in order to ensure that all those interested in the debt were bound by the decision, whatever it was, but was a requirement that the court could waive in appropriate circumstances. In the context of a vote by creditors on an IVA, it was the equitable assignee who held the voting rights for the purposes of the Insolvency Act 1986.

But the Court of Appeal reached what was clearly the right answer in *Kapoor* by other means. The debtor claimed to have liabilities of £10m, of which £8.5m was owed to a connected party, whose vote would not count in relation to the IVA. The connected party therefore assigned £4m of its debt to an unconnected party, who duly voted in favour of the IVA, outweighing the other unconnected parties. An assignment of part of a debt can only take effect in equity but, as mentioned, the Court of Appeal decided that this did not prevent the assignee from voting. What did block the plan was a lack of good faith, an overriding consideration that the Court of Appeal imposed on Insolvency Act. Essentially, the assignment was an implausible put-up job in order to ensure that the IVA was passed, as the debtor and his connected parties wanted (eg the assignment apparently involved the assignee paying more for the assignment than he could ever recover from the IVA he voted for). The Court of Appeal said that this was enough to disqualify the assignee's vote, and the majority external creditors therefore got their way.

Freezing injunctions

Mobile assets

A freezing injunction in support of a judgment should still except payments due in the ordinary course of business.

If C has a judgment that has not been paid, it might expect the court to help it to enforce that judgment. A freezing injunction is not enforcement, but it is a useful tool on the way to enforcement or to persuade D to pay. But in *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040, the Court of Appeal was not prepared to help.

C did not actually have a judgment, but it had an arbitration award in its favour and it had been granted permission to enforce the award as if the award were a judgment. An appeal was pending against that decision. C also obtained a worldwide freezing injunction against D, and had persuaded the lower court to delete the standard exception in the freezing injunction for payments in the ordinary course of business.

D was a vehicle used for tax reasons within a group, including for the issue of a bond. In order to pay interest on the bond, D needed money from its parent (which had also guaranteed D's obligations on the bond). But if the parent paid D, the money would be frozen in D's hands, leaving the bondholders out of the money and with a right to accelerate, at least unless the parent topped up its payment. So D applied for the reinstatement of the ordinary course of business exception in the freezing injunction to enable it to pay the interest due on the bonds.

David Steel J refused D's application, but the Court of Appeal agreed. The Court of Appeal said that the ordinary course of business exception should generally be included in freezing injunctions granted in aid of enforcement of an arbitration award. Otherwise, the Court of Appeal thought, it would be preferring one contractual creditor over another. But shouldn't the Court of Appeal be encouraging the payment, or at least the securing, of arbitration awards rather than allowing D to avoid doing so for longer? A bit of pressure on D might be a good thing in that regard.

Hiding behind the law

The FSA is not obliged to give an undertaking in damages in favour of third parties when obtaining an injunction.

It is established that law enforcement agencies, including the FSA, are not obliged to give undertakings in damages in favour of defendants if the enforcement agencies come to the civil courts in order to obtain an interim injunction to restrain what the agencies say is breach of the law. But what about the usual undertakings in favour of innocent third parties? There may be some logic in saying that enforcement agencies should not be restrained from pursuing malefactors through fear of the financial consequences of getting it wrong (but should enforcement agencies be coming to the civil courts rather than using statutory enforcement powers?). But innocent third parties? Surely if an innocent third party suffers a loss as a result of the authorities' attempt to enforce the law, that loss should be socialised through the enforcer paying.

Not according to the Court of Appeal in *Financial Services Authority v Sinaloa Gold plc* [2011] EWCA Civ 1158. The Court of Appeal decided that the FSA does not need to give the standard freezing injunction undertaking in favour of third parties. The Court of Appeal rejected the argument that the FSA's statutory immunities prevented it giving or being liable on an undertaking, but the Court of Appeal then put innocent third parties in the same boat as defendants. Not obviously the right answer.

Enforcement

The first cut is the deepest

It's first come, first served as far as enforcing judgments is concerned.

The Algosaibis owe lots of money. After initially fighting claims by several banks up to the opening days of a trial, they submitted to judgment. Judgment is not the same as payment, and even if the Algosaibis could repay their debts, they show no inclination to do so. One of the banks that obtained judgment then stole a march on the others by securing interim charging orders over certain Mayfair properties that it said were owned by the judgment debtors. The other banks piled in with their own interim charging orders, and objected to the first bank's order being made absolute without an obligation to share the proceeds.

In *British Arab Commercial Bank plc and others v Algosaibi* [2011] EWHC 2444 (Comm) (Clifford Chance acted for one of the other banks), Flaux J recognised that if there had been any possibility of insolvency in England, that would have been a sufficient reason not to make the interim order absolute (*Roberts Petroleum v Kenny* [1983] 2 AC 192). But there was no prospect of an insolvency in England. The only place there might be insolvency proceedings was Saudi Arabia, which had an "imperfect" process that would not lead to a pari passu distribution of assets. As a result, the law of the jungle applies. The first creditor to find and enforce against an asset keeps it all; the other creditors get nothing.

Flaux J noted that he had a discretion whether to make the charging order absolute and, in exercising that discretion, he was bound to consider whether any other creditor would be "unduly" prejudiced by the making of the order (section 1(5)(b) of the Charging Orders Act 1979). However, he felt that "undue" meant that there had to be something in the creditor's conduct that would cause prejudice or some other exceptional circumstances. Merely being quickest off the mark was not enough. Would a Chancery judge have reached the same conclusion?

European account protection orders

The UK has not opted into the European Commission's proposed regulation on EAPOs.

Over the summer, the European Commission proposed a regulation to create a European Account Preservation Order, ie a measure to allow courts in Lisbon, Lodz, Leipzig and Lecce to freeze bank accounts (including derivatives transactions) in London, and vice versa. The UK is only bound if it opts in to the proposed regulation. The Government has decided not to opt in. Although sympathetic to the aspiration of making enforcement of debts easier, the Government accepted the submissions of Clifford Chance and others that the proposal is such a mess that it would be dangerous to opt in at this stage. If the regulation is significantly improved during the legislative process, the UK may yet opt in, but that is an issue for another day.

Privilege

Knuckles rapped

The FSA is told to take greater care with privileged materials.

The FSA might have met a benevolent Court of Appeal in *Sinaloa* (above), but Burnett J was less sympathetic in *R (Ford) v Financial*

Services Authority [2011] EWHC 2583 (Admin), suggesting that the FSA should take the same black bag approach as the police when dealing with material that might be privileged (ie not look at the material until the issue is resolved).

The case concerned Keydata. The FSA was looking into Keydata, which instructed lawyers. When Keydata went into administration, the FSA extracted documents from the administrators, but was conscious that they might include privileged materials. It therefore isolated those that might be privileged, and asked the administrators to waive privilege, which they did. The FSA used those privileged materials to present its case against the directors to its Regulatory Decisions Committee.

On finding out about the use of privileged materials, the directors argued that any privilege was jointly shared between them and the company, and that the company could not on its own waive the privilege. Burnett J examined joint privilege in a useful manner, concluding that it can arise where two parties jointly instruct the same lawyers or where the parties have a joint interest in the subject matter of the communication at the time it came into existence (only legal advice privilege was claimed). In this case, he concluded that everyone should have realised that the lawyers were advising both the company and the directors personally, even though the only retainer letter from the solicitors was addressed to the company, because of the close association between the directors and the company. The privilege was, therefore, joint, and couldn't be waived by the company alone.

The FSA will need to think hard about what it can do with this investigation (eg can those who have seen the privileged stuff continue to be involved? - see *Stiedl* below) and how it behaves in the future. It will need to be more alive to privilege, as will administrators, and, especially, who might be able to claim it.

Careless whispers

Reference to interviews with witnesses is held to waive the privilege in notes of those interviews.

An application for a freezing injunction requires evidence and, what is more, a full and frank disclosure of that evidence. But mentioning the evidence can waive privilege, as C found in *Cadogan Petroleum plc v Tolly* [2011] EWHC 2286 (Ch).

C obtained a worldwide freezing injunction against D in June 2009, claiming bribery and such like in relation to contracts entered into by C. In its evidence in support of the application, C's solicitors said that they had interviewed seven witnesses, and then set out a "distillation of their accounts". D sought disclosure of documents recording what was said in the interviews. C resisted on the basis of litigation privilege.

Newey J decided that litigation privilege applied, but went on to conclude that C had waived that privilege by relying on the interviews in support of its application. The question was whether it would be unfair to allow C not to reveal the whole of what was said in the interviews because it would risk the court only having a partial and potentially misleading understanding of the interviews. In this instance, C had not merely referred to the fact of the interviews but to their content. C might not have expressly mentioned notes, but the reference to the content was enough the waive privilege in the interviews and thus in notes recording that content. D was entitled to see the notes in order to determine whether the "distillation" put forward by C was accurate.

So beware this decision. On the facts, you can see where the judge was coming from. But suppose there had been no mention of interviews but just the standard line that the witness has been informed by so and so, and believes, that such and such is the case? In those circumstances, there is no formal reference to an interview. But does that still mean that notes of what so and so said cease to be privileged? Or is it the fact that what was set out was only a "distillation" that made the difference?

Danish bacon

Solicitors are allowed to continue acting despite access to privileged material.

If a solicitor sees privileged material belonging to the other side, can he or she continue to act against that party? In *Stiedl v Enyo Law LLP* [2011] EWHC 2469 (Comm), Beatson J distinguished between two situations: first, where the solicitors obtained the privileged material because they had acted for the other side; and, secondly, where the solicitors obtained the privileged material despite having not acted for the other side. In the first situation, the normal remedy is an injunction to stop the solicitors acting; in the second situation, the normal remedy is to injunct the solicitors from making use of the privileged material but not to stop them acting. In either case, however, the remedy may be different depending upon the circumstances.

Stiedl was in the second of these two camps. The contents of a company's

server were shipped by the company's liquidators to solicitors, Addleshaws, to assist in suing C, a former director. Addleshaws started a tier one review of the documents on the server, which involved paralegals and similar giving the documents a quick once over to exclude those that were obviously irrelevant to the claim against C. A group then left Addleshaws to set up Enyo Law, and took the case with them.

C then claimed that some of the documents on the server were his and were privileged. C applied for Enyo Law to be injuncted from continuing to act because of their access to the privileged documents during the tier one review while at Addleshaws.

Beatson J refused the application. Of the 25 potentially privileged documents, 24 had been reviewed by one person, who remained with Addleshaws. The other document had been reviewed by someone who had moved to Enyo Law, but who, entirely plausibly, said that she could remember nothing about it. No one else had looked at it. The chance of C being prejudiced was, therefore, so slight that an injunction would have been a gross over-reaction.

The case has two other interesting aspects. First, C presented his case in person via videolink from, it seems, a prison cell in Denmark. Secondly, independent counsel were appointed, first to look at the documents alleged to be privileged and advise as to whether they were in fact privileged and relevant and, secondly, to act for Enyo Law but on the basis that he did not tell Enyo Law what the documents said. Since Enyo Law's main argument was that even if anyone within their team had looked at the documents, they had since forgotten what the documents said, that argument would have been destroyed if anyone had looked at the documents for the purposes of the application.

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