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

Newsletter August 2014

Contentious Commentary

Equity

Pragmatism and property

An agent holds a bribe in trust for his principal.

Whether or not a principal has a proprietary interest in a bribe paid to his fiduciary or only has a personal claim for the amount of the bribe has been much debated. Since the Court of Appeal in *Sinclair Investments Ltd v Versailles Trade Finance Ltd* [2012] Ch 453 declined to follow the Privy Council in *Attorney General for Hong Kong v Reid* [1994] 1 AC 324, the academic journals have positively hummed with argument between those, favouring *Sinclair Investments*, who consider that granting a proprietary interest abuses property law and is unfair on the fiduciary's other creditors, and those, favouring *Reid*, who consider that not granting a proprietary remedy abuses and misunderstands equity and a fiduciary's obligation to account.

In *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, a seven man Supreme Court, giving a single judgment, has resolved this debate. In characteristic common law fashion, the Supreme Court did not approach it as a matter of philosophy, doctrine or underlying legal structure. Instead, it went through the existing case law, decided that the courts are all over the place and concluded that there is no plainly right or wrong answer.

As a result, the Supreme Court determined the matter as one of "principle and practicality" - rather more of the latter than the former. The Court's conclusion was that the principal does have a proprietary interest in a bribe paid to his fiduciary and, as a result, can trace the bribe into other assets, if advantageous to do so.

The reasons offered by the Supreme Court for this conclusion were essentially threefold. First, it is simpler to have a black and white rule that all bribes and secret profits obtained by a fiduciary are held on trust for the principal than to define when breach of fiduciary duty gives a proprietary remedy and when it does not (an unusual lack of self-confidence on show here). Secondly, bribes and secret commissions undermine trust in the commercial world. A salutary rule is therefore appropriate *pour encourager les autres*. Thirdly, the principal's benefit from the underlying transaction will commonly have been reduced by the amount of the bribe or secret commission, which can therefore fairly be said to be the principal's property.

The Supreme Court considered that the objections to this approach based on unfairness to the errant fiduciary's other creditors were of limited force. After all, the bribe should never have been part of the fiduciary's estate.

In *FHR European Ventures*, C employed D to negotiate the purchase by C of the Monte Carlo Grand Hotel. As C's agent, D owed C fiduciary duties. D successfully secured the hotel for C at a price of €211.5m. Unknown to C, however, D also had an arrangement with the seller of the hotel under which D would get paid €10m on the sale of the hotel.

C unquestionably had a personal claim against D for the €10m, but the

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question was whether C also had a proprietary claim that would allow C to trace the bribe into other assets and claim those assets. The Supreme Court's conclusion was that C did have a beneficial interest in the amount of the bribe and could therefore trace the proceeds.

So *Reid* is restored and *Versailles* is vanquished. It seems unlikely that the academic debate will abate just because the Supreme Court has spoken. Academics spurned by the Supreme Court will be sharpening their keyboards in order to explain why the Supreme Court has got it wrong. Since the Supreme Court did not venture into the theory of a fiduciary's obligation to account, but really just asserted that its solution was the rightest and easiest answer, there is still lots to say.

Counting the pennies

An account of profits can be awarded against a constructive trustee.

A fiduciary's primary duty is one of loyalty. If a fiduciary abuses that loyalty, he or she must account to the beneficiary for all profits made from that abuse, whether or not the beneficiary would or could have made those profits. But a constructive trustee, whether in knowing receipt or dishonest assistance, is not a real trustee. Can an account of profits nevertheless be awarded against a constructive trustee?

Yes, according to the Court of Appeal in *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908. Constructive trustees are liable to account as if they were trustees, and this fiction of trusteeship extends to the remedies that can be granted against them.

Fiduciaries are liable for any profits made within the scope of their fiduciary duties, which avoids any need to consider causation - the only question is the scope of the fiduciary's duties. Constructive trustees do not have a prior scope of fiduciary duty, and therefore a causal link between the profit and the constructive trust is required. The Court of Appeal rejected the argument that a simple "but for" test should be applied, preferring a normal common law test of causation, ie applying common sense and distinguishing between the effective cause of the loss and an event that had merely been the occasion of the loss.

In any event, the Court of Appeal decided that the court had a discretion whether or not to award an account.

Service of process

Holding service

Service on a process agent in liquidation remains good service.

CPR 6.11 provides that where a contract term allows a claim form to "be served by a method or at a place specified in the contract", service by that method or at that place is good service. In *DVB Bank SE v Ismin Amin Ltd* [2014] EWHC 2156 (Comm), the clause provided that service on a particular company acting as process agent was good service on D. By the time of service, however, the company was in liquidation. Field J accepted that service on the company remained good even though the company had stopped carrying on any kind of business, let alone as a process agent. Service would have been effective even if the company's authority to accept service had been expressly revoked by D because that would have undermined the purpose of the service clause. The onus is on the party appointing the process agent to ensure that all is well with its process agent, not on the server.

The claimant in *DVB Bank* would only have had a problem if the company appointed as the process agent had ceased to exist, as it will once its liquidation is complete: service cannot be effected on a spectral entity. CPR 6.11 makes it clear that it is not necessary to appoint a process agent as such, with the risk that the agent will join the choir invisible. A method or place of service is sufficient. This method could be service at a specified address. If so, service at the address will only fail if the address ceases to exist; it is up to the person specifying that method to ensure that a claim form wends its way from that address to that person.

Indeed, there is no requirement that the claim form finds or could find its way to the named defendant. The contractual method chosen could, for example, be casting the claim form from Westminster Bridge into the muddy waters of the Thames under a full moon while Big Ben strikes midnight and a lone bagpiper plays Glengarry's lament. Neither sensible nor practical, perhaps, but so casting the claim form would be good service, though it might be wise to take a video of the event in order to prove compliance (and also to provide entertainment for the masses on Youtube).

Courts

Try, try and try again

Mitchell* is discarded, to be replaced by the softer, more cuddly, *Denton.

"... we think that the judgment in *Mitchell* [*v News Group Newspapers Ltd* [2013] EWCA Civ 1537] has been misunderstood and is being misapplied in some courts. It is clear that it needs to be clarified and amplified in certain respects... We hope that what follows will avoid the need in future to resort to the earlier authorities."

So said the Court of Appeal in *Denton v TH White Ltd* [2014] EWCA Civ 906. Translated from the private dictionary in use in the judicial neverland, this means as follows: Oh dear. It looks as if we got *Mitchell* badly wrong, so we'd better have a second try. Please pretend that our first effort never happened, though, of course, we must maintain for public consumption that the decision in *Mitchell* was right and that any problems arising from it are entirely someone else's fault - indeed, anyone's fault but our own - even though, as many have pointed out, the consequences of the decision (satellite litigation, injustice and so on) were entirely predictable.

Mitchell laid down a two stage approach to an application for relief from sanctions under CPR 3.9, as amended in the Jackson reforms of last year: is the rule breach "trivial"? if so, grant relief; if not, is there a good reason for the breach? if so, grant relief; if not, refuse relief.

The *Denton* approach comes in three stages. First, the "seriousness and significance" (sometimes expressed as seriousness or significance) of the breach must be assessed. This seems to focus less on the iniquity of the breach itself and more on whether the breach imperils future hearing dates or disrupts the conduct of the litigation (but with the caveat that something can be serious and/or significant even if it does not affect the efficient progress of the litigation, eg non-payment of court fees). Earlier rule breaches are not relevant at this stage. If the breach is not serious or significant, relief will usually be granted.

Secondly, why did the failure occur? If there is good reason, relief will usually be granted.

Thirdly, even if the breach is serious and/or significant and there was no good reason for the breach, it no longer follows inexorably that an application for relief from sanctions will fail (this may be the real departure from *Mitchell*). A more "nuanced" approach is required. It is, as ever, necessary to consider all the circumstances. In doing so, the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with the rules are of "particular" (no longer "paramount") importance (Jackson LJ, the author of the eponymous reforms, dissented on this point, considering that they are merely factors to weigh in the balance alongside all other factors). Promptness of application is relevant at this stage, as is past behaviour.

In *Mitchell*, the thrust was that rule breach is intolerable and must be punished even if doing so conferred fortuitous benefits on the innocent party (as in *Mitchell* itself, where C's offence of filing its budget slightly late was held to excuse D from liability in costs, beyond court fees, even if D went on to lose the case). No surprise then that innocent parties sought to take advantage of the windfalls on offer by resisting applications for relief from sanctions. However, in *Denton* the Court of Appeal reversed the censure by condemning the innocent for (predictably) seeking to grab the gratuities offered *by Mitchell*. The innocent were, it seems, to blame for the failure of the *Mitchell* rules. As a result, if a court thinks that an innocent party has unreasonably not agreed to relief from sanctions, the Court of Appeal in *Denton* threatened that party with "heavy cost sanctions", not just in relation to the costs of the application itself but even unto the making of costs orders at the end of the case.

The Court of Appeal also added that unless orders should be confined to situations where they are truly required to enable the litigation to proceed efficiently and at proportionate cost.

The case that will become known as *Denton* involved three appeals heard together. In *Denton* itself, the claimant served six new witness statements a month or so before the trial was due to start. The judge allowed them in, even though this meant that the trial had to be postponed. The Court of Appeal considered that the judge was wrong to grant relief from the sanction. The breach was significant because it led to the trial being put off; there was no good reason; and all the circumstances militated against relief because the trial had to be postponed. The judge's concern that the trial would have taken place on a false basis, without all the evidence, was not a relevant factor because it was the claimant's fault that he only identified the need for the extra evidence so late in the day. An improved prospect of securing the right result at trial therefore counts for nothing if it means that the trial is delayed.

In *Decadent*, a court fee due under an unless order was sent by cheque on the day it should have been paid and would therefore have been late come what may. The cheque was then lost in the post or by the court, but the fee was paid some time later when this loss emerged. The delay was not serious or significant; there was no good reason; but all the circumstances pointed to relief because the breach wasn't especially serious.

In *Utilise*, a party was 45 minutes late in submitting its budget. This breach was not serious or significant; there was no good reason; but all the circumstances pointed to relief.

Where does this leave us? In *Denton*, the Court of Appeal has signified a softer approach while stressing that it will not tolerate going back to a culture in which breach of the rules does not matter (was there ever such a culture?). The first and third stages of the Court of Appeal's new test are closely related because the more serious and significant the breach, the less likely it is that it will be appropriate to grant relief - though it seems that seriousness and significance for the first limb are not always the same as seriousness and significance in the third limb. But a focus on the effect of the breach, rather than merely on the fact of the breach, is unquestionably an improvement. Notwithstanding the Court of Appeal's strictures, more satellite litigation is inevitable.

Privilege

Russian roulette

Privilege is a matter of English law.

In *Rochester Resources Ltd v Lebedev* [2014] EWHC 2185 (Comm), Blair J confirmed that whether a document is admissible before the English courts under the without prejudice principle is a matter of English law. This is so even if the document in question is a draft New York complaint sent under rubric referring to the incarnation of the without prejudice principle in New York's procedural code. New York law might influence how the parties would reasonably have regarded the communication, but admissibility is always for the lex fori.

Blair J went on to decide that the draft complaint was inadmissible. The correspondence referred to the possibility of settlement, and constituted an opening shot in possible settlement negotiations even though it did not offer any concession and the recipients did not take up the offer of discussions.

Senior moments

The failure of a senior legal representative to sign a costs budget is merely an irregularity.

When, in the olden days (ie pre-*Denton*), *Mitchell* offered such bounty, points of little merit were bound to be taken in the hope of finding a judge sadistic enough to want to penalise the other side in a wholly disproportionate manner for some insignificant (but not trivial) breach of the rules.

One such case was *Americhem Europe Ltd v Rakem Ltd* [2014] EWHC 1881 (TCC), in which one party latched on to the fact that the other's costs budget had been signed by a mere costs draftsman; it is required to be signed by a "senior legal representative" (PD3E, §1). This meant, the innocent party argued, that no costs budget had been filed on time and, as a result, that the defaulting party could only recover court fees should the defaulter be awarded costs (CPR 3.14).

Stuart-Smith J agreed that a costs draftsman is not a legal representative for these purposes (this means a lawyer involved in the substantive issues in the case), and certainly not a senior one. But he thought that the failure to have the budget signed properly did not render the budget a nullity, thus requiring an application for relief from the sanction in CPR 3.14; it was only an irregularity in a budget that had been submitted in time. The proportionate response was to require the budget to be signed by a senior legal representative, not to deprive the party of its costs altogether.

Another such case was *Gordon v Fraser (No 1)* (16 June 2014), in which the deputy judge anticipated *Denton*, describing the *Mitchell* principles as "an unforgiving doctrine" and "one strike and you are out". However, he forgave D its failure to serve a witness summary on time despite the breach of the rule not being trivial and there being no good reason for it. The judge accepted that the (*Mitchellised*) expectation in these circumstances was that the sanction (ie the witness in question cannot be called: CPR 32.10) would apply. The judge defied this expectation because the delay in service had no effect on the trial and would have deprived the court of essential evidence. Justice between the parties remained important, he thought. This last point may, however, out-*Denton Denton*.

In yet another such case, *Davies v Liberty Place (Sheepcote Street) Management Co* [2014] EWHC 2034 (Admin), Leggatt J took a more radical route to the same destination as the judge in *Gordon*, ie allowing late service of a witness statement. CPR 32.10 provides that if a witness statement or summary is not served within the prescribed time, the witness may not be called without the court's consent. In *Gordon*, and also subsequently in *Denton* itself, the court assumed that CPR 32.10 imposes a sanction. Any application for permission to a serve witness statement late is therefore an application for relief from that sanction, and CPR 3.9, as interpreted in *Mitchell* (now *Denton*), governs that application.

In *Davies*, Leggatt J decided that CPR 32.10 does not impose a sanction and, as a result, that *Mitchell/Denton* has no relevance to an application for permission to serve a witness statement late. CPR 32.10 does not preclude reliance on evidence; it merely provides that the admission of the evidence requires the court's consent. It is only if that consent is refused (or if an unless order is made and not complied with) that a sanction is imposed and the *Mitchell/Denton* principles apply. If the *Mitchell* principles had applied, the judge accepted that he could not have overturned the lower judge's decision to refuse permission to adduce the evidence. But since *Mitchell* did not apply, Leggatt J could approach the matter in more rounded (*Denton*esque?) manner and grant permission.

Leggatt J's approach to the concept of when a sanction is imposed was not addressed in *Denton* - the Court of Appeal assumed without consideration that there was a sanction. *Mitchell* was, indeed, generally applied to any application for an extension of time that was made after the time in question had expired, not only to a more obvious application for relief from a sanction. The Court of Appeal will have to decide whether the limitation on the application of CPR 3.9 in *Davies* is right.

Mitigating circumstances

The parties' ability to extend dates is expanded.

Alongside the *Denton* aim of relieving the courts from the irritation of having to hear applications for relief from sanctions, CPR 3.8 has been amended with effect from 5 June 2014. CPR 3.8(3) says that where a rule or order requires a party to do something within a particular time and specifies consequences for the failure to comply, the parties cannot by agreement extend the time for doing the act. CPR 3.8(4) has now been added stating that the parties can extend time by agreement for "up to a maximum of 28 days, provided always that any such extension does not put at risk any hearing date". In the light of *Denton*, the court will expect the parties to exercise this power; the innocent party can no longer say that it is a matter for the court.

Limited default

A default judgment against one defendant does not prevent another defendant raising contrary arguments.

In *Page v Champion Financial Management Ltd* [2014] EWHC 1778 (QB), C raised the intriguing argument that, because C had entered default judgment against D1, D5 could not raise arguments that might lead to a second judgment inconsistent with the default judgment. Unsurprisingly, the judge thought this nonsense.

The context was section 39 of FSMA. This renders an authorised principal liable for the activities of its appointed representative; in return, the appointed representative does not need to be independently authorised. C sued D1, the appointed representative, for selling an unsuitable product to C, and entered default judgment against D1. The principal, D5, contested liability on the basis that D1 was carrying on execution only business, the product was suitable etc. C argued that D5 could not raise these points because, if successful, they would lead to a second judgment in the same action that was inconsistent with the first. The court system would implode in the face of such awful inconsistencies.

The judge agreed that D5 could defend the case to the full (and would, if necessary, have set aside the default judgment of his own motion). Consistency is good, but not to the point of stopping one party defending a case just because another can't be bothered to do so.

Sent to Coventry?

The recoverability of success fees and ATE insurance premiums may breach the ECHR.

The recoverability in costs of success fees and after the event insurance premiums was a cornerstone of the legal system from 1999 until the introduction of the Jackson reforms last year. The length of litigation means that it still arises under conditional fee agreements entered into before April 2013. In *Coventry v Lawrence (No 2)* [2014] UKSC 46, the Supreme Court has thrown a considerable spanner into the works by suggesting strongly, though not deciding, that this recoverability breached article 6 of the ECHR (right to a fair trial) or article 1 of the First Protocol to the ECHR (peaceful enjoyment of possessions).

Coventry involved a nuisance claim by the owners of a bungalow against a motor racing track some 850 yards away. C won at first instance, lost in the Court of Appeal but won again in the Supreme Court. C's costs at first instance, under a CFA, were £398k, plus a success fee of £312k and an ATE insurance premium of £350k. C's bungalow was worth £300k. D objected to paying the success fee and ATE insurance premium on the basis of the ECHR.

The Supreme Court launched into a tirade against the cost of civil litigation, with a *cri de coeur* that someone with responsibility for civil justice should do something about it. The Supreme Court panel happened to include two former Masters of the Rolls who, as such, had responsibility for civil justice from 2005 to 2012.

Specifically, the Supreme Court condemned the "malign" influence of the recoverability of success fees and ATE insurance premiums. It cited "regrettable" features, such as the claimant's having no interest in its legal fees because it would never have to pay them, and the better a losing defendant's case was, the greater its costs liability would be because the success fee would be higher.

The Supreme Court thought that there was a case to be answered on whether this malignant system was compatible with the ECHR, but decided that it could not resolve the issue without first hearing from the Government. Any decision might not just invalidate secondary legislation (elements of the old CPR 44), but might also require a declaration of incompatibility in respect of part of the Access to Justice Act 1999. If the Access to Justice Act and the CPR were incompatible with the ECHR, the Government might face financial claims in Strasbourg from the victims of the legislation who were ordered to pay success fees.

The Supreme Court's outraged concern was over the seven figure costs bill that arose at first instance in *Coventry*. Further costs will have been added in the Court of Appeal and in the Supreme Court, which has already given two judgments. More costs will be added by a directions hearing before the Supreme Court on costs, now involving the Attorney General and/or the Secretary of State for Justice (and, quite possibly, other interveners), and then one or more substantive hearings. Plus ça change.

Ratings rejected

The MR has rejected the CJC's recommendations for new guideline hourly rates.

Guideline hourly rates are used by courts to award costs on summary assessment. But it is a long time since a thorough survey has been undertaken to establish what rates are appropriate. So a sub-committee of the Civil Justice Council, chaired by Foskett J, was sent off to produce new rates.

The approach of Foskett J's sub-committee was to send to solicitors (not barristers) a long questionnaire demanding details of how much solicitors spend on salaries, IT, marketing, rent, accounting etc, and how many hours everyone works. Having thus determined the cost of practising law, the sub-committee then decided how much profit solicitors should make, and came up with new GHRs. The results were submitted to the Master of Rolls, as Head of Civil Justice, for his approval and promulgation.

But the MR has rejected the sub-committee's recommendations. So few people responded to the sub-committee's survey that he considered that it failed to offer a sound statistical base. Rates therefore remain as they are (the MR also rejected an inflation uplift as, for some reason, "arbitrary"). But the MR has said that he will have urgent discussions with the Government and the Law Society to see if better evidence can be produced.

It is unclear whether the MR appreciates the impracticality and anachronistic nature of the committee's approach. Trying to establish the cost of practising law and then adding on profit (ie what the great and the good think solicitors should earn) is an outdated approach. What the sub-committee might more usefully have done was to identify market rates in the highly competitive legal market. This would have been far easier to do and might have led to an acceptable level of response. The MR makes reference to market rates in his response, but what he will actually do is unclear.

Contract

Continuing joy

An upgrade cures a downgrade.

The battle between text and context in contractual interpretation had looked like flowing in the direction of the text. Judges (particularly first instance judges) generally seemed happier in focusing on what the words mean, justifiably doubting their ability to ascribe commercial common sense to one meaning or another. But, as has happened in the past, a higher court then ebbs in the other direction, borne by a bore of self-confident contextual extrapolation.

So with *Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata CLO 2 BV* [2014] EWCA Civ 984. The question was whether a condition requiring that "the ratings of the Class A1 Notes have not been downgraded below their Initial Ratings" was met in 2013 if the rating had been downgraded, in 2010, but then upgraded, in 2012.

The Chancellor decided that this was an all or nothing condition. If the ratings had ever been downgraded, the condition could never thereafter be fulfilled. He focused primarily on the words, noting that the documents often referred to something having happened and being continuing, words conspicuously lacking from this condition.

The Court of Appeal disagreed. They stressed that interpretation is an iterative process. Each potential interpretation must be tested against the commercial consequences in order to decide whether the meaning really is clear and unambiguous. Testing against the commercial consequences is not merely a safety valve in cases of absurdity. If words have more than one meaning, the court should adopt the meaning which is most consistent with business common sense (while being wary as to whether it can really identify what is and what is not commercially sensible).

In this case, the Court of Appeal tested the Chancellor's meaning against their view of commercial reality and found that meaning wanting. Unsurprisingly, the Court of Appeal found that the alternative meaning (that the downgrade had to be in effect at the relevant time) did accord with business common sense.

This stresses that construing a contract must involve not only a linguistic argument but also an argument as to why the outcome offers commercially the right solution. Only the plainest of plain words are likely to be treated as having one meaning.

Though a business explanation is essential in any argument about construction, the weight that will or should be given to business common sense remains difficult. For example, in *Soufflet Negoce SA v Fedcominvest Europe Sarl* [2014] EWHC 2405 (Comm), Eder J said that "there is no overriding criterion of construction to the effect that an interpretation that makes more business sense is to be preferred", citing an earlier Court of Appeal case as authority for this proposition.

In *Soufflet*, Eder J picked the interpretation that he preferred as a matter of language, punctuation and overall internal structure of the clause in question. Against that, in *Cohen v Teseo Properties Ltd* [2014] EWHC 2442 (Ch), Sales J considered that the drafting of the contract before him was poor and, as a result, that it was hard to conclude that the parties intended the contract to mean what it said literally. In his view, it was therefore particularly important to have regard to business common sense. You pays your money...

Clifford Chance LLP acted for the issuer in *Napier Park*.

Goa to arbitration

A time limited obligation to resolve a dispute by "friendly discussion" is enforceable.

An agreement to agree or to negotiate is unenforceable: *Walford v Miles* [1992] 2 AC 128. But is a requirement that the parties "shall first seek to resolve the dispute or claim by friendly discussion" over a four week period before starting an arbitration also unenforceable? In *Emirates Trading Agency LLC v Prime Mineral Export Private Limited* [2014] EWHC 2104 (Comm), Teare J held that it was enforceable, making the discussions a condition precedent to the commencement of arbitration and therefore to the arbitrators having jurisdiction.

Arbitration

An award in Erewhon

An arbitration award set aside by the court with supervisory jurisdiction can still be enforced.

An arbitration has a seat. The courts of the seat have supervisory jurisdiction over the arbitration in order to ensure that the arbitrators behave properly. If those courts set aside the arbitration award, the arbitration award no longer exists with the result that the award cannot be enforced elsewhere, specifically not in England.

In most cases, this will be correct. But not in all cases. In *Yukos Capital SarL v OJSC Oil Company Rosneft* [2014] EWHC 2188 (Comm), Simon J decided that it does not apply if the decision to set aside the arbitration award should not be recognised in England because the decision is tainted by fraud, is contrary to public policy or was obtained by breach of the principles of natural justice.

If the decision setting aside the award is not recognised, the award stands as if there had been no challenge to it. It is not a question of the award floating free in a supra-national ether; it is merely a question of whether the foreign court decision should be recognised, a question to which the normal rules on the recognition of a foreign judgments apply.

There are cases that have upheld an obligation to mediate prior to going to court, provided that there is sufficient procedural structure around the mediation to enable it to be enforced without more (eg *Holloway v Chancery Mead Ltd* [2007] EWHC 2495 (Ch)), and cases where obligations of this sort have been held to be unenforceable (eg *Sulamerica v*

Enesa Engenharis [2013] 1 WLR 102 and *Wah v Grant Thornton* [2012] EWHC 3198 (Ch)). It really comes down to whether the judge thinks that the uncertainties of what is required are so insuperable as to render the obligation meaningless, or whether the judge considers the difficulties identified to be overstated.

Teare J was firmly in the latter camp. Influenced by Australian jurisprudence, in *Emirates Trading Agency* he decided that there was no contrary English case on point that obliged him to hold the clause unenforceable. He concluded that the agreement was complete and that it was sufficiently certain. An obligation to resolve a dispute by discussion had an identifiable, if implied, standard that the court could apply: fair, honest and genuine discussions in good faith aimed at resolving the dispute. It might be difficult to prove breach, but that was not the same as saying that the obligation itself lacked certainty. Further, where a party has voluntarily accepted a limitation on its negotiating position (to do so in good faith to resolve the dispute), it could not be said, *pace* Lord Ackner in *Walford v Miles*, that it was inherently incompatible with the process of negotiation.

A key point was that the obligation to discuss was time limited. Its function was to delay the arbitration by four weeks, offering the chance of avoiding a lengthy and costly arbitration; it did not compel the parties to reach agreement. But for the time limit, the clause would probably have been unenforceable.

In any event, having decided that four weeks of discussion was a condition precedent to arbitration, the judge decided that the party which had initiated the arbitration had complied with this obligation and that the arbitrators therefore had jurisdiction to give their award. A month in Goa well spent.

English law rules, OK

English law contracts can be terminated for reasons of insolvency even if barred by foreign insolvency law.

The laws of some countries prohibit the termination of a contract by reason of the other party's insolvency. For example, in the US clauses of this sort are called *ipso facto* clauses, and are commonly unenforceable. English law is different, giving greater weight to freedom of contract than to protecting creditors. Termination for the other side's insolvency is permissible (though the anti-deprivation principle may limit this ability in rare circumstances: *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] AC 383). Even administration, a core part of the "rescue culture" for the financially failing, does not prevent termination of a contract by reason of the administration (*Bristol Airport plc v Powdrill* [1990] Ch 744).

In *Re Pan Ocean Co Ltd, Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch), D sought to inveigle the US approach into an English law contract through the rules applicable in a foreign insolvency. The Cross-Border Insolvency Regulations 2006 introduce into English law the UNCITRAL Model Law on Cross-Border Insolvency. The Model Law provides for the recognition of foreign insolvencies. Where recognition is given, article 21(1) allows the English court to "grant any appropriate relief, including (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets..." In *Pan Ocean*, D's South Korean insolvency proceedings had been recognised under the Regulations, and the judge assumed that it would be contrary to South Korean insolvency law for C to terminate its English law shipping contract with D by reason of D's insolvency. D asked the judge to restrain C from exercising the express right of termination given by the contract.

Morgan J concluded that he not could stop C from terminating the contract. He considered that, echoing section 11(3) of the Insolvency Act 1986, "individual actions and individual proceedings" in article 21(1) referred to court and similar steps, not to self-help contractual remedies. He also rejected the argument that "any appropriate relief" gave him the power to do whatever he wanted. This was, he thought, confined to the kind of relief that an English court could give when dealing with a domestic insolvency. There is no power to stop termination of a contract where a domestic insolvency is concerned, so there is no power for a foreign insolvency. English law as the governing law of a contract therefore trumps foreign imposters.

Late knights

Arbitration in London does not mean that the Late Payment of Commercial Debts (Interest) Act 1998 applies.

If a contract for the sale of goods or the supply of services does not provide for interest, the Late Payment of Commercial Debts (Interest) Act 1998 is worth considering, not least because it provides for interest at a whopping 8% over the Bank of England's rate. However, similar to (though not the same as) UCTA, the Act does not apply to contracts which, but for the choice of English law as the applicable law, have no significant connection with England and would not otherwise have been governed by

English law (section 12).

In *Martrade Shipping & Transport GmbH v United Enterprises Corporation* [2014] EWHC 1884 (Comm), Popplewell J had to consider what provided a significant connection with England and when, for these purposes, a contract would otherwise be governed by English law. He decided that the penal rate of interest provided by the Act reflected domestic policy considerations, and that the purpose of section 12 was to avoid this penalty discouraging foreigners from using English law. He therefore concluded that the significant connection had to arise from the transaction itself - the place of performance, the nationality of the parties, where the parties carried on business etc - not from the dispute resolution clause. A London arbitration clause was not enough, nor was the language of the contract, nor adjustment of general average in London.

Similarly, the dispute resolution clause could not lead to the conclusion that the contract would, apart from the choice, be governed by English law. If the clause is relevant in determining the governing law, it represents an implied choice and therefore can't be relevant to determine what would apply absent (express or implied) choice.

So foreigners can safely come to these shores to resolve their disputes without risk of excessive interest rates; these are only imposed on the natives. Better, however, to provide expressly for interest in the contract.

(The rate of interest on judgments is also 8%: section 17 of the Judgments Act 1838. The rate has not been changed since 1993, and is far above current interest rates. However, a court can, in its discretion, apply a different interest rate to judgments in a foreign currency: section 44A of the Administration of Justice Act 1970. In *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908, the CA decided that, despite the Judgments Act rate now being penal, the aim of interest on a judgment is compensatory, and that is sufficient reason not to apply the Judgments Act rate to foreign currencies.)

Soft on crime

Money paid for an illegal purpose can be recovered before the purpose is carried out.

C pays money to D under an illegal contract pursuant to which C and D intend to buy shares in reliance on insider information. In fact, no insider information is forthcoming, no shares are bought and the idea is abandoned. D fails to return the money to C. C sues for its return on the basis of total failure of consideration or an agent's obligation to account, bizarrely pleading the illegal purpose of the contract. Does the illegality prevent C's recovering the payment?

In *Patel v Mirza* [2014] EWCA Civ 1047, the Court of Appeal overturned the first instance judge's decision and decided that C could recover the money (the judge had been the first person to recognise that illegality might be relevant).

Rimer and Vos LJJ held that the fact that C had relied in on the illegality in pleading his cause of action (whether or not he needed to do so) was prima facie enough to bar the claim for illegality.

However, C and D had not in fact carried out their illegal intent. Even though this failure of the criminal scheme was not the result of a Damascene conversion by C but because D's source of insider information failed to deliver, Rimer and Vos LJJ considered that the non-performance of the scheme was still sufficient *locus poenitentiae* to allow C to recover the money from D. The reason behind C's withdrawal from the illegal scheme was irrelevant.

Gloster LJ reached the same ultimate conclusion, but for wider reasons, particularly on the first issue. She considered that the mere fact of pleading or relying on an illegal purpose did not in itself lead to the application of the ex turpi causa rule. It would only do so if there was a strong connection between the illegality and the cause of action. C was not seeking to enforce the illegal contract but only to claim ancillary relief related to the illegal contract. It was necessary to consider the policy behind the illegality in order to decide whether it should bar this claim. Gloster LJ could see no reason why the legislation on insider trading should prevent C recovering from the money he had paid to D when no insider trading, or trading of any sort, had actually taken place. She was influenced by the fact that C may not have known that insider trading was illegal, while D clearly did.

The bottom line, as Gloster LJ put it, is that "it is almost impossible to ascertain or articulate principled rules from the authorities relating to the recovery of money or other assets paid or transferred under illegal contracts."

Lord Hughes made the same point *Hounga v Allen* [2014] UKSC 47, saying that "a generalised statement of the conceptual basis for the doctrine under which illegality may bar a civil claim has always proved elusive." This did not stop the Supreme Court in *Hounga* coming up with a new generalised statement that departed from the approach in *Tinsley v Milligan* [1994] 1 AC 340, which had been followed by the majority in *Patel*, and took an approach more like that of Gloster LJ. This approach, imported from Canada, is to focus on the integrity of the legal system. Would the award of damages in a civil suit allow a person to profit from illegal or wrongful conduct or permit an evasion of a penalty imposed by the criminal law? If so, illegality bars the claim; if not, the claim can proceed.

In *Hounga*, C fraudulently secured entry into the UK on a false passport, and then overstayed her visa. She was also illegally employed as an au pair to look after D's children, being abused by D with threats of being reported to the authorities. D eventually threw C out of D's house, and C ended up with the social services. C sued D for breach of contract, unfair dismissal and racial discrimination in her sacking.

By the time the case reached the Supreme Court, all that was left was whether the illegality of the whole enterprise was sufficient to defeat C's discrimination claim, for which she was awarded compensation for injury to her feelings. The Supreme Court accepted (with varying degrees of enthusiasm) that the illegal employment contract could not be enforced, nor could C's claim for unfair dismissal.

The Supreme Court decided that the discrimination claim was not barred by the illegality. It didn't allow C to profit from her illegal contract; it didn't allow her to evade a penalty for wrongful entry to the UK; it wouldn't encourage others to enter the UK illegally; but it might encourage people to follow D in entering into illegal contracts of employment because no consequences would follow from breach of the contract.

A majority of the Supreme Court were also influenced by their view that D was involved in human trafficking, and any rejection of C's claim would run counter to the UK's policy of discouraging trafficking.

Jurisdiction

Greek fire

Damages can be obtained for breach of a jurisdiction agreement.

The Alexandros T (the case sometimes known as *Starlight Shipping Company v Allianz Marine & Aviation Versicherungens AG*) has already been to the Supreme Court once on a question of jurisdiction. It has now dropped down one tier to the Court of Appeal in order to decide outstanding issues ([2014] EWCA Civ 1010). The nub of the Court of Appeal's decision is that English courts can award damages for breach of a jurisdiction clause, by the bringing of proceedings in the wrong (ie foreign) court, even if that wrong court is elsewhere within the EU. Indeed, the damages can be claimed whilst the foreign court is still hearing the case and protected by the constitution of a fund.

The case concerned an insurer's failure to pay out on a lost vessel. The owners sued in England (as required by the jurisdiction provisions in the insurance contract), and alleged that the insurers had sought to persuade the crew to perjure themselves, had spread false rumours about the owners and generally behaved badly. The case settled through a Tomlin order under which the insurers paid the maximum amount due under the insurance contract (though with no interest or costs), the court having rejected a claim for damages for late payment. The settlement agreement gave exclusive jurisdiction to the English courts. End of story.

Or not. Three years later, the owners sued the insurers in Greece for the equivalents of malicious falsehood and defamation on the same facts as had been alleged in England. The insurers lifted the stay on the original English proceedings, as well as starting a new action, to enforce the terms of the Tomlin order. The insurers sought a declaration that the proceedings in Greece breached the jurisdiction provisions in the Tomlin order and the insurance contract and an order that the owners indemnify the insurers for any liability in Greece.

The Supreme Court decided that the English courts had jurisdiction over the insurers' claims. Those claims did not involve the same cause of action as the owners' were pursuing in Greece, and therefore fell outside article 27 of the Brussels I Regulation. They were, however, related claims within article 28 of Brussels I but the Supreme Court decided, in its discretion, not to stay the English proceedings because that would have rewarded the owners' breach of contract.

The case reverted to the Court of Appeal to decide on the substantive points. The Court decided that the Greek proceedings fell within the jurisdiction provisions of the underlying insurance contract and the settlement agreement. The Court of Appeal went on that awarding a declaration of, and damages for, breach of the jurisdiction agreements did not offend EU law. The English courts are unable to grant anti-suit injunctions against other EU courts because it is for the court first seised to determine its jurisdiction (*Turner v Grovit* [2005] 1 AC 101); in contrast, damages recognise the jurisdiction of the foreign court rather than interfering with it (even if they do render the exercise of that jurisdiction futile). Whether the CJEU would agree with the Court of Appeal on this is, perhaps, questionable.

The Court of Appeal also ordered the creation by the owners of a fund to meet the insurers' ongoing expenses in the Greek litigation (this was done, technically, under an indemnity provision in the settlement agreement rather than to support the claim in damages). As a result, the owners will have to pay all costs on all sides as they pursue their Greek action - provided, of course, that the English order can be enforced. If this requires the insurers to go to Greece, that might be interesting.

(Note: on 10 January 2015, the Brussels I Regulation (recast) comes into force. This allows a court with the benefit of an exclusive jurisdiction clause to proceed with its case even if another EU court is first seised. Though not without its ambiguities, on the facts of *The Alexandros T*, this would have meant that the English courts could simply have proceeded with the case, and the Greek courts should have declined to hear the case, even though the Greek courts were first seised. What would in fact have happened may be more open to question.)

Companies

A free shot

Directors can act for whatever reasons they wish when imposing restrictions on shares.

The normal principle of company law is that directors must act in good faith in the best interests of the company, using powers for their proper purposes (eg *Hogg v Cramphorn Ltd* [1967] Ch 254 and, now, section 171ff of the Companies Act 2006). But the Court of Appeal has decided, by majority, in *JKX Oil & Gas plc v Eclairs Group Ltd* [2014] EWCA Civ 640 that this doctrine does not apply to restrictions imposed on shares in a public company following a request for information about "interests" in those shares under Part 22 of the Companies Act 2006. Directors can act for any reason they like, apparently, or, at least, this power has almost unlimited proper purposes.

Part 22 of the Companies Act 2006 allows a public company to serve notices on shareholders enquiring who has an "interest" (very widely defined) in the shares. It is a crime not to answer and, in the event of default, the court can impose restrictions on transfer of the shares, on voting and on dividends. Companies' articles often expand this power by allowing the directors to impose sanctions without going to court if they reasonably consider that an answer is inaccurate. In *JKX Oil*, the directors reasonably considered the answers they received from D to be inaccurate, and imposed voting restrictions. But they did so in the hope that this would enable them to get certain special resolutions through the next AGM rather than to assist in extracting the correct information.

Briggs LJ, following Mann J at first instance, held that using the provisions for this purpose was improper and, as a result, that the board resolution imposing the restrictions was ineffective. Longmore LJ and Sir Robin Jacob disagreed. They considered that the doctrine had no significant role to play in this context because the shareholder had only itself to blame for failing to give proper answers, because the shareholder could cure the default at any stage by giving correct answers, because the restrictions allowed by the Act were intended to be penal, and because the whole purpose of restricting voting rights was to stop the shareholder voting at a general meeting. Essentially, once a shareholder chooses to go into default by failing to answer a question, the directors can declare open season on the shareholder.

Contentious Commentary is a review of legal developments for litigators

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