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Contentious Commentary

Privilege

Lifting the cloak of invisibility

Marking correspondence without prejudice does not make it so.

The without prejudice rule prevents a court from hearing evidence of settlement negotiations. For the rule to apply, there must be a genuine dispute and the evidence must relate to genuine attempts to settle that dispute.

In *Avonwick Holdings Ltd v Webinvest Ltd* [2014] EWHC 3222 (Ch), David Richards J explored whether correspondence about restructuring a loan could be without prejudice. He decided that the correspondence was not without prejudice because, on the facts, there was no dispute about liability at the time of the correspondence. The proposed restructuring was a contractual negotiation to extend the time for payment of the original loan, not a dispute about the loan. A dispute that arose later could not retrospectively clothe in a cloak of invisibility correspondence that was not, at the time, without prejudice.

Avonwick is all the stronger because the parties' lawyers marked the correspondence about the restructuring "without prejudice and subject to contract". The fact that it was marked without prejudice was, in the judge's view, a strong indication that there was a genuine dispute and that the correspondence was inadmissible, but marking is not conclusive. In this case, there was no evidence of any dispute, genuine or otherwise, at the time of the correspondence. The fact that the borrower subsequently chose to contest its liability was not enough.

The without prejudice rule is based in part on public policy and in part on express or implied agreement between the parties (*Cutts v Head* [1984] Ch 291). The argument in *Avonwick* was based solely on the former - the policy of encouraging the settlement of disputes. If it had been argued that correspondence marked on both sides without prejudice created an agreement not to adduce that correspondence in evidence, would the outcome have differed? Perhaps not, but worth a try.

Evident mistakes

Don't assume that privileged material has been disclosed by mistake.

CPR 31.20 provides that where a party mistakenly allows a privileged document to be inspected, the inspector can use it only with the consent of the court. The law before the introduction of CPR applies to the court's discretion to allow use of a privileged document (*Al-Fayed v Commissioner of Police for the Metropolis* [2002] EWCA Civ 780), namely that consent will be given unless permitting inspection of the document was an obvious mistake.

Rawlinson & Hunter Trustees SA v Director of the Serious Fraud Office [2014] EWCA Civ 1129 does not change the law but its emphasis is interesting. It stresses that a party is not obliged to assert privilege in respect of privileged documents and, as a result, no one is bound to assume that the inclusion of privileged documents in those disclosed is a mistake. The starting point is that a party who is permitted to inspect documents can assume that the documents were intentionally produced whether or not they are privileged. It must be really very obvious that the disclosure is a mistake before the court will intervene.

Rawlinson is also interesting for the regrets expressed by Longmore LJ

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about the state of English law. He noted that the Australian courts have parted company with the English courts in this area, holding that where a privileged document has been disclosed by mistake, the court will ordinarily order its return without bothering about whether the mistake was obvious. He thought that the English courts should follow suit but, since there is already a binding Court of Appeal authority on the point (*Al-Fayed*), this will require intervention by the Supreme Court.

Tort

Titanic battle

A securitisation vehicle can sue a valuer in negligence.

Securitisation vehicles operate on a limited recourse basis, ie they issue notes to investors entitling the investors to be paid interest and principal, but the vehicles' liability is limited to distributing the monies they collect. In these circumstances, does a vehicle have a claim if the money its collects is reduced because of a valuer's negligence? The vehicle suffers no loss because its liability to investors is correspondingly reduced.

In *Titan Europe 2006-3 plc v Colliers International UK plc* [2014] EWHC 3106 (Comm), Blair J decided that the vehicle, C, did have a claim for losses.

A bank held a loan to a German company secured on real estate in Nuremberg. As part of the securitisation, the property was valued and the loan assigned to the C, with the security over the property going to a security trustee. The financial crash then happened, the borrower went bust, and the property turned out to have been negligently overvalued. Noteholders will therefore receive less than they would otherwise have done. The valuer, D, argued that the noteholders had a cause of action against it, but that C did not because C suffered no loss.

Blair J was concerned that allowing the noteholders (who were, as is customary, split into tranches) a direct claim against the valuers would upset the priorities inter se that were controlled by the payments waterfall applicable to the notes. He concluded that, to the extent that

Illegality

Illegal drugs

Only crimes and quasi-crimes will suffice for the ex turpi causa rule.

The ex turpi causa rule continues to vex the courts because, as Lord Sumption put it in *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, the doctrine necessarily operates harshly in some cases and can confer capricious benefits on merit-free defendants. For that reason, some courts have favoured a discretionary approach. Those courts were slapped down by the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340, and now again by the Supreme Court in *Servier*.

Both House of Lords and Supreme Court stressed that the principle is a rule of law, not dependent on an assessment of the relative moral righteousness or otherwise of those involved. Rules must be applied regardless of whether the judge views the outcome with satisfaction or distaste.

Servier concerned a limited point, namely what constitutes turpitude for the purposes of the rule. The case was a claim on an undertaking in damages given in order to obtain an interim injunction to prevent the sale of a drug in the UK. The judge eventually found that the patent involved was invalid, with the result that the injunction should never have been granted. An obvious case for calling on the undertaking in damages, save for the fact that, in order to sell the drug in the UK, D would have manufactured it in Canada, where to do so would have been illegal as contrary to a patent that was valid there. Breach of Canadian intellectual property law was, C argued, sufficient turpitude to engage the ex turpi causa rule and, thereby, to compel the court to refuse to grant D the damages to which it would otherwise be entitled.

The Supreme Court did not agree. Turpitude means criminal offences or something pretty close. This is because the ex turpi causa rule exists in order to defend the public interest, and no public interest in engaged by private wrongs, such as torts (other than those involving dishonesty), breaches of contract and other statutory and civil wrongs. The parties themselves can squabble about private consequences. Inevitably, there will be exceptional cases, both of crimes that do not engage the principle and of non-crimes that do, but the Supreme Court was concerned to limit the principle's scope by shrinking the territory of turpitude.

Servier is the second case in the Supreme Court this year to deal with ex turpi causa (following *Hounga v Allen* [2014] UKSC 47), and had the feel of a holding position. The Supreme Court stressed that it was only looking at one aspect of the rule - not, for example, the necessary relationship between the turpitude and the claim or the attribution of an agent's turpitude to the principal - nor had it been asked to re-consider *Tinsley*. A thorough review is for another day.

noteholders had a claim, it devolved with the notes (so those who sold their notes also sold their claim) but, more significantly, that C itself had a claim against the valuers, with any recoveries going into the waterfall.

C could sue the valuers because C suffered a loss when C bought the loan, with the accompanying security, because C acquired a chose in action that was not worth the price it paid. C's financing of its acquisition through the note issue was an irrelevant transaction with third parties, even if part of the same overall deal, which, under the res inter alios acta principle, did not affect C's damages.

Blair J might also perhaps be taken to have hinted that the security trustee might have been an appropriate claimant, but no one argued that before him. He therefore contented himself with saying that his decision depended solely on the documents before him and the facts; other documents and facts might produce different outcomes.

Crest fallen

Another misselling claim fails.

Success in a derivatives' misselling claim commonly depends upon persuading the judge that derivatives are instruments of the devil, whose sulphurous nature overwhelms their unwary victims, such that, despite often borrowing large amounts of money, the victims could not understand the risks inherent in interest rate movements or the meaning of the contracts they signed.

But even convincing the judge of the presence of diabolism is not necessarily enough. In *Crestsign Ltd v National Westminster Bank plc* [2014] EWHC 3043 (Ch), the judge seemed persuaded of all that but still found for the bank, D, because D's terms of business were entirely, and repeatedly, clear that D was not giving C any advice about the derivatives.

C was refinancing loans supporting a commercial property portfolio. It did this in June 2008 with an interest-only loan for five years. The interest was floating rate. At D's behest, C also entered into an interest rate swap with D. The swap secured C a reduced interest rate for the first two years of the loan, followed by a fixed rate for eight years (though D had a right to terminate the swap in years five to eight). The swap was therefore for a longer term than the loan, though C anticipated extending the loan for a further five years. As events have turned out, of course, the fixed rate is far higher than C would otherwise now be paying.

C alleged that D owed it a common law duty of care to provide proper advice and recommendations on the options available, which D failed to do.

But for one factor, the judge would have held that D's conduct was such as to give rise to a *Hedley Byrne* advisory duty and that D was in breach of that duty. The judge accepted that the suitability obligations in the regulatory scheme do not of themselves give rise to common law duties (*Green & Rowley v Royal Bank of Scotland plc* [2013] EWCA Civ 1197), but decided that a common law duty of care could, on the facts, produce similar results. In this case, C had reasonably relied on D's skill and judgement (despite having an accountant on its board, who was asked for comments on the transactions, and there being a conflict of interest between C and D), which was sufficient to give rise to a duty of care.

D was in breach of that duty because the swap was unsuitable in the light of the difference in the length of the loan and the swap (though C intended to extend the loan), because it was inflexible (aren't all contracts?), because it placed nearly all the risk on C because of D's ability to terminate in the final period (if interest rates rose, the risk was on D for five years), it exposed C to adverse interest rate conditions for seven years (or protected C from adverse conditions) and had high break costs (ie damages for breach of contract).

The judge did, however, conclude that if the bank's obligations had been confined to ensuring the accuracy of the information it gave to C, the bank had complied with that duty.

The one factor that drove the judge away from giving judgment for C was D's terms of business. These set out repeatedly that, whatever D might say, C could not rely on D's advice. As the judge put it, D's salesman "was saying in effect..: "although I recommend one of these products as suitable, the banks do not take responsibility for my recommendation; you cannot rely on it and must make up your own mind." I do not see anything unrealistic about that…"

This established the basis of the dealings between C and D (or created a contractual estoppel) rather than being an exclusion clause. It was not, therefore, subject to UCTA (though if the term had been subject to UCTA, it would have been unreasonable).

The case is arguably a strong one for banks. D lost on most points (though the (deputy) judge was more than a trifle generous to C), but D's contract terms and its repeated assertion that it was not giving advice to C ultimately trumped all else. Banks may, however, want to check that their procedures and documentation are in order.

Contract

The day of reckoning

ISDA calculation provisions must be strictly applied.

In *Lehman Brothers Finance SA v SAL Oppenheim jr & Cie KGAA* [2014] EWHC 2627 (Comm), D failed to calculate the sum due on termination of the ISDA Master Agreement correctly, but the court intervened and decided the sums due on the basis of expert evidence, reaching the position that D should itself have reached.

C and D entered into Nikkei index options subject to the 1992 ISDA Master Agreement. The Agreement provided for automatic early termination on the occurrence of an event of default. When the Lehmans group's parent company went into Chapter 11 bankruptcy on 15 September 2008, the Agreement accordingly terminated. This required D, as the non-defaulting party, to request market quotations from four market makers as of the Early Termination Date or as soon as reasonably practicable after that Date in order to calculate the sum due. D could only avoid this if quotations could not be obtained or if they would not produce a commercially reasonable result.

D did not obtain any market quotations or, it seems, even try to do so. Instead, it calculated the close out amount from valuations based on market rates at close of business on 12 September 2008. (The decision to take this approach had, presumably, nothing to do with the fact that D (although the non-defaulting party) was the payer on close out, and rates before the impact of Lehman's insolvency was felt in the market were more favourable than those after.)

Burton J was clear that whatever D could do, D could not calculate the close out amounts by reference to a date before the Early Termination Date. The Tokyo markets were closed on 15 September 2008, so the day as of which quotes should have been obtained was 16 September. Experts agreed that quotes would have been obtainable on that day had D bothered to try. (D had in fact hedged its position on 15 September, but declined to disclose the terms upon which it had done so.) It could not be said that quotations could not be obtained or that quotations would not have produced a commercially reasonable result (indeed, D had never addressed its mind to this issue).

Burton J was also clear that any quotes obtained had to be "live", ie capable of being accepted and not merely indicative or a historic assessment of what quotes would have been on the relevant day.

D had therefore failed to do what the contract required. D was in breach of contract, which required the court to try to determine what price D would have come up with had it conducted the close out properly. Unsurprisingly, the expert evidence produced a figure payable to C significantly higher than the figure produced by D.

C was entitled to interest on the sum due to it at a rate equal to its cost of funds. C claimed interest at the rate at which its parent would have lent to it on 12 September 2008. The judge rejected this because that was not the payment date; on the payment date, the parent was not in a position to lend anything to anyone. Instead, the judge took the rate of the debtor in possession funding that C's parent had obtained as being indicative of the rate at which C could have borrowed.

The bottom line is that D failed to comply with the requirement in the Agreement to obtain quotes. The court therefore stepped in to determine what the price resulting from the quotes would have been. This was, however, a case where the sum was payable to the defaulting party; by failing to operate the close out provisions properly, the paying party placed itself in breach of contract, and the court remedied that breach.

Tidal waive

A payment made through CHAPS is subject to the rules and practices of the system.

If you ask your bank to make a payment to someone through CHAPS, you might expect the payment to be subject to the rules and practices of the CHAPS system. And so the Court of Appeal held in *Tidal Energy Ltd v Bank of Scotland plc* [2014] EWCA Civ 1107, but it was a surprisingly near thing.

In *Tidal Energy*, C instructed its bank to make a CHAPS payment and to debit its account with the relevant amount. C filled in the bank's CHAPS form, which included the account details of the recipient (number and sort code), together with the recipient's name. The receiving bank had an account that fitted the number and sort code, but the name on the account was different because C had fraudulently been supplied with the wrong details. Nevertheless, the payment went through because practice in the CHAPS system is to act only on the account number and sort code, ignoring the name. Anything else would slow down the system such that the target of all payments being made within 1½ hours would be impossible. The money disappeared.

C sued its bank on the basis that the bank had no authority to debit C's account because the account to which the payment was made was in the wrong name. Floyd LJ, an intellectual property lawyer, agreed with C. The bank's CHAPS form included the intended recipient's name, along with the account number. C was entitled to assume that the payment would be made to an account that met all the criteria on the form, including the name. If the bank wanted anything else, it should amend its form. The fact that the bank had no means to check the recipient's name counted for nothing.

Lord Dyson MR and Tomlinson LJ were more realistic. If you ask your bank to make a payment through the CHAPS (or any other) system, you do so subject to the rules of the system, which are not a secret. It is impractical to check names, not only for timing reasons but because of the huge risk of error in a name and because the paying bank has no idea what name is attached to any particular account number. C was defrauded, not the bank. C couldn't pass on the losses from the fraud to its bank.

Credit when due

Injuncting payment on a letter of credit remains hard.

The Privy Council has confirmed that it is very difficult to obtain an injunction to stop a bank from paying out on a letter of credit, even at an interlocutory stage. In *Alternative Power Solution Ltd v Central Electricity Board* [2014] UKPC 31, the Privy Council said that the test is that "it must be clearly established at the interlocutory stage that the only realistic inference is (a) that the beneficiary could not honestly have believed in the validity of its demands under the letter of credit and (b) that the bank was aware of the fraud."

The merits threshold for an interlocutory injunction is usually a serious issue to be tried, which is way under 50%. For LCs, the Privy Council thought the threshold is that it must be seriously arguable on the material available that the only realistic inference is fraud, which the Privy Council thought was a significantly higher threshold (though that is not obvious logically).

While restraining a bank from paying out under an LC is difficult, restraining the beneficiary of the LC from making a demand on the LC remains, it seems, easier (eg *Simon Carves Ltd v Ensus UK Ltd* [2011] EWHC 657 (TCC) and *Doosan Babcock Ltd v Commercializadora de Equipos y Materiales Mabe Limitada* [2013] EWHC 3010 (TCC) and [2013] EWHC 3201 (TCC)).

Rules of incorporation

A jurisdiction clause is incorporated into a contract by a reference to arbitration.

A bill of lading (a negotiable instrument) incorporates the provisions of a charterparty "including the Law and Arbitration clause". In fact, the charterparty does not contain an arbitration clause; it contains a clause giving exclusive jurisdiction to the English courts. Is the wording in the bill sufficient to incorporate the jurisdiction clause and, as a result, for the English courts to grant an anti-suit injunction restraining the cargo interests from suing in Morocco?

Part of the problem for the Court of Appeal in *Caresse Navigation Ltd v Zurich Assurances Maroc (The Channel Ranger)* [2014] EWCA Civ 1366 was that there are numerous historic cases about the meaning of words of incorporation in bills of lading. These cases are not entirely consonant with the contemporary approach to the interpretation of contracts. In particular, general words of incorporation in a bill of lading are deemed insufficient to incorporate "ancillary" clauses, such as law and arbitration clauses. Hence the express reference to them in the bill of lading.

Fixations

An economic tort remedies the passing of property.

Whether a chattel becomes part of the land on which it stands is a matter of law, not the intention of the relevant parties (though the purpose, objectively ascertained, of the attachment to the land is relevant).

As a result, in *Lictor Anstalt v Mir Steel UK Ltd* [2014] EWHC 3316 (Ch), Asplin J decided that an agreement between the supplier of a hot strip steel mill and the owner of the land on which it was erected that stated that the mill was a chattel and would remain the property of the supplier did not prevent the 300 metre long, 4000 tonne mill bolted to concrete foundations becoming part of the land. Title to the mill therefore passed from the supplier to the landowner.

As a result, when the land on which the mill stood was sold, the buyer also obtained title to the mill. That was sufficient to defeat the supplier's claim to the return of the mill, but insufficient to defeat the supplier's claim in tort against the buyer.

The contract under which the mill was supplied contained a provision allowing the supplier to enter on the land and remove the mill - a long and expensive, but not impossible or unknown, task. (This provision was also key to the supply agreement's not being void for common mistake.) By selling the land, the original landowner put itself in breach of the contract because it was no longer able to comply with its obligation to allow the supplier to remove the mill.

Further, the buyer of the land knew about the supply contract and, by acquiring the land, was sufficiently involved in the breach to render it liable for procuring breach of contract. Tort therefore trumped property law (since the buyer was solvent), and the buyer of the land must pay for the mill.

But in *Caresse* the Court of Appeal refused to be distracted by the old cases. It considered that the question was how a reasonable person, with the relevant background, would have understood the wording of the bill. The Court of Appeal concluded that this person would have realised that something had gone wrong with the language of the bill since there was no arbitration clause in the charterparty and, as a result, that the reference to arbitration was a reference to the jurisdiction clause. The Court of Appeal could not overrule the earlier cases since some were at Court of Appeal level, but its clear indication was that the contemporary approach should prevail in all areas, even areas as singular as the shipping market.

Jurisdiction

The parent trap

A subsidiary does not have its central administration where its parent company operates.

Under the Brussels I Regulation, a company can be sued in its domicile. It is domiciled where it has its statutory seat, its central administration and its principal place of business (ie it can be domiciled in up to three places simultaneously). The first of these will usually be easy to identify, the last is a matter of fact but the second raised, for a time, some awkwardness in *Young v Anglo American South Africa Limited* [2014] EWCA Civ 1130 (called *Vava* at first instance).

Young concerned an attempt to sue a South African company in England on the basis that its central administration was in England because its ultimate parent was English. The Court of Appeal rejected this. It considered that a company's central administration is located where the company, through its relevant organs according to its constitution, takes decisions that are essential for that company's operations, ie where, under its constitution, the company conducts its entrepreneurial management.

C failed to show a good arguable case that D's central administration was in England. D might have been heavily influenced by the views of its parent, and the group's management committee might meet in England, but formal decisions for D were taken by its board in South Africa.

The Court of Appeal therefore upheld basic company law. As long as proper corporate procedures are honoured and a parent does not usurp the functions of a subsidiary's board, the subsidiary will be domiciled where its board meets, usually the place of incorporation. A claimant against a subsidiary cannot ignore that in favour of the parent's domicile.

Costs

Turning back the clock

The strict approach of Part 36 is not to be applied to *Calderbank* offers.

If a defendant beats its Part 36 settlement offer, even if only by £1, it gets its costs from the time of the offer. The Court of Appeal decided otherwise in *Carver v BAA plc* [2008] EWCA Civ 412, but the decision was deservedly condemned and was eventually reversed by CPR 36.14(1A). But what about *Calderbank* offers, ie offers outside Part 36 made without prejudice save as to costs? Does the strict, Part 36, approach apply, or does the court have a broad discretion?

In *Coward v Phaestos Ltd* [2014] EWCA Civ 1256, the Court of Appeal decided that the court had a wide discretion in deciding what consequence to accord *Calderbank* offers. CPR 44.2(2) sets out the general rule that a winner gets its costs, but CPR 44.4 goes on to say that in deciding what order to make about costs, the court must have regard to all the circumstances, including any admissible offers to settle. This, the Court of Appeal considered, gave the court a broad discretion, and CPR 36.14(1A) should not be applied by analogy. *Calderbank* offers are, therefore, considerably less of a threat than Part 36 offers.

Middle ground

A refusal to mediate does not lead to a costs penalty.

In *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4) Ltd* [2014 EWHC 3148 (TCC), D refused to mediate on grounds that Ramsey J considered to be unreasonable. Normally a costs penalty would follow, despite D's overall success. However, the judge recognised that a failure to mediate was only one of the factors to be taken into account when considering costs. C had also refused an offer made without prejudice save as to costs, which was another factor to be taken into account (CPR 44.2(4)(c)). Overall, the judge concluded that he should not take into account either D's failure to mediate or C's refusal of the settlement offer, leaving the general rule (CPR 44.2(2)(a)) that the winner (D) should receive its costs.

Courts

A free ride

Technicalities avoid an interim payment.

In *Deutsche Bank AG v Unitech Global Ltd* [2014] EWHC 3117 (Comm), D will have to pay C either $120m or $170m. Shouldn't D get at least the smaller sum now rather than allowing C to stall? Teare J thought not but recognised that his refusal to order the payment "can be said to be unsatisfactory". He considered that the rules gave him no option.

The case concerned a loan. Cooke J decided that C's alleged involvement in LIBOR fixing did not give D a misrepresentation claim against C and, as a result, that D had no right to rescind the loan agreement ([2013] EWHC 471 (Comm)). D had no other defence and, as a result, Teare J entered summary judgment against D for the amount of the loan, ie $170m ([2013] EWHC 2793 (Comm)).

The Court of Appeal then decided that Cooke J was wrong and that D had a sufficiently arguable misrep claim such that rescission of the loan agreement was a possibility ([2013] EWCA Civ 1372). The judgment must go. But even if D succeeds in its misrep claim, rescission will only be granted on the basis that D repays the net amount it has received from C, ie $120m. C therefore sought an order that D pay $120m now, or at least pay the money into court.

The first basis upon which C sought payment was a conditional order under CPR 24, ie that D be given permission to defend the claim on terms that it paid the $120m. The court can make conditional orders when the court considers it possible that a defence may succeed but improbable that it will do so (PD24, §4). Teare J's problem was that the Court of Appeal had said that D had a realistic prospect of success on the misrep claim, and he couldn't now say otherwise. The defence did not become improbable just because, as a condition for rescission, D would have to pay $120m.

Secondly, C argued that the court had a general case management discretion to make any order, including an order revoking a previous order (as here), conditional, including on a payment (CPR 3.1(3) and (7)). The judge considered that he could not use general case management powers to get round the requirements of CPR 24.

Finally, C relied on CPR 25.7(1)(c), which allows the court to order an interim payment where the court is satisfied that, at trial, the claimant will obtain judgment for a substantial sum. The problem here was that C made no claim for $120m. Its claim was for $170m on the loan. C would only get $120m if D succeeded in its misrep defence and rescinded the contract, which rescission would be on terms that D paid $120m to C by way of restitution. Teare J did not consider that this could be regarded as C obtaining judgment for that sum. As a result, CPR 25.7 had no application.

This decision will be a joy to D. It owes a large amount of money, but has been able to delay payment until the trial takes place, said to be a couple of years away, because of Teare J's decision. To make matters worse for C, the judge concluded that, had he felt able to order payment of the $120m, he would not have declined to do so on the basis that it would have stifled D's defence. The defect in the rules - or the judge's narrow interpretation of the rules - was all that blocked C's path.

Denton unbound

Denton applies to most applications for an extension of time made after expiry of the time.

Mitchell and *Denton* were concerned with applications under CPR 3.9 for relief from sanctions imposed by the court's rules or a court order. In *Altomart Ltd v Salford Estates (No 2) Ltd* [2014] EWCA Civ 1408, the Court of Appeal explained that CPR 3.9 applies where the rule or order in question itself imposes a sanction. An unless order is a classic example. CPR 3.9 does not apply where, as in most instances under the CPR, there is no express sanction for a failure to do something within a particular time (eg file witness statements).

So far so good. *Mitchell/Denton* is narrowly confined.

But not so fast. Even if there is no express sanction, courts have treated other applications as analogous to an application for relief from sanctions and have therefore applied the same principles. An application for permission to appeal out of time falls within this category. There is an implied sanction where the passing of a time limit prevents a party from doing what it wants. So *Mitchell/Denton* applies, even though the application for an extension of time is under CPR 3.1(2)(a) rather than CPR 3.9. This is not what the rules say, but judges have decided that this is how it shall be.

Mitchell/Denton involves a three stage enquiry: first, the seriousness and significance of the default; secondly, its cause; and, thirdly, evaluating all the circumstances of the case (in particular, the consequences for the future conduct of the case) in order to enable to the court to deal with the application justly.

Altomart itself concerned an application for permission to file a respondent's notice for an appeal eight weeks after the expiry of the time for doing so. Without an extension of time, the respondent could not rely on the extra arguments it wanted; that constituted an implied sanction; and *Mitchell/Denton* therefore applied.

The Court of Appeal decided that the eight week delay was not serious or significant since the appeal would not be heard for a further six months or so. As to the second stage, there was no good reason for the delay (the party got in a new counsel, who took a different view as to the need for a respondent's notice from the counsel originally instructed). As to the third stage, refusing an extension of time would be purely penal, and would serve no legitimate purpose. Extension granted.

The Court of Appeal thus conflated the first and third stages of the *Mitchell/Denton* rules. The effect on the conduct of the case is stage three, when considering all the circumstances of the case, not serious and significance under stage one. A one day delay is not serious or significant, but an eight week delay is clearly serious and significant. But the greater the flexibility, the better.

Multiple mistakes

***Norwich Pharmacal* orders are made against numerous banks.**

Banks inevitably make mistakes. One bank says that in May 2014 it made 603 mistaken payments through the Faster Payments System (which deals with lower value payments than the CHAPS system), whether duplicate payments, mistaken account numbers or such like. This might be a large number of mistakes in absolute terms, but out of 8.5 million payments in total, it isn't surprising given human fallibility.

When a bank makes a mistake, it will want, understandably, to get its money back. The problem is that it often will not know from whom to reclaim its money. In cases of duplicate payments, it needs the cooperation of its customer to provide details of the payee, which cooperation is not always forthcoming; in cases of mistaken account numbers, the receiving bank can only provide the name of the recipient with the consent of the recipient, which consent might also not be forthcoming. So in *Santander UK plc v National Westminster Bank plc* [2014] EWHC 2692 (Ch), C sought numerous *Norwich Pharmacal* orders against fellow banks in order to oblige them to divulge the names of the recipients of its mistaken bounty.

Birss J considered the applications, granting them all. He concluded that the bank had a prima facie claim in unjust enrichment against the recipients and that disclosure of the names was necessary so that the claims could be pursued. The judge then went through the balancing exercise required by the ECHR (eg the right to privacy) before concluding that the balance lay in favour of disclosure.

Contentious Commentary is a review of legal developments for litigators

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