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Contentious Commentary

Equity

Missed Target

Equitable compensation seeks to put the beneficiary in the position as if the obligation had been performed, not to provide windfalls.

A solicitor receives £3.3m in mortgage monies in respect of a property valued at £4.25m. The monies are held in trust for the mortgagee. The solicitor is obliged to use the money to pay off a prior mortgage and to advance the rest to the mortgagors. Negligently, the solicitor advances only £1.2m to the prior mortgagee, leaving £300k outstanding on the prior mortgage, and remits the rest to the mortgagors. The mortgagee therefore gets a second ranking mortgage rather than first. The mortgagors default, and the property is sold for £1.2m. The mortgagee is £300k down on the position it would have been in had the solicitor not been negligent.

What is the liability of the solicitor to the mortgagee? The answer might be thought to fall into the category of the obvious: £300k. That is the loss the solicitor's negligence caused. However, in *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58, C raised the old argument that the solicitor had a continuing obligation to rectify its trustee accounts. In breach of trust, the solicitor had paid too little to the prior mortgagee and too much to the mortgagors. The solicitor was therefore obliged to put the £3.3m wrongly advanced back into the accounts and return it to the mortgagee, thereby indemnifying the mortgagee for its bad loan.

This argument was rejected by the House of Lords in the similar case of *Target Holdings Ltd v Redferns* [1996] AC 421, but C sought to undermine or distinguish *Target Holdings* in the light of the substantial academic criticism of the case. However, the academic criticism does not in general object to the result in *Target* - that the solicitors should only pay for the loss they caused - but only to the House of Lords' route to that result.

The Supreme Court was fully on board with the House of Lords. Equity does not necessarily approach compensation in the same way as the common law but the underlying rationale is the same, namely to compensate the beneficiary by putting the beneficiary in the same position as if the breach had not occurred. What is required to achieve this will vary according to the particular equitable wrong in question; and it should be assessed at the date of the trial, with the benefit of hindsight. Foreseeability is not relevant, but the loss must be caused by, ie flow directly from, the breach of trust.

The Supreme Court only engaged to a limited degree with the detail of the academic criticism of *Target Holdings*, but was clear that the obviously right answer was not to be achieved simply through the court's discretion under section 61 of the Trustee Act 1925 to relieve a trustee from liability. Rather, the Supreme Court pointed out that damages for different torts are measured in different ways, and so compensation for different breaches of fiduciary duty also need not be approached in a uniform manner. This was a commercial case, rather than a traditional trust, and a commercial approach was required. This pointed clearly to equitable compensation in the sum of £300k.

Contents

Two speeches were given in the Supreme Court, by Lords Toulson and Reed. Everyone else agreed with both of them. Lords Toulson and Reed insisted that their speeches were consistent (if so, why bother with two speeches?), but needless to say that is not necessarily so, leaving scope for future squabbles. For example, Lord Toulson thought that damages should be the same as if this were a breach of contract (which, in substance, it was); Lord Reed, however, thought that liability for breach of trust will not generally be the same as liability for breach of contract even where the trust arises in the context of a commercial transaction otherwise regulated by contract.

International law

The state of the nation

The act of state doctrine does not prevent a court from ruling on liability for torture.

If the allegations in *Belhaj v Straw* [2014] EWCA Civ 1394 are true, they demonstrate conduct on the part of states, including the UK, of a sort that many will have hoped belonged to a bygone age. The core allegations are that, acting on intelligence supplied by the UK, opponents of the Libyan (Gaddafi) regime were kidnapped, tortured and interrogated by, inter alia, Thai and US officials, before being shipped to Libya itself for further detention, interrogation and torture, including by UK officials. The UK's involvement in this was revealed by a contemporaneous letter from the Director of Counter Terrorism at MI6 in which he congratulated Libyan security officials on the arrival of the Cs in Tripoli and commented that "[t]his [the rendition] was the least we could do for you and for Libya to demonstrate the remarkable relationship we have built over recent years."

The Ds applied to have the Cs' claim struck out on two grounds: state immunity; and act of state.

The Court of Appeal considered that the Ds' claim to state immunity was hopeless because the claim was against UK persons and entities only (a former Foreign Secretary, the author of the letter, the Foreign Office, the Home Office, MI5 and MI6, as well as the Attorney General). State immunity applies to claims against foreign states or their officials. The fact that the Cs could have joined foreign states to the proceedings, but didn't because the foreign states would have been entitled to immunity, does not begin to engage the State Immunity Act 1978 so far as the UK defendants were concerned.

The main argument centred on the act of state doctrine, a doctrine recently viewed with distaste by the Court of Appeal in *Yukos Capital SarL v OJSC Rosneft Oil Co* [2012] EWCA Civ 855. This Court of Appeal was similar in outlook.

The Court of Appeal considered that the justification for the act of state doctrine was comity and the sovereign equality of states. An English court cannot sit in judgment on the conduct of foreign states within their own territories (though the doctrine may, exceptionally, extend to conduct away from home). Since the Cs' case did involve the English courts deciding on the legality of such acts by foreign states, the doctrine was prima facie engaged (though all the US's conduct was outside the US, and so the doctrine did not apply to it).

However, the Court of Appeal was satisfied that there was an exception arising from public policy for torture and special rendition, akin to the refusal to recognise the Iraqi law transfer of title to Kuwaiti aircraft after Iraq's invasion (*Kuwait Airways Corpn v Iraqi Airways Co (Numbers 4 and 5)* [2002] AC 883). Most relevant countries were signatories to the UN Convention against Torture, and in

Costs

Discretionary zeal

A Part 36 offer that is not beaten is treated as if it had been beaten.

D made a Part 36 offer in the sum of £250k; C secured £277k at the trial on quantum. C therefore won, the Part 36 offer was irrelevant, and C should get its costs. A straightforward application of the rules.

That was not, however, how Eder J saw it in *Sugar Hut Group Ltd v AJ Insurance* [2014] EWHC 3775 (Comm). He refused C its costs from 14 days after D's offer, and awarded D its costs from that time. To the uninitiated, this might look suspiciously like treating D as if it had beaten its Part 36 offer. Eder J was insistent that this was not so - no way, Jose - and that he was not re-introducing the near miss rule of *Carver v BAA* [2008] EWCA Civ 412, abolished by CPR 36.14(1A) - perish the thought. He was merely using his discretion under CPR 44.2. He considered that C's reasons for rejecting the Part 36 offer showed that C was unreasonably exaggerating its claim (C was awarded significantly less than it claimed) and that C had been dilatory and difficult over disclosure. These, he thought, entitled him to depart from the winner gets its costs rule in CPR 44.2(2)(a).

The factors cited by the judge might, perhaps, have led him to reduce C's entitlement to costs, but it is hard to see how awarding D its costs was anything other than the reintroduction of the *Carver* rule. The judge gave D exactly what D would have obtained had it beaten its Part 36 offer despite its not having beaten said offer. The certainty of outcome that Part 36 is meant to entail is therefore undermined.

any event torture was now, according to the Court of Appeal, incompatible with peremptory norms of international law. Further the claim was only against UK officialdom, who had no immunity. If they were able to rely on act of state, the very serious allegations would never be determined by any court of law.

The Court of Appeal was dismissive of concerns that the US security services in particular would never again liaise with MI5 and MI6 if the court went into this, jeopardising the UK's national security. The Supreme Court will doubtless have to consider whether those concerns should be taken more seriously.

The one point decided in the Ds' favour was that the Court of Appeal concluded that the kidnapping etc of the Cs was governed by the law of the place where it happened. The Cs therefore had to plead the law of each of those places - no small task.

Crown imperial

Crown act of state acts as a defence to a claim in tort.

Rahmatullah v Ministry of Defence [2014] EWHC 3846 (QB) has similarities to *Belhaj* (above). It involved arrests by the UK in Afghanistan and Iraq. Those arrested were handed to the US for custody and were, so it was alleged, then tortured. Defences based on act of state failed, as they were bound to following *Belhaj*, but *Rahmatullah* also involved the additional defence of Crown act of state in respect of the Cs' detention by the UK and their subsequent release into US custody.

Crown act of state offers a defence, according to Leggatt J, to a tortious act committed overseas if the act was authorised or subsequently ratified by the Crown. Here the detention of allegedly dangerous people in Afghanistan and Iraq was authorised by the Crown as part of the UK's operations in those countries. The Ds therefore had a defence to the claim. The same was not true of the allegations of conspiracy with the US to torture the Cs because the Crown had obviously not approved torture.

Arbitration

Rudderless decision

Failure to consult parties on course of action constitutes a "serious irregularity".

An arbitral tribunal must act fairly and impartially, giving each party a reasonable opportunity of putting its case and dealing with that of its opponent. Parties should be able to assume that the tribunal will decide on the arguments put before it. However, if a tribunal decides to tread a more creative path, taking a course advocated by neither party, it must give the parties an opportunity to address this. Otherwise, its award could be challenged for serious irregularity where substantial injustice has resulted. The risk of this happening is greater in a "paper arbitration". If the tribunal were more vigilant of these risks in *Lorand Shipping Limited v Davof Trading (Africa) BV (The Ocean Glory)* [2014] EWHC 3521 (Comm), it could have saved itself from having to rewriting parts of the award.

D, the charterer, was delayed in delivering animal feed due to the loss of the vessel's rudder. C, the owner, requested a partial award for demurrage under the charterparty governing the relationship with D. C also attempted to "reserve" the tribunal's jurisdiction in respect of future claims which C might make against D if C was sued by cargo receivers. This was a thinly veiled attempt to circumvent an inconveniently short contractual limitation period in the charterparty. In its response, D requested that the tribunal dismiss all claims on a final basis. There was no oral hearing.

The tribunal issued a final award accepting C's demurrage claim. This part was not contested. But it went on to dismiss C's application to "reserve" the cargo claims, whilst also explaining that, should cargo claims arise, they could be referred to arbitration in fresh proceedings. In so doing, Eder J held that the tribunal had both dismissed the application to reserve jurisdiction and failed to determine the claims in favour of D and therefore adopted neither the course proposed by C nor that proposed by D. Moreover, the basis on which the tribunal came to its decision had not been raised with the parties. Had the parties had an opportunity to address these points, the tribunal might realistically have come to a different conclusion.

Eder J held that the high threshold required for a finding of "serious irregularity" under section 68 of the Arbitration Act 1996 had been met in this case, set aside the offending parts of the award and remitted those parts for reconsideration by the tribunal.

Courts

Use and abuse

Parties seeking permission to use disclosed documents for some other purpose have to make a very strong case.

If the Royal Courts of Justice offered a loyalty points scheme, the Tchenguiz brothers would have collected their toaster and be well on the way to a free coffee-maker. The latest round in their battle with the Serious Fraud Office over an

investigation into their businesses is *Tchenguiz v SFO* [2014] EWCA Civ 1409, in which the Court of Appeal looked at the circumstances in which a court can give permission for documents disclosed during litigation to be used for a collateral purpose.

The documents being considered had been disclosed by the SFO in English proceedings, and related to the SFO's attempts to obtain assistance from the authorities in Guernsey for an investigation. C thought that the documents might be useful for proceedings on foot in Guernsey involving the trustee (X) of certain trusts which benefited C and his family. C sought permission to use the documents for three purposes: (1) to give them to the lawyers advising X in the Guernsey proceedings; (2) to rely on them in the Guernsey proceedings and any appeal; and (3) to given them to counsel advising C on whether there was evidence to show that the employees of a firm of accountants had committed criminal offences.

At first instance the judge allowed the use of the documents for purposes (1) and (3) but not (2). C appealed, arguing that the judge had failed to explain why there was a strong public interest in protecting the documents from use in the Guernsey proceedings, that he had applied too stringent a test for permission under CPR 31.22, that he had failed to consider the documents individually rather than as a group and that he had generally failed to carry out the required balancing exercise or to give reasons for his decision.

But the Court of Appeal upheld the decision of the judge, stating that the correspondence between the SFO and foreign authorities was inherently confidential, and that there was a substantial public interest in maintaining the co-operation of foreign states in the investigation of crime. The Guernsey authorities had appeared by counsel at the hearing and said that they were strongly opposed to the use of the documents for any collateral purpose at all. The judge did not have to consider the documents individually because the parties themselves were making "all or nothing" arguments and there was no sensible middle ground. Further, the judge had correctly identified the conflicting public interests and had given adequate and proper reasons for his decision.

The judgment is a reminder that a party seeking permission for the use of disclosed documents for purpose other than the litigation in which they were disclosed must show cogent and persuasive reasons amounting to special circumstances.

Insolvency

A singular process

There is limited common law power to help foreign liquidators.

The liquidators of the Saad group want the working papers of the group's former auditors. But in two trips to the Privy Council, they failed to get them because the tendentious theory of "modified universalism" in insolvency does not stretch as far as they would have liked. This theory was an attempt by some judges to create a global insolvency regime when their nation states had failed to agree an appropriate treaty. The high point was Lord Hoffmann's frolic in *Cambridge Gas* [2007] 1 AC 508, but that didn't last long. In *Rubin v Eurofinance* [2013] 1 AC 236, a stake was applied to the heart of the theory, but a majority in the Privy Council has concluded that the extremities may, perhaps, still be twitching - but not in the right areas to get the liquidators what they wanted.

The first case, *PricewaterhouseCoopers v Saad Investments Company Ltd* [2014] UKPC 35, was clear. SICL was incorporated and wound up in the Cayman Islands. The auditors were in Bermuda and provided only limited papers in response to requests from the Cayman courts. So a decision

A serviced apartment

Process for any claim can be served on the UK address.

In *Teekay Tankers Ltd v SFX Offshore & Shipping Co* [2014] EWHC 3612 (Comm), Hamblen J confirmed the orthodox position that service can be effected on the English branch of an overseas company even if the claim has nothing to do with the English branch.

This follows from the wording of section 1139(2) of the Companies Act 2006 (and of CPR 6.9), but the issue arose because regulations made about overseas companies require the registration of the name and address of the person in the UK who is authorised to accept service of document on behalf of the company "in respect of the establishment". This, the judge thought, did not restrict section 1139(2), the reference to the establishment referring to the person, not the nature of the claim. As a result, even if the claim was wholly unconnected with the branch, the claim form could still be served on the company "by leaving it at, or sending it by post to, the registered address of any person resident in the United Kingdom who is authorised to accept service of documents on the company's behalf", as the Act puts it.

was taken to wind up SICL in Bermuda too and then to obtain from the Bermuda courts an order that the auditors produce their working papers. However, the Privy Council decided that the Bermuda courts had no jurisdiction to wind up foreign companies that do not carry on business in Bermuda. Further, the auditors were, exceptionally, able to challenge the winding up order in the subsequent application to obtain their papers, not least because the challenge went to jurisdiction and because the order was specifically directed at the auditors. One down, one to go.

The second case, *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, was also an application in Bermuda for the auditors' working papers, but this time under the common law rather than under Bermuda insolvency law. The liquidators argued that the Bermuda courts could assist the Cayman liquidation by requiring the auditors to produce their working papers, applying by analogy Bermuda insolvency law under the theory of modified universalism.

The Privy Council was unanimous that this did not work for two reasons. First, the application of legislative powers by analogy is not permissible because it trespasses beyond the proper judicial function. The legislator either gives judges powers or it does not. Judges can't take powers given to them in statute and extend them further by analogy.

Secondly, Cayman law does not allow liquidators to demand auditors' working papers, though Bermuda law does. The Bermuda courts could not support the Cayman liquidation by granting orders that the Cayman courts could not themselves make. Common law support for a foreign liquidation is effectively confined to making good territorial difficulties, not making good a lack of local law powers.

The Privy Council therefore agreed that, if there was a common law power to assist foreign liquidations, it was not available in this case.

The Privy Council split on whether the common law power existed at all. Lords Sumption, Clarke and Collins considered that there is a limited power to assist liquidators appointed by a foreign court to obtain information that was necessary for the liquidation. It is a limited power because, for example, it can't be used where there is a statutory scheme that could be used instead or if it is inconsistent with substantive law and public policy in the requested state. The majority did "not wish to encourage the production of other common law powers to compel the production of information."

Lords Mance and Neuberger would have preferred not to address the question of whether there was a common law power but, if forced to do so, would have decided that there was no such power. The extreme view of universality in insolvency as expounded in *Cambridge Gas* has gone but, as Lord Neuberger put it, "as with the Cheshire Cat the principle's deceptively benevolent smile still appears to linger, and it is now invoked [by the majority] to justify the creation of this new common law power. It is almost as if the Board is suggesting that, while we went too far in *Cambridge Gas* and should pull back as indicated in *Rubin*, we do not want to withdraw as completely as we logically ought. In my view, the logic of withdrawal from the more the more extreme version of the principle of universality is that we should not invent a new common law power based on that principle."

Going Dutch

An anti-suit injunction can be used to protect the integrity of insolvency proceedings.

Whilst English-based courts flirt with modified universalism (see above), the Dutch courts appear to have little concern for such matters. Dutch law and procedure actively encourage litigation in the Netherlands, and are not put off by foreign insolvencies (at least if outside the EU). But London courts are not without their own weapons to fight back.

In *Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41, D had put money into a Madoff fund through the acquisition of shares in C, a BVI feeder fund. Following Madoff's exposure, D sued C in the Netherlands. D was able to do this because a Dutch bank acted as C's asset custodian, and held money for C, albeit in an account at its Dublin branch. D was able to obtain a conservatory attachment over this account as of right (the only bar is if the claim is unarguable).

Having obtained the conservatory attachment (which does not confer a proprietary interest), the Dutch courts could determine the substantive claim since C was domiciled outside the EU, even though the claim had nothing to do with the Netherlands. The fact that C subsequently went into liquidation in the BVI was, as a matter of Dutch law, irrelevant. D could still proceed with its claim and, if it won, enforce against the frozen account even though this would give D priority over other creditors. Priority over other creditors was, as D admitted, exactly what it wanted.

But C fought back. C applied in the BVI for an anti-suit injunction to restrain D from pursuing the Dutch proceedings and, more importantly, from enforcing against the Dublin account. The Privy Council agreed that the court had equitable jurisdiction to restrain the acts of persons amenable to the court's jurisdiction which were calculated to violate the statutory scheme of distribution in an insolvency. Vexation and oppression, the usual requirements for an anti-suit injunction, were not required for this species of the genus.

To grant an injunction, which acts in personam, the court must have jurisdiction over the offender. The BVI courts did have jurisdiction over the Dutch pension fund because the fund had turned up in court to fight the injunction and because it had lodged a proof of debt in the BVI winding up (eg *Rubin v Eurofinance SA* [2013] 1 AC 236).

Finally came discretion. The fact that Dutch law allowed, if not encouraged, local creditors to seek to obtain priority over others in a foreign liquidation offered no reason to defer to the Dutch courts in the name of comity. Instead, an injunction would be granted to stop them doing so.

The moral might be that D could have secured its priority, but only if it had taken the hard-nosed approach of ignoring entirely the insolvency in the BVI. By trying both to run with the hare and hunt with the hounds, D might have lost its priority.

Ice and snow

An exclusion from home law in insolvency is given a wide interpretation.

The basic proposition of European insolvency law is that the law of the home state of the institution being wound up governs everything to do with the insolvency. But there are exceptions. One exception, in article 30 of the Credit Institutions Winding Up Directive and article 13 of the EUIR, is where an act detrimental to the creditors as a whole (eg a transaction at an undervalue) is subject to the law of a Member State other than the home Member State, and that law does not allow any means of challenging the act in the case in point.

In *LBI hf v Merrill Lynch International Ltd* (Case E-28/13), the EFTA Court gave article 30 a wide interpretation. The case concerned the purchase by Landsbanki shortly before its demise of its own bonds. An application was made to set aside the transaction under Icelandic insolvency law, but it was argued that the bonds and their purchase were governed by English law, English law offered no means of challenging the purchase, and so it could not be challenged in Iceland.

The EFTA Court agreed (subject to the Icelandic court's decision on English law). The question was whether, at the time the challenge was launched in the Icelandic courts, the transaction could have been challenged under English law. If not, whether for reasons of substantive law or time-bar, the transaction stands. The decision therefore offers greater security for transactions; insolvency law does not unravel all.

Contentious Commentary is a review of legal developments for litigators

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