CLIFFORD CHANCE

Client briefing
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Contentious Commentary

A review for litigators

Contract

Plus ça change

A re-run of an earlier case on the ISDA Master Agreement produces the same result.

In *Lomas v JFB Firth Rixson Inc* [2010] EWHC 3372 (Ch) (see January's edition), Briggs J decided that section 2(a)(iii) of the ISDA Master Agreement did what it said on the tin. Section 2(a)(iii) provides that an innocent party is not obliged to pay its counterparty if that counterparty is subject to an event of default. Briggs J rejected arguments that sought to get round this wording. Implied terms, the anti-deprivation principle and the rule against penalty clauses offered, he concluded, no reason to depart from the terms agreed.

In *Lehman Brothers Special Financing Inc v Carlton Communications Ltd* [2011] EWHC 718 (Ch), C sought in substance to persuade the judge that *Firth Rixson* was wrong. Since the judge who had to be so persuaded was none other than Briggs J, this was never going to be easy. And forlorn it duly proved.

C repeated the argument that a term should be implied that section 2(a)(iii) only suspended the payment obligation for long enough to enable the innocent party to decide whether to terminate or to perform, or until the agreement ended ordinarily. C produced expert evidence to the effect that, without an implied term along one of these lines, section 2(a)(iii) could have adverse capital consequences for banks. These consequences were, C argued, part of the ordinary commercial knowledge that was reasonably available to the person to whom the document was addressed, and should thus be taken into account when interpreting the Agreement.

Briggs J was not convinced that adverse capital consequences would flow but, even if they did, he remained unpersuaded. D was not a bank, and there was no reason, the judge thought, to impute to D knowledge of banking capital requirements. An ISDA Master Agreement put forward by a bank to govern derivatives transactions was addressed to the counterparty, not to the bank. A bank's capital requirements were matters for the bank, about which counterparties would not be bothered.

Repeated arguments about the anti-deprivation principle went the same way. In *Firth Rixson*, the parties hadn't bothered to argue that section 2(a)(iii) was a penalty clause because they agreed that this argument was hopeless at first instance. In *Carlton Communications*, C argued the point, but the judge found it hopeless. Section 2(a)(iii) was two-sided in its effect, and was not oppressive.

Carlton Communications therefore delivered a predictable result. But not the final word. *Firth Rixson* has been appealed, and judgment is awaited from the Supreme Court on the anti-deprivation principle in *Belmont*, a fellow-traveller of the now settled *Perpetual*. Watch this space.

Sauce for the gander

Automatic early termination under an ISDA Master Agreement requires two-way payments.

Firth Rixson and *Carlton Communications*, above, involved attempts by a party in default under an ISDA Master Agreement to force the innocent party to pay to

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the defaulting party the value of derivatives lost as a result of the default. Those attempts failed. *Britannia Bulk plc v Pioneer Navigation Ltd* [2011] EWHC 692 (Comm) was also an attempt by a party in default to compel the innocent party to pay to the defaulting party the value of the derivatives lost as a result of the default. That attempt succeeded.

The difference between *Carlton Communications /Firth Rixson* and *Britannia Bulk* was that the parties' agreement in *Britannia Bulk* provided for Automatic Early Termination. An Event of Default automatically brought the derivatives (freight forwards) the subject of the Master Agreement to an end. The innocent party could not therefore follow the pattern of *Firth Rixson* and *Carlton Communications* - refuse to terminate and rely on section 2(a)(iii) to avoid paying what might otherwise be due to the defaulting party. In *Britannia Bulk*, the innocent party sought to achieve the same result by arguing that since the calculation of sums due was to be done on the basis of Loss, there was no loss and so nothing was due to the defaulting party.

The argument ran that Loss represented the value of the payments that would have been due if there had been no termination. No payments would have been due to the defaulting party because section 2(a)(iii) of the ISDA Master Agreement relieved the innocent party of the obligation to pay the defaulting party. As a result, the defaulting party suffered no loss, and the innocent party did not have to pay anything to the defaulting party.

Flaux J rejected this argument. The calculation of Loss under the ISDA Master Agreement required the assumption that there had been no Event of Default, not that there had been no termination. Anything else would have led to nothing ever becoming due on termination because the contract provided that it terminated on the occurrence of an Event of Default - contrary to the innocent party's argument, the contract could never continue with an Event of Default in existence.

So the ISDA Master Agreement still does what is says on the tin.

Carving out new ground

A party can be prevented from calling on a performance bond if to do so would be a clear breach of contract.

The conventional wisdom is that, absent fraud, a court will not grant an injunction to prevent a beneficiary calling a performance bond or letter of credit, or the issuing bank paying out on it. But in *Simon Carves Ltd v Ensus UK Ltd* [2011] EWHC 657 (TCC), Akenhead J challenged this orthodoxy, coming up with a new(ish) ground on which the beneficiary could be restrained from calling a bond or be ordered to withdraw a call already made. Basing himself on dicta in *Sirius International Insurance Co v FAI Insurance Ltd* [2003] 1 WLR 2214, the judge decided that if it could be shown at an interim stage that the claimant had a strong case that the contract pursuant to which the bond was issued barred the call, an injunction could be granted on *American Cyanamid* grounds to restrain the call. On the facts, the judge decided that an injunction should be granted.

Any infringement of the principle that documentary credits are autonomous from the underlying transaction and to be treated as the equivalent of cash will be controversial. The question may be whether or the extent to which this decision undermines the general principle or is an isolated backwater. How clear does the contract have to be in barring the beneficiary from calling the performance bond? How strong does the case have to be at an interim stage? Considerable potential for judicial inventiveness or self-denial.

Clifford Chance LLP acted for Simon Carves Ltd.

Creditors' duties

Creditors have limited disclosure obligations to guarantors, but conclusive evidence clauses may not be as wide as they seem.

Guarantees are not contracts uberrimae fidei, but creditors still have some obligations to disclose material facts to guarantors. However, in *North Shore Ventures Ltd v Anstead Holdings Inc* [2011] EWCA Civ 230, the Court of Appeal limited the scope of this duty. The duty

Arbitration

Scott free

A *Scott v Avery* clause stops a court granting a freezing injunction in support of an arbitration.

A standard arbitration clause merely states that any relevant dispute shall be referred to arbitration. A *Scott v Avery* clause adds that the parties shall not bring any court proceedings until a dispute has been resolved by the arbitrator and that an arbitration award is a condition precedent to any legal proceedings. *Scott v Avery* clauses are commonly found in GAFTA, FOSFA and other commodity agreements, but also sneak in elsewhere.

Section 44 of the Arbitration Act 1996 provides that, unless otherwise agreed, courts can grant interim injunctions in support of an arbitration. In *B v S* [2011] EWHC 691 (Comm), the issue was whether a *Scott v Avery* clause was an agreement otherwise for the purposes of section 44, ie an agreement that prevented parties from applying to the courts for, eg, a freezing injunction in support of an arbitration.

The answer that Flaux J intended to give became clear when he declared at the outset that, untrammelled by authority, he regarded it as obvious that a *Scott v Avery* clause did have the effect of preventing applications to the court under section 44. He then analysed some obscurely worded judgments before reaching the inevitable conclusion that they did not prevent him reaching the conclusion he wanted. He acknowledged that his decision might come as a surprise to some but, he said, those who didn't like it could simply amend their arbitration clauses.

is confined to an obligation to disclose unusual features of the contractual relationship between creditor and debtor or between the creditor and other creditors of the debtor. There is no obligation to disclose background facts known to the creditor that might, for example, go to the debtor's creditworthiness. But a mere belief, however reasonable, that the guarantor knows a particular fact will not discharge the creditor's duty if the guarantor does not in fact know the fact.

In *North Shore Ventures*, there was, according to the Court of Appeal, also an oral variation of the underlying contract between creditor and debtor which reduced the interest due. The creditor demanded repayment of the sum due absent that variation, and then relied on a clause in the guarantee providing that the creditor's certificate of the amount due was conclusive evidence unless manifestly incorrect. The creditor contended that even though it had calculated the sum due on the wrong basis (it denied the existence of the variation all the way to the Court of Appeal), its certificate, which did not include any calculations, prevented the guarantor from challenging the sum due.

Unsurprisingly, the Court of Appeal was not having any of that. The Chancellor was minded to construe the clause as covering only quantum, and not the fact or legal effect of any variation. Ultimately, however, he accepted the view of the other judges that the certificate was manifestly incorrect. The error was manifest in the light of the Court of Appeal's decision on the variation, and did not have to be manifest at the time of the certificate. In the light of the Court of Appeal's decision, made almost three years after the certificate, that there had been an oral variation of the underlying contract, it became obvious that the certificate was based on the wrong rates, and that was enough. The manifest may have a long horizon.

Factual failings

Two more claims against banks fail.

Banks have a good record of seeing off misselling claims in the English courts. *Wilson v MF Global UK Limited* [2011] EWHC 138 (QB) in last month's edition, and now (at least) two more. In *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWCA Civ 484 (Comm), the judge resoundingly rejected fraud and other allegations against Barclays for, supposedly, misselling a structured product, including a CDO[2]. The judge was satisfied that the factual basis for the claim simply wasn't there.

Similarly, in *Bank Leumi (UK) plc v Wachner* [2011] EWHC 656 (Comm), the judge rejected allegations that the bank had made misrepresentations in relation to foreign exchange trading and had failed to take reasonable steps in classifying its customer under FSMA. Retrospective claims that a customer didn't understand what she was doing don't in general go down well, and this case was no exception.

Trust in me

A beneficiary of a discretionary trust can be a decision-maker for the trust.

Rectification of a contract generally requires a mistake. With individual contracting parties, the individuals must make the mistake. With corporations, it is necessary to look for the decision-maker to see if he or she was mistaken, applying rules of attribution in accordance with *Meridian Global Funds v Securities Commission* [1995] 2 AC 500. But where the corporation is the professional trustee of a discretionary trust, and in practice might lean in favour of doing what the principal discretionary beneficiary suggests, it is more difficult. Can that beneficiary, though he has no formal position within the trustee and his "decisions" must be confirmed by the trustee, be the decision-maker for the trustee for the purposes of rectification?

Yes, according to *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2011] EWHC 503 (Ch). The trust was selling shares in a company that was, for most practical purposes, controlled by the principal beneficiary (though without any formal position in the company either, but with the use of two corporate jets, a helicopter and a catamaran). The beneficiary negotiated the sale of "his" company, but it was the trustee who signed the sale agreement. The beneficiary was mistaken as to the terms, the trustee having no view. The judge decided that the beneficiary's mistake was the trustee's mistake for these purposes. Since the buyer was also mistaken, rectification was ordered.

Clifford Chance LLP acted for Stella Global UK Ltd.

Insolvency

Atlantic crossing

The balance sheet test for insolvency is not straightforward to apply.

English law has two tests for insolvency: inability to pay debts as they fall due; and insolvency, ie assets less than liabilities. This latter test is surely easy to apply. You look at the audited balance sheet, and find out which of the two sides is the heavier. But, according to the Court of Appeal in *BNY Corporate Trustee Services Ltd v Eurosail* [2011] EWCA Civ 227, the test is much more subtle and subjective than that naively simplistic interpretation. Yes you start with the balance sheet, but you might need to make adjustments, and, even after doing that, the question to ask is not which side is bigger but whether the company has reached the point of no return because of an incurable deficiency in its assets.

Eurosail concerned a securitisation note issue by an SPV. Its problem was that its underlying assets (mortgages) were in sterling but some of the notes it issued were in dollars and some in euros. It therefore entered into a currency swap. Unfortunately, that currency swap was with Lehman. The swap therefore disappeared in September 2008, and the collapse of sterling against both dollar and euro left a deficiency, according to the balance sheet, of some US$75m. The terms governing the notes allowed enforcement if the company was insolvent within the meaning of section

123(2) of the Insolvency Act 1986, namely "the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities". On that basis, US$75m down sounds pretty insolvent.

But, said the Court of Appeal, the balance sheet test merges into the cash-flow test, leading to the question of whether the company can pay its debts and, if it can, whether it should do so. If it can't pay its debts as they fall due, end of story. If it can pay its debts now (as the SPV could here), the question is whether it ought to do so or whether that would unfairly prefer current creditors over longer term creditors. Just because assets are worth less than liabilities is not, on its own, enough to wind up a company. The company must have reached the point of no return because, in practical terms, it is clear that the company will not be able to meet its future or contingent liabilities.

But future and contingent liabilities are not simply to be taken at face value. The closer in time and the more likely the contingency is to apply, the more relevant they will be. To determine the assets and liabilities, the balance sheet is the starting point. But in *Eurosail*, a claim against Lehman on the swap was excluded from the balance sheet on normal accounting principles, but was added back in by the court for section 123 purposes, reducing the deficit. The claim was included at 40% of its gross value because that is the price of Lehman debt in the market. But a comparable figure was then deducted because the liabilities on the notes were stated to be at "amortised cost", which assumed no recourse and therefore underestimated the liabilities.

These adjustments still left the company some US$75m in the red. But it was not insolvent. The securitisation could extend to 2045. With fluctuations in exchange rates and interest rates over such a long period, the Court of Appeal did not feel able to conclude that the company had passed the point of no return.

Though not relevant for its decision, the Court of Appeal also opined that an option under which noteholders could be compelled to sell their notes did not affect whether the SPV was insolvent (though it would have prevented its being wound up). Securitisation vehicles are required to be bankruptcy remote in order to secure appropriate ranking from credit reference agencies. An outright statement that claims could not exceed assets had tax disadvantages in the UK (since removed), so bankruptcy remoteness was secured through a Post Enforcement Call Option, ie an option given to an associated entity to buy at a nominal price all the notes after enforcement had taken place, thereby preventing a noteholder from winding up the company. But, said the Court of Appeal, that did not prevent the company from being insolvent within the terms of the notes, at least before the option was exercised.

So the bottom line is that relying on insolvency to wind up a company, still more to call an event of default or similar, is likely to be hazardous. Addition and subtraction is no longer enough. Rather, sophisticated analysis and judgement is required, leaving much to argue about.

Trusts

The morning after

A mistake by trustees' advisers no longer undoes the trustees' resulting acts.

Advising discretionary trustees used to be easy. Advisers could make a mistake (invariably about tax), but, because the trustees' resulting decision was based on this error, their decision was without effect. The tax bill never materialised and the advisers (and, more particularly, their insurers) had no compensation to pay. HMRC didn't seem to care.

But no more. This approach, known as the rule in *Hastings-Bass*, was killed off by the Court of Appeal in *Pitt v Holt* [2011] EWCA Civ 197. The Court of Appeal was emphatic that courts coming after *Re Hastings-Bass* [1975] Ch 25, principally from *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 onwards, had been led into error by the summary of the decision in *Re Hastings-Bass* given by none other than the court in *Re Hastings-Bass*. The Court in *Re Hastings-Bass* did not, apparently, know what it had decided.

In *Pitt v Holt*, the Court of Appeal pronounced that a decision by trustees only lacked effect in two circumstances: first, if the decision was one that the trustees had no power to make, in which case the decision was void; and, secondly, if the decision was given in breach of fiduciary duty, in which case the decision was voidable. Significantly, the Court of Appeal decided that a decision by trustees based on reputable, if errant, legal or other advice was not made in breach of fiduciary duty.

So the days are gone when trustees could bowl up to court saying that they had made an mistake based on legal advice and, in that one bound, leap free of a tax bill. Now someone - a beneficiary or the original trustees' successors - must assert breach of fiduciary duty, which will be harder to prove, as well as upping the ante very considerably for the trustees. And HMRC now cares. Much easier to sue the advisers.

Icelandic woes

Proceedings continue in England against an Icelandic bank because Iceland messed up its legislation.

The Tchenguiz family and Kaupthing Bank aren't getting on very well at the moment. Family trusts are suing the Bank for all sorts of alleged crimes and misdemeanours, and some members of the family were recently arrested in relation to wrongs allegedly committed by them in relation to the Bank. In *Rawlinson & Hunter Trustees SA v Kaupthing Bank HF* [2011] EWHC 566 (Comm), the issue was the more mundane one of whether the trusts' proceedings in England could go ahead in the light of winding up proceedings in Iceland.

The agreements on which the trusts were suing gave exclusive jurisdiction to the English courts, so the argument for a stay rested on the Credit Institutions (Re-organisation and Winding-up) Regulations 2004. The

Regulations (based on an EU Directive) require English courts to stay proceedings if, at the time the proceedings were commenced, there were winding-up proceedings in existence in Iceland. Undoubtedly there were. The issue was whether they were winding-up proceedings within the definition in the Regulations, which required "collective proceedings opened and monitored by the [Icelandic] administrative or judicial authorities".

Agreeing with a decision by the Paris Court of Appeal, Burton J decided that the Icelandic proceedings were imposed by Icelandic primary legislation, not by administrative or judicial authorities. Winding-up it might have been, but not within the Regulations. Following the Parisian decision, Iceland had corrected the problem, but the English proceedings had already been issued by then.

Kaupthing also argued that the English proceedings should be stayed as an abuse of process. The trusts had lodged proofs of debt (which were rejected) in Kaupthing's insolvency because a failure to do so would, under Icelandic law, have extinguished their claims. The claims lodged in the insolvency had moved to the Icelandic courts, which had declined to stay their proceedings. The judge did not see this as a reason to stay proceedings in the English courts, which had jurisdiction under article 17 of the Lugano Convention. There was no decision by the Icelandic courts giving rise to a res judicata, and taking an administrative step to file a proof did not oust the agreed jurisdiction of the English courts. So the English courts will go ahead. Enforcement of any resulting judgment may, however, be a different matter.

Evidence

Two-timing experts

Having privileged material from one side will not prevent an expert appearing for the other.

If you have discussed a case with a potential expert witness, passing privileged information to her and obtaining her agreement in principle to act, you might be peeved to see her turn up later for the other side, even if she had withdrawn from your side shortly after the initial discussions. And in *Meat Corporation of Namibia Ltd v Dawn Meats (UK) Ltd* [2011] EWHC 474 (Ch), C was decidedly peeved in this scenario. C's failure to persuade the court not to allow the expert to testify for D will not have reduced C's peevishness.

The case for not granting permission for the putative expert to give evidence for D started with *Prince Jefri Bolkiah v KPMG* [1999] AC 222, which requires fiduciaries to avoid any significant risk that confidential information will be misused. However, Mann J decided that the full rigours of equity that apply to solicitors should not also apply to expert witnesses. The witness was not engaged by C to do anything, but merely had information pushed at her in preliminary discussions. She undertook to the court not to use or disclose any of the information she had received from C, which the judge considered was sufficient protection for C.

The judge was influenced in his decision by having seen emails passing between the expert and C (D did not see them), which he thought were of no relevance to her role as an expert, though they would have been of interest to D's solicitors.

C's sense of grievance would not have abated on the failure of its second challenge to the expert, based on a supposed lack of independence. She had become a consultant to D on certain matters. Following cases such as *Field v Leeds City Council* [1999] CPLR 833, the judge decided that this was not enough to bar her from giving expert evidence for D. Though it was desirable that an expert should not have any interest in the outcome of the proceedings, the issue is whether the putative expert understands that her primary duty is to the court and is able to carry out that duty. The judge was satisfied that she could, subject to one point.

That point was a suggestion that she might have had some involvement in the underlying facts. She denied it, but the judge said that he could not decide the issue at an interim hearing. It would have to be teased out in cross-examination. As a result, although the issue of whether an expert could be called should generally be determined before trial, in this case C remains able to attack her independence, and hence credibility, at trial. That might give D an awkward decision as to whether to persist with her.

The moral is do not give any confidential information to an expert until he or she is truly tied down to act for one party and one party alone. Until that stage, there is a risk that she will defect to the other side.

Experts times two

If a party wishes to change experts, the court can order that the previous expert's report be disclosed as a condition of permission to rely on the new one.

CPR 35.4 states that "No party may call an expert or put in evidence an expert's report without the court's permission." The court can attach conditions to its permission. In *Edwards-Tubb v J D Wetherspoon plc* [2011] EWCA Civ 136, the question was whether C should be permitted to put in a report by an expert only if he also disclosed an earlier expert report prepared by someone else.

C sued D after a fall at work. The pre-action protocol for personal injury actions says that the parties should give notice to the other side of the names of experts that they might instruct, and give it the opportunity of objecting to any of those experts. C gave notice to D of three orthopaedic surgeons. No objections were raised by D. C instructed one of the surgeons, X, who examined C and provided a report. That report was never relied on or disclosed by C. Proceedings were then issued, and C's particulars of claim attached a report by a different surgeon, Y. D applied for the disclosure of the earlier report by X. D conceded that it had no absolute right to disclosure, but said that disclosure ought to be made a condition of the permission C needed to rely on the report by Y.

The question for the Court of Appeal was whether the court could grant permission to adduce expert evidence on condition that privilege in a report by someone else was waived. The Court of Appeal held that it could, although Hughes LJ said that "it is a power which should usually be exercised where the change comes after the parties have embarked upon the protocol and thus engaged with each other in the process of the claim. Where a party has elected to take advice pre-protocol, at his own expense, I do not think the same justification exists for hedging his privilege, at least in the absence of some unusual factor."

If, as Lord Taylor of Gosforth CJ said in *R v Derby Magistrates ex p B* [1996] 1 AC 487, 507, "privilege is... much more than an ordinary rule of evidence... [i]t is a fundamental condition upon which the administration of justice as a whole rests", what basis is there for requiring its waiver in order to pursue a claim? Does that not undermine the administration of justice as a whole? The decision is, however, representative of the dislike of privilege held by some judges, who fear that privilege might be used to pull the wool over their eyes.

Immune deficiency

Experts are no longer immune from liability in negligence.

The immunity of advocates from negligence claims was removed in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615. It was only a matter of time before the immunity enjoyed by expert witnesses went the same way. In *Jones v Kaney* [2011] UKSC 13, it duly did so (on a 5-2 majority, with rather ill-tempered judgments).

The majority in the Supreme Court thought that immunity from the general principle of liability for professional negligence required justification. None of the justifications offered - reluctance of anyone to act as an expert, discouraging experts giving full and frank evidence, experts being harassed by vexatious suits, risk of multiplicity of proceedings, and conflict of interest with experts' obligations to the court - passed muster. Added to the uncertainties of the current law (experts can be liable for advisory work not directly court-related), the majority found the case easy.

The minority considered that the immunity had existed since the 16th century (some of the majority thought it only started in 1992), and that greater deliberation was required before removing long-established rules. Lady Hale thought it should be left to the Law Commission and Parliament (she described the majority as "irresponsible [in making] such a change on an experimental basis"), and Lord Hope pointed out with satisfaction that the decision did not apply in Scotland.

The decision does not apply to factual witnesses or to defamation claims.

Do not pass Go

The contents of hacked voicemail messages can be "technical or commercial information", removing the alleged hacker's privilege against self-incrimination.

Gray v News Group Newspapers and Mulcaire [2011] EWHC 349 (Ch) is one aspect of the hacking-gate scandal louring over the News of the World. It involved a private investigator (D2) alleged to have accessed the voicemail boxes of the Cs (a Sky football pundit, since sacked for inappropriate comments, and a comedian) and to have passed certain information to D1, which published the paper. The Cs sought further information from D2 about his activities. He relied on privilege against self-incrimination in refusing to provide that information.

Certain statutes abrogate that privilege. One of them is the Senior Courts Act 1981, which states that the privilege will not apply in "proceedings for infringement of rights pertaining to any intellectual property or for passing off." "Intellectual property" is defined as meaning "any patent, trade mark, copyright, design right, registered design, technical or commercial information or other intellectual property."

The Cs argued that some of the information in voicemails they typically received was "commercial information" in that it related, in the case of the football pundit, to players moving clubs or who would or would not play certain games (all useful to him in his work), and, in the case of the comedian, to negotiations over various film and television projects.

D2 argued that "commercial information", in the context of the Act, had to be some sort of intellectual property. The examples given by the Cs did not involve intellectual property as that term is commonly understood. However, the judge found that the section should not be construed so narrowly, and that Parliament had been concerned to "remove the privilege where the action was a claim to protect commercially confidential information, as much as where it was in respect of the infringement of the traditional kinds of intellectual property."

"Technical or commercial information" was therefore any information that could be protected by action. The judge struck out those parts of D2's defence that sought to rely on the privilege, and ordered him to re-serve the defence with those parts deleted, and any consequential amendments he thought appropriate.

International law

Irish ayes

The English courts will not frustrate the Irish bank asset transfer scheme.

Irish banks, like banks in a number of other countries, have encountered some difficulties in recent years. One solution offered by Ireland was that a state body, NAMA, should acquire assets from Irish banks, including from the banks' overseas branches. In *Carey Group plc v AIB Group (UK) plc* [2011] EWHC 567 (Ch), one customer of AIB's London branch unsuccessfully took exception to its (English law governed) liabilities being transferred to NAMA. The grounds upon which C objected to the transfer were twofold: first, breach of the facility agreement; and, secondly, enforcement of foreign public laws in the UK.

As to the first ground, this rested on a discretionary overdraft facility. C argued that AIB could not hand over the discretion to a third party. The judge disagreed. The facility agreement allowed assignment of all rights. In the light of that, there was no basis for implying a public law approach that would have required AIB personally to exercise the discretion.

As to the second ground, it was accepted that relevant Irish law was foreign public law. Foreign public, including tax, law cannot be enforced in the English courts. But in this instance, AIB was not asking for the enforcement of Irish law. It positively wanted to cede control of its rights against C to NAMA. The judge considered that a person carrying on business in England (AIB) was at liberty to comply voluntarily with a request from a foreign government, based on foreign public law, provided that in doing so it committed no actionable wrong under English law. Since, AIB was not in breach of its contractual obligations, there was no basis to restrain AIB from doing what it wanted to do.

Courts

Irrevocability

The court's power to revoke its orders does not extend to final orders made by way of judgment on admission.

In *Kojima v HSBC Bank plc* [2011] EWHC 611 (Ch), C was sued by D for repayment of a loan. C admitted owing most of the sum, and disputed the balance. Because the entry of a judgment against him would have affected his career as a financial adviser, the District Judge made an order that unless C executed a charge for the admitted amount over his London flat, D could enter judgment for that amount. C executed the charge, and the remainder of the claim was sent for mediation. Sometime later, C received advice suggesting he had a defence, and sought to have the order set aside. He pointed to CPR 3.1(7), which says that "A power of the court under these Rules to make an order includes a power to vary or revoke the order." But the High Court held that the order, albeit an "unless" order, was a final order, and that there is a public interest in the finality of proceedings which means that such orders cannot be set aside.

Expansionary tendencies

Judges can give extra reasons when refusing an application for permission to appeal.

Fiona Trust v Privalov [2010] EWHC 3199 (Comm) is a monumentally long judgment, but, it seems, not long enough. One ground upon which C applied for permission to appeal against the judgment was that the judge had misunderstood C's allegations of dishonesty and, as a result, had fallen into error. The Ds' response was to ask the judge to make supplementary findings to deal with that point (they must have been confident as to what those findings would be). C was neutral on the application - opposing might have seemed like refusing charity. So in refusing permission to appeal, the judge did make supplementary findings ([2011] EWHC 715 (Comm)), which bore out the Ds' apparent confidence in the outcome.

In another judgment ([2011] EWHC 664 (Comm)) supplementing the main judgment, Andrew Smith J considered interest. He recognised that the normal course in the Commercial Court is to award interest on sterling at UK clearing banks' base rate + 1%, and on dollar sums at US prime rate. However, in this case he awarded interest on dollar sums at US$ Libor plus 2.5% because he was persuaded that Libor was more commonly used to set interest rates for loans to shipping companies, like those involved in the case, and US prime rate is not used outside the US. The 2.5% uplift was to produce a rate at which the successful claimant could have borrowed, taking into account the general nature of the claimant rather than investigating its actual circumstances and borrowing rates. Since the judge was awarding equitable compensation, he also compounded interest at 3 monthly rates.

Hospital pass

A party paying a judgment debt to another party's solicitor should take care to set out the basis on which the monies are to be held.

In *Tradegro (UK) Limited v Price* [2011] EWCA Civ 268, C had sold a business to D. As part of the agreement, C gave tax indemnities and D promised to pay Additional Consideration, which was to be assessed if it could not be agreed. Claims were made by D under the tax indemnity provisions, and were ultimately litigated. The court held that C owed D £650,000. But D was going to owe C something for the Additional Consideration, not determined at that stage. C did not want to pay D the judgment debt when there was every chance that D might owe C just as much, or more. D suggested that the judgment debt be paid to its solicitors, O, instead. O gave an undertaking to hold the monies on deposit, and not to deal with them "without the consent in writing of [C] or order of the court, until the satisfaction of any Additional Consideration determined to be payable… provided always that this undertaking will be immediately discharged by the payment of the [Additional Consideration]."

The Additional Consideration was eventually determined to be £2.5 million, but D became insolvent in the meantime. C claimed the monies held by O, as part payment of the Additional Consideration, but D said the sum belonged to it, and should be paid to its administrators.

The court had to decide on whose behalf O held the monies. Did the undertaking give rise to a trust? A stakeholder arrangement? A solicitor's undertaking? A personal contract?

The CA decided that the sum was held by O for D's benefit, and the undertaking should not be treated as giving C's claim for the Additional Consideration a special secured status as against D's other creditors. That would require the implication of a term that, if the Additional Consideration was not paid, the monies should be used to pay C. Such an implication was not appropriate. This dilemma could have been avoided had the undertaking been clearer about (a) the basis on which the monies were held and (b) what was to happen if the anticipated payment of the Additional Consideration did not happen.

The hobgoblin of small minds

A party can claim to have been induced to act by a representation it denies was made to it.

C claims that D represented that X was the case, that this representation induced C to enter into a contract, and that X was not the case, as D knew. D denies having represented that X was the case but says that she represented that Y was the case. Can C amend its pleadings to deny that D represented that Y was the case, but go on to plead, in the alternative, that if the court finds that D represented that Y was the case, that representation induced C to enter into a contract, and that representation was also incorrect, as D knew? How can C say that it was induced to enter into a contract by a representation that it denies was made to it? How can it confirm that by a statement of truth?

According to Henderson J (albeit obiter) in *Bleasdale v Carris* [2011] EWHC 596 (Ch), there is no problem in C making these alternative pleas. If need be, the court can dispense with the need for a statement of truth (CPR 22.1(2)), and C can rely on the rebuttable presumption that it was induced to enter into a contract by a material representation. It is also difficult, if not impossible, for claimants to analyse precisely what they enter into contracts. So inconsistency in pleadings is not, on its own, a ground to refuse permission to amend.

The bear necessities

The Ministry of Justice announces its implementation of the Jackson reform proposals.

The Ministry of Justice has announced that, in the light of its consultation on Sir Rupert Jackson's proposals, it will

- Remove the recoverability of success fees and ATE premiums
- Cap success fees in personal injury cases at 25% of damages, excluding those for future care
- Allow lawyers to enter into contingency fee agreements, similarly capped
- Increase non-pecuniary damages by 10%
- Introduce qualified one way costs shifting in personal injury cases
- Give claimants an additional 10% on their recoveries if they beat their Part 36 offers
- Cap costs recoveries at a sum proportionate to the claim

The Ministry of Justice is also consulting on proposals for the County Court, eg increasing track financial thresholds, compulsory mediation for certain types of case and "mediation information sessions" for all.

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