CLIFFORD
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Contentious Commentary

Property

Muck and brass

European Union Allowances are property.

By a series of regulations dating back to 2003, the EU introduced European Union Allowances, each of which is unique (but fungible) and exists on an electronic national register operating under an overall EU register. EUAs are doled out to carbon emitters, who are then required to surrender enough EUAs each year to match their emissions; if they fail to do so, they are fined. If an entity emits less than expected, it can sell its surplus EUAs, including by transfers between national registers; but someone who wants to increase the pace at which it is polluting the planet must pay for the privilege by purchasing more EUAs. And where there is an asset of value that can be sold, inevitably there will be market-making and associated transactions to provide, amongst other things, liquidity to the market.

All fine and dandy and frightfully green. But fraudsters also circle around assets of value. Poor security (since tightened) at some of the national registers allowed fraudsters to transfer EUAs without the knowledge of the owners. That leads to difficult legal questions as to what EUAs are, who owns them, and what remedies the deprived owner has against a recipient. The fraudsters disappear with the spoils, so the question is inevitably which of two fairly innocent parties - original defrauded owner and buyer - must take the loss.

The first English case on this topic to reach trial is *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch). C held EUAs on the German register, but supplied its login details and password to a fraudster in a simple phishing fraud. Using those details, the fraudster "sold" C's EUAs to D on the UK register; D almost immediately sold them on at a small profit to a third party. Who bears the loss: C or D? The first question is what are EUAs because the nature of the property dictates the cause of action.

The judge decided that, in English law (should it be EU or German law?), EUAs are property of some sort: they are definable (a bundle of rights, principally the right to avoid being fined), they are identifiable and they are transferable. He decided that they are not choses in possession (eg bills of exchange) because that requires a physical manifestation. They probably aren't choses in action either because they aren't enforced by a claim in the courts (though the judge wouldn't have been bothered had he felt compelled to categorise them as choses in action). So they fell within the general bucket of intangible property that isn't otherwise defined.

The claim on which C succeeded against D was a knowing receipt constructive trust. The judge recognised that this required the division of the legal and equitable interests in the EUAs. That is accepted if a fraudster takes ownership of the asset in question itself, but less easy to explain when, as here, the EUA is transferred directly from C's account at the German registry to D's account at the UK registry. However, the judge concluded that the fraudster's wrongful obtaining of C's login details and password gave the fraudster "some form of de facto legal title" (what is that?) that did not deprive C of its equitable title, of which the fraudster was trustee. As a result, the judge considered that whatever title D received from the fraudster would be held as a knowing receipt constructive trustee for C if D had acted unconscionably. The judge made no mention of German law, which, as the place where the assets were located when the fraudster obtained its de facto legal title (was ist das?), would normally determine the passing of title.

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The Judge decided that C had acted unconscionably. Unconscionability, like bad faith, is not the same as dishonesty. D had asked know your customer questions about the purported transferor, but had not received answers. That should have made D enquire further, and was sufficient to render C's conscience judicially impaired. The judge did not go into the time at which D should have become suspicious and, indeed, took into account information received by D after the EUAs had been transferred to D but before D paid for the EUAs. That is somewhat odd (information received after acquisition cannot retrospectively render the acquisition unconscionable), at least unless D's payment constituted acceptance of the fraudster's offer to sell to D the EUAs already transferred to D.

If legal and equitable titles had not been split by the fraudster's obtaining of legal title, the judge decided that C would still have won on the basis of a proprietary restitutionary claim (not to be confused with unjust enrichment). The judge considered that, in those circumstances, legal title remained with C throughout, and C's claim was simply for the return of its property or for its value. This is not the obvious solution. EUAs only exist on a register, and it might be thought that legal title is held by the person registered as the owner rather than being something apart from the register, as the judge thought.

If legal title had remained with C, the judge considered that C would still lose that title to a bona fide purchaser for value without notice. This angelic person has historically been referred to as "equity's darling" because he or she takes legal title free from prior equitable interests. It is less clear how D, who didn't get legal title on this analysis, could upgrade its interest to both legal and equitable titles because it was a purchaser for value in good faith from someone who had no title (there was no suggestion that EUAs are negotiable instruments, to which the nemo dat quod non habet rule does not apply). However, for the same reasons that D had acted unconscionably, the judge decided that D had notice and was not in good faith.

All very difficult legally, and probably not the last case to reach court on EUAs, which have been the subject of much fraud because too many national registers have not required a Moriarty amongst fraudsters to penetrate their perimeters. The pity may be that D bought the EUAs for €267,645 and sold them for €272,500. The litigation, including a five day trial, will probably have eaten up that already. Nevertheless, let's hope for an appeal.

Contract

Time immemorial

Non-payment of a deposit will usually be a repudiatory breach of contract.

At common law, time was always of the essence of a contract: if one party failed to perform by the date specified, the other could terminate the contract immediately. Equity sometimes agreed with the common law where timing was obviously critical (eg transactions on financial markets), but its general position was that allowing a non-defaulting party to terminate a contract merely for delay was unduly harsh. Where equity regarded termination as unduly harsh, equity would intervene to allow performance after the prescribed time. Equity's patience was not, however, unlimited. If the innocent party gave notice requiring performance within a reasonable time (ie making time of the essence), which performance was not forthcoming, equity would decline to intervene further, leaving the parties to their position at law.

So explained Lewison LJ as the necessary preamble to his judgment in *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, even though common law and equity were supposedly fused in the century before last. Despite fusion, the first issue in *Samarenko* was whether equity would have regarded the punctual payment of a deposit on a contract for the sale of land as so important that equity would always have left a non-payer to its fate at law, ie would equity have regarded time for payment of a deposit as of the essence? The Court of Appeal didn't quite say that failure to pay a deposit on time would always be a repudiatory breach of any contract, but it was pretty much inclined in that direction. Certainly, in the case before it, the Court of Appeal regarded the time for payment of the deposit as of the essence, entitling C to terminate immediately when D failed to pay.

The second question only arose if the Court of Appeal was wrong about that. When D failed to pay the deposit on the day on which it was due, C had given notice requiring payment within five days and threatening termination of the contract if that payment was not forthcoming. The payment failed to materialise, and C terminated the contract. Unsurprisingly, the Court of Appeal considered that the non-payment following the notice was repudiatory, entitling termination.

There was a disagreement between Rix LJ and Lewison and Etherton LJJ as to the circumstances in which a party could terminate after giving notice making time of the essence.

Rix LJ went back to Lewison LJ's historical preamble, and said that after the expiry of the time given by

an equitable notice making time of the essence, the position reverted to the common law. At common law, all stipulations as to time were conditions. Once equity would no longer intervene, the breach became repudiatory, and the innocent party could accept the repudiation.

Lewison and Etherton LJJ were not quite so sure. They contemplated the possibility that not all stipulations as to time should continue to be regarded at common law as being conditions. *Hong Kong Fir* [1962] 2 QB 25 had famously invented innominate, or intermediate, contractual terms that were neither conditions (breach of which could lead to termination of the contract) nor warranties (breach of which could only lead to a claim in damages), but for which the consequences depend upon the severity of the breach. The disappearance of the traditional bifurcation between conditions and warranties meant that all stipulations as to time should no longer automatically be categorised in the common law as conditions. As a result, the judges considered that the failure to perform on time must still, after time is made of the essence, go to the root of the contract - though in contracts for the sale of land, it would always do so.

In *Multi-Veste 226 BV v NI Summer Row Unitholder BV* [2011] EWHC 2026 (Ch), Lewison J had said that the effect of notice making time of the essence was to allow the question of whether a failure to perform on time went to the root of the contract to be approached on the basis that the obligation that had been timed out would never be performed. In *Samarenko*, Lewison LJ was not so convinced that failure to perform an innominate term after time had been made of the essence should always be treated as an absolute refusal to perform. The simple black letter rules that appealed to a first instance judge are evidently less attractive higher up the judicial ladder.

Generally, one might have expected the courts to have sorted out these temporal problems by now without continuing reference to ancient legal history. A recent review of the latest edition of *Snell on Equity* argued that a book dedicated to a legal system merged with the common law so long ago, rather than to a substantive legal topic, could only perpetuate problems and artificiality. Stipulations as to time might be one of the areas in which the perpetuation occurs.

Arbitration

That sinking feeling

A negative declaration given by arbitrators can be enforced in the courts.

Allianz must regard coming before the English courts in relation to West Tankers as a decidedly unrewarding process. Allianz continues to pursue Italian proceedings in defiance of a London arbitration agreement and a decision of the arbitrators. The strong judicial policy in favour of arbitration (see, eg *Sulamerica* below) makes that defiance an unattractive place from which to start any plea for assistance from the English courts, with the result that Allianz usually loses. But that may not matter if the CJEU is on Allianz's side, as it has been so far in refusing to restrain the Italian courts.

Allianz duly lost again in England in *West Tankers Inc v Allianz SpA* [2012] EWCA Civ 27. The issue was whether the court could make an order under section 66 of the Arbitration Act 1996 "enforcing" a negative declaration made by the arbitrators, ie a declaration that West Tankers was not liable. The reason for converting the arbitration award into a judgment was a fear that, notwithstanding the arbitrators' decision, the Italian court might give judgment in favour of Allianz, which might then seek to enforce that judgment in England under the Brussels I Regulation. Enforcement of the Italian judgment in England would be not be possible if the Italian judgment was irreconcilable with an English judgment between the same parties (article 34(3) of the Brussels I Regulation).

Allianz argued that it was not possible to "enforce" a negative declaration. After routinely setting out the parties' arguments, the Court of Appeal dismissed the point shortly, following a number of first instance decisions. The argument took far too limited a view of what enforcement meant in the context of section 66, which was about giving force to an award in an appropriate case. A court declaration in the same terms as that granted by the arbitrators would do that.

But that is not the end of the matter. There remains a question over whether an arbitration award converted into a judgment is a judgment within the meaning of article 34(3) of Brussels I. The Court of Appeal did not resolve that. If, therefore, the Italian courts do as the skirmishing in London indicates the parties think they might, another trip to the CJEU will presumably follow. It is, after all, now only the twelfth year since the shipping accident in Syracuse that started the litigation and the ninth year since proceedings were initiated in the Italian courts.

Arbitration

Meritocracy

The court has jurisdiction to grant an anti-suit injunction against a non-party to an arbitration for using court proceedings to undermine an arbitration agreement.

BNP Paribas SA v OJSC Russian Machines [2011] EWHC 308 (Comm) involved complicated issues of law, but (like most litigation) it is hard to avoid the conclusion that it was really resolved on the facts.

D1, a Russian company, and C were parties to an arbitration in London over a guarantee. D1 argued in the arbitration that the guarantee was not valid. D2, an affiliate of D1, then started proceedings in Moscow against C and D1 also contending, though for slightly different reasons, that the guarantee was not valid. C sought an anti-suit injunction against D1 and D2 to restrain the continuation the Moscow proceedings. The facts were stark, and Blair J was not prepared to allow the arbitration to be undermined by Russian litigation, despite some jurisdictional issues in his path.

As against D1, the basic position was straightforward. It was a party to the arbitration agreement, and thus the English courts had jurisdiction under CPR 62.5(1)(b) (application for an interim order under section 44 of the Arbitration Act 1996) over the claim and to grant the injunction sought by C. There was more of a problem with D2 because it was not a party to the arbitration agreement. Nevertheless, Blair J decided that since C alleged that D2 was engaging in unconscionable steps to frustrate the arbitration, CPR 62.5(1)(b) still applied. He also thought that he had jurisdiction to allow service out on D2 as a necessary and proper party to the proceedings under PD 6B, §3.1(3).

Blair J accepted that there was a good arguable case on the merits, and rejected allegations of undue delay in applying for the anti-suit injunction. He was then faced with questions about the manner of service of the legal process. D1 had been served by sending the claim form to the London solicitors acting for D1 in the arbitration (who had not confirmed their authority to accept service). The judge was prepared to make an order for retrospective deemed service under CPR 6.15(2) because, had C asked for permission to serve on D1's solicitors, it would have been granted. He regarded it as standard practice to grant permission to serve an arbitration claim form on the London lawyers acting in the arbitration.

As to service on D2, the judge upheld service by post in Russia. The problem was that CPR 6.40(4) prohibits service in a manner that is "contrary to the law" of the place where service is to be effected. The judge accepted that under Russian law, English process was required to be served through official channels under the Hague Convention (which takes three to six months), but he also accepted that it is not actually illegal to serve foreign process by post in Russia (cf Switzerland). CPR 6.40(4) only applied to service by a means that is illegal, which allowed the judge to get round the Hague Convention and to permit the proceedings to go ahead. He could therefore conclude that D2 had been served, and that the anti-suit injunction could continue. The right result.

Russian Machines contrasts with *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14, in which the Court of Appeal overturned the grant of an anti-suit injunction with regard to Russian proceedings on a guarantee, condemning the first instance decision as showing "a touch of egoistic paternalism". But the facts *Star Reefers* were starkly different: there was no jurisdiction clause; there were no English proceedings at the time the Russian litigation was started; and there was a legitimate advantage in a Russian wanting to litigate at home.

Clifford Chance LLP acted for *BNP Paribas* in the Russian Machines case.

Jurisdiction

Mediation blues

An agreement to mediate is not binding.

Agreements that contain conflicting court jurisdiction and arbitration provisions are, sadly, not uncommon. But in *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia* SA [2012] EWHC 42 (Comm), Cooke J was faced with an agreement that contained not just competing jurisdiction and arbitration provisions, but that also threw mediation into the mix. To complicate matters further, the agreement (an insurance policy) was expressed to be governed by Brazilian law.

The first issue Cooke J addressed was the law governing the arbitration provision. The agreement said that it was governed by Brazilian law, but the seat of the arbitration was London. Following earlier decisions (including a decision by one Cooke J), the judge decided that the arbitration clause was governed by English law, notwithstanding that the choice of law provision in the agreement did not exclude the arbitration provision from its ambit. An arbitration agreement is treated as distinct from the rest of the agreement and so, in effect, requires its own choice of law provision.

Absent express choice, the question is what law has the closest and most real connection with the clause, and that law is generally the law of the seat of the arbitration.

Cooke J then turned to the mediation provision (somewhat fudging the issue of whether it was part of the arbitration agreement, and therefore governed by English law, or was governed by Brazilian law). He concluded that a mediation agreement would be binding if three conditions were met. First, the process was sufficiently certain, and did not require further agreement to allow matters to proceed. Secondly, the administrative processes for picking and paying the mediator were defined. Thirdly, the process, or a sufficient model of the process, was set out so that the detail of the process was sufficiently certain. The second and third of these conditions could easily be seen as specific aspects of the first, the real question being whether the mediation agreement is sufficiently certain or whether further agreement is required.

On the clause before him, Cooke J decided that the clause did not provide sufficient certainty, and was therefore not binding. The parties hadn't bound themselves to mediation in clear terms (they would only "seek to have the Dispute resolved amicably by mediation"), no process was set out, and no provision was made for the selection of a mediator.

The next question was which of the arbitration and jurisdiction provisions prevailed. The agreement said that all disputes were subject to the jurisdiction of the Brazilian courts, but went on that if the parties failed to resolve a dispute by mediation, it would be referred to arbitration in London. For no clearly stated reason beyond English judicial policy strongly favouring arbitration, Cooke J decided that the arbitration provision prevailed, thereby denuding the jurisdiction provision of any real content.

So Cooke J granted an anti-suit restraining D from pursuing its action in the Brazilian courts, despite interim decisions by a Brazilian court that D was not necessarily bound by the arbitration agreement as a matter of Brazilian law and injuncting C from pursuing the arbitration pending a final decision. The Brazilian court had, however, on an English conflicts analysis, applied the wrong law, and thus could be ignored. So there is a Brazilian injunction stopping the arbitration, and an English injunction stopping the Brazilian court proceedings. Ambassadors have been recalled for less.

Lebanese captivity

A non-exclusive jurisdiction agreement confers jurisdiction on the English court, but the claimant must still serve the claim form properly.

In *Abela v Baadrani* [2011] EWCA Civ 1571, the Court of Appeal reinforced the potency of a non-exclusive jurisdiction clause. If the parties have agreed to the non-exclusive jurisdiction of the English courts, there must be an "extremely strong reason" for the English courts to decline jurisdiction (provided that the Brussels I Regulation does not apply). The fact that C had started proceedings in the Lebanon on the same matter six years before doing so in England was not sufficiently potent for these purposes. All C had to do was to undertake not to progress the Lebanese proceedings.

But service failures brought C's proceedings to a swift halt. The Court of Appeal confirmed that CPR 6.15 (alternative service) was applicable to

Company law

Punch drunk

Piercing the corporate veil does not lead to contractual liability.

Piercing the corporate veil has always been difficult - what's the point of incorporation if it's not? The now orthodox, if question-begging, statement of the circumstances in which it can be done is that it requires that "the company was used as a device or façade to conceal true facts thereby avoiding or concealing any liability of [the] individuals" behind it (*Trustor AB v Small (No 2)* [2001] 1 WLR 1177, at [23]).

In *VTB Capital plc v Nutritek International Corp* [2011] EWHC 3107 (Ch), Arnold J decided that even where the corporate veil can be pierced, it does not lead to the puppeteer being liable on a contract entered into by its corporate puppet but only to an equitable remedy. In reaching this conclusion, the judge declined to follow a contrary decision by Burton J in *Antonio Gramsci Shipping Corp v Stepanovs* [2011] EWHC 333 (Comm).

C claimed that it had made a loan to D1 as a result of fraudulent misrepresentations by D1 that the purchase for which D1 required the funding was at arm's length; it was not because the seller was controlled by those who controlled D1. This, C claimed, made D2 et al liable on the loan agreement entered into by D1 as if D2 et al were parties to it.

Arnold J rejected this claim, leaving C with a claim in tort only (though he thought that the tort was governed by Russian law rather than English law). Piercing the corporate veil leads to fraud claims, not contractual liabilities.

service out of the jurisdiction despite being in the section of CPR 6 dealing with service within the jurisdiction (see also *Russian Machines* above). This is because CPR 6.37(5)(b)(i) allows the court to give directions as to the method of service. However, C had served the claim form on D's Lebanese lawyer in Beirut. The Court of Appeal considered that service should only be retrospectively validated if it would otherwise have been valid (see *Russian Machines* above again). Since the Lebanese lawyer had no authority to accept service of the English proceedings, the Court of Appeal refused retrospectively to validate service.

Normally, this would be resolved by serving again. But the time within which the claim form could be served had expired, as had the limitation period. C's attempt to move from the Lebanon to London therefore failed.

Greek gifts

Enforcing a Tomlin Orders can include damages claims for breach of the order.

An unexpected virtue of a Tomlin Order was revealed in *Starlight Shipping Co v Allianz Marine* [2011] EWHC 3381 (Comm), though the facts appear so extreme that some caution must be exercised as to its application to other less fragrant cases. The virtue is that a stay under a Tomlin Order leaves the proceedings on foot for the purposes of Brussels I, and that carrying into effect the settlement terms offers a wide range of remedies.

The matter opened with acrimonious English proceedings brought by shipowners against their insurers in 2006. The shipowners' allegations included that the insurers had bribed crew members to give false evidence to support the insurers' claim to avoid the policy. The proceedings were settled by two Tomlin Orders, which (in usual form) stayed the proceedings save for the purposes of carrying into effect the settlement agreements. The settlement agreements gave exclusive jurisdiction to the English courts (one did not include the word "exclusive" but was still interpreted as such).

Three years later, the shipowners started near identical proceedings against the insurers in Greece. The English courts could not injunct the shipowners from pursuing their claim in Greece (*Turner v Grovit* [2004] ECR I-3565), but Burton J went as far as he could to stymie the Greek claim.

He decided that the settlement agreement covered the fraud claims despite the wording not expressly mentioning fraud expressly. The settlement agreement, which was in normal terms, was clearly intended to wipe the slate clean, and the existence of the fraud claims was known at the time. No surprise there.

More significantly, Burton J decided that the stay of the English proceedings granted by the Tomlin Order did not mean that the English courts became unseised of the claim. As a result, the English courts did not have to defer to the Greek courts under article 27 of the Brussels I Regulation.

He went on to conclude that, despite some awkward precedents, the provision in a Tomlin Order staying the proceedings "save for the purposes of carrying into effect the terms agreed" allowed the insurers to claim damages for breach of the settlement agreement (ie damages for bringing proceedings in Greece), including the costs of the dealing with the Greek claims.

Burton J even ordered by way of quia timet relief the creation of a fund in England to meet in advance the insurers' costs of dealing with the Greek proceedings. Whilst leaving it to the Greek courts to decide whether they have jurisdiction, Burton J therefore made the claimants in the Greek proceedings pay in advance for the insurers to defend the claim (assuming that the English order can in practice be enforced against the shipowners).

The underlying merits of *Starlight* are pretty clear, but whether the CJEU would agree that Burton J (who has previous form in this area) could go as far as he thought he could in defeating the Greek courts is more open to question.

Respect

A claim made on one contract cannot also be in respect of another contract.

A agrees to buy an aircraft from C under a contract governed by English law. D guarantees A's obligations in a guarantee that is not governed by English law. The English courts have jurisdiction outside the scope of the Brussels I Regulation over a claim made "in respect of a contract where the contract... is governed by English law" (PD6B, §3.1(6)(c)). Can C use PD6B, §3.1(6)(c) in order to sue D in the English courts on the basis that C's claim on the guarantee is a claim in respect of the underlying contract between A and C?

No. In *Global 5000 Ltd v Wadhawan* [2012] EWCA Civ 13, the Court of Appeal decided (obiter) that the claim was in respect of the guarantee, not the contract between A and C (the Court of Appeal did not consider whether the claim might have been in respect of both). PD6B, §3.1(6)(c) is not confined to claims directly on a contract, but the Court of Appeal was not prepared to allow C to leap from one contract to another.

Insolvency

Judicial universality

Courts have an inherent power to allow overseas insolvency officials to use provisions of the Insolvency Act 1986.

Statutory powers must, it might be thought, be exercised in accordance with the conditions laid down by statute. But that created a problem in *Re Phoenix Kapitaldienst GmbH, Schmitt v Deichmann* [2012] EWHC 62 (Ch).

A German administrator wanted to use section 423 of the Insolvency Act 1986 (transactions at an undervalue) to recover from investors in a Ponzi scheme the fictitious profits that had been paid to them. But the EU's insolvency regulation didn't apply because Phoenix was an investment undertaking. The Cross-Border Insolvency Regulations 2006 didn't apply for timing reasons. Section 426 of the Insolvency Act 1986 didn't apply because Germany has not been designated under that section. So the answer is that the German administrator can't use section 423.

Except that it's not. Proudman J decided that she had inherent common law authority to allow a foreign administrator to use section 423. Following Lord Hoffmann's comments about the "underlying principle of universality" in insolvency (*Cambridge Gas* [2007] 1 AC 508), she decided that she could expand the application of the Insolvency Act into areas beyond Parliament's intention. Constitutionally decidedly dubious.

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