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Contentious Commentary

Conflict of laws

Le chat amongst les pigeons

The French *Cour de cassation* has caused problems for a common form of jurisdiction provision.

A jurisdiction agreement that gives jurisdiction to an EU court must meet the requirements of article 23 of the Brussels I Regulation if one of the parties is domiciled in the EU. The governing law of the contract is irrelevant for these purposes (*Benincasa v Dentalkit*, Case C-269/95). The interpretation of Brussels I is (or should be) the same throughout the EU. Ultimately, this will be dictated by the Court of Justice of the European Union, but pending an authoritative decision on any particular issue, decisions by national courts may be persuasive elsewhere.

As a result, a decision by the highest French court, the *Cour de cassation*, concluding that a commonly used form of jurisdiction clause does not comply with article 23 is troubling.

The clause in question was in a deposit agreement, and required the depositor to sue the bank in the Luxembourg courts but allowed the bank to sue the depositor in Luxembourg, in her domicile or in any other competent court. The depositor sued the bank in France. The bank applied to stay the proceedings in favour of Luxembourg on the basis of the jurisdiction clause. The *Cour de cassation* decided that the clause did not comply with article 23 and was, therefore, wholly ineffective (decision no 11-26.022, 26 September 2012). Jurisdiction fell to be determined by the normal provisions of Brussels I, under which the French courts had jurisdiction.

There are strong arguments to suggest that the *Cour de cassation*'s decision should not be followed. For example, its decision doesn't reflect the wording of article 23. As Professor Adrian Briggs, the leading Anglo-Saxon guru in this area, put it, "Had the customer agreed in writing to the jurisdiction of the court of Luxembourg, the jurisdiction of which shall be exclusive unless the parties agree to different effect? She had. Why is that not the end of the story?"

Although decided on the basis of the interpretation of article 23, the court referred to the French law concept of *conditions potestative*, one-sided contractual provisions that French law renders unenforceable. French law is irrelevant to article 23, but all lawyers bring with them the baggage of their home law. The court did not even expressly consider whether it should refer the case to the CJEU, which it is obliged to do under article 267 of the Treaty on the Functioning of the European Union unless it considers EU law to be *acte clair*. Some might have thought it hard for the *Cour de cassation* to reach that conclusion given that there are contrary decisions in the lower French courts, not to mention by the Italian *Corte di Cassazione* earlier this year.

Despite the criticisms that can be made of the *Cour de cassation*'s decision, it exists. The interpretation of the Brussels I Regulation ultimately depends upon the CJEU, and no one can entirely discount the possibility that the CJEU will follow the *Cour de cassation* (though the French case in question will not go to the CJEU). Hostility to one-sided jurisdiction clauses is not confined to France: eg Spain and Poland have national laws that render them ineffective outside the scope of Brussels I, and Belgium and Luxembourg all have laws disapproving of *conditions potestative*. In contrast, there are decisions in Germany and Italy upholding one-sided jurisdiction clauses.

If someone wishes to escape from one of these jurisdiction clauses, an argument based on the *Cour de cassation*'s decision can be expected, if only to delay exploration of the substantive issues. The English courts, with their emphasis on freedom of contract, might on their own give little credence to the point, but ultimately the decision lies in Luxembourg rather than in London. English (and other) courts might feel obliged to refer the point to the CJEU,

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and all EU courts must follow the CJEU, whatever the CJEU may eventually decide.

From Russia without affection

The Russian courts strike down one-sided arbitration clauses.

The *Cour de cassation* (above) was following the Supreme Arbitrazh Court of the Russian Federation in its dislike of unilateral dispute resolution clauses. In a case between RTK and Sony Ericsson, the Russian Court reversed the lower courts in deciding that a clause that provided for ICC arbitration in London but with the option for Sony to go to any competent court was ineffective. As a result, proceedings brought by RTK in the Moscow courts in breach of that clause were not stayed (Case VAS-1831/12). However, it appears that the Arbitrazh Court did not strike down the whole clause. Its view was probably that an option given to one party must should be treated as also available to other. As a result, either party could opt for the courts rather than the choice only being available to Sony.

The court's reasoning was that one of the guarantees of fair dispute resolution is that the parties should have equal rights to present their positions to the adjudicatory tribunal, including having equal procedural opportunities. Giving one party the right to go to a court of its choosing violated the balance of the parties' rights. This argument perhaps confuses equality of procedural rights within a tribunal - both parties must, for example, have an equal right to be heard - with the right to chose which tribunal should hear the matter. Absent a binding jurisdiction agreement, the choice of tribunal is always exercised by one party only, the claimant.

If an arbitration has taken place under a unilateral clause of this type, the Supreme Arbitrazh Court's decision is unlikely to render the arbitration award unenforceable in Russia.

The Russian court was echoing a decision of the Bulgarian Supreme Court of last year (Judgment No. 71 in commercial case No. 1193/2010). The Bulgarian Court also struck down an arbitration clause that gave one party the right to choose whether or not there should be an arbitration. The Court concluded that the clause was void pursuant to article 26(1) of the Bulgarian Contracts and Obligations Act, which outlaws all contracts that violate or evade the law or breach of good morals. The "potestative" nature of the provision, giving one party the power to affect unilaterally the legal position of another, was held to offend the law and morals.

So, whether it be in litigation or arbitration, unilateralism in dispute resolution clauses is under attack. Parties to contracts therefore need to look carefully at their dispute resolution provisions to decide what they want them to achieve, what is risk is acceptable and what the outcome will be if the clause fails.

Personal pleasures

A personal judgment based on fraudulent preference given in a US insolvency is refused enforcement in England.

There is no treaty that allows for the direct enforcement of US judgments in England. In order to achieve indirect enforcement, the English court will treat a US judgment as creating a debt; an English judgment, usually summary, can then be entered on that debt. However, to be regarded as creating a debt, the US judgment must meet certain conditions. These conditions include the US court having jurisdiction over the defendant, which is assessed on the basis of English rules. The defendant must, for example, have submitted to the jurisdiction of the US court or been present in the US at the material time. If the US court had no jurisdiction over the defendant, the judgment is not enforceable in England. Thus speaks *Dicey, Morris & Collins*, the English bible on conflict of laws.

So far so good, and doubtless relied on by the Ds in *Rubin v Eurofinance SA* [2012] UKSC 46 in deciding not to appear in US proceedings in which sums were claimed from them by an insolvent entity on the basis of the US equivalent of fraudulent preference. Default judgment was entered against the Ds in the US, and its enforcement then sought in England. At first instance, enforcement was refused on the conventional grounds set out in *Dicey*: the US courts had no jurisdiction over the defendants because the Ds had neither submitted to the US courts' jurisdiction nor were in the US at material times.

It must have come as an unpleasant surprise to the Ds when the Court of Appeal re-wrote English law and allowed enforcement of the US judgment. The Court of Appeal decided that it should make up for global legislative failings in not agreeing a universal approach to insolvency by concluding that, in England, the basic rule stated in *Dicey* no longer applies to insolvency proceedings. In this, they (sort of) followed the controversial and enigmatic decision of the Privy Council in *Cambridge Gas* [2007] 1 AC 508.

Fortunately for the Ds, the Supreme Court (Lord Clarke dissenting) has restored order - not a surprising outcome given that the Supreme Court was led by the current and eponymous editor of *Dicey, Morris & Collins,* Lord Collins.

The Supreme Court concluded that the judgment in question was a personal judgment because it ordered the Ds to pay a sum of money, even if the legal basis was insolvency law rather than reflecting pre-existing rights (eg under a contract). As a result, the *Dicey* rule applied unless policy demanded an exception for insolvency. The Supreme Court decided that if an exception was required, it was for Parliament to provide it. Any change would involve difficult questions (eg it would require two new jurisdictional rules: one to decide what insolvencies should benefit from the relaxed rule, and another to decide what connection with the insolvency jurisdiction judgment debtors should have in order to allow the judgment to be enforced against them). This would not be an incremental development of the common law, but a step change in an area already much affected by legislation.

A majority of the majority (losing Lord Mance on this point) decided that *Cambridge Gas* was wrong, even though that point was not argued. *Cambridge Gas* involved a US court order implementing the equivalent of a scheme of arrangement. The order purported to transfer shares in an Isle of Man company. The Cayman owner of those shares was not subject to the jurisdiction of the US courts. The Privy Council decided that the Manx courts could give effect to the US insolvency court's order even though the property in question was in the Isle of Man, not the US, and the lack of submission by the owner to the jurisdiction of the US courts. The bottom line for the Supreme Court, in rejecting this approach, was the conventional one that, insolvency or no insolvency, US courts can't decide title to property outside the US.

The Supreme Court also decided that neither section 426 of the Insolvency Act 1986 nor the Cross-Border Insolvency Regulations 2006 (implementing the UNCITRAL Model Law) allowed the English court to enforce foreign insolvency judgments (the EU's Insolvency Regulation was not in play).

Rubin was heard with another case, *New Cap Reinsurance Corporation v Grant*, in which a different conclusion was reached. This other case involved a similar default judgment, by an Australian court this time. The key point in *New Cap*, dividing it from *Rubin*, was that the Ds had submitted to the jurisdiction of the Australian

Competition and limitation

Hard times

National limitation periods are allowed under EU law if they are sufficiently foreseeable or clear.

In *BCL Old Co Limited v BASF plc* [2012] UKSC 45, D was part of a vitamins cartel the members of which were fined by the European Commission. They had until 31 January 2002 to appeal against the Commission's infringement decision or the fine. D appealed against the fine only. The Court of First Instance reduced the fine on 15 March 2006. No further appeals were lodged.

On 12 March 2008, C brought follow-on proceedings for damages. D argued that the claims were out of time. Under the Competition Act 1998, a follow-on claim must be made within two years beginning on the "relevant date". C said that this was the last date on which D could have appealed the level of the fine (ie two years from 25 May 2006). D said the relevant date was the last date on which it could have appealed from the infringement decision (ie two years from 31 January 2002).

The Competition Appeal Tribunal agreed with C. The Court of Appeal overturned that decision. The Court of Appeal also held that the CAT had no power to extend this time limit. C appealed to the Supreme Court, arguing that the operation of the limitation period caused uncertainty, and that this meant it was difficult for parties to pursue follow-on damages claims. This, they said, was in breach of EU law.

The Supreme Court showed little sympathy to C, holding that national limitation periods are allowed under EU law as long as their true effect or interpretation is sufficiently foreseeable or clear. In this case, the limitation period was clear. It started on the expiry of the time for appeal against the infringement decision, not the time for appeal against the level of the fine. The Competition Act distinguishes between infringement and penalty decisions, and makes this clear. As the time limit was clear, the CAT had no power to extend it.

A further problem for C was that, even if it had won, that would only have meant that the UK was in breach of its obligations under EU law. European law does not require the setting aside as between civil parties of a limitation defence which a party independent of the state has successfully established under domestic law, just because its existence or scope was uncertain until the court decision establishing it.

courts. The Ds had filed proofs of debt in the Australian insolvency, lodged proxies and done various other things. That, the Supreme Court considered, was sufficient for the Ds to have submitted to the jurisdiction of the Australian courts and, as a result, for the judgment to be enforced under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (which reflects the common law rules).

Generally, sanity has been restored. Lord Collins recognised that anything other than the restoration of the law as stated in *Dicey* would have been unfair on English parties because the English courts would have been very liberal in enforcing foreign insolvency law when the reverse would not necessarily have been the case. The English courts would have allowed English law contracts to be re-written and English parties subjected to foreign insolvency law just because a foreign insolvency court said it should be done. Absent reciprocity, enforcing foreign judgments might have looked like an act of prostration by the English courts.

Contract

Shalls, mays and musts

Providing that a party "may" serve notice in one of two ways does not prevent service by other means.

Parliamentary Counsel's guide to drafting used to have a section running to myriad pages on the merits and meanings of "shall", "will" and "must" when drafting statutes. When is it the future tense? when is it conveying insistence or obligation? Now, their guide simply says that "shall" should (or shall or must) be avoided. Fowler's *Modern English Usage* says that the "history of these auxiliary verbs [ie shall and will, along with should and would]... is immensely complicated and cannot be satisfactorily summarized here", a curious admission for a book whose sole role is to provide that summary.

To this linguistic minefield will (or should or could or may) be added the word "may". In *ENER-G Holdings plc v Hormell* [2012] EWCA Civ 1059, one judge considered "may" was sufficient to create an obligation; fortunately, the other two did not agree.

The context was a service clause in an agreement for the sale of a business. It provided that notice of a warranty claim "shall" be given in writing and "may be served by delivering it personally or by sending it by pre-recorded post to each party... at or to the address referred to in the Agreement..." The Court of Appeal was rightly clear that "delivering it personally" meant personal service on the recipient, not that the server could deliver it in person to the relevant address. But the Court of Appeal was split as to whether the Agreement required notices to be served by one of the two methods specified or whether other methods were acceptable.

Longmore LJ considered that one of the two methods needed to be used. He didn't see "may" as entirely permissive but only as offering a choice between the two specified means of service. Lord Neuberger MR and Gross LJ struggled with the meaning, but were eventually persuaded that "may" meant that other means of service were acceptable, though these alternative means did not benefit from the subsequent deeming provisions as to when service took place. Ultimately, the contrast with the requirement that notices "shall" be in writing persuaded the majority that the drafter was drawing a deliberate distinction between the two words.

The facts of *ENER-G* were somewhat eccentric, resulting in both parties arguing on what would normally be the wrong side. The Agreement required notice of warranty claims to be given within two years of the date of the Agreement; legal proceedings then had to be started within one year of that notice. C tried to serve notice of a warranty claim personally three days before the end of the period, but D was not at home. The server therefore left the notice at the premises, where D found it later on the same day. C also served the notice by registered post, which was deemed to be served on the day before the end of the period.

A claim form was then issued a year - give or take - later such that it was in time if the second (posted) notice was the operative notice of the warranty claim, but out of time if the first (hand-delivered) notice was operative. D therefore argued that even though he had not been served personally with the first notice in accordance with the clause, he had nevertheless been validly served with it by other means - hand delivery to his home address. Service of a second notice could not undo the prior service of the first.

The Court of Appeal agreed. The MR observed that clear words would be required before the parties could be presumed to have intended that a recipient who actually received a notice should nevertheless be deemed not to have done so. There were no such words. Gross LJ recognised the potential harshness of the conclusion, but stressed the parties' desire for commercial certainty and the role of strict time bars in providing that certainty. He also recognised the problems of appealing to commercial common sense as an aid to construction, as both parties did (see *Aston Hill Financial Inc v African Minerals Finance Ltd* [2012] EWHC 2173 (Comm) below). Ultimately, as Lord Nicholls put it in *Valentines Properties Ltd v Huntoc Corporation* Ltd [2001] UKPC 14, at [20], "[i]nherent in a time

limit is the notion that the parties are drawing a line. Once that line is crossed, a miss is as good as a mile."

Though unable satisfactorily to summarize the position on the use of auxiliary verbs, Fowler does say that although "shall" is generally declining in use, it survives "in legal drafting, where it means "must, has a duty to"". The Court of Appeal did not consider "may" to be in the same legal league.

The uses and abuses of common sense

Identifying the commercially correct outcome is not easy.

When construing a contract, a court should endeavour to give it a meaning that accords with business common sense (eg *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 at [21]ff). But *Aston Hill Financial Inc v African Minerals Finance Ltd* [2012] EWHC 2173 (Comm) shows the limits of this approach. Eder J said that each side had trumpeted its interpretation as being the one that gave proper commercial effect to the contract, but he found it difficult to decide who was right.

Faced with this, the judge retreated to the language of the contract in order to decide for the defendants, though still uncertain whether his interpretation in fact accorded with business common sense: "I have found the arguments in relation to what was supposedly business common sense difficult to apply and whatever such arguments may be, the conclusion which I have reached is one which, in my judgment, is more consistent with the language used in the Facility." In keeping with tradition, therefore, as a first instance judge, Eder J has stuck to the words in the contract, leaving it to higher courts to determine with the greater confidence that judicial elevation brings what truly represents commercial common sense.

Deemed actuality

Deeming something to be the case does not make it so.

“Deem” is a word much-used by lawyers but which seldom escapes into the real world. Even in legal documents, however, its meaning can be obscure. Does it mean that something is actually the case or only that the parties are pretending that it is the case even though it is not?

In *Alstom Power Ltd v SOMI Impianti spl* [2012] EWHC 2644 (TCC), the parties had deemed property of a subcontractor to belong to the main contractor. But did that mean that title had actually passed? The judge decided that if the parties used language that made it clear that title passed, so be it. But “deeming” title to do so was ambiguous, and it was therefore necessary to look at the rest of the contract to assess what was intended. In context, he was clear that title did not pass. The parties were only pretending that it had done so in order to allow the main contractor to use the sub-contractor’s stuff if the sub-contractor was thrown off the site for breach of contract.

Recognising illegality

The effect of illegality on the enforceability of a contract remains difficult to determine.

In *Parkingeye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338, the Court of Appeal was determined not to allow D to escape from paying damages for repudiatory breach of contract by reason of C's illegality in performance. The reason for the decision in terms of a rule of law is, however, hard to discern. The Court of Appeal might not have expressed with perfect clarity exactly why it was doing what it was doing, but it did know that it was not exercising a discretion. The House of Lords banned discretion as regards illegality in *Tinsley v Milligan* [1994] AC 340, and so in no way, under no circumstances - indeed, never - could the Court of Appeal contemplate doing such a thing, even if its approach might have looked a trifle discretionary to the naive outsider.

The case concerned parking. D contracted with C for C to install cameras in D's car parks to take the numbers of cars that over-stayed their shopping-time allowance. C then wrote a series of stroppy letters to the owners of the cars (who may or may not have been the drivers) demanding payment. The third of these letters was held to constitute the tort of deceit since it demanded payment from car owners on the basis of false representations. This, said D, constituted the illegal performance of the contract, which rendered it unenforceable.

The Court of Appeal considered C's infraction far too trivial to allow D to escape from its obligation to pay damages for its otherwise unquestioned wrongful termination of the contract. There was no need for the contract to be performed illegally; the illegality could have been stopped at D's request; and the illegality was anything but central to the performance of the contract. Letting D off the hook of its repudiatory breach would have been disproportionate to C's offence (an assessment of proportion must not, of course, be confused with the exercise of discretion).

Tort

Space-wasting

The rule in Rylands v Fletcher is almost dead.

In *Stannard v Harvey* [2012] EWCA Civ 1248, Ward LJ usefully

summarised the rule in *Rylands v Fletcher* as follows:

1. D must be the owner or occupier of land.

2. D must bring or keep or collect an exceptionally dangerous or mischievous thing on its land.

3. D must have recognised or ought reasonably to have recognised, judged by the standards appropriate at the relevant place and time, that there was an exceptionally high risk of danger or mischief if that thing should escape, however unlikely an escape may have been thought to be.

4. D's use of its land must, having regard to all the circumstances of time and place, be extraordinary and unusual.

5. The thing must escape from D's property into or onto C's property.

6. The escape must cause damage of the relevant kind to C's the rights and enjoyment of its land.

7. Damages for death or personal injury are not recoverable.

8. It is not necessary to establish D's negligence but an Act of God or the act of a stranger will provide a defence.

This summary shows, following *Transco plc v Stockport MBC* [2004] 2 AC 1, that the rule in *Rylands v Fletcher* is in a near vegetative state because of the current judicial dislike of strict liability. *Stannard* moved a hand towards the off-switch of the life-support machine, at least in the case of fire.

Stannard involved a disorderly pile of tyres that caught fire, burning down next door. A claim in negligence by next door was dismissed, leaving only its claim in *Rylands v Fletcher*. The judges decided that the fire, which started in electrical wiring, had not been brought by D on to the land and therefore the rule in *R v F* was irrelevant.

Lewison LJ went even further in deciding that a claim in *R v F* for fire was ruled out by section 86 of the Fire Prevention (Metropolis) Act 1774, a re-enactment of legislation first passed in 1707 in response to the urban disasters like the Great Fire of London. One might have thought that someone else would have noticed this in the intervening 305 years.

Remoteness control

Losses flowing from market problems after Lehman's collapse are not too remote.

One of the casualties of Lehman's collapse was AIG, which had to be rescued in the US. But AIG's tentacles reached to these shores in that it sold in considerable volumes a Premier Access Bond. The PAB was, in substance, an investment pool that placed its money in highly rated bonds and, as a result, offered a better rate of interest than bank accounts while still promising to be safe. On Lehman's demise, rumours spread of AIG's bankruptcy, with the result that investors wanted their money out in a rush. This required AIG to sell the investments in the PAB, which it couldn't do at sufficient speed or at sensible prices, so it suspended redemptions for three months (as its rules allowed). When redemptions resumed, payments were less than 100% because no one was buying even cash-based investments then.

C claimed to have lost about £180k of the £1.25m he invested in the PAB three years earlier. Some might have been relieved, but C (a solicitor married to an ex-investment banker) sued the bank through which he had made the investment. In *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184, he won on liability, as he had at first instance, but the Court of Appeal overturned the judge's decision that the losses were too remote, duly awarding him damages.

The Court of Appeal followed the judge in holding that the bank had acted in breach of the FSA's Conduct of Business rules, giving a claim for breach of statutory duty under section 150 of FSMA, and in negligence. The bank had failed to explain the nature of the investment (it was not a deposit but a share in a market fund and thus subject to capital risk), nor was it suitable. But while the judge had decided that in 2005, when the investment was made, no one would have foreseen the market mayhem resulting from Lehman's collapse, the Court of Appeal had twenty-twenty vision. It pointed out that the problem for the fund was lots of investors seeking the return of their money and the fund being unable to get good prices in the market for its investments. The terms of the investment referred to this risk, which cannot therefore have been too unforeseeable.

The only aspect of the case that caused the Court of Appeal any concern was the passage of time. The bank recommended the investment in 2005, and C had said that he was unlikely to hold the investment for more than a year; the problems did not occur until 2008, with C still holding the investment. However, the Court of Appeal decided that it was impossible to limit the extent of the obligation by reference to time. Ultimately, remoteness depends upon the rule imposing liability, and this was a consumer protection rule. Fine distinctions were not appropriate in a consumer context. Once the court had accepted that the bond was unsuitable and that C (a consumer) did not understand its nature, the court was inclined to land the bank with the consequences.

Normal service

A claim for misselling of derivatives fails in Scotland.

The Scottish courts reached the more usual result in misselling cases in *Grant Estates Ltd v The Royal Bank of Scotland plc* [2012] CSOH 133, striking out a claim for the supposed misselling of an interest rate collar on a peremptory basis and, in doing so, following the English cases (eg *Springwell*, *Titan Steel Wheels* and *Peekay*).

In late 2007, C (a property developer) entered into an interest rate collar, which fixed its interest rate within a band from 5.5% to 6.5%, ie C did not suffer if rates went above 6.5% but the price of that security was that C would not gain if rates went below 5.5%. The collar hedged C's interest rate risk on a floating rate loan from the bank. Post Lehman, interest rates went below 5.5% and have stayed there for a long period; hence C's complaint, in response to the bank's appointing administrators of C.

The parties had entered into a contract on the usual banking terms, reciting that the bank was not advising C, that C was not relying on the bank, that C would take such independent advice as it wanted and that the bank was providing an execution only service.

The court rejected C's argument that it could claim under section 150 of FSMA for breach of the FSA's Conduct of Business rules. C was not an individual and, as a result, could only claim under section 150 if it suffered loss other than in the course of carrying on business. Following *Titan Steel Wheels*, Lord Hodge declined to give "carrying on business" a narrow meaning, but was in any event clear that in entering into the collar, C was acting in the course of its business even though entering into the collar was a one-off transaction. The judge also concluded that by limiting rights of action to non-businesses, the UK was not in breach of its obligation in EU law to implement MiFID correctly.

The judge declined to imply an advisory contract between C and the bank. It was not necessary to do so, and was contrary to the terms of the express contract they had entered into. He also declined to imply tortious duties as a result of MiFID and COB, in part because that would have undermined the legislative decision not to give rights of action to businesses but also because tortious obligations would be inconsistent with the contract between the parties. The judge accepted the English law position that the parties can agree that one is not advising the other, thus allocating risks between them, even if that does not reflect the reality (though Lord Hodge said that in Scotland it would be a contractual bar rather than the more clumsy contractual estoppel in England).

Finally, the judge concluded that UCTA was irrelevant because the parties were not excluding liability but defining the scope of the service, negating any assumption of an advisory duty.

A very normal decision in a commercial context. Also a useful summary of English law from a Scottish judge.

Courts

Second try

In which the Court of Appeal makes a second attempt to legislate.

In *Simmons v Castle* [2012] EWCA Civ 1039, the Court of Appeal decided that general damages for pain and suffering would be increased by 10% in all cases in which judgment was given on or after 1 April 2013. The point was not in issue *Simmons*, which was just picked on as a vehicle for making the change. The Court of Appeal didn't consider whether it had power to make prospective changes to the law in that way (courts can't generally prospectively overrule past decisions), but it was a pragmatic way to implement the forthcoming Jackson reforms. It was thinly disguised judicial legislation.

But the Court of Appeal got it wrong. Lobby groups turned up at court to argue that the increase in general damages was meant as compensation for losing the right to recover success fees, but only those who entered into conditional fee agreements after 1 April 2013 would be unable to recover success fees. If the increase in general damages was given to those with pre-existing CFAs, they would get a windfall. The Court of Appeal acceded to this, amending their earlier order (and also making it clear that it applied to general damages not just in tort but in contract too): [2012] EWCA Civ 1288.

First time round, the Court of Appeal had moved silently over its power to make this prospective change to damages. Second time round it moved swiftly over how it could change a judgment already given and finalised. It simply said that it was going to do it, rapidly adding that this was not to be taken as a precedent for anyone dissatisfied with a judgment to go back to court for its reconsideration. Dubious theoretically, if pragmatic.

An open and shut case

The presumption of public hearings can be difficult to displace.

When a case is heard in court, there is a general rule that the hearing is to be held in public. CPR 39.2 sets out various circumstances in which a hearing, or part of it, may be in private, and one of these is where the court

considers this to be necessary in the interests of justice.

In *Deripaska v Cherney* [2012] EWCA Civ 1235, a case that involved allegations of organized crime gangs in Russia and bad behaviour on the part of the D, the C made an application that certain witness evidence be heard in private, on the grounds that (1) if the witnesses had to give evidence in public, that would infringe their right to life guaranteed by article 2 of the ECHR and (2) it was necessary in the interests of justice, and therefore the usual principle of open justice should be departed from.

The first instance judge agreed that some witnesses should be permitted to give evidence in private, but refused the application in respect of the majority of them. C appealed, but the Court of Appeal held that the judge had made the right decision.

C had not demonstrated that the lives of the witnesses would be at risk, not least because none of them had said that they feared being killed. Nor had they said that they would refuse to give evidence if they were not allowed to do so in private. Therefore, the article 2 argument failed.

On the subject of whether it was "necessary in the interests of justice", the Court of Appeal noted that it should not interfere with the judge's balancing of the various factors to be taken into account, but rather it should "generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him" (*Aldi Stores Limited v WSP Group plc* [2007] EWCA Civ 1260 followed). C had to satisfy the Court of Appeal that the judge was wrong, and not merely that there were different inferences that could have been drawn from the evidence. C had failed to do that, so the appeal was dismissed.

Contentious Commentary is a review of legal developments for litigators

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