C L I F F O R D
C H A N C E

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Contentious Commentary

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Contract

Representational illusions

A warranty is not the same as a representation.

Idemitsu Kosan Co Ltd v Sumitomo Corporation [2016] EWHC 1909 (Comm) involved a legally ambitious, but ultimately doomed, attempt to circumnavigate the 18 month time limit on bringing warranty claims under a sale and purchase agreement. To get round this contractual time limit, long since passed, C claimed that some of the warranties were as to existing facts and that, by sending the execution copy of the agreement to C for signature, D had made representations in the terms of the warranties in the SPA in order to induce C to enter into the SPA. These representations/warranties were incorrect, and, accordingly, C claimed to be entitled to damages for misrepresentation under section 2(1) of the Misrepresentation Act 1967 untrammelled by the constraints in the SPA.

Whilst legal imagination is commendable, in this case the judge rightly considered C's argument to be unsustainable. A representation is a statement of existing fact; a warranty is a contractual promise. By warranting a matter, D promised that it was correct and to pay damages in accordance with the contract if it proved incorrect. The fact that D could have represented the same matters did not turn the warranties into representations. D had therefore not made any representations. If a party says it is warranting a particular matter, that is all it is doing.

In any event, the judge considered that D's sending the execution copy of the SPA to C did not carry with it an implied representation. The representations (as such they weren't) in the SPA could not be divorced from the rest of the SPA. All D was saying by sending the execution version of the SPA was that it was willing in principle to give the contractual warranties in the SPA.

C's claim also failed because the SPA provided that C had not relied on any representations or warranties other than the warranties in the SPA. By claiming to have relied on the warranties as representations for the purposes of tortious claims, C was seeking to rely on something outside the four walls of the SPA (not to mention its floor and ceiling), which it was not entitled to do.

Idemitsu is a comforting decision that denied C the ability to circumvent through an entirely artificial construct the contractual restrictions on claims to which it had agreed. *Idemitusu* therefore followed the line of *Sycamore Bidco Ltd v Breslin* [2012] EWHC 2471 (Ch) rather than the unfortunate decision in *Invertec Ltd v De Mol Holding BV* [2009] EWHC 2471 (Ch). But note that the position might arguably (though subject always to the terms of the contract) have been different if D had, in the SPA, both represented and warranted the contents of the warranties. But D had not done so. Generally, it is necessary to consider what should be a representation and what a warranty, and what remedies the contract should make available for both.

Six and out

The Labour Party can impose a requirement of six months' membership to vote in its leadership election.

The Labour Party was successful in *Foster v McNichol* [2016] EWHC 1966 (QB) (see last month) in upholding the NEC's decision that, as incumbent leader, Jeremy Corbyn could stand in the Party's leadership election without the troublesome need to secure nominations from 20% of the Party's MPs and MEPs. The Party was also successful in *Evangelou v McNichol* [2016] EWCA Civ 817, though it needed an appeal to achieve this success, in upholding the NEC's decision to impose a requirement that Party members could only vote in the forthcoming leadership election if they

had been members since at least 12 January 2016. The Leader of the Party was, reportedly, less enamoured with the latter decision than he was with the former.

The NEC's six month cut-off prevents almost a quarter of the Party's membership from voting in the leadership election (though they could still have secured a vote by registering as supporters in the three days up to 20 July and paying an additional £25, a scheme that netted the Party £3.2m but seems unlikely to obstruct Mr Corbyn's re-coronation).

Hickinbottom J had decided that the NEC's power to determine "precise eligibility criteria" should be construed narrowly as being confined to procedural matters and, as a result, that the six month cut-off date was ultra vires. Disagreeing, the Court of Appeal could see no reason to confine the wording in that way. The words meant what they said, and by setting the cut-off date the NEC had determined the eligibility criteria. The Court of Appeal also considered that the judge had placed too much emphasis on the background to the rules, which would not have been known to most members.

The Court of Appeal's conclusion was that the wide discretion conferred on the NEC to set eligibility criteria was controlled only by the implied requirement to act for a proper purpose, in good faith and not capriciously, arbitrarily or perversely. The Court of Appeal stressed that the potency of this limitation should not be underestimated. It emphasised more than once that there was no challenge to the NEC's decision on this basis. One might speculate whether the outcome of the case would have been the same if this challenge had been made. The prime reason for the cut-off date was said to be to require members to show by

Immunities

Mission impossible

Special diplomatic missions are entitled to immunity from criminal proceedings.

Section 134 of the Criminal Justice Act 1988 makes torture a crime in the UK wherever the torture occurs. So, for example, torture inflicted by Egyptian officials in Cairo is a crime under UK law. In the light of this universal jurisdiction, it is perhaps unsurprising that political and campaigning bodies, like former Egyptian President Morsi's Freedom and Justice Party, should seek to use UK law and the UK courts to bring to book officials of the military regime that pushed the Party from power. In *R (oao The Freedom and Justice Party) v Secretary of State for Foreign Affairs* [2016] EWHC 2010 (Admin), this failed because the court decided that, despite the English court's universal jurisdiction in respect of torture, the person sought to be charged was immune from the criminal jurisdiction of the English courts.

The Egyptian official involved, Lt Gen Hagazy, came to the UK in September 2015 as part of an Egyptian government delegation that had discussions with various limbs of the UK government. The Metropolitan Police declined to arrest him for alleged torture in Egypt on, essentially, advice from the Foreign & Commonwealth Office via the Director of Public Prosecutions that he had personal immunity from the criminal jurisdiction of the English courts. Lt Gen Hagazy has long since returned to Egypt and has no published plans to come back to the UK, but the case considered whether the FCO's advice was correct.

If Lt Gen Hegazy had been a diplomat at the Egyptian embassy in London, he would have had immunity under the Vienna Convention on Diplomatic Relations, given effect in the UK by the Diplomatic Privileges Act 1964. But he wasn't. He had come to the UK as the member of a special (and temporary) Egyptian mission to the UK, a mission expressly recognised by the FCO. The question was whether members of foreign governments' special missions of this sort enjoy immunity at common law from the criminal jurisdiction of the English courts. This depended upon whether customary public international law granted this immunity, which itself turned on the settled practice of states in affording immunity to special missions, together with *opinio juris*, ie this immunity was afforded because states felt obliged by international law to do so.

There is a Convention on the immunities of special missions, a follow-on to the VCDR, which the UK has signed but not ratified. The issue was whether, or to what extent, this Convention reflected or has come to reflect customary public international law. The Divisional Court undertook an extensive review of international practice and concluded that customary practice does afford immunity to members of special missions and that, while the exact scope of the immunity might be open to question, it certainly includes immunity from criminal prosecution.

Having reached this conclusion as to customary international practice, the Divisional Court saw no reason why English common law should not give effect to that practice by granting immunity from the UK's criminal jurisdiction, even as regards alleged torture, to the members of special missions. No public policy or constitutional provision overrode the position in public international law.

length of membership that they had not joined simply to vote in the election or without intention to participate in the Party's activities. Is that consistent with the ability of anyone to register as a supporter, and thus to vote, in a three day window shortly before the election?

Jurisdiction

Grouped together

A person can by its conduct become subject to expert determination.

In groups of companies, it is often perceived not to matter which member of the group actually undertakes any particular task. But *ZVI Construction Co LLC v The University of Notre Dame (USA) in England* [2016] EWHC 1924 (TCC) shows that it can matter for jurisdiction and other purposes.

The case involved a dispute over work done by one group company (C) on a building owned by another (S) but then sold to D. C entered into a duty of care deed for D's benefit. The sale contract, between S and D, provided for expert determination of disputes as to the quality of the works, which were carried out at D's behest. Expert determination took place, throughout which it was always S and C as the named parties on one side and D on the other. C never pointed out that it was not a party to the sale contract and was not therefore bound by the provisions regarding expert determination. The judge decided that, after the expert had decided against it, C could not change its mind about its participation in the determination process. C had impliedly agreed through its conduct to be bound by the dispute resolution provisions or there was an estoppel by convention to that effect. Judgment was therefore entered against C in the amount decided by the expert.

Doubled up

A jurisdiction clause "for the benefit of" a party does not make it exclusive.

The 1968 Brussels Convention created uncertainty as to whether non-exclusive jurisdiction clauses were permissible. But it also offered a way round this problem by providing that if a jurisdiction clause was for the benefit of one party only, that party could bring proceedings elsewhere if it wished. And so it came to pass that clauses were expressly stated to be "for the benefit of" one of the parties or categories of party. This is the origin of the one-sided jurisdiction clauses that now predominate in financial contracts, notwithstanding the recent efforts of the Cour de cassation in Paris.

But in 2002 the Brussels I Regulation, which replaced the Convention, brought to an end the uncertainty over non-exclusive jurisdiction clauses by expressly allowing them. It also removed the provision referring to clauses that were for the benefit of one party only.

Contractual drafting can, however, be anachronistically adhesive. Thus in *Perella Weinberg Partners UK Ltd v Codere SA* [2016] EWHC 1182 (Comm), the jurisdiction clause said that "[D] agrees for the benefit of [C] that the courts of England will have non-exclusive jurisdiction", thereby taking advantage of the clarity provided by the Regulation but also retaining the old-style wording. In *Perella Weinberg*, C sought boldly to use the outdated wording to argue that the clause obliged D to sue in England while allowing C to sue elsewhere. Understandably, this failed. The clause said non-exclusive, and the expression of the clause being for C's benefit was not sufficient to change that position.

Perhaps more interestingly, the judge suggested, obiter, that one-sided exclusivity is enough for article 31(2) of the recast Regulation to apply. Article 31(2) confers on courts given exclusive jurisdiction priority over all other courts, even if the other courts were first seised (ie it stops an Italian torpedo in its tracks if the parties have agreed that another court has exclusive jurisdiction). However, whether the judge is right about this is open to question. Is a court in which one party is obliged to sue but which the other can disregard "a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction" within the meaning of article 31(2)? It might be suggested that the court doesn't have exclusive jurisdiction precisely because one party can choose to go elsewhere. The question is whether exclusivity over disputes generally is required or whether exclusivity over claims initiated by one of the parties is enough. The books are distinctly divided on the point.

Norwich or bust

An application for a Norwich Pharmacal order cannot be served outside the jurisdiction.

A Norwich Pharmacal order requires someone not (generally) alleged to be a tortfeasor to provide information to assist the wronged party to vindicate its rights against the tortfeasor, including by identifying the tortfeasor. Easy if the third party is within the jurisdiction of the English courts but, according to *AB Bank Ltd v Abu Dhabi Commercial Bank PJSC* [2016] EWHC 2082 (Comm), the English courts do not have jurisdiction to make a Norwich Pharmacal order against an innocent party which is outside the jurisdiction (at least, if the party is outside the EU).

To serve proceedings, including Norwich Pharmacal proceedings, on a non-EU party outside the jurisdiction,

it is necessary for the case to fall within one of the gateways in PD 6B. In *AB Bank*, C relied on three of these gateways.

First, C claimed that it was applying for an interim remedy in support of foreign proceedings under section 25 of the Civil Jurisdiction and Judgments Act 1982 (PD 6B, §3.1(5)). The judge decided that a Norwich Pharmacal order is not an interim remedy. It is final so far as the respondent to the application is concerned.

Second, C argued that a Norwich Pharmacal order is an injunction that requires the respondent to do something within the jurisdiction (PD 6B, §3.1(2)). The judge accepted that a Norwich Pharmacal order is a form of injunction, but not that it requires something to be done within the jurisdiction. The information could be supplied from outside the jurisdiction.

Third, C contended that the respondent was a necessary and proper party to proceedings against someone else (PD 6B, §3.1(3)). But the respondent was not a necessary and proper party within the meaning of this rule because the claim against it would be resolved long before any substantive, anchor, claim.

If that wasn't enough, the judge said that he would, even the court had jurisdiction, have refused as a matter of discretion to permit service out. The information sought was as to the destination of payments from a bank account in Dubai. The provision of the information might have constituted a criminal offence under local law. The judge decided that the appropriate course was for C to go to the Dubai courts to obtain the information.

Competing laws

A competition claim governed by a foreign law is subject to the foreign law's limitation period.

The ability to bring competition claims in the Competition Appeal Tribunal has expanded over the years such that the CAT now has parallel jurisdiction with the courts. Before complete parallelism was achieved, the CAT's jurisdiction was largely confined to follow-on claims, and a special limitation period, akin to that for contribution claims, was set for these claims, ie two years from the final decision in question, whether of the European Commission or the UK competition authorities. But did this special limitation period apply only to claims governed by English law or did it also oust the limitation period otherwise applicable to a tort claim governed by foreign law under the Foreign Limitation Periods Act 1984 (pre-Rome II)?

In *Deutsche Bahn AG v Mastercard Inc* [2016] CAT 14, the CAT decided that the FLPA applies to follow-on competition claims governed by a foreign law in the same way that it applies to any other foreign law tort claim. This means that if a competition claim is governed by, say, Belgian law, the Belgian limitation period applies to that claim. And if this limitation period is shorter than the English one, the claim cannot be brought in England. Expect to see defence competition lawyers scouring Dicey, Morris & Collins to establish that cartel and similar claims are governed by a law with a conveniently short limitation period.

Employed problems

There can be jurisdictional difficulties when suing fraudulent employees.

Bosworth v Arcadia Petroleum Ltd [2016] EWCA Civ 818 is a reminder of the jurisdictional problems that can arise when suing errant employees. In particular, article 22 of the Brussels I Regulation (recast) requires employees to be sued in the member state in which they are domiciled "in matters relating to individual contracts of employment" regardless of where they work. But when suing employees who have been siphoning off money, the claim might be for breach of the contract of employment, breach of fiduciary duties, economic torts and so on. What does article 22 apply to?

Bosworth may not do much other than to illustrate that this is a difficult area. Gross LJ described the test as follows: "As a matter of reality and substance, do the... claims relate to the [employees'] individual contracts of employment? Is there a material nexus between the conduct complained of and those contracts? Can the legal basis of these claims reasonably be regarded as breach those contracts so that it is indispensable to consider them in order to resolve the dispute?"

Broad, general and all highly factually sensitive. In *Bosworth*, despite the alleged fraud only being possible because the supposed fraudsters were employees and the claims being capable of being pleaded as breach of contract, the Court of Appeal decided that the conspiracy claims were not within article 22. Claims for breach of fiduciary duty owed to the employing companies were within article 22, but claims for breach of fiduciary duty owed to other group companies were not within article 22. This all risks creating a patchwork of jurisdictions, with a multiplicity of actions depending upon how a judge chooses to characterise the claims.

Costs

No second chance

Non-payment of costs leads to an unless order.

Costs orders made following unsuccessful interim applications generally have to be paid within 14 days (CPR 44.7). But what if payment is not made? In *Gamatronic (UK) Ltd v Hamilton* (4 May 2016), the court was clear that failure to pay will generally lead to an order that, unless payment is made, the ordered payer's claim or defence, as the case may be, will be struck out.

In *Gamatronic*, a plea of lack of funds was made (a plea already rejected when the costs order was made), coupled with article 6 of the ECHR (right to a fair trial), as reasons why an unless order should not be made. The judge pointed out that proving lack of funds was hard, and that insufficiently frank evidence had been provided in this case. The payer failed to get to first base.

Interestingly, the judge also suggested that even if paying the costs meant that the relevant party would not then be able to afford legal representation itself, this would not on its own engage article 6. The case was not complicated. The inability to pay lawyers did not necessarily drive a party from the seat of justice.

Litigants in person are an increasingly common phenomenon, if much to the chagrin of many judges.

Companies

Who knows what?

Companies know what those they employ know.

Howmet Ltd v Economy Devices Ltd [2016] EWCA Civ 847 looked at the perennially difficult question of what knowledge is to be attributed to a company, and came up with the simple answer that it is the knowledge of those entrusted by the company with the task in question.

The case involved a claim in tort in relation to a device intended to cut-off a heating element in certain circumstances in order to prevent fire. It didn't and a building burnt down. Those in charge of the production line knew that the device wasn't working and had put in place alternative means to prevent fire, which also failed, but the senior managers did not know of the problems. If the knowledge of fragility of the device was the company's, the claim failed. The company would have continued voluntarily to use defective equipment at its own risk (though the Court of Appeal was not quite at one as to the legal analysis).

Basing itself on *Median Global Funds v Securities Commission* [1995] 2 AC 500, the Court of Appeal said the question of attribution was to whom had the company entrusted the task of maintaining and operating the system in a safe manner. That was those who knew of the problems. The claim therefore failed.

Disclosure

Pre-lash

Pre-action disclosure will rarely be ordered in a commercial case.

"I am satisfied that [this] is not one of those unusual cases, at least the commercial context, in which the court should order pre-action disclosure." Thus spake Blair J in *Clermont Energy Partners LLP v SDP Services Ltd* [2016] EWHC 1328 (Comm) summing up the general approach of the Commercial Court to pre-action disclosure, ie that, whatever the rules say, it will rarely be ordered. In *Clermont*, difficulties in the way of C's application included: D said it did not have the key document that C wanted, which made it hard for the court to order D to disclose it; C had already drafted Particulars of Claim so did not need more information for that purpose; and one of its requests was akin to full disclosure. Generally, several steps too far.

Courts

Onwards and downwards

Briggs LJ has produced his final report of his Court Structure Review.

At the beginning of the year, Briggs LJ published an interim report in his Court Structure Review. In July, he published his final report. In the nature of these things, not much has changed between the interim and final stages. The main proposals remain the same.

The most eye-catching proposal is for an Online Court, which Briggs LJ would call the "Online Solutions Court", as a separate institution from the existing courts (and therefore requiring primary legislation). The propositions underlying this proposal are that lawyers are too expensive for low value claims and that laws and court procedures are too lawyerish for the layperson to cope with. The aim is therefore to establish a court that a layperson can use to pursue modest claims without assistance from a lawperson. Since the layperson cannot be expected to know the legal basis for his or her claim or how to plead it, the starting point will be an online interrogation system that will ask the litigant questions and, based on the answers, produce the equivalent of Particulars of Claim. Briggs LJ sees this system as vital to his vision of the OC, not as something that can be bolted on later.

The problem is that such a system does not currently exist. Even allowing for those types of claim that Briggs LJ accepts should fall outside

the scope of his OC (eg personal injuries), it requires the development of software that can identify the facts and law relevant to the innumerable causes of action that exist in law, from banks misselling to dishwashers leaking to neighbours noising to software corrupting to hedges overgrowing to builders delaying and so on and on and on.

Briggs LJ himself observes that the creation of his behemoth system will be an "exercise in knowledge engineering... depend[ing] first upon a detailed and accurate understanding of the underlying law relating to each case type within the court's jurisdiction. Secondly it requires the construction of a series of questions for litigants (in the form of a decision tree for each case type) which will extract from them the alleged facts and evidence about their case which the court will need to know in determining it". It's not even just a one-off job since the law has the unfortunate habit of changing. Easy the task certainly is not, but without this system, litigants will still need legal assistance to use the non-lawyerish court, which would defeat its purpose.

The OC is intended to be compulsory for all claims up to £25k (though perhaps initially £10k) that fall within its scope. At £25k, this amounts to about 99% of the County Court's existing work, which will leave the County Court to deal in the main with the residue of claims that fall outside the OC's jurisdiction and the High Court's cast-offs (see below) – though if an OC case goes to trial, it will be determined by a County Court judge. The procedures in the OC will include conciliation by Case Officers (see below), and will be more investigative than is the case now.

Briggs LJ's second main proposal is for the use of Case Officers. Judges (even District Judges), like lawyers in general, are expensive, so the object is to push court work down to a cheaper class of person. Case officers must have some kind of legal background (Briggs LJ sees the invention of case officers as a job creation scheme for the over-supply of law graduates), and must be trained and supervised by a judge. They will have power to make procedural decisions and to conciliate (though taking part in conciliation will, perhaps controversially, not necessarily mean that they cannot be further involved in the case), but the parties will also have the right to refer any decision by a case officer to a judge for the decision to be taken afresh.

One issue in this vision is location. Briggs LJ thinks that case officers should work in large teams within business centres. He also thinks that case officers must work in close proximity to judges so that the judges can provide face to face supervision and team spirit can be built between judges and their case officers. However, Briggs LJ recognises that judges won't want to work in anonymous office blocks in low-cost locations; they want to work at hearing centres, ie in courts. Briggs LJ does not offer a solution to this apparent contradiction.

An irony is that the function of Masters and DJs was originally to case manage a claim to trial by a judge. But work has been pushed down by judges to their case managers so that DJs and Masters now do work formerly done by judges. The case managers are therefore now to get their own case managers.

Other conclusions reached by Briggs LJ include: that the County Court and the High Court should not be unified into a single civil court (curious how High Court judges and above usually reach this conclusion, while their lower brethren tend to take the opposite view); that more work should be done outside London; that civil work should not be a Cinderella to the criminal system's ugly sisters; that the financial limit for High Court work should be raised to £250k and then to £500k (this would remove at least three-quarters of the QBD's work); and that thought needs to be given to the structure in the High Court, but he inclines to the creation of a new Business and Property Division.

The report is an interesting and progressive piece of work. But like other influential judicial reports of its ilk (Woolf, Jackson etc), it is very the view from the upper end of the judicial hierarchy. Translating the vision into something that really works to improve the litigation system at the bottom is anything but easy.

In September, the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals issued a short white paper entitled *Transforming Our Justice System*, which set out high level aspirations for the civil courts, as well as the criminal and family courts, broadly along the lines suggested by Briggs LJ. So, for example, "we will automate and digitise the entire process of civil money claims by 2020", "minimise combative hearings" and "promote the full range of methods of settling disputes more swiftly". The devil will be in the detail.

Contentious Commentary is a review of legal developments for litigators

Contacts

Simon James
Partner

T: +44 20 7006 8405
E: simon.james
@cliffordchance.com

Anna Kirkpatrick
Senior PSL

T: +44 20 7006 2069
E: anna.kirkpatrick
@cliffordchance.com

Susan Poffley
Senior PSL

T: +44 20 7006 2758
E: susan.poffley
@cliffordchance.com

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www.cliffordchance.com

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