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Newsletter

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Contentious Commentary

Contract

Indefinite articles rule

The minutiae of drafting matter.

"Let's eat Grandma. Let's eat, Grandma. Commas save lives" reads the slogan on one t-shirt. The need for this kind of attention to small detail in drafting was recently illustrated by two cases.

An Event of Default on a €450m loan note occurred if the Issuer "makes any agreement for the deferral... of all its debts, proposes or makes a general assignment or an arrangement or composition with or for the benefit of relevant creditors in respect of such debts..." The Issuer secured, through the Spanish Courts, the "homologation" (ie repayment at a discount) of one debt but not all of its debts, nor in a manner that could be said to be "general". Is there are Event of Default? Did "an arrangement... with... relevant creditors in respect of such debts" have to be general?

In *Fomento De Construcciones Y Contratas SA v Black Diamond Offshore Ltd* [2016] EWCA Civ 1141, the Court of Appeal decided that an Event of Default had occurred. The use of the indefinite article before "arrangement" showed that "general" did not govern "arrangement", and the Court concluded that "relevant" creditors were those who were subject to the arrangement, not a reference back to "all". So despite the clause addressing initially dealings in all the Issuer's debts (and, elsewhere, containing a cross-default clause with a €100m requirement), the end of the clause provided for an Event of Default on dealings with one, potentially small, debt.

The case also illustrates the problems that can occur in restructurings. The homologation was part of wider restructuring that saw substantial new equity injected into the borrower that, since it ranked below the loan note, improved the noteholders' position. One noteholder, however, was able to secure a decision that an Event of Default had occurred and, accordingly, that the notes were repayable.

Dooba Developments Ltd v McLagan Investments Ltd [2016] EWHC 2944 (Ch) similarly turned on grammatical detail. A contract allowed either party to rescind it "if all of the Conditions have not been discharged... by the Longstop Date". What this convolution was intended to mean might have been clear when drafting in the wee small hours, but it is less so in daylight. In particular, did the right of rescission arise on one Condition being undischarged or was it enough that one Condition was discharged?

The judge decided that, literally (applying, he said, Boolean logic), it meant that rescission was only available if none of the Conditions had been discharged by the Longstop Date.

Class X men

The equity portion of a CMBS does not benefit from default interest.

Contractual interpretation can be difficult. That is, perhaps, the only conclusion that can safely be drawn from *Credit Suisse Asset Management LLC v Titan Europe 2006-1 plc* [2016] EWCA Civ 1293.

Three experienced commercial judges agreed on the principles, but then split 2-1 on the outcome. As the minority judge, Briggs LJ, put it: "English law assumes that every question of construction has a right and a wrong answer. In reality there can often be as much scope for reasonable differences of view as there is in many questions about the

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exercise a of discretion". The majority said much the same. All the judges emphasised the importance of the words, and expressed reservations about attributing too much weight to underlying commercial logic, but their reaching of opposite conclusions illustrated that the meaning given to the words often depends upon the commercial starting point: expectation drives interpretation.

Titan Europe concerned Class X notes, the "equity" in a CMBS. These notes are intended to scoop up the difference between the interest due on the underlying loans within the securitisation and the interest payable to the normal noteholders. The issue in the case was whether, in calculating the interest rate for the Class X notes, only the standard rate of interest on the underlying loans should be included or, if any underlying loans were in default, the default rate should replace the standard rate. If only the standard rate was used, it potentially left significant sums for the shareholders in the orphan securitisation vehicle, ie charities, because these unanticipated payments did not then go to the Class X noteholders or anyone else. The majority (like the Chancellor at first instance) were satisfied that any potential surplus was indeed a charitable donation.

The feature that persuaded the majority was that the interest rates going into the calculation were all defined as "per annum rates". This, they thought, referred to an interest rate that had already been annualized, which they considered was only the case for the standard rate, not the default rate. The terms did not provide a method of making calculations that included the default rate. The majority accepted that the resulting charitable donation was not the intention of those behind the structure, but nor did they regard this outcome as so uncommercial as to require another interpretation.

The minority, Briggs LJ, was more influenced by the commercial purpose of the Class X notes, ie to pick up any surplus. From that starting point, he had no difficulty in regarding default interest as involving a rate per annum. He could see no reason to give "rate per annum" the limited meaning that the majority attributed to it. On such small matters can large fortunes turn.

Camden unlocked

No implied term prevents a bank from marketing the sale of its loan.

The owners of various sites around

Data protection

Data unprotection

Subject access requests cannot be refused because the documents may be used in litigation.

The vexed issue of when and why subject access requests (SARs) under the Data Protection Act 1998 can be made was considered by the Court of appeal in *Dawson-Damer v Taylor Wessing LLP* [2017] EWCA Civ 74. The Cs had made a SAR to D, which was the solicitor to the trustee of certain funds, and then made a section 7(9) application to the court when they did not get the documents they wanted. D argued that the Cs did not want the information for the purposes of checking whether D was processing data lawfully and correcting any errors in it, but rather because they intended to use it in proceedings against D. This is, indeed, a common reason for making a SAR.

At first instance, the judge had decided that this collateral purpose was not a proper use of the SAR procedure. The Court of Appeal disagreed. Section 7(9) confers a discretion on the court to make an order against a data controller to comply with a SAR if the court is satisfied that the data controller has failed to do so. The discretion is not expressly limited in any way. A "no other purpose" rule would have undesirable secondary consequences, such as non-compliance by data controllers with SARs on the grounds that the data subject had an ulterior purpose.

The decision means that the purpose for which a SAR is made will be largely irrelevant. The Court of Appeal said that an application under section 7(9) might in some circumstances be an abuse of the court's process, but a mere collateral purpose will not fall into that category.

Although this is the main point for which *Dawson-Damer* will become known, the Court of Appeal decided two other points which are of interest. First, it decided that the privilege exemption from SAR disclosure in the Data Protection Act applies only to documents to which privilege would apply in proceedings in the courts of England and Wales, rather than in other jurisdictions.

Further, the Court of Appeal decided that the privilege exemption in the Act is not to be read as extending to other bases upon which a party might be entitled to refuse to disclose documents, in this case trustees under the approach in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709. Privilege means privilege as generally understood (generally, legal professional privilege), not a wider concept of any grounds upon which disclosure can be refused.

Camden lock were marketing the sites with a view to selling them and paying off the loans used to acquire them. They were concerned that their lenders were at the same time marketing the loans (by way of sub-participation) as part of a portfolio of distressed debt. The Camden folk denied being distressed and, in particular, were concerned that the simultaneous marketing of the loan would reduce the price of the property. Vulture funds would, they feared, see purchase of the loans as a way of securing the property cheaply without buying the land from the owners or as a means to drive down the price.

So in *Irish Bank Resolution Corporation Ltd v Camden Market Holdings Corp* [2017] EWCA Civ 7, C argued that there was an implied term in the loan agreement that D (the lender) would not do anything to hinder the marketing of the premises by marketing the sale of the loan in competition with the sale of the premises. The problem was that the loan agreement included provision, in LMA-like terms, expressly allowing the lender to disclose otherwise confidential information to potential sub-participatees. The Court of Appeal accepted that the implied term claimed by C was inconsistent with the substance of this clause and would cause considerable uncertainty as to what was permitted and what was not. The clause expressly allowed the marketing of the loan; seeking by reference to an implied term to restrict that power was, the Court of Appeal thought, well nigh impossible. No term could be implied.

Misselling missold

Another misselling claim fails.

Misselling claims against banks that actually reach trial have a poor record. This could be because banks settle most of the claims that might prove more troublesome, but it is also driven by the caveat emptor philosophy of English commercial law and the reluctance of English judges to believe in the naivety protested by some commercial parties. Conduct that turns out badly is not necessarily someone else's fault.

Property Alliance Group Ltd v The Royal Bank of Scotland plc [2016] EWHC 3342 (Ch) was the first case in which LIBOR-rigging allegations have reached a full trial, but it can be added to the line of failures.

PAG began life as an orthodox swaps misselling claim. C was the fixed rate payer on interest rate swaps entered into between late 2004 and early 2008, and C thus failed to benefit from the low interest rates that followed the global financial crisis. C accepted that D did not owe it a general duty of care to advise on the swaps, but sought to conjure a substantially similar duty out of the fact that D had passed comment on the swaps. These comments had to be accurate, but the judge rejected C's argument that they also had to be full and proper to the extent of including worked examples of termination costs in various interest rate scenarios. The documentation and the parties' commercial relationship excluded this.

Asplin J also decided that describing the swaps as "hedges" was too vague to carry any legal meaning. She went on to reject an implied term of suitability because it too was excluded by the documentation.

As regards LIBOR, C claimed that D had impliedly represented that D had no reason to believe that LIBOR as a whole was being calculated other than in accordance with the rules then applicable and that D had not made any false LIBOR submissions. C had to put its claim in this wide way because D admitted having made improper submissions regarding JPY and CHF LIBOR, but not for three month GBP LIBOR on which the swaps in question were based.

The judge considered that C's proposed implied representation was far too wide. An implied representation had to be based on something that D had said or done, and nothing in D's conduct came close to implying a representation as broad as C needed in order to succeed. If there had been a representation, it would have been confined to three month GBP LIBOR. Even if so, C failed to prove reliance.

Proof that a LIBOR (mis)representation has induced a swap contract is key to any LIBOR-based claim because misrepresentation allows rescission of the swap contract, with the resulting reversal of all prior payment flows. The judge having rejected the case on misrepresentation, there wasn't much left. But Asplin J did accept that there was an implied term in the swap contract that D would make proper submissions for three month GBP LIBOR. Even if C had been able to prove breach of this term (it couldn't), breach would only have resulted in damages, which would have been minimal.

So banks can breathe a sigh of relief. C was a substantial property company, with its own financial advisors. The judge was sceptical of its claim to naïve innocence, nor convinced that the costs of the almost non-existent interest rates from 2009 onwards should necessarily be visited on the financial services industry.

Misselling reviewed

A claim based on the FCA's misselling review is struck out.

One claim not asserted in the *PAG* (above) was a claim based on the bank's conduct of the swaps misselling review required by the FCA. There are conflicting first instance decisions (*Suremime Ltd v Barclays Bank plc* [2015] EWHC 2277 (Comm) and *CGL Ltd v The Royal Bank of Scotland* [2016] EWHC 281 (Comm)) as to whether banks owed their customers a duty of care in the conduct of those reviews, and *CGL* is, apparently, going to the Court of Appeal in June. As a result, in *Elite Property Holdings Ltd v Barclays Bank plc* [2016] EWHC 3294 (QB), D accepted that it could not realistically at this stage have a claim based on the conduct of the review struck out as disclosing no cause of action.

But D did still succeed in getting the claim based on the review struck out because C and D had entered into a settlement agreement covering all claims arising "directly or indirectly... out of, or... in any way connected with" the swaps. The settlement was entered into in 2010 and the review was carried out under an agreement between D and the FCA in 2012, but the judge was still satisfied that the settlement resolved the review claim. Any claim that attacked the way D conducted the sale of the swaps was covered by the settlement.

The claims, if extant, were also settled by a subsequent settlement agreement, which covered everything except "consequential" claims; C's claims were not consequential.

Subject to subject to contract

A subject to contract proviso cannot be lightly overridden.

Conduct after a contract has been entered into cannot be used to construe the contract because the meaning is fixed at the time the contract is entered into. But, according to *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37, post-conclusion conduct can be used to decide whether a contract has been entered into. The contract alleged was an oral one, and the Court of Appeal refused to accept that it could only consider events up to the date of the alleged contract. It could look at later correspondence etc in order to decide whether there had in fact been an earlier oral agreement.

The oral agreement was supposedly on terms set out in a letter headed "Without Prejudice and Subject to Contract" and a subsequent phone call. The Court said that acceptance of a subject to contract offer does not generally create a contract. Clear evidence is required that the subject to contract condition had been lifted and that the parties actually intended to create a contract there and then. No such evidence was present.

Financial collateral

Gray continuation

Control remains key to financial collateral.

In *Private Equity Insurance Group SIA v Swedbank AS* (Case C-156/15), the CJEU has echoed the approach of the English courts in *Gray v G-T-P Group Ltd* [2010] EWHC 1772 (Ch) and *Re LBIE (in administration)* [2012] EWHC 2997 (Ch) (without mentioning those

Privilege

Problems of the privileged

Fact finding does not necessarily attract legal advice privilege.

The RBS Rights Issue Litigation [2016] EWHC 3161 (Ch) has caused consternation amongst English lawyers because it potentially limits the scope of legal advice privilege.

One of the prime purposes of legal advice privilege is to allow clients to communicate facts to their lawyers in the safe knowledge that the communication will not have to be revealed to anyone. The lawyers can then give equally confidential legal advice to their clients in order to enable the clients comply with their legal obligations, which is in the public interest.

However, in *The RBS Rights Issue Litigation* the judge decided that the only communications that are privileged are those between a company's lawyers and those within the company who are authorised to obtain and receive legal advice on behalf of the company. He expected this to be a small and senior group. Those who hold the company's information that the lawyers need to know in order to give legal advice are, he concluded, neither necessarily the lawyers' "client" nor representing the "client" for legal advice privilege purposes.

This decision could cause problems for investigatory work undertaken before litigation is reasonably in contemplation (litigation privilege is not affected by the decision). Legal advice as such will remain privileged, but the interviews and similar to obtain the facts upon which the legal advice is based may not be privileged. There may be steps that can be taken in mitigation of the resulting risks – what is appropriate will depend upon the particular circumstances – but the issue needs urgent resolution by the highest court.

cases, though the Advocate General did) in demanding that a taker of financial collateral under the Financial Collateral Directive (2002/47/EC) has legal control over the collateral; mere possession is not enough.

Private Equity Insurance Group concerned collateral in the form of a bank account that stood as security for all the depositor's obligations to the bank (the sum in dispute was all of €274). The CJEU considered that this could in principle create financial collateral under the Directive. The obligations secured by financial collateral must give a right to cash settlement or the delivery of financial instruments. Debts owed to a bank were covered. The debts do not have to be linked to securities transactions or similar. Likewise a debt owed to a bank can be collateral.

But the collateral must be "delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker". Where collateral is money in an account at the collateral taker, the collateral taker "may be regarded as having acquired "possession or control" of the monies only if the collateral provider is prevented from disposing of them". This means that the contract covering the deposit must contain a clause preventing the collateral giver from disposing of the money in its account rather than the collateral taker merely having de facto control because it holds the bank account. Accordingly, the CJEU indicated that the arrangement in this case would fail because "... the financial collateral arrangement at issue... does not contain any clause to the effect that [the collateral giver] was prevented from disposing of the monies after they had been deposited in the account."

Conflict of laws

Portuguese men of war

Elements relevant to a situation is a very wide category.

Parties have freedom to choose the law that governs their contracts. But nation states also have an interest in upholding their mandatory law - what's the point of mandatory laws if they are easy to circumvent? The (or one of the) compromises between these competing principles is in article 3(3) of the Rome I Regulation. This applies if all the elements relevant to the situation at the time of the choice are located in a country other than the one whose law has been chosen; in that case, the choice of a foreign law cannot prejudice the application of laws of that other country that cannot be derogated from by contract. A company in Coventry selling widgets to a company in Kettering can't avoid English mandatory law (not that there is much) by choosing Croatian law to govern the contract.

But how easy is it to find elements relevant to the situation that are located in a country other than the obvious one? According to *Banco Santander Totta SA v Companhia Carris de Ferro de Lisboa SA* [2016] EWCA Civ 1267, pretty easy. This concerned "snowball" swaps between a Portuguese bank (C) and the company that runs public transport in Lisbon and Porto (D), entered into between 2005 and 2007. D, as the fixed rate payer, ended up paying between 30% and 92%. C sued D for €273m. D argued that all the elements relevant to the situation were located in Portugal, as a result of which D could escape the swaps under a mandatory Portuguese "abnormal change in circumstances" law, ie interest being near zero since early 2009.

The Court of Appeal upheld Blair J's first instance decision that not all the elements relevant to the situation were located in Portugal and, accordingly, that article 3(3) had no application. Article 3(3) is an exception to the general rule of freedom of choice of applicable law, and so should be interpreted narrowly. Elements relevant to the situation is a broader category than elements relevant to the contract, nor is it confined to those matters that might be taken into account in determining, absent choice, the applicable law. The judge was therefore entitled to take into account matters such as the assignability of the swaps, the need for back to back swaps with banks outside Portugal, the international nature of the derivatives market, and the use of international standard documentation (the ISDA Master Agreement).

Note, however, that the use of English law only worked because it was accompanied by the choice of the English courts. If the matter had ended up in the Portuguese courts, they may have been able to give effect to Portuguese mandatory law under articles 9(2) or 21 of Rome I. As it was, English law's hard-hearted, pacta sunt servanda, approach prevailed.

New meanings for old

The Court of Appeal takes a wide view of the BRRD.

Foreign legislation cannot in general change the terms of an English law contract. One of the few exceptions concerns resolution measures taken under an implementation of the EU's Bank Recovery and Resolution Directive, which measures must be recognised across the EU. At first instance in *Guardians of New Zealand Superannunation Fund v*

Novo Banco SA [2016] EWCA Civ 1092, Hamblen J took the view that this exception must be strictly applied. The Court of Appeal took a far more benevolent approach. If the measures were enforceable locally, regardless of the detail of how they were taken, then they should be recognised in England.

Exclusive company

One-sided exclusivity is still exclusive.

The French Cour de cassation caused concern across the continent with its decision in *Mme X v Société Banque Privé Edmond de Rothschild* (26 September 2012) that a one-sided, or unilateral or asymmetric, jurisdiction clause was invalid under the Brussels I Regulation, ie it did not confer any form of jurisdiction on the named court. The Cour de cassation has rowed back a bit since then (eg *Société eBizcuss.com v Apple,* 7 October 2015), but the potential problem remains until the CJEU resolves the matter (or, for English courts, Brexit intervenes).

The validity of a one-sided jurisdiction clause under Brussels I came up for decision in England in *Commerzbank AG v Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm). To the surprise of no one, the court decided that the asymmetric clause was valid to confer jurisdiction on the English court - indeed, it looks as if Counsel barely dared to argue the contrary. It remains, however, a decision ultimately for the CJEU.

Perhaps less obviously, though helpfully, Cranston J also decided that unilateral jurisdiction clauses are exclusive for the purposes of article 31(2) of the Brussels I Regulation (recast). As an exception to the normal lis alibi pendens rule, article 31(2) allows a court second seised of a case to go ahead as long as its jurisdiction derives from an exclusive jurisdiction clause. An asymmetric clause is not obviously exclusive because it allows the party with the benefit of the clause to sue elsewhere, but Cranston J considered that this did not matter. It was exclusive so far as the other party was concerned, and the policy behind article 31(2) (enhancing the effectiveness of jurisdiction clauses and avoiding abusive tactics) pointed to one-sided exclusivity being sufficient. Another question ultimately for the CJEU.

Tort

Tavern gossip

Exclusions of liability work even in tort.

Taberna Europe CDO II plc v Selskabet AF 1.September 2008 [2016] EWCA Civ 1262 raises three interesting points about potential liability in tort for a financial offering. It emphasises yet again that English courts are happy for commercial parties to control their own obligations (see also *PAG* above).

The case concerned the purchase of subordinated securities on the secondary market. In making the purchase, C relied on an "Investor Presentation" that the issuer had put on its website and which significantly understated the level of the issuer's non-performing loans. The Presentation was, however, directed to potential purchasers of entirely different securities, not to the securities that C acquired or to dealings in the secondary market.

The first legal point addressed by the Court of Appeal was whether D owed C a duty of care in tort as to the contents of a presentation that was addressed neither to C nor to the securities that C bought. The Court observed that the general principle was that C would not do so: this would result, in the well-worn phrase, in liability in an indeterminate amount for an indeterminate period to an indeterminate class, something that the courts have always resisted. The fact that the issuer had put the Presentation on its website for all to see did not displace this principle. But, on the facts, the court concluded that C had been specifically directed to the Presentation by or on behalf of the issuer in relation to its purchase sufficiently for the issuer to be liable, potentially, in tort. (Would the Court of Appeal have reached this conclusion if it had decided the subsequent points differently?)

The second issue concerned the disclaimers in the Presentation. These included normal no reliance and no liability provisions (duty-negating and liability-negating respectively). Although there was no contract between C and the issuer, the Court of Appeal accepted that the issuer could, by a non-contractual notice, prevent a duty of care that might otherwise arise from doing so. The duty-negating clauses limited the nature and scope of the statements in the Presentation, making it clear that they could not be relied on as the basis for a decision of any kind. No duty as to their accuracy therefore arose.

The Court of Appeal also concluded that the issuer was entitled to say non-contractually that it would accept no liability for its statements, provided that the terms were sufficiently clear. The Court decided that the statements were sufficiently clear. It declined to apply either the contra preferentem rule or the rule in *Canada Steamship* (ie negligence requires express mention if liability for it is to be excluded) in order to limit

the effect of the terms. Commercial parties can, broadly, do what they like in order to allocate responsibility between themselves.

The final point concerned damages under section 2(1) of the Misrepresentation Act 1967. In *Taberna Europe*, the issuer had (if the Court of Appeal was otherwise wrong) made a representation to C that induced C to enter into a contract with X to buy the issuer's subordinated securities. As a result of the contract between C and X, C also obtained contractual rights against the issuer regarding the securities. The case was not the conventional situation of A making a representation to B in order to induce B to enter into a contract with A. The Court of Appeal decided that the Act was confined to the conventional situation, and did not cover the scenario in *Taberna Europe*.; ie it did not apply to a representation that induced an intermediate contract that in turn created further contractual relations between the representer and representee.

The parent trap

A holding company is not directly liable to persons injured by its subsidiaries.

Okpapi v Royal Dutch Shell plc [2017] EWHC 89 (TCC) is another case in which a large group of claimants, gathered by English claimant lawyers, brought proceedings in the English courts against an overseas operating subsidiary's UK parent alleging that the parent owed a direct duty of care to persons injured by the operating subsidiary's allegedly wrongful acts. On this occasion (as, indeed, on a couple of others), it was oil spills in the Niger delta, the claims being brought on behalf of some 42,500 individuals making up two "kingdoms" within Nigeria.

There is a split amongst the judiciary as to the sanctity of corporate structures and, as a result, whether it is appropriate for claims of this sort to be brought in the English courts. On the one side, *Chandler v Cape plc* [2012] EWCA Civ 525 allowed the claim, as have some first instance decisions; on the other side, *Thompson v The Renwick Group plc* [2014] EWCA Civ 635, like other first instance decisions, rejected the claims. There are factual differences, but it probably comes down more to an underling approach.

In *Okpapi*, Fraser J was on the *Thompson* side of the line. The evidence before him indicated that D was purely a holding company with no employees and did nothing substantive itself. Even applying the expansive approach to the existence of a duty of care set out in *Chandler*, he could see no basis upon which D owed a duty of care to Nigerians in respect of D's subsidiary's operations. The claim against D therefore had no prospect of success. D, as the anchor defendant, was the basis for bringing the Nigerian subsidiary before the English court. That claim therefore had to go to, this time back to Nigeria.

Broken brokers

Brokers owe a duty of care when paying away monies.

There has been a flow of litigation relating to Singularis Holdings Ltd, a Cayman company formerly owned the (now) notorious Mr Al Sanea, which collapsed in 2009. In *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2017] EWHC 257 (Ch), the liquidators of Singularis succeeded in recovering substantial payments made by a broker to third parties shortly before the insolvency formally started on the basis that the broker should not have allowed the monies to be paid to a third party.

The broker (D) provided finance to Singularis (C) through repos but, when the clouds gathered around C, D was able to close out the transactions, leaving it with over $200m in cash. Unusually, the monies were not then paid to a bank account in C's name but, on the instructions of S, who was a director of C and C's only shareholder, they were paid to related entities. The monies have not been seen since.

C's first argument was that the payments were made in breach of S's fiduciary duty to C and that D was liable as a constructive trustee for assisting in that breach. Rose J accepted that S was acting in breach of fiduciary duty and, given C's impending insolvency, could not as the sole shareholder ratify the payments. But liability for D required dishonesty on the part of D, which, the judge decided, was not present.

But C did succeed on the basis that D owed C duty of care when making payments for C that appeared dubious. The problem with a general duty of this kind is that it could prevent a bank from executing an apparently valid instruction, which will often be carried out without human intervention. The duty is therefore limited in scope, and only applies to payments if the bank is put on enquiry in the sense of having reasonable grounds for believing that the payment may amount to misappropriation. Here, D was not a bank but a broker with, perhaps, a heightened duty because it was not in the business of paying monies for its customers to third parties, but in any

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event Rose J considered that there were "glaring" signs that should have led D to appreciate that S was perpetrating a fraud on C, not least in his offering two inconsistent explanations for the payments.

D sought to rely on various illegality-related defences, but failed. S's fraud was not to be attributed to C, nor would the case have passed the new, general, illegality test laid down in *Patel v Mirza* [2016] UKSC 42. D even failed on various arguments based on its standard terms of business because it could not prove that they had ever been sent to C. The judge described D as having a "dysfunctional structure" and of being "haphazard" in its client induction processes. The only point on which D did succeed was contributory negligence, which led the judge to reduce C's damages by 25%.

Courts

Use and abuse

Almost anything can breach the implied undertaking on disclosure.

CPR 31.22 provides that, with limited exceptions, documents disclosed in court proceedings may only be used for the purposes of those proceedings (unless the court otherwise consents; CPR 32.12 has a comparable provision for witness statements). In *Tchenguiz v Grant Thornton UK LLP* [2017] EWHC 310 (Comm), D sought declarations that reviewing documents disclosed in earlier litigation in order to assess their relevance for later litigation, listing that material for disclosure purposes in the later litigation and then allowing inspection of it would not constitute improper collateral use of the documents. Knowles J declined to give such a declaration. He considered "use" to be very wide indeed. Great care is therefore required in the use that is made of any documents disclosed in the course of court proceedings.

Contentious Commentary is a review of legal developments for litigators

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