C L I F F O R D

C H A N C E

Newsletter

May 2017

Contentious Commentary

Contract

Bifurcation

In which the Supreme Court shows that contractual interpretation remains a matter in debate.

In *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, the Supreme Court asserted that its previous decisions in *Rainy Sky* [2011] 1 WLR 2900 and *Arnold v Britton* [2015] AC 1619 "were saying the same thing". That was not the reception that has generally been given to the cases. It is true that *Arnold v Britton* did not overrule *Rainy Sky*, but *Arnold v Britton* was perceived as drawing the emphasis back towards literalism and as discouraging the judiciary from roving too enthusiastically within the contextual undergrowth in order to stretch the parties' deal as expressed in their words.

In *Wood*, the Supreme Court glossed the position: literalism might prevail where parties are sophisticated, the subject matter is complex, and the contract was drafted by lawyers; but context may play a greater role in less formal contracts. Except, of course, where the parties' lawyers have made a mess of the drafting, when the factual matrix and the purpose of similar provisions in contracts of the same type might be useful.

Wood itself concerned an indemnity clause that covered

> "all expenses and liabilities suffered or incurred, or remediation or payments imposed on or required to be made by the Company following or arising out of claims… registered with the FSA… pertaining to any mis-selling"

The Company was forced by the FSA to pay compensation to customers for misselling after the Company had self-reported problems. The issue was whether both the liabilities and remediation had to arise from claims registered with the FSA, or whether only the remediation was subject to the requirement that it flowed from registered claims. This represented the common problem of whether a qualifier ("claims registered with the FSA") applies to one or both of the prior conditions (most easily solved by layout in drafting).

The Supreme Court, like the Court of Appeal, was influenced by a separate warranty dealing with regulatory breaches, and decided that the indemnity as a whole was premised on claims made to the FSA. No claims had been made, so the indemnity was not triggered.

Traumatic post stress syndrome

A notice must be received.

The wisdom of including in a contract a clause that says how notice under the contract must be given and when notice will take effect was illustrated by *Newcastle Upon Tyne NHS Foundation Trust v Haywood* [2017] EWCA Civ 153, which turned on the date upon which a redundancy notice was given. If notice was given on 26 April, C received a lower pension; but if the notice was given on 27 April, she received an enhanced pension because she would then have reached the age of 50 when the notice took effect 12 weeks later. The three judges split 2-1 on the outcome, with none following the same reasoning.

Contents

The primary issue was whether notice is given when it reaches the address in question or whether it is necessary for the intended recipient actually to receive it.

Lewison LJ, dissenting, decided that the default rule in the general law is that notice is given when it reaches the correct address, regardless of whether or not the recipient is there. Arden LJ decided that there is presumption that notice is given at that time, but that the recipient can rebut this by showing that she did not in fact see the notice until later. In *Hayward*, C was, according to Arden LJ, able to rebut the presumption (C was on holiday). Lewison LJ, looking from the point of view of the notice-giver, considered Arden LJ's approach to be too uncertain: the notice-giver could never be sure whether or when notice had been given. Arden LJ, looking from the point of view of the notice-receiver, regarded Lewison LJ's approach as unfair: the notice-receiver might be treated as having received notice and therefore obliged to respond even if the notice was justifiably lying undisturbed on the door mat.

Arden and Lewison LJJ approached the case as depending upon the general law, but Proudman J propounded a rule specific to employment contracts that a notice had to be communicated to an employee, which she seemed to regard as meaning actual knowledge (or, perhaps, means of knowledge).

The bottom line was therefore that C received the enhanced pension. Best draft out of the issue.

Penal punk

A side letter to a lease is struck down as a penalty.

A lease provided for a certain rent, with periodic upward-only rent reviews. There was also a side letter to the lease that provided for a lower rent, including a cap on the amount of any reviewed rent that, as it turned out, almost halved the rent (the side letter was a personal reduction reflecting the benefit of having a well-known name in the street). However, the side letter provided that

> "if you [the tenant] breach any… term of the Lease… we [the landlord] may terminate this agreement with immediate effect and the rents will then be payable in the manner set out in the Lease as if this agreement had never existed."

Some minor breaches occurred while the landlord and tenant were trying to sort out what payments were due, and the landlord purported to terminate the side letter. In *Vivienne Westwood Ltd v Conduit Street*

Tort

Premature discharge

A negligence claim is mistakenly discharged by a restructuring.

A company, C1, made a loan to E in reliance on negligent advice by D, a firm of accountants. E was in trouble. C2, the individual who owned C1, decided to restructure his dealings with E for tax and related reasons. To achieve his aims, C2 made a new loan to E, which E used to repay the earlier loan made by C1 (C2 ended up controlling E). Can C1 or C2 claim against D for D's negligent advice about the original loan or does the fact that E paid off the original loan extinguish the loss that might otherwise have been recoverable? (By the time the case reached the Supreme Court, it was accepted that D did not owe a direct duty of care in tort to C2.)

In *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, the Supreme Court decided that the restructuring did have the unintended effect of extinguishing the Cs' claim against D.

The Cs put three arguments. First, C1 argued that the restructuring should be ignored as a *res inter alios acta*. The Supreme Court observed that this could not be so since the repayment by E to C1 had, and was intended to have, the effect of discharging the debt that formed the basis of C1's claim against D. The loan by C2 to E was not an indirect payment to C1 but part of distinct transactions each with their own consideration. C2's loan was not collateral to anything.

Secondly, C1 argued that the principle of transferred loss applied and that C1 should be able to recover the loss (now) suffered by C2 (*Linden Gardens* [1994] 1 AC 85, *Panatown* [2001] 1 AC 518 etc). But, at its widest, this principle depends upon a contract being entered into by two parties in the expectation of benefit to a third. Here, it was no part of D's engagement by C1 to benefit C2. C2's loss arose from the refinancing transaction, not from D's breach of duty to C1.

Thirdly, C2 argued that he should be subrogated to C1's rights against D as a remedy to prevent D from being unjustly enriched at C2's expense. Even if the other requirements for unjust enrichment could be satisfied (as to which some of the Supreme Court were doubtful), the Supreme Court concluded that the enrichment was not unjust for legal purposes. There was no failed or defective transaction. Everything achieved exactly what it was intended to achieve, namely the discharge of E's debt to C1 and a new debt owed by E to C2. There was no relevant mistake on anyone's part; it was just that, as far as C2 was concerned, the transactions had unintended consequences.

As Lord Sumption observed, C2 made the mistake of treating C1 as indistinguishable from himself. It was a costly mistake.

Development Ltd [2017] EWHC 350 (Ch), the judge decided that the provision allowing termination of the side letter was penal and thus unenforceable.

In the light of *Makdessi* [2015] UKSC 67, the first question was whether the increased rent fell within the penalty doctrine at all. The doctrine does not apply to primary obligations (price, rent etc), but only to secondary obligations arising on breach of a primary obligation. In *Vivienne Westwood*, this issue was whether the primary obligation was to pay the full rent, with a conditional right to a discount such that the increase was an aspect of the primary obligation, or whether the primary obligation was to pay the reduced rent, with the increased rent providing a secondary obligation arising on breach of the primary obligation. Redolent of angels and pinheads perhaps, but the judge decided that the substance of the side letter was a reduced rent. The increase in the rent arose on breach and thus fell within the penalty doctrine.

Then there was a question of interpretation. Did the landlord's ability to terminate the side letter arise on any breach of the lease or only on a material breach, as the tenant argued? The judge considered it inevitable that there would be regular breaches of a full repairing lease. If any breach triggered the right to increase the rent, the reduced rent would in practice depend upon the landlord's continuing goodwill in not exercising its right to terminate the side letter. That could not have been the parties' intention, and so the judge decided that an implied term as to the nature of the breach was required. But he thought materiality too uncertain, favouring instead non-trivial breach. Any less uncertain?

Next came the question of whether the termination of the side letter brought with it a retrospective increase in the rent. The judge decided that it did. That was what it said by treating the side letter as if it had never existed.

Finally, having crawled through the weeds, the judge arrived at the key question: was the relevant clause in the side letter penal? Yes. The consequences of breach were out of all proportion to the legitimate interest of the landlord in relevant performance. This was especially so since the rent increase on breach was retrospective, but the judge would have reached the same conclusion if it had been prospective only.

Though not necessary, the judge concluded that had the rent increase only been penal because of its retrospective nature, he would have severed the words that had this effect and thus removed the penal consequences.

So despite *Makdessi* being thought to render the law on penalty clauses of largely historical interest only in commercial cases, *Vivienne Westwood* shows that there is still some life in the old punk yet.

Valued customers

A liberal view is taken of valuation on close out.

The events of the autumn of 2008 still occupy the courts, though in *LBI EHF v Raiffeisen Zentralbank Österreich* [2017] EWHC 522 (Comm) it was Landsbanki's failure rather than Lehman's that caused the dispute. The issues were, however, similar, concerning close-out under a GMRA and a GMSLA.

The first question was whether a default notice sent by fax was effective. It became effective when "received by a responsible employee in legible form". C said that it had sent a fax, and produced a transmission report; D said that it could find no record of a fax from C being received. Faced with a lack of information, Knowles J decided that, on a balance of probabilities, it had been received legibly at D's offices.

D then contended that a "responsible employee" was someone who had responsibilities relevant to the default, ie who would recognise the notice for what it was and understand the steps required. Knowles J thought that went too far. The judge considered that a responsible employee was someone with responsibility for receipt of a fax, not for handling a default, and so could be a fax room operative. Despite a lack of evidence, Knowles J decided that it had been received by a responsible employee at D.

Then there was the inevitable valuation question, which turned upon the "fair market value". Knowles J rejected the argument that this meant a value as between willing seller and willing buyer, acting without compulsion in a normal market. This was, after all, a close-out on default. He focused on the non-defaulting party's right to make the determination of the fair market value and, in particular, on the implied limitations on that right, ie it must act in good faith and not perversely (*Socimer Bank Ltd v Standard Bank Ltd* [2008] EWCA Civ 116). Here, C had taken into account a whole host of information, including models. The judge considered that it was impossible to say that it was irrational, in the *Socimer* sense, to use this range of information.

So generally the case is benevolent to those closing out transactions on the counterparty's default. Even if the market is in a mess, as long as the non-defaulting party makes a sensible stab at the figures, that may be enough.

Endeavouring to be reasonable

An obligation to use reasonable endeavours to enter into an agreement with a third party is enforceable.

Astor Management AG v Atalaya Mining plc [2017] EWHC 425 (Comm) is interesting as illustrating the unintended consequences of an amendment, as well as departing from another first instance decision on the enforceability of an obligation to use all reasonable endeavours.

The case concerned the development of a copper mine in Spain. As part of a complex agreement, C was entitled to deferred consideration when two conditions were met: the local authorities gave permission for mining to restart; and D obtained senior debt finance sufficient to restart mining. The agreement also contained an obligation on D to use all reasonable endeavours to obtain senior debt finance, and included provisions that to a large extent blocked other forms of finance. The agreement was, however, later amended to allow the group of which D was part to raise funds through equity and to channel them to D as intra-group loans.

As it turned out, D could not obtain senior debt finance, but was eventually able to secure sufficient equity to start mining. So, said D, the second condition for the deferred consideration was not met and thus no deferred consideration was (or would ever be) payable. The judge agreed. That was what the agreement said. He rejected the argument that there is a "principle of futility", ie that if a term or condition has become futile it can be disregarded – here, senior debt finance was no longer required and so the condition should be ignored. The judge considered that the court could not re-write the agreement in the way that this would require.

The judge then decided that the intra-group loans were not senior debt finance and that there was no obligation of good faith because that was subsumed in the all reasonable endeavours obligation.

D argued that its obligation to use all reasonable endeavours to obtain senior debt finance was not enforceable. *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 817 (QB) had indicated that an obligation to use reasonable endeavours to enter an agreement with a third party is generally unenforceable for the same reasons that an agreement to agree is generally unenforceable, ie uncertainty. Leggatt J did not agree. The object of the best endeavours was clear, ie an agreement with a third party, and just because the agreement could be in numerous different forms did not make the obligation to enter into it inherently uncertain. It might be hard to decide whether appropriate endeavours had been used, but that did not make the obligation unenforceable.

As to what all reasonable endeavours meant, Leggatt J decided that D could not decline senior debt finance just because it would be more expensive than equity (it triggered the obligation to pay deferred consideration). But nor was D obliged to take on senior debt finance that would make the mine commercially unviable. He decided that D had used all

Tort

SAAMCO redux

The Supreme Court confirms the Hoffmann scope of duty analysis.

D, a solicitor, gives negligent advice to C in relation to a secured financing. Had the advice been non-negligent, C would not have gone ahead with the transaction. But if the advice had been non-negligent and C had gone ahead (which he wouldn't have done), C would have lost all his money anyway. Can C recover his losses arising from the transaction?

This is classic Hoffmanite mountaineer's knee, scope of duty of care, information and advice, causation territory as elaborated in *SAAMCO* [1997] AC 191 and subsequent cases and innumerable academic articles. In *BPE Solicitors v Hughes-Holland* [2017] UKSC 21, the Supreme Court reasserted firmly the Hoffmanite approach, overruling some cases that had slipped back into the old ways (in particular, looking for "no transaction" cases).

The Supreme Court reaffirmed that the main question is the scope of the duty of care. Here, D gave one piece of information relating to the transaction, and was not responsible for advising on the merits of the transaction generally. D was therefore only liable for the consequences of that information being wrong. In *BPE Solicitors*, there were no consequences of the information being wrong because C would have lost his money anyway because it was a naff deal. This was not a matter of causation, nor was it properly viewed as a cap on damages. The question is what losses fall within the scope of the duty owed. C's losses did not do so, even though C would not have suffered any loss had the duty not been breached because C would not have entered into the transaction at all.

reasonable endeavours in this case, but had still failed to find senior debt finance.

But C scrambled home because of restrictions on what D could do with surplus funds and on intra-group payments. D was obliged to use excess cash to pay the deferred consideration. The judge decided that this blocked the use of surplus funds until the deferred consideration was paid even though the deferred consideration was not otherwise due. Its amount was, however, clear.

The context requires otherwise

In which a definition is not applied because to do so would make no sense.

In *Kitcatt v MMS UK Holdings Ltd* [2017] EWHC 675 (Comm), D made the bold argument that a warranty given by the buyer (D) in a Share Purchase Agreement was unenforceable because the drafting left it devoid of content. Though boldness is not to be disparaged, it was to no avail in this case.

D warranted that it was not

> "aware of any facts or circumstances that could reasonably be expected to have a material impact upon the Operating Income and/or Revenue in 2012 or 2013 (being a reduction of at least 20% in the case of Operating Income and 10% in the case of Revenue) including… the resignation or expected loss of any client of [D]"

This mattered because the Cs were to receive deferred consideration based on the subsequent earnings of the business sold and that part of D's existing business with which the business sold was to be merged. The Cs wanted to be sure that D's existing business wasn't about to lose its major customers, reducing the deferred consideration.

D argued that this warranty was unenforceable because of the words in parentheses. Operating Income and Revenue were defined as the actual Operating Income and Revenue in those years. To determine whether there has been a drop of 10% or 20% requires a comparison of two figures. The SPA did not specify what the starting point of the comparison was to be – all it referred to was the actual figures.

Males J rejected D's argument. He concluded that the clause provided for a comparison of what would reasonably be expected on the basis of the facts and information provided to the Cs prior to the SPA and what would have reasonably been expected if the facts and circumstances in question had been disclosed.

Insofar as the definitions rendered the clause unworkable because of the reference to actual figures, the judge noted that the definitions clause opened, in customary fashion, with the words "the following words and expressions have the following meanings unless the context requires otherwise". He concluded that "the context clearly does require otherwise". Literalism will go so far, but not to the extent that it renders a carefully crafted clause wholly ineffective.

Tata to all that

An arbitration clause is not too uncertain to operate.

Another case in which a court declined hold that a clause was enforceable is *Associated British Ports v Tata Steel UK Ltd* [2017] EWHC 694 (Ch). This case concerned the long-term licence contract covering the deep water harbour at Port Talbot used by the local steel works. The agreement provided that if there was

> "any major physical or financial change in circumstances affecting the operation of [the steel works]… either party may serve notice requiring the terms of this Licence to be re-negotiated… and if agreement is not reached within a period of six months… the matter shall be referred to an Arbitrator (whose decision shall be binding on both parties and who shall so far as possible be an expert in the area of dispute…)"

C argued that the clause was too uncertain to be enforceable because there were no sufficient criteria for an arbitrator to decide what was and what was not a major change in circumstances and, even if there were, there were no criteria upon which the arbitrator could decide how the licence agreement should then be changed. Rose J rejected both arguments.

With regard to major changes, the judge considered that as long as there were some changes that would definitely be major changes within the clause and some that would not, the clause would be sufficiently certain to be operable "even though it may be difficult in the abstract to draw the precise divide between changes falling on either side of the line". Some issues may be hard to decide, but that does not make them too uncertain to be enforceable.

As to the revised contractual terms that the arbitrator could impose, Rose J implied that these must be reasonable and must be in response to the change in circumstances. She stressed that the arbitrator could not make up a wholly new contract as he went along. The parties had chosen to allow a third party to impose terms, removing their right to agree or not according to their own perceived interests. In this regard, arbitrators might, in practice, be allowed rather more flexibility than courts grant themselves.

Unjust enrichment

Retaining the middle man

The Supreme Court deprecates the use of vague and generalised language.

To have a claim in unjust enrichment, the defendant's enrichment must be at the expense of the claimant. In *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, the Supreme Court explored what "at the expense" of the claimant means, concluding that the question is whether there was "sufficient causal connection, in the sense of sufficient nexus or link, between the loss to the bank and the benefit received by the defendant".

Less than two years later, in *HMRC v The Investment Trust Companies* [2017] UKSC 29, a differently composed Supreme Court (though two members were the same) excoriated this approach (though not the result). It "leaves unanswered", the later Court said, "the critical question, namely, what connection, nexus or link is sufficient… in view of the uncertainty which has resulted from the use of vague and generalised language, this court has a responsibility to establish more precise criteria."

The aim of the Supreme Court in *The Investment Trust Companies* was sound in this regard. Greater precision in the test improves legal certainty and gets away from the idea that unjust enrichment (and, indeed, other areas of the law) is largely discretionary, allowing judges to do what seems right on the facts that confront them without the distraction of inconvenient rules. The execution was, perhaps, less sound, not least because the Supreme Court went on that it would not attempt a definitive statement. The overall intention of the Supreme Court was, however, to tighten what "at the expense" means, not quite limiting it to direct payments from C to D but putting any indirect payments into special categories requiring special justification.

The Investment Trust Companies is one of the legion of cases arising from the Government's mistakes in the transposition of EU tax rules into UK law. This case involved a chain of VAT payments. Investment managers charged investment trusts VAT on the managers' fees as required by UK legislation. Under EU law, VAT should not have been charged, and the UK legislation was therefore invalid. The Managers received this output VAT, deducted their input VAT, and passed the balance to HMRC. The restitutionary claim against HMRC to recover the VAT mistakenly paid was brought not by the investment managers (who actually paid HMRC) but by the investment trusts (who paid the investment managers who paid HMRC) alleging that HMRC had been unjustly enriched at the expense of the investment trusts.

The Supreme Court rejected the claim. The investment trusts had a claim in unjust enrichment against the managers for the mistaken payment of VAT, and the managers had a claim in unjust enrichment against HMRC, but the two claims could not be collapsed into a single claim by the investment trusts against HMRC. There was no agency, no trust, no sham and no coordinated transactions that might have justified ignoring the intermediate steps. The middle man was key.

Tax and spend

A doubt can still be a mistake.

Another aspect of the UK's failure properly to implement EU tax law arose in *Jazztel plc v HMRC* [2017] EWHC 677 (Ch), this time the Stamp Duty Reserve Tax, at 1.5%, charged when shares were put into clearing or depositary systems. This was ruled unlawful in 2009. HMRC is still fighting attempts to obtain repayment.

In *Jazztel*, the main issue before the court was about mistake (there are other issues that were not before the court). HMRC argued that C had not made a mistake when it paid the SDRT because it had received advice that there was, at the least, an argument that the SDRT was not payable. Marcus Smith J decided that mistakes and doubts could co-exist, as long as the doubt doesn't overwhelm the mistake. If the level of subjective doubt remains below 50%, it is still a mistake (ie the worse the advice, the easier it will be to claim). On this basis, C had made a mistake.

The limitation period for claims arising from a mistake runs from the time that the mistake could reasonably have been discovered (section 32(1)(c) of the Limitation Act 1980). However, section 32(1)(c) does not apply to tax-related mistake claims brought after 8 September 2003: section 320 of the Finance Act 2004. This had a retrospective effect that was, the judge concluded, in breach of the EU principle of effectiveness. He therefore decided that section 320 could only apply to claims accruing after 8 September 2003 and claims accruing prior to that date which did not depend on section 32(1)(c).

HMRC also argued that it had changed its position in reliance on the mistaken payments, giving it a defence to the unjust enrichment claim. Like Henderson J in *The FII Group Litigation* [2014] EWHC 4302 (Ch), Marcus Smith J was immensely sceptical whether this had any factual basis at all. Not only were the sums trivial in the context of governmental finance, but governments estimated (ie guessed) their revenue each year and, if there was a shortfall, they simply borrowed more. There was no hypothecation and no reliance on particular income. HMRC is, however, taking the point to the SC in other cases.

Jurisdiction

Legal immunity

English courts have no jurisdiction over foreign lawyers who induce their clients to sue in the wrong place.

If you set up your business model so that client relations are governed by English law and you give the English courts exclusive jurisdiction, it will be pretty annoying to be dragged before the German (or any other non-English) courts. All the more annoying if you operate an execution-only securities business, but can be liable in German tort law as an accessory for the wrongs of German investment advisers. And more annoying still if you think that German claimant lawyers are whipping up claims against you.

So it might seem like a neat response to sue the German lawyers for inducing your clients to break their contracts with you by suing in Germany in defiance of the exclusive jurisdiction clause in the contract. But that depends upon the English courts having jurisdiction over the claim against the lawyers, which in turn depends upon the meaning of what is now article 7(2) of the Brussels I Regulation (recast), ie England being the place where the harmful event occurred. Article 7(2) gives the claimant the option of suing in the courts for the place where the event giving rise to the damage occurred or the courts for the place where the damage occurred. The event was clearly in Germany, so C argued that the damage had occurred in England because C had been deprived of the jurisdiction of the English courts or because that was where C was based.

In *AMT Futures Ltd v Marzillier, Dr Meier and Dr Guntner Rechtanswaltgesellschaft mbH* [2017] UKSC 13, the Supreme Court disagreed. The Supreme Court regarded it as obvious that the damage had occurred in Germany, where C had to pay money to employ lawyers and potentially to pay damages. It refused to craft a special rule (as there is, for example, for cartels and defamation) or to have regard to the benefit of being able to sue in England. It even considered it so *acte clair* that no reference to the CJEU was required (but there may be a degree of judicial politics in this – the Supreme Court now seems less keen on references to the CJEU than it used to be).

So what might, reasonably, have seemed like a neat response has only added to the some £2.2m that the proceedings in Germany were said to have cost.

Tort

Old mother Hubbard

New liabilities for asset strippers.

In *Marex Financial Ltd v Sevilleja* [2017] EWHC 918 (Comm), Knowles J decided that there is a tort of inducing a company to act in wrongful violation of its obligations under a judgment.

What happened was that a draft judgment was given to the parties, finding against a company. Faced with this adverse judgment being handed down shortly, D was alleged to have asset-stripped the company so that it could not meet the judgment after its formal delivery. C, the judgment creditor, sued D directly for, in substance, preventing the company from meeting its obligations to C under the judgment.

Knowles J reasoned that wrongly preventing a party from performing a contractual obligation could be tortious, and so wrongly preventing payment of a judgment debt (into which the contractual obligation was merged by the judgment) could similarly be tortious.

Knowles J considered that D's conduct could also constitute the tort of causing loss to C by unlawful means. In this case, C was alleged to be a director or agent of the judgment debtor company, and his asset-stripping was a breach of his fiduciary duties to the company and, as such, constituted unlawful means. The judge did not accept that the principles surrounding the non-recovery by, largely, shareholders, of reflective loss prevented C's claim because it had a direct action itself for losses caused to it, not just a reflective claim.

Snowbound

The EU's insolvency law trumps its jurisdictional law.

The English courts have jurisdiction under the Lugano Convention over a claim against an Icelandic bank. However, that Icelandic bank is in insolvency. Under the EU's insolvency laws (the EUIR and, in this case, the Credit Institutions Winding-up Directive), the effect of insolvency on lawsuits against the insolvent bank must be determined according to the law of the insolvency, ie Icelandic law. Under Icelandic insolvency law, all claims against the bank must be pursued within the insolvency, not in the ordinary courts. Which wins – the Lugano Convention or insolvency law?

In *Tchenguiz v Kaupthing Bank HF* [2017] EWCA Civ 83, the Court of Appeal decided that insolvency law won.

Insolvency law does not apply only to winding-up and similar proceedings. The aim of an insolvency is to collect assets and distribute them fairly. This requires constraints to be placed on the pursuit of individual claims, wherever they are taking place, which is achieved by applying the law of the insolvency to the pursuit of those claims. That necessarily entails overruling court jurisdiction that might otherwise exist under the Lugano Convention or the Brussels I Regulation. Thus, once a company enters into insolvency, the question of where new proceedings can be brought against the company is a question for the law of the insolvency, not general jurisdictional law (pending proceedings are different).

C argued that Icelandic insolvency law barred ordinary court proceedings in Iceland, but said nothing about proceedings elsewhere in the world. The Court of Appeal disagreed, but in any event found that the effect of the winding-up directive was to internationalise Icelandic law – what applied within Iceland now applied globally (or at least within the EEA).

Data protection

Data, data everywhere

The Court of Appeal has clarified some common issues for data controllers.

The Court of Appeal has handed down another data protection judgment, this time answering six questions about the operation of the Data Protection Act 1998. We may actually understand what it all means just as the Act ceases to exist, which would be ironic.

The judgment relates to two appeals heard together, the first involving a data subject and a management company for the block of flats in which he lived (*Ittihadieh v 5 – 11 Cheyne Gardens RTM Company)* and the second a data subject and a university (*Deer v The University of Oxford*), both cited as [2017] EWCA Civ 121. The issues the Court of Appeal looked at included:

- The scope of the definition of "personal data" in the Act: This requires consideration of whether the data in question "relates to" a living individual and whether the individual is identifiable from those data. The requirement in *Durant v Financial Services Authority* [2003] EWCA Civ 1746 that data be "biographical in a significant sense" goes too far.
- Who is a "data controller": A data controller is a person who makes decisions about how and why personal data are processed. A data controller is responsible for persons who process data on his behalf. Where decisions about data are taken by natural persons, they will not themselves be data controllers if those decisions are made as agents of a company of which they are directors.
- What constitutes a subject access request ("SAR"): There is no prescribed form in the Act, other than a requirement that a SAR be in writing. This can include electronic transmission, including email or even social media sites such as Facebook and Twitter. Since a request may be made informally, exacting standards of precision would be inappropriate.
- Whether the duty to comply is subject to a reasonable and proportionate search: Lewison LJ commented that he thought the Directive and Act "have, as an underlying assumption, the assumption that personal data can be sufficiently retrieved and made ready for disclosure to the data subject at the touch of a few buttons. Experience shows that this assumption is fundamentally unsound." However, he thought that the Directive did not intend to impose excessive burdens on data controllers. It restricts the types of systems to which it applies. A member state may lay down time limits for the retention of data. And the principle of proportionality is a general principle of EU law. While this principle cannot justify a blanket refusal to comply with a SAR, it does limit the scope of the efforts that a data controller must take in response to one.
- The extent of the exemption for data processed only for an individual's

personal or household use: The balance must be struck between two competing entitlements to privacy – that of the data subject and that of the individual data controller. But activities relating to the management of a private block of flats in which the putative data controller resides fall within the scope of the exemption because they directly concerned his private life and his household.

- The extent of the court's discretion under section 7(9) of the Act to order a data controller to comply with a SAR: The court must be satisfied that there has been a breach of duty. It may then consider whether there is a more appropriate route to obtaining the requested information, such as by disclosure in legal proceedings, the nature and gravity of the breach and the reason for having made the SAR (although, as we saw in *Dawson-Damer v Taylor Wessing* [2017] EWCA Civ 74 (March), a collateral purpose of assisting in litigation is not an absolute bar).

Debtor protection

A new pre-action protocol is being introduced.

From 1 October 2017, a new pre-action protocol, for debt claims brought by businesses against individual debtors, will come into force. This might apply, for example, to claims on guarantees (though it is debateable whether a claim on a guarantee is a debt claim) and, quite possibly, to most other claims for sums payable under a contract that aren't damages for breach of contract.

The pre-action protocol is in the usual kind of form, eg allowing 30 days from the date of the letter to respond (and requiring the letter to be posted on that date or, at the latest, the day afterwards).

Financial services

Identification parades

Identification requires a good deal of specificity.

Financial Conduct Authority v Macris [2017] UKSC 19 will be welcomed by the FSA, which succeeded in its appeal, but it by no means answers all the questions that can arise about the identification of a third party in a warning notice issued by the FSA.

A third party "identified" within the meaning of section 393 of Financial Services and Markets Act 2000 in a manner that is prejudicial to him is entitled to make representations to the FCA (and thus, so far as the FCA is concerned, potentially to interfere with its procedures and timings, especially with regard to settlement with an identified individual's employer).

The majority of the Supreme Court took a very narrow approach to what identification means, requiring a name or a synonym for an individual (what if the synonym must refer to one of two people?). Where there is a synonym, the relevant audience is the public at large, who must be able to identify the individual from the synonym without the aid of extrinsic information (though the public can have information to allow them to "interpret" the notice, but not to "supplement" it – a distinction that may not be easy to apply). But one of the majority then wavered, perhaps allowing the public a short opportunity to google the contents of the notice.

The minority in reasoning split too. They said that the audience thinking about who the synonymised person might be wasn't the public at large, but those in the relevant financial markets, but not if they were so established in that market as actually to know the person concerned (what if it's a small market?). The minority then divided on the application of their test. One said that those in the market wouldn't have been able to identify the individual (a limited view of what market participants might make it their business to know?); the other said that they would been able to identify the person involved.

The FCA will like the decision because it is narrower even than it argued for. Generic wording, like "management", should avoid identification of an individual (directors? board?). The Upper Tribunal may, however, face further cases in trying to work out what the Supreme Court should be taken to have meant. Indeed, if there is enough at stake, one or more further trips to the Supreme Court seem inevitable.

Clifford Chance acted for the respondent to the appeal in *Macris*.

Courts

Whiter than white

Civil courts should rarely if ever interfere with the money laundering regime.

The money laundering regime is draconian. Under the Proceeds of Crime Act 2002, if a bank suspects, rightly or wrongly, that a customer has paid criminal property (very widely defined) into the customer's account, the bank must seek the authorities' consent to deal with the dosh, failing which the bank will commit a criminal offence. If the bank hears nothing back, the account must be blocked for seven days; if consent is refused, the account must be blocked for a further 31 days (a period the Government would like to extend).

The blocking of accounts is potentially serious for the account holder, and it was tales of resulting imminent ruin that led Burton J to grant an interim declaration in *The National Crime Agency v N* [2017] EWCA Civ 253 that the bank would not be committing a criminal offence if it made certain payments from the account despite the bank's having reported its suspicions to the authorities and the moratorium therefore applying.

It is unsurprising that the Court of Appeal should have disagreed with Burton J. The statute says what the statute says, and courts can't disapply the law just because they think it's a tad harsh in the circumstances. As a result, although the Court of Appeal did not say that interim declarations could never be granted in these circumstances (courts never, at least seldom, say never about their own powers), it came as near to this as makes no difference. The court could give an interim declaration if satisfied that there was no real prospect of the bank having any criminal liability but, as the Court of Appeal observed, the court will seldom have sufficient evidence to reach a conclusion on this point at an interim stage.

So, innocent or guilty, it will generally simply be tough if your account is frozen under POCA.

Unsecured funders

A court can order that the identity of funders be revealed.

The RBS Rights Issue Litigation is complicated case. At the time of this ([2017] EWHC 463 (Ch)) interim decision, about 23% by value of the claimants under the Group Litigation Order were still heading for a liability trial in May, the rest having settled. Hildyard J decided that the names of those funding the extant claimants should be disclosed to the defendant.

There is power under section 51 of the Senior Courts Act 1981 to order third parties to pay costs. There is also power, under CPR 25.14, to order a third party funder to provide security for costs. In *The RBS Rights Issue Litigation*, D did not make an application under either of these provisions, but sought an order that the identities of the third party funders be disclosed so that D could then decide whether to apply for security.

Hildyard J decided that the court had power to grant this order under its general jurisdiction to make ancillary orders to make a remedy effective – it is impossible to apply for security for costs against a third party funder without knowing who the third party funder is.

The judge decided that an application for security for costs would have a realistic prospect of success, and did not accept that third party liability for costs is secondary. As professional litigation funders should know (particularly in GLO proceedings, where the named claimants are usually only severally liable for their share of any costs liability), they stand in the front line on costs. Despite arguments that it would now be far too late to order security, Hildyard J decided that he would order disclosure of the names, while not offering any encouragement that an actual application for security would succeed.

Hildyard J did, however, refuse to order disclosure of the Cs' after-the-event insurance policy, which is intended to cover the claimants' liability in costs if they lose. He decided, despite some contradictory authority, that he had power to do so under CPR 3.1(2)(m) (case management and furthering the overriding objective) and that an ATE policy is not privileged, but on balance considered it inappropriate on the facts of the case.

Public international law

Crimean phoney war

Russia obtains, indirectly, judgment on a debt owed by Ukraine.

In November 2013, Ukraine was scheduled to sign an association agreement with the EU at a gathering in another location that was also once within the Soviet Union, Vilnius in Lithuania. Russia objected to Ukraine's plan to move towards the EU's orbit, and brought economic and other pressure to bear on Ukraine not to sign the agreement. Ukraine's President Yanukovych eventually succumbed to that pressure, in return for a promise of cheap loans and gas from Russia. One of these loans was a two year $3bn, eurobond, the documents for which were executed on 24 December 2013. These notes were structured in the usual way, were subject to English law and jurisdiction, and were listed on the Irish stock exchange. Russia was the only subscriber for the notes and remains the only holder.

Ukraine's withdrawal from the proposed association agreement with the EU led to mass protest in Kyiv. In February 2014, President Yanukovych fled (to Russia), Russia invaded Crimea, and military interventions took place in eastern Ukraine, causing considerable destruction.

Ukraine paid the interest falling due on the eurobond but, shortly before its maturity in December 2015, imposed a moratorium on repayment. Russia caused the trustee to bring proceedings in the English courts seeking summary judgment for the sums due on the notes. In *The Law Debenture Trust Corporation plc v Ukraine* [2017] EWHC 655 (Comm), the trustee/Russia succeeded.

The arguments raised by Ukraine, but rejected by Blair J, were essentially fivefold.

First, Ukraine argued that the eurobond was ultra vires because it offended Ukraine's budget law. Blair J decided that a foreign state recognised by the UK Government has unlimited capacity. The ultra vires rule, of the sort that applies to domestic and foreign local authorities, has no application to a state.

Secondly, Ukraine's argument on capacity was to be characterised as one of lack of authority. However, the judge decided that the Minister of Finance, who signed the documentation, had usual, alternatively ostensible, authority to enter into the agreements on behalf of Ukraine. He had signed 31 previous eurobond offerings. Ostensible and usual authority were matters of English law as the law governing the notes. (The trustee/Russia also argued that Ukraine had ratified the eurobond, but the judge concluded that, had that been relevant, it was fact-dependent, and would have required a trial.)

Thirdly, Ukraine argued that it had entered into the various agreements pursuant to which the eurobond was issued under duress, which continued. The duress consisted of illegitimate economic pressure, coupled with threats of military action (subsequently carried out). The judge decided that this argument fell within the act of state doctrine and, as such, was non-justiciable in the English courts (or, put another way, was subject to principles of judicial abstention). Courts will not pass judgment on dealings between sovereign states, including on the use of armed force. There was no relevant public policy exception.

Fourthly, Ukraine argued that there was an implied term in the eurobond that Russia would not act in a manner that made it impractical or impossible for Ukraine to repay, or that Russia would not demand repayment if acting in breach of international law. The judge concluded that it was difficult to imply terms into tradable documents such as eurobonds, especially as Russia was not actually a party. The legal structure adopted for the loan could not be ignored. The terms proposed by Ukraine were not necessary, were too uncertain and raised issues that were not justiciable.

Fifthly, Ukraine argued that under article 49 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, Ukraine was entitled to take countermeasures against Russia, including non-payment of sums otherwise due. The judge considered that this argument was in substance the same as duress, and was not justiciable in the English courts.

As a result, the trustee of the notes was entitled to summary judgment against Ukraine. However, Blair J granted permission to appeal and stayed enforcement.

Contentious Commentary is a review of legal developments for litigators

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