CLIFFORD
CHANCE

CONTENTIOUS COMMENTARY

A REVIEW FOR LITIGATORS

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C L I F F O R D

C H A N C E

CONTENTIOUS COMMENTARY - NOVEMBER 2017

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CONTRACT

TIME WAITS FOR SOME

If a contract requires six months' notice, it means only six months' notice.

"The notice period is six months… such notice to expire no earlier than [4 October 2013]". Notice was given in August 2012 to expire on 4 October 2013. Is it valid?

In *Liontrust Investment Partners LLP v Flanagan* [2017] EWCA Civ 985, the Court of Appeal confirmed that the notice was not valid. The contract said that six months' notice was needed, not at least six months'. What was given was 14 months' notice, which was not what the contract required. The Court of Appeal accepted that the meaning was dependent on the context (so, for example, if it required six months' notice to expire on a particular date, that might be indicate that it should be read as at least six months), but there was nothing in the context here that required any departure from the literal meaning.

MATERIAL MATTERS

Materiality to what is always a vital question.

A Shareholders Agreement required parties who wanted to sell their shares to a third party first to offer the shares to existing shareholders in a notice setting out "the price… at, and the material terms… on which" the sale to the third party was to be effected. In addition to wishing to sell its shares, as part of the same transaction one shareholder also intended to sell debt owed by the company. The pre-emption rights did not apply to the debt. The notice to the other shareholders failed to mention the sale of the debt. Other shareholders argued that this failure rendered the sale of the shares void because the sale of the debt was a material term and its omission invalidated the notice.

In *M&G Broad European Loan Fund Ltd v Hayfin Capital Luxco 2 SARL* [2017] EWHC 1756 (Ch), the judge considered that the notice was valid. Where materiality is concerned, a vital question is material to what. Significance as well as substantiality matter. Here the pre-emption provision only concerned the shares, so it was only the terms relating to the sale of the shares that were material for the purposes of the Shareholders Agreement. If the price of the debt affected the price of the shares, disclosure might have been necessary, but that was not argued. As a result, the absence from the notice of any reference to the debt did not invalidate the notice.

WATER, WATER EVERYWHERE

Trustees must be cautious about expenses.

UBS AG v GLAS Trust Corporation Ltd [2017] EWHC 1788 (Comm) is a dispute de nos jours in the financial markets for it involved the waterfall in a pre-crash securitisation that is now drowning. When funds are scarce, disputes between the parties who might be entitled to them can be intense. This dispute may still be in the splash pool, with the deep water still to come.

A group of investors replaced the trustee with one which might be more "active", and then persuaded the trustee to meet the c.£2.5m in legal and other fees that the investors had incurred, as well as further fees going forward. Fees properly incurred by the trustee were at the top of the waterfall, so paying substantial fees incurred by a group of investors potentially deprived those further down.

In the course of the hearing, the trustee accepted the need to show more independence, agreeing that it could not simply meet all the investors' legal fees but had to scrutinise those fees to see if they were proper and of value to the trustee. Blair J expressed particular scepticism as to whether the trustee should pay for legal advice that was being shown to it on a no reliance basis. Further, the judge was doubtful about fees relating to restructuring the transaction because that was not generally a matter for the trustee.

Basically, the wholesale attempt to shift investors' legal fees to the trustee was defeated by the swap counterparty (fourth in the waterfall). The trustee must approach fees with real independence.

SMALL BEER

Discretion is narrowly construed.

> "If Leumi requires the Client to repurchase any Receivables and the Client fails to do so… Leumi will be entitled to charge the Client an additional collection fee at up to 15% of the amounts collected by Leumi thereafter. This collection fee is in addition to any other fee payable by the Client to Leumi under this Agreement. The Client expressly acknowledges that such fee constitutes a fair and reasonable pre-estimate of Leumi's likely costs and expenses in providing such service to the Client."

So said a receivables financing agreement covering sales of Cobra beer. Does this allow Leumi to

charge whatever fee it wants, up to 15%, if the Client fails to repurchase? In *BHL v Leumi ABL Ltd* [2017] EWHC 1871 (QB), Judge Waksman decided that the clause gave Leumi a discretion to charge a fee, but that the fee to be determined by reference to Leumi's internal costs of collecting the debts (out of pocket expenses were charged under another provision).

Leumi believed that it could charge whatever it wanted up to 15% and, unsurprisingly, decided to charge 15%. The judge concluded that Leumi had not in fact exercised its discretion because it didn't think it had one or, to the extent that it had done so, it had not taken into account the relevant matters and, as a result, had reached a perverse conclusion.

But that didn't mean that Leumi had not entitlement to a fee. The judge decided that he would assess the maximum that Leumi could have charged had it exercised its discretion properly. This was less than 15%. C had overpaid by mistake, so could recover the excess.

The contract looks as if the drafter noticed that the fee became payable on breach, became concerned about penalty clauses, and so tacked on the last sentence in order to justify the additional fee. But in doing so by reference to Leumi's costs and expenses in taking over collection, the drafter skewed the likely intention of the clause. Now it became an expenses-based fee, rather than just a flat (up to) 15% payable after the fashion of default interest. Caution can have unexpected consequences.To add insult to the injury, the judge decided that the clause would not have been a penalty clause anyway because it was a primary obligation rather than a secondary one.

But the judge didn't decide that because the discretion had not been exercised, Leumi was not entitled to any fee at all. He could step in and pick the highest sum that Leumi could properly have selected.

SITUATIONS VACANT

A letter of credit is situated at the payer's home.

The concept of a debt having a situs is not obvious. Physical things are always somewhere; incorporeal things (choses in action) aren't anywhere save in the legal imagination.

But the law requires every thing to be somewhere. The situs of a debt is generally where the debtor is located, but there was an exception for letters of credit, which were situated where the documents had to be presented (*Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233). But in *Taurus Petroleum Ltd v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64, the Supreme Court decided that there was no justification for this exception. LCs are, like other debts, now situated where the payer (the issuing bank) is located.

The LC in question was issued by the London Branch of a French bank. Under the UCP, which is applied to almost all LCs, a bank branch is to be treated as if it were a separate entity. The debt was therefore situated in England. This meant that the English courts could, in principle, make a third party debt order in respect of the sum owed on the LC.

The other issue in *Taurus Petroleum* was the interpretation of the LC, which was issued to pay for oil supplied by D. D was described as the beneficiary of the LC, but the LC required payment to an account of the Central Bank of Iraq (CBI) at the Federal Reserve Bank in New York, and the Issuer undertook to both CBI and D that it would pay the proceeds into that account. (The Supreme Court was dismissive of the idea that there might be no consideration for this promise to CBI.) C held an arbitration award against D. A third party debt order over the sum due on the LC could be made to enforce the award if the debt was owed to D, but not if it was owed to CBI.

The Supreme Court split 3-2, an unfortunate outcome in a final appeal court because the loser will suspect that a different panel might have reached a different outcome.

The majority (Lords Clarke, Hodge and Sumption) considered that the debt was owed to D. CBI might be able to sue for damages if the debt was not paid into its account, but a third party debt order intercepted the debt before that stage, while the debt was still in D's hands, and therefore CBI's rights did not come into existence. It remained a debt due to D, against which a third party debt order could be granted.

The minority (Lords Neuberger and Mance) could not see how a sum expressed to be payable to CBI could be a debt owed to D. The LC said that the money was payable to CBI, so it was CBI that could sue for it. Just because the debt under an LC is normally owed to the "beneficiary" does not mean that it is always so.

It is not beyond the bounds of possibility that the structure of this LC, with the proceeds being paid to the Iraqi central bank at the US central bank, was set up with half an eye to sheltering sums otherwise payable to D under the considerable immunities that central banks enjoy under section 14(4) of the State Immunity Act 1978 and other similar legislation. If so, the stratagem failed - but only just.

TORT

DUTY DISSOLVING

Banks owe no duty of care in tort in carrying out the FCA's swaps misselling review.

CGL Group Ltd v The Royal Bank of Scotland plc [2017] EWCA Civ 1073 has extensive discussion about when a duty of care in the tort of negligence is owed for economic losses. Has it made us any the wiser? Probably not, but it has made banks happier by deciding that they did not owe a duty of care to customers in carrying out the FCA's swaps misselling review.

The background is that, before the Global Financial Crisis, banks commonly required borrowers to hedge the interest rate risk on floating rate loans through swaps and similar products. This hedging meant that customers have not benefitted from the post-GFC decline in interest rates. As a result, some customers have sued their lenders.

A number of these swaps misselling claims have failed for substantive and/or limitation reasons. New claims have therefore been sought to circumvent these problems. This has led to the swaps misselling review.

Under threat of sanctions under the Financial Services and Markets Act 2000, banks agreed with the FCA in June 2012 that the banks would review the sales of certain categories of swap under the scrutiny of an independent reviewer and, if appropriate, offer redress to customers. So, said aggrieved customers, the banks owed a duty of care in tort for the conduct of the review, the review was carried out negligently, the customers thereby suffered loss (in the same amount as the underlying claim), and the limitation period on this claim had not expired. With one bound, the claims were free.

But did the banks owe a duty of care in tort for the review? According to the Court of Appeal, no. The Court ran through the three tests for a duty of care regarding economic loss (assumption of responsibility, threefold and incremental - these being "concepts to express value judgments about whether a duty exists in an individual case"), discussed their ups and downs (assumption of responsibility seems to be on the down), and, having applied all three tests, concluded clearly that there was no duty.

As to assumption of responsibility, the banks were carrying out reviews because the FCA forced them to do so, as the customers were told. The agreement mandating the review said that no duties were owed to customers (though that was unknown to the customers until 2015). FSMA sets out when customers can bring claims for regulatory breaches, and the imposition of a duty of care would undermine the statutory regime. Further, the role of the independent reviewer mitigated against any assumption of responsibility because the process was not entirely within the control of the banks.

As to the threefold and incremental tests, this required a situation akin to contract. Here there was a contract under which the work was done, but it was with the FCA which pointed against a duty to a third party, as did the attempt to circumvent the Limitation Acts. Further, this was not (unlike negligently drafted wills) a situation where there was a lacuna that needed to be filled. If something was wrong, the FCA could take action. The Court also struggled with the idea that the customers had relied on the review.

The bottom line is that the existence of a duty of care in novel situations remains a difficult question. The tests can be applied, and should, according to the courts, reach the same answer. But it all depends upon what answer the court feels, viscerally, is the right one.

CITY CONFIDENTIAL

There is a strong public interest in observing duties of confidentiality.

Reuters wanted to publish information that it had obtained from documents sent by a hedge fund to its customers and that had been wrapped in numerous layers to demonstrate their confidential and sensitive nature (prior phone calls, passwords, legends etc). But the hedge fund got an injunction to stop publication, and in *Brevan Howard Asset Management LLP v Reuters Limited* [2017] EWCA Civ 950 the Court of Appeal upheld that injunction.

Even applying article 10 of the European Convention on Human Rights and section 12 of the Human Rights Act 1998, the Court of Appeal said that the "only question… was whether the important public interest in the observation of obligations of confidence was outweighed by sufficiently significant matters of public interest in favour of publication". The public interest didn't only stretch to revelations of impropriety, but the Court of Appeal was clear that the public interest in commercial confidence was strong and that merely because the public would be interested in the information was not enough to justify publication in breach of confidence.

PRIVATE INTERNATIONAL LAW

TRAFFIC JAMS

Process can be served on an embassy.

The key practical point for commercial lawyers arising from *Reyes v Al-Malki* [2017] UKSC 61 is probably that a claim form can, it seems, now be served on an embassy in London without needing the prior consent of the ambassador. Service, at least by post, will not infringe the inviolability of the embassy enshrined in the Vienna Convention on Diplomatic Relations.

This was not directly in issue in *Reyes*. The case concerned the alleged trafficking and modern slavery of a Filipino maid, C, employed by a Saudi diplomat and his wife, the Ds. After C's escape, she sued the Ds, who claimed diplomatic immunity.

The first issue was whether the process had been validly served on the Ds. The claim form had been posted to their home address. A diplomatic mission is "inviolable" (article 22(1) of the VCDR, given force of law in the UK by the Diplomatic Privileges Act 1964), and the "private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission" (article 30). The Ds argued that the claim form could not be served at their residence because service infringed its inviolability.

The Supreme Court was clear that service by post at a diplomat's residence does not violate anything (see the quote on this page - though the Supreme Court did concede that personal service on a diplomat might do so). The inviolability of a diplomat's residence is the same as that of an embassy. The same principle should therefore apply to an embassy. The established practice of requiring the ambassador's prior consent to service at the embassy can, therefore, probably stop (though it would still be a good idea).

"Premises are violated if an agent of the state enters them without consent or impedes access to or from the premises or normal use of them… The delivery by post of a claim form does not do any of these things. It simply serves to give notice to the defendant that proceedings have been brought against him, so that he can defend his interests, for example by raising his immunity if he has any. The mere conveying of information, however unwelcome, by post to the defendant, is not a violation of the premises to which the letter is delivered. It is not a trespass. It does not affront his dignity or affect his right to enter or leave or use his home" (Lord Sumption).

On the substance of the case, the Supreme Court decided that the Ds were not immune because they had ceased to be diplomats by the time of the hearing in the Supreme Court (though they were diplomats when the proceedings started). Article 39 provides that diplomatic immunity ceases when the diplomat leaves the country, but continues in respect of "acts performed by such person in the exercise of his functions as a member of the mission". C was employed to clean, to help in the kitchen and to look after the Ds' children. The Supreme Court decided that this employment did not fall within the Ds' functions at the mission, and so the Ds' immunity came to an end on their ceasing to be Saudi diplomats in the UK.

There was also an (obiter) issue as to whether the Ds would have been immune had they still been diplomats. This turned on article 31(1)(c), which provides that a diplomat does not have immunity for "any professional or commercial activity in the receiving State outside his official functions" (article 42 prohibits a diplomat from "practis[ing] for personal profit any professional or commercial activity").

Lords Sumption and Neuberger considered that employing a maid was not engaging in a commercial activity sufficient to lift immunity. Lords Wilson and Clarke and Lady Hale took the opposite view, largely for policy reasons. They considered that people trafficking, particularly by diplomats, was a major problem. Involvement in trafficking should therefore be considered as a commercial activity, even if the involvement was only as the recipient of the trafficked person rather than in the trafficking itself, in order to discourage diplomats from bad behaviour.

Former embassy employees made similar claims in *Benkharbouche v Secretary of State for Foreign & Commonwealth Affairs* [2017] UKSC 62, but this time against the states

themselves (neither of which took in the appeal). The claims turned on the State Immunity Act 1978. The Act gives states immunity, but not in respect of contracts of employment for work to be performed in the UK (section 4(1)). But this employment contract exception from immunity only applies if the employee is a UK national or is habitually resident in the UK (section 4(2)(b)). The Act also preserves immunity if diplomatic immunity could have been relied on (section 16).

The claims in question were barred by the Act, but the argument was whether the provisions of the Act were invalidated by the EU's Charter of Fundamental Rights (so far as the claims fell within the scope of EU law) or infringed the ECHR, requiring a declaration of incompatibility. This turned on article 6 of the ECHR and its equivalent in the Charter, access to court. Barring access to court could only be justified if done consistently with customary international law.

The Supreme Court decided that sections 4(2)(b) and 16(1)(a) were not required by customary international law. There was no rule or established practice that prevented local courts from determining grievances of foreign non-diplomatic employees. As a result, the EU law based claims could go ahead because EU law trumps statute (it now seems accepted that the Charter has this effect despite earlier Governmental protestations to the contrary). The non-EU law based claims could not proceed because the ECHR does not override statute, but a declaration was made that the provisions of the Act barring the claims were incompatible with the ECHR. It's now for the Government and Parliament to decide what to do.

A MERITED SUCCESS

Prospects of success are relevant to bring foreign defendants to the domicile of another.

Article 6(1) of the Brussels Regulation (now article 8(1) of the recast Regulation) provides that where a defendant is one of a number of such unfortunate creatures, he may be sued in the courts where one of them (the anchor defendant) is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine the claims together to avoid the risk of irreconcilable judgments resulting from separate proceedings. *Sabbagh v Khoury* [2017] EWCA Civ 1120 turned on whether any form of merits test had to be applied to the claim against the anchor defendant before foreign defendants can be imported.

The Court of Appeal split 2-1 on this issue. The majority took the view that a serious issue to be tried was needed against the anchor defendant. In the absence of a serious issue, it would never, they thought, be expedient to try the two claims together. Further, they considered that if the claim against the anchor defendant was liable to be struck out, it could be considered to have been brought for the sole purpose of removing the foreign defendant from the jurisdiction of his domicile, which also allowed them to refuse to hear the claim against the foreign defendant.

The majority focused on expediency and connection. Looking at these concepts through English spectacles, they unsurprisingly reached the conclusion that the English courts have reached in domestic law.

The minority, Gloster LJ, focused not on expediency and connection but on the risk of irreconcilable judgments. Just because an English court concluded that there was no serious issue to be tried did not mean that a foreign court would reach the same conclusion. The claimant could start elsewhere, the elsewhere would not be bound by the English court's decision, and inconsistent judgments could abound. So the scheme of the Regulation required that all defendants be dragged to the domicile of one of them, even if the claim against that one of them was fragile (as long as it wasn't pursued solely to import the others), because that was the only way to avoid inconsistency.

This is ultimately a question for the Court of Justice of the European Union – if it can get there on time.

THE PARENT TRAP

A parent company can be sued in England for the defaults of its subsidiary.

Lungowe v Vedanta Resources plc [2017] EWCA Civ 1528 involved important issues on the liability of a parent company for its subsidiaries' defaults and on forum non conveniens. Unfortunately, the Court of Appeal failed to engage seriously with these issues, leaving them, perhaps, to the Supreme Court.

The case concerned the liability of a parent company (19 employees) and its 79% owned Zambian subsidiary (16,000 employees) for pollution from a mine in Zambia operated by the subsidiary. The claims were governed by Zambian law. The Court of Appeal decided that since the parent was domiciled in the UK, the English courts had no discretion to refuse to hear the case against the parent (Brussels I Regulation and *Owusu v Jackson* [2005] QB 801) unless the case met the high threshold of being an abuse of EU law, which this case didn't. So the case against the parent would proceed in the English courts.

That led to the question of whether there was an arguable case against the parent for the sins of its subidiary, and the differing approaches of the Court of Appeal in, eg, *Chandler v Cape plc* [2012] EWCA Civ 525 and *Thompson v The Renwick Group plc* [2014] EWCA Civ 635. In *Lungowe*, the Court of Appeal did not engage with the law, contenting itself with the general observation that the case against the parent was arguable.

The Zambian subsidiary was sued in England as a necessary or proper party to the claim against the parent (PD6B, §3.1(4)). Jurisdiction over the subsidiary was not based on the Brussels I Regulation, and so forum non conveniens remained in play. But the court accepted that since the claim against the parent on, essentially, the same facts would go ahead in England, the claim against the subsidiary should do so too even though England was not the appropriate forum for the claim. Forum non conveniens is therefore distorted in cases such as this because of the compulsory jurisdiction over parties domiciled in the UK under the Brussels I Regulation, coupled with the judicial dislike of two courts looking at what is in substance the same claim.

Generally, the Court of Appeal retreated to the proposition that difficult points of law require a trial to determine the facts and that first instance judgments should be respected unless wrong in principle. In jurisdictional disputes, that means that parties can be dragged into the English courts when it is less than obvious that they should be.

The Supreme Court will have to resolve a number of these issues (most notably, parent/ subsidiary liability), but Brexit in the longer term may also affect the position.

BONDED SERVITUDE

The party ultimately interested in a bond cannot sue the issuer.

Public bond issues are structured in a way that, to an outsider at least, might seem curious, even if there are good and sound reasons for it and it works in practice.

The typical structure involves an issuer issuing a bearer bond, which is held by a common depositary/ custodian on behalf of the clearing systems (eg Euroclear and Clearstream). Members of the clearing system trade interests in the bond, often on behalf of their clients. As a result, the chain of obligations (and, in particular, of payments) is (in theory at least) issuer to depositary, depositary to clearing system, clearing system to member, and member to client. The ultimate investor can be at least four degrees of separation away from the issuer. And that's the simple case. There might be a trustee, paying agents and others involved in or alongside the chain, not to mention a deed of covenant, a right to definitive bonds and so on.

This distance between issuer and ultimate beneficiary caused C a problem in *Secure Capital SA v Credit Suisse AG* [2017] EWCA Civ 1486. C was the ultimate holder of longevity notes issued by D. C claimed not for non-payment by D but for breach of contract on the basis that information in the issuance documentation was misleading. The problem was finding a contract between C and D.

The only contract to which D was a party was that in the bearer note, which created an obligation owed to the bearer and was governed by English law. C could not sue on that contract because C was not the bearer. So C came up with the imaginative argument that whilst the rights on the note itself might be a matter of English law, who could sue was a matter for the law of the location of the note, ie Luxembourg. C argued that Luxembourg law allowed C to sue D directly (cf *Taurus Petroleum* above).

The Court of Appeal, like the first instance judge before it, regarded this as untrammelled nonsense. The first issue was to characterise the nature of the claim. It was in contract. The law governing the contract was English law, which therefore determined who could sue. Luxembourg law can't change or add to the rights on an English law contract. Despite C's plea that this created a lacuna because the claim lay with the common depositary, which suffered no loss, leaving D, which (it said) had suffered a loss, with no claim, the Court of Appeal refused to invent a new conflicts rule for this purpose. The structure of the issue was carefully established. A deed of covenant allowed C to claim directly against D for non-payment, but the note specifically prevented other contractual claims by noteholders (eg the Contracts (Rights of Third Parties) Act 1999 was excluded). C might have had a claim in tort against D but did not pursue that claim.

C's other argument was that Luxembourg law had been incorporated as a matter of contract. The Court of Appeal accepted that this was theoretically possible, but the wording did not achieve it in this case.

So the Court of Appeal was comfortable in upholding what it saw as the established way of doing business in the bond markets.

CANALISED THINKING

A dispute that falls outside an arbitration clause is refused a case management stay.

Autoridad del Canal de Panama v Sacyr SA [2017] EWHC 2228 (Comm) involved advance payment guarantees given by those behind the construction company widening the Panama canal when that company had to go cap in hand to the Republic of Panama for upfront funds to solve a cash flow problem. The contract for the construction of the canal included an arbitration clause, but the APGs gave exclusive jurisdiction to the English courts.

Blair J concluded that, as matter of construction, the APGs were traditional guarantees, not documentary credits. It was not enough for C simply to make a non-fraudulent demand on the guarantors. C had to prove the underlying conditions to payment (including that the construction company was liable on its contract). The APGs were drafted like conventional guarantees, were not issued by banks, and the inclusion of the words "on demand" was not enough to change their nature.

This decision meant that the court would have to go into issues on the main canal-widening contract in order to decide liability on the APGs. The canal-widening contract contained an arbitration clause. So, said D, the case had to be stayed because the "matter" was to be determined by arbitration and, where that is so, section 9 of the Arbitration Act 1996 requires a stay.

Blair J disagreed. He discussed what a "matter" subject to an arbitration clause was before concluding that the case before him did not involve one. The matter before him was liability on the English law APGs, not liability under the Panama law canal-widening contract. He was influenced by the fact that the parties had agreed on English law and jurisdiction for the APGs and did not want this to be circumvented, but it was always ambitious of D to argue that an arbitration clause in a contract to which D was not a party somehow blocked C's court claim.

Finally, D sought a case management stay. The judge decided that the Brussels I Regulation did not prevent him from granting a stay but that a sufficiently compelling claim had not been made for one. The case should therefore go to trial.

ALTERNATIVE SERVICE OUT

Alternative service within the jurisdiction on a defendant out requires permission.

In *Marashen Ltd v Kenvett Ltd* [2017] EWHC 1706 (Ch), C wanted to pursue an order for third party costs against V, who was the owner of the unsuccessful D. V was in Russia. But C obtained an order under CPR 6.15 that V be served by alternative means by service on D's solicitors in England. V challenged service on the basis that this order could not be made without also an order for service out, which had not been made. The judge agreed. He thought that the source of the power to make an order for alternative service on a defendant outside the jurisdiction came from CPR 6.37(5)(b)(i) (when giving permission to serve out, the court may "give directions about the method of service"), which presupposed a prior order for service out. But since this was an obvious case for service out (no other court could make a third party costs order under section 51 of the Senior Courts Act 1981), the judge granted permission.

V then argued that since Russia is a party to the Hague Convention on service, that Convention provided the only permissible means of service. The judge rejected that too. Alternative service could not be used just because the Hague Convention can be painfully slow or otherwise to circumvent it, but the Hague Convention was not an absolute bar to alternative service.

But exceptional circumstances were required to justify service by alternative means. The judge decided that exceptional circumstances were not present in this case. The judge therefore set aside the order for alternative service, forcing C to spend up to 18 months serving V in Russia under the Hague Convention.

COURTS

MISTAKEN DISCLOSURE

The Court of Appeal takes a tolerant approach to the mistaken disclosure of a privileged document.

The circumstances of *Altantisrealm Ltd v Intelligent Land Resources (Renewable Energy) Ltd* [2017] EWCA Civ 1029 are far from atypical in a disclosure exercise of any substance. First tier review of documents (though by trainees and junior solicitors rather than paralegals); documents flagged disclose, privileged or unsure. Unsure were referred up the chain, but by mistake a privileged document was flagged for disclosure. This was unknown to the senior members of the disclosing side until the other side started to wave the document in their faces during settlement discussions.

CPR 31.20 states that where a party inadvertently allows a privileged document to be inspected, the other party can only use it with the consent of the court. This has been treated as not changing the pre-CPR law, which was substantially codified in *Al-Fayed v The Commissioner of Police for the Metropolis* [2002] EWCA Civ 780. *Al-Fayed* says that the recipient can use the document unless its disclosure was an obvious mistake.

The gloss added in *Atlantisrealm* is that the fact that a junior reviewer marked the document for disclosure does not prevent the subsequent disclosure being a mistake. It requires greater seniority for the disclosure to be considered as a waiver of privilege. Further, the fact that the first reader on the receiving side doesn't appreciate that disclosure was a mistake is not the end of the matter. If someone else then looks at the document and appreciates that it probably was disclosed by mistake, it will be treated as an obvious mistake that the court can then undo.

The basic rule of thumb remains the same: if a privileged document appears in the other side's disclosure, unless it is obviously intentional check with them that the disclosure was deliberate.

THE PUBLIC EYE

Witness statements for trial should not be made publicly available before the trial.

Witness statements may only be used for the purpose of the relevant proceedings unless consent is given (by the court or the witness) or the witness statement has been put in evidence at a hearing held in public (CPR 32.12). But a witness statement that stands as evidence in chief at trial is open to inspection during the course of the trial, absent contrary order (CPR 32.13).

So a witness statement for trial is filed and then referred to at a rather late application for permission to adduce expert evidence. Can the press get hold of the witness statement immediately or must they await the trial?

In *Blue v Ashley* [2017] EWHC 1553 (Comm), Leggatt J decided that there was nothing to stop the court ordering disclosure to the press of witness statements filed for the trial before the trial took place, but the court would seldom do so. Open justice required that the public should have access to the evidence given at trial, ie the witness statement, but just because a witness statement was filed did not make it evidence in the case. The witness might, for example, not be called, in which case the witness statement would never become evidence.

But the *Blue* witness statements had been used in court, albeit not at trial. Leggatt J decided that this was only to enable the judge to decide whether they pointed to a need for expert evidence, not as to their substance (similar might apply to a pre-trial review). If the press had wanted the statements to enable them to understand the arguments on the application for permission to adduce expert evidence, that might, in the interests of open justice, have called for disclosure. But there was no evidence that the press had any interest in the expert evidence application. They wanted the witness statements to help them report the sensational trial, and they should wait until the trial actually happened for that.

TAKE THAT!

The fees for Employment Tribunals are ultra vires.

The Supreme Court launched a broadside against the Government's policy on court and tribunal fees. That policy is to treat courts and similar as a service that its users should pay for, not that taxpayers as a whole should provide in the interests of society. In *R (oao UNISON) v Lord Chancellor* [2017] UKSC 51, the Supreme Court lectured the Government, in the manner of an aging teacher to a pupil some distance from the top of the class, on the nature of the rule of law, the critical importance of the courts in that, and the benefits to society as a whole of decisions by the courts (the "written case lodged on behalf of the Lord Chancellor in this appeal itself cites over 60 cases, each of which bears the name of the individual

involved. The Lord Chancellor's own use of these materials refutes the idea that taxpayers derive no benefit from the cases brought by other people").

The case involved fees for Employment Tribunals. The Supreme Court decided that the ability to charge fees was subject to the overriding principle that they should not create a real risk that persons would effectively be prevented by the fees from having access to justice. If the Government wanted to introduce fees that would have this consequence, the rule-making power had to be a lot clearer. The 85% drop in case numbers since the introduction of the fees showed that the fees had impeded access to justice and, as a result, had to go.

The question now is whether this decision will encourage an attack on civil court fees, which have been raised in order to fund other parts of the justice system, notably the family courts. That would be harder since there is specific legislation allowing fees to be charged in order to generate a surplus rather than to cover cost, and the effect on access to justice is less obvious.

NEW BOTTLES FOR OLD WINE

Part of the court system has rebranded itself.

The court system is now using an umbrella term for courts that, generally, deal with commercial issues. This is the Business and Property Courts of England and Wales. This does not involve any actual reorganisation of the court system, but is merely a branding exercise in order to try to promote commercial dispute resolution in England and Wales.

The courts that fall under this parasol include the Commercial Court, the Mercantile Court (now renamed the Circuit Commercial Court since "mercantile" is deemed too antiquated a word for this new brand), the Technology and Construction Court and the Chancery Division. Notwithstanding the branding, these courts will continue to operate as they have traditionally done.

PROTOCOL PERSISTENCE

A new Pre-Action Protocol for Debt Claims has been issued.

A new Pre-Action Protocol for Debt Claims came into force on 1 October 2017. It only applies to claims by businesses against individuals (whether the individual is acting in a private or a business capacity). It could apply, for example, to claims on guarantees (though it is questionable whether a claim on a guarantee is a debt claim).

APPEAL PROCEEDINGS

A costs award on appeal does not lead to immediate detailed assessment.

If you fight and win an interim appeal, you will normally be awarded costs. The appeal court could summarily assess the costs there and then, in which case payment becomes due (unless stayed). But if the appeal court simply orders the loser to pay costs but says nothing more, the winner will not be entitled to the immediate detailed assessment of its costs; detailed assessment will only happen if it is specifically ordered by the appeal court; if there is no specific order, the winner will have to wait until the proceedings as a whole have ended (*Khaira v Shergill* [2017] EWCA Civ 1687).

As a result, if you win on appeal, don't forget to ask for summary assessment or an immediate detailed assessment of the costs of the appeal. If you lose, keep quiet.

CHOCKS AWAY

Enforcing a judgment can be a fiddly process.

Midtown Acquisitions LP v Essar Global Fund Ltd [2017] EWHC 2206 (Comm) is an example of the care needed when enforcing a judgment, in this case against an aircraft - a highly mobile asset requiring swift footwork. Enforcement requires taking possession of the goods (an aircraft is a good, just a rather large one). If the good is not on the public highway, the enforcement agent must have power to enter the relevant premises (Schedule 12 of the Tribunals, Courts and Enforcement Act 2007). In *Midtown*, Blair J decided that power to enter meant having an entry warrant from the court, not merely permission from the property owner.

The problem for C was that it obtained a warrant to enter Lasham Airfield, in Hampshire, only to find when travelling there that the aircraft was in fact at Stansted with plans to fly to India. Following a handbrake turn on the M3, the enforcement agent was able to persuade the Stansted authorities to let him flightside and to speak to the captain and touch the aircraft, but Blair J decided that the agent did not have "power" to enter the premises for the purposes of the Act. So, even though the enforcement agent took actual possession of the aircraft, it was not lawful possession for enforcement purposes.

One feature was that the aircraft was mortgaged to a bank for more than the value of the aircraft. Blair J rejected the argument that the attempt at enforcement should be set aside on that ground alone. Hassling the judgment debtor may be legitimate even though realisation of the asset will not actually produce any cash to meet the judgment debt.

CRIME

NO MORE HONEST DISHONESTY

Dishonesty no longer involves subjectivity.

Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67 concerned the legality of an elaborate ruse designed, successfully (to the tune of £7.7m), to skew the odds of winning at the casino game of Punto Banco.

Punto Banco is intended to be a game of pure chance. C played through one shoe of cards and, during that, induced the croupier, through a display of superstition, to turn certain cards one way and others the other way. C then demanded to use the same shoe again and, by doing so, C was able to identify good cards (7s, 8s and 9s) and thus to improve his odds of winning. This was possible because the pattern on the back of the cards was not absolutely symmetrical, with the result that cards turned one way were distinguishable (though only to the seriously eagle-eyed) from cards turned the other way.

(If you would like better to understand the game - which involves betting on which of two hands of cards will add up to closer to nine (tens and court cards count as zero, and a total over nine has ten deducted from it) - see the first six pages of the judgment for a detailed explanation of the game and how this "edge-sorting" was done.)

It is a criminal offence to "cheat" at gambling (section 42 of the Gambling Act 2005). Gambling contracts are now enforceable (sections 334 and 335 of the Act), but the parties agreed that there was an implied term in the contract that the parties would not cheat. Cheating is not defined in the Act, but the Supreme Court had no doubt that C was cheating. What he did was a "sting"; he took "positive steps to fix the deck", which, in a game that depends upon the random delivery of cards, "is inevitably cheating".

C argued that cheating required dishonesty and that he was not dishonest because he genuinely believed that what he was doing was legitimate. The odds are usually stacked in favour of the casino (eg it pays evens if Punto wins but 19/20 if Banco wins). C was an "advantage player", who was merely taking steps to move the odds away from the casino and in his direction. The Supreme Court decided that dishonesty was not a necessary element of cheating. It was essentially a jury question as to what constituted cheating. The judge thought that C was cheating, whatever C's view of his own conduct was, and the Supreme Court agreed.

More significantly, however, the Supreme Court took the opportunity to re-write the criminal law on dishonesty because they thought they were unlikely to get another opportunity (this was strictly obiter and therefore not binding, but that is unlikely to matter in practice).

Dishonesty was defined by the test in *R v Ghosh* [1982] QB 1053, which involved two stages: first, was the conduct complained of dishonest by the objective standards of ordinary honest and reasonable people; if it was, secondly, did the defendant realise that ordinary honest people would so regard his behaviour. Only if the defendant did realise that ordinary honest people would regard his behaviour as dishonest could he be convicted of an offence requiring dishonesty.

The Supreme Court decided that the *Ghosh* test was too complicated and that the second limb should be abandoned. Juries must decide what the defendant's actual knowledge or belief was as to the facts (whether reasonably held or not) and, in the light of that, decide whether the conduct was dishonest according to the standards of ordinary decent people. The test is thus the same as in civil law (eg for accessory constructive trust liability: *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476).

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