CLIFFORD CHANCE

CONTENTIOUS COMMENTARY

A REVIEW FOR LITIGATORS

FEBRUARY 2018

CLIFFORD CHANCE

CONTENTIOUS COMMENTARY - FEBRUARY 2018

CONTENTS

Contentious Commentary is a review of recent developments in the English courts

CONTRACT

PHONE A FRIEND

Terminating under a contractual right is not the same as terminating for breach.

The relationship between termination of a contract under an express contractual right and termination for repudiatory breach is difficult, and remains so after *Phones 4U Ltd v EE Ltd* [2018] EWHC 49 (Comm). The main issue is usually whether loss of bargain damages are available for termination under an express clause. In *Phones 4U*, they were not, which could mean that D will have to pay C a slug of money it might otherwise have dodged.

In *Phones 4U*, the judge decided that D had an arguable case, sufficient to defeat summary judgment, that C was in repudiatory breach of contract. D's problem was that it had terminated the contract under an express clause that relied on C's appointment of administrators, which was not in itself a breach of the contract.

The judge considered that to obtain loss of bargain damages (ie the value of the unperformed obligations), it was necessary for the breach of contract to be the cause of the termination (through the medium of the innocent party's acceptance of the repudiatory breach). Where the cause of the termination was manifestly something else – an express term of the contract not involving breach – loss of bargain damages simply were not on the table because breach had not deprived the innocent party of the benefit of the unperformed obligations. *Phones 4U* was not a case where it could be said that termination under the express clause and for repudiatory breach were really the same (eg *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75).

D's letter of termination in this case included an extensive reservation of rights. The judge considered that to be of no avail. D may have reserved its rights arising from C's breach, but a claim for loss of bargain damages depended upon D's actually having exercised those rights. D had not done so, thereby forfeiting that claim.

So termination remains difficult. Not only is there often a question of whether there is a right to terminate at all but, if there is, it is also necessary to consider the basis upon which termination is effected. If loss of bargain damages aren't important, all well and good; but if they are, take care how any notice of termination is drafted and beware of the risks.

HOME WIN

An English law obligation is unaffected by the voidness of related agreements under their applicable law.

Dana Gas PJSC v Dana Gas Sukuk Ltd [2017] EWHC 2928 (Comm) is, in substance, the tale of a bond issuer seeking to restructure bonds due in October 2017 with the added force of an argument that the bonds were void. The bonds were part of a sukuk al-mudarabah, and the voidness was said to come from the supposed failure of the overall structure to comply with Shari'a law. To add spice, the issuer started proceedings in London, Sharjah and the BVI, with anti-suit and other injunctions abounding.

Unsurprisingly, litigation seems to have overtaken negotiation. In the English arm of the litigation, Leggatt J was satisfied that, whatever Shari'a law said, the obligations he was concerned with were governed by English law and were enforceable. These English law obligations therefore fulfilled their function of securing the investors' capital against potential invalidity under Shari'a law.

The issuer was incorporated in the UAE. It issued certificates to a trustee in return for the trustee's financial investment in a joint venture; for its part, the issuer invested its skill and labour. The joint venture was supposed to produce a return sufficient to pay the trustee, and thereby the investors behind the trustee, 7% or 9% pa (depending on the type of investment), with the joint venture assets being used to repay the trustee its capital.

But just in case something went wrong, the trustee could require the issuer to buy back the joint venture assets at a price equal to the redemption amount. The issuer provided security over other assets to support this purchase obligation. The agreement containing the purchase obligation was governed by English law, with payment of the purchase price to be made to an account in London.

The other agreements were governed by UAE law, and Leggatt J assumed for the purposes of the hearing that they were all void for breach of the Shari'a. The question was whether this breach of the Shari'a also invalidated the English law agreement. The purchase obligation was said to breach Shari'a law because it had the effect of guaranteeing to the trustee the return of its capital and thus to offend the fundamental requirement of risk participation.

The issuer's first argument was that, as a matter of construction of the English law purchase agreement, the (assumed) fact that the agreement (governed by UAE law and in a form required by the purchase agreement) by which the trustee would transfer its interest in the joint venture assets back to the issuer would be void under its governing law meant that the issuer's obligation to pay the purchase price did not arise.

Leggatt J rejected this. The obligation to pay the purchase price arose on service of the requisite notice, with any transfer of the joint venture assets following but being independent of the issuer's obligation to pay the price.

The issuer's second argument was that the agreements were entered into on the basis that they complied with Shari'a law. They didn't and, as a result, all the agreements were void. Leggatt J rejected this because the trustee was entitled to trigger the purchase obligation if the agreement was not Shari'a compliant. The issuer could not allege a common mistake when the risk was expressly addressed in the agreement and placed on the issuer.

Finally, the issuer contended that its performance would be illegal in the place of performance, whether under *Ralli Brothers* [1920] 1 KB 614 or article 9(3) of the Rome I Regulation. Leggatt J rejected this because payment was due in London, not the UAE. As a variant, the issuer alleged that the transaction was a conspiracy to break the laws of a friendly foreign country (*Foster v Driscoll* [1929] 1 KB 740) but Leggatt J decided that this too demanded some performance in that foreign state. There was none.

The Sharjah courts will in due course rule on whether the underlying agreements do in fact infringe Shari'a law. But, according to Leggatt J, that makes no difference to the issuer's obligations under the purchase undertaking. The carefully crafted use of English law agreements in transactions intended to be Shari'a compliant achieved its aim.

LAST DAY BLUES

The failure to serve a notice on the last available day extinguishes the claim.

Never, ever, ever leave anything until the last day of a limitation period for it is a truth universally acknowledged that whatever can go wrong on such a portentous day will go wrong. And there will be no time to put it right.

Zayo Group International Ltd v Ainger [2017] EWHC 2542 (Comm) is an illustration of this ineluctable truth.

A party that had bought a business wished to serve notice of a warranty claim on seven management vendors who were severally liable for the management warranties given in the Share Purchase Agreement. Notice of the claim had to be given within 18 months of the SPA. The SPA had an admirably full notice clause requiring notice of warranty claims to be served at the address shown in the SPA or at a substitute address notified by the relevant management vendor. The clause even said that as long as a notice was delivered to the right address, the notice was deemed to have been received by the management vendor.

On the last day of the 18 months, seven couriers were despatched to the seven addresses shown in the SPA with seven letters for the seven management vendors.

Six of the couriers duly inserted the letters through their six letter boxes.

The seventh courier rang the bell of his address, and was told by the occupant that the seventh management vendor had moved to New Zealand. The seventh management vendor's Antipodean flight wouldn't have mattered if the seventh courier had left the seventh letter at the seventh address – whether the seventh management vendor found out about the notice was her problem as she had not provided a substitute address. But the seventh courier had (unsurprisingly) not read the SPA and, as a result, saw no point in leaving the seventh management vendor's letter at an address over 11,000 miles from where the seventh management vendor then was. The seventh courier therefore took the letter away with him. Oh dear.

The judge decided that notice of the warranty claim had not been given to the seventh management vendor within the time permitted by the SPA. There was no scope for implied terms or such like about attempted service, a reasonable (if incompetent) try at service or an obligation to provide an alternative address. The seventh management vendor therefore had no liability.

And it got worse. The SPA said that no management warranty claim could be made against a management vendor unless it was made against all management vendors. The claim had not, and could not now, be made against the seventh management vendor. With one courier mistake, the six other management vendors skipped free.

The judge was (obiter) not particularly impressed by the notices given (they had to contain reasonable details of the claims, as is usual), but he did decide that, in context, "to the extent that" meant "if". The context was that the management vendors had no liability "to the extent that provision or reserve in respect of the liability… giving rise to the claim was made in the Accounts". The judge felt that the commercial considerations outweighed the words. If provision was made in the Accounts, the buyer had notice of the claim and the provision, and could decide if it was enough or demand an express warranty. If "to the extent that" had not meant "if", he thought it would have been a statement of the blindingly obvious, a conclusion that might be thought rather less than blindingly obvious.

NOTICE BORED

A claim notice under an SPA must identify specific warranties.

As is far from atypical in a Share Purchase Agreement (see above), the clause dealing with warranty claims required the buyer to give notice of claims to the seller by a specified date, the notice "setting out reasonable details of the Claim (including the grounds upon which it is based and the Purchaser's good faith estimate of the amount…" Two notices were served, which set out some facts and asserted generally that they gave rise to warranty claims. In *Teoco UK Ltd v Aircom Jersey 4 Ltd* [2018] EWCA Civ 23, the Court of Appeal recognised that every notification clause depends upon its own individual wording, but decided that the notices in this case were insufficient because they did not identify the particular warranties said to have been breached. A notice only "set out" the "grounds" for the claim if it identified individual warranties. It must err in the direction of a pleading; omnibus wording, aimed at keeping all options open, is not enough

LIFE ON MARZ

Another misselling claim fails.

Marz Ltd v Bank of Scotland plc (5 December 2017) is typical of the (relatively few) pre-global financial crisis interest rate hedging product misselling cases that have actually reached trial. It went down in flames on both the facts and the law. C knew what it was doing, and the judge was satisfied that D had not assumed any responsibility to advise C, whether in contract or tort. D had to ensure that what it said was accurate, but was acting as a salesman rather than an adviser throughout. In any event, the terms included standard ISDA non-reliance wording, which the judge upheld as establishing (indeed, confirming) the (non-advisory) basis of the relationship.

C was, it seems, aggrieved that the terms of a loan obliged it to hedge its interest rate risk as a condition of a loan. This hedging has, as a result of the GFC, cost C a lot of money. Losing the litigation will have added to those costs.

NEW CONTRACTS FOR OLD

A novation creates a new contract.

Everyone knows that you cannot transfer a contract. You can, in most instances, assign the benefit of a contract. The transfer of the burden of a contract requires the obligee's agreement; that is a novation, which creates a new contract.

This was the conclusion of the Court of Appeal in *Budana v The Leeds Teaching Hospitals NHS Trust* [2017] EWCA Civ 1980. Even in contracts, like LMA-standard syndicated loan agreements, which provide expressly for transfer, "this amount[s] – at least quoad the borrower and the transferring lender and transferee – to a novation", though "the original syndicated loan agreement remains as a continuing operating contractual instrument between the borrower and all parties" (Gloster LJ).

Budana actually involved the attempted transfer of a conditional fee agreement by one solicitors' firm to another on the transferor giving up personal injury work in the face of the Jackson costs reforms. The success fee could only be recovered from D if it was payable under a CFA entered into before 1 April 2013 (section 44(6) of Legal Aid, Sentencing and Punishment of Offenders Act 2012), as the original CFA was. Despite the contractual analysis that the transfer (with the client's consent) of the CFA after the deadline resulted in a new agreement, the Court of Appeal remained satisfied that the success fee should be regarded, for the purposes of the Act, as a CFA entered into before the deadline. A somewhat imaginative interpretation of the statute, driven perhaps by the lack of obvious merit in D's attempt to escape its liability for costs.

ALL ABOARD

Almost anyone can be a financial institution.

Assignment provisions in loan agreements commonly allow transfer to a "bank or other financial institution" (though they are often a bit broader these days). In *Argo Fund Ltd v Essar Steel Ltd* [2006] EWCA Civ 241, the Court of Appeal took a wide view as to what a financial institution is – a legally recognised form or being which carries on business in accordance with the laws of its place of creation and whose business concerns commercial finance. In *Grant v WDW 3 Investments Ltd* [2017] EWHC 2807 (Ch), the judge held that a special purpose vehicle incorporated to hold the rights assigned as nominee for a fund was an "other financial institution" for these purposes. The fact that receipt of the assignment was its only activity, that it had negligible capital and that it did not trade were irrelevant, as was the lack of any applicable regulation.

WDW 3 also involved termination of an ISDA Master Agreement. One party to the Agreement went into insolvency proceedings. That was an Event of Default which absolved the other (second) party from the obligation to make further payments (section 2(a)(iii) and *Lomas v JFB Firth Rixson Inc* [2012] EWCA Civ 419). But the second party itself then entered an insolvency process, as a result of which the first terminated the transactions subject to the Agreement. The second argued that since the first was already a defaulting party, the first could not rely on the second's Event of Default to set an Early Termination Date.

The judge disagreed. The first's Event of Default absolved the second from its payment obligations and, had the second elected to terminate, the first would have been the defaulting party. But the second had not terminated, and the transactions subject to the Agreement remained on foot (albeit in suspension). Nothing in the ISDA Master Agreement prevented the first from relying on the later Event of Default affecting the second to terminate the transactions subject to the Agreement.

UNGUARDED WORDS

"It is… necessary to say something about exclusion clauses. The traditional approach of the courts towards exclusion clauses has been one of hostility. A strict and narrow approach to their interpretation held sway. This began to change with the passing of the Unfair Contract Terms Act 1977. Since then the courts have become more accepting of such clauses, recognising (at least in commercial contracts made between parties of equal bargaining power) that exclusion and limitation clauses are an integral part of pricing and risk allocation: see *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373, [2017] PNLR 29 at [57]. As Briggs LJ put it in *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 CLC 573 at [19]:

"Commercial parties are entitled to allocate between them the risks of something going wrong in their contractual relationship in any way they choose. … The court must still use all its tools of linguistic, contextual, purposive and common-sense analysis to discern what the clause really means.""

Interactive E-Solutions JLT v O3B Africa Ltd [2018] EWCA Civ 62, [14], Lewison LJ.

"…the courts have become more accepting of [exclusion] clauses, recognising (at least in commercial contracts made between parties of equal bargaining power) that exclusion and limitation clauses are an integral part of pricing and risk allocation"
Lewison LJ

TORT

LOAN TO VALUATION

A surveyor is only liable for the consequences of his valuation being wrong.

A surveyor values a development property at £2.3m in its current state but £4.5m when developed. A lender lends £2.475m for nine months, taking security over the property. Nine months later, the same surveyor values the property at £3.5m in its current state. The lender lends £2.8m to pay off the first loan (including interest) and a further £0.29m, again with security. None of the indebtedness is repaid. The lender alleges that the second valuation, but not the first, was negligent. If the second valuation was in fact negligent, can the lender recover all its advances under the second loan (>£3m) or only the further sum (£0.29m)?

The Court of Appeal allowed recovery of the whole of the second loan, but in *Tiuta International Ltd v De Villiers Surveyors Ltd* [2017] UKSC 77, the Supreme Court regarded this as nonsense on stilts. The basic measure of damages arises from a comparison of: C's position had D fulfilled its duty; and C's actual position. Here, but for the negligence, the lender would not have entered into the second loan facility, but it would still have lost the sum advanced on the first loan facility. The loss caused by second valuation was therefore only the additional sum advanced, not the whole of the second loan.

LASER-GUIDED MISSILES

An arranger owes a duty of care to bondholders for the enforceability of the bond documentation.

Golden Belt 1 Sukuk Company BSC v BNP Paribas [2017] EWHC 3182 (Comm) is a novel decision. Relying on the description of D as the "arranger" of a Shari'a compliant certificate (ie bond) issue, Males J decided that D had arranged the transaction for the bondholders, not solely for the issuer. Accordingly, D owed bondholders present and future a specific duty to take reasonable care to ensure that one of the transaction documents (a Saudi law promissory note) was properly executed (even, perhaps, to the extent of vires).

The signature on the document in question was applied by laser printer rather than by hand (though this was not apparent at the time), which the judge decided did not meet the requirements of Saudi law. The judge held that D had taken control of the arrangements for execution of the documents and should have sent its own representatives or known witnesses to oversee the signing of the promissory note. Allowing the signatory to find its own witnesses from a local law firm, even when advised that this was acceptable by external counsel, was insufficient. Having not done so, D was therefore liable for the losses, if any, suffered by bondholders as a result of the invalidity of the promissory note.

The judge observed that the tests for the existence of a duty of care in negligence for economic loss were easier to state than to apply, but he considered that the bondholders were "dependent" (if not consciously reliant) on the arranger to secure due execution of transaction documents since bondholders could not check the matter for themselves and, as a result, D owed a duty to the bondholders when making the relevant arrangements. The judge didn't think that the fact that D was acting for the underlying borrower (the now-defunct Saad group) displaced this, nor did he think it would be "sensible" for bondholders to rely on the Saad group (as they did for everything else) since the purpose of the promissory note was to give rights against the Saad group. He regarded procuring due execution as a "service" provided by D, as arranger, to or for the bond-holders.

The judge even considered that this duty to ensure due execution was owed not just to the bondholders to which D itself sold bonds, but to all subsequent holders, even distressed debt traders who only entered the fray long after the obligor's demise. The normal objections, based on indeterminate liability to an indeterminate class for an indeterminate time, did not, the judge thought, apply since liability was capped at the amount of the bond, the class was all bondholders, and liability ended on maturity. D could have excluded liability in the Offering Circular, but that would have required clear wording, which he considered was not there. The judge decided that the standard disclaimers were concerned only with the content of the Circular, not with D's role as arranger in procuring execution of the transaction documents.

The judge did not decide what losses C had suffered. He concluded that, in principle, recoverable losses should be the amount that the bondholders would have recovered had the promissory note been valid.

Since no international creditors of the Saad group have yet been paid anything, the answer may prove to be nothing. With that in mind, the judge also declined to decide immediately, the costs of this part of the trial.

Clifford Chance acted for the defendant in this case. The defendant has appealed to the Court of Appeal against the first instance decision.

DATA, DATA EVERYWHERE

An employer is vicariously liable for an employee's breach of data protection requirements.

A disgruntled employee of Morrisons legitimately obtained personal data about all Morrisons' employees (including their bank details), and illegitimately placed that data on the internet for all to see. He is now in prison, but his incarceration must have been lightened by Langstaff J's decision that Morrisons, the target of his disgruntlement, is vicariously liable to all other employees for the consequences of his publication of their data.

In *Various Claimants v Wm Morrisons Supermarket plc* [2017] EWHC 3113 (QB), an employee (S) was disaffected by the way that disciplinary proceedings against him, which led to his receiving a verbal warning, had been handled.

S was in the internal audit team, with responsibility for providing information to D's external auditors. The external auditors wanted employee details, so S duly obtained the information and passed it to the auditors. But he also kept a copy, which he then, in the light of his disgruntlement, posted anonymously on the internet. Despite laying a false trail, he was tracked down, charged under the Computer Misuse Act 1990 and the Data Protection Act 1998, convicted, and sentenced to eight years imprisonment. He continues to reside in one of Her Majesty's less salubrious institutions.

A group action on behalf of D's employees was commenced against D for the wrongful disclosure of their personal data. Langstaff J decided that D was not strictly liable under the Data Protection Act. D had not itself broken any of the data protection principles. Instead, S had constituted himself a data controller, and he (not D) had then broken the principles. The same applied to claims for breach of confidence and misuse of private information. Further D's security measures were appropriate to protect the data.

But there was no doubt that S had committed all sorts of civil (as well as criminal) wrongs. The judge rejected the argument that the DPA impliedly excludes vicarious liability, but was troubled as to whether S's conduct was sufficiently in the course of his employment for the consequences to be visited on D. D was, after all, the target of S's malevolence.

Langstaff J eventually decided that S was entrusted by D with responsibility for the data, and, though S then abused his position, what he did was within the field of activities assigned to him (retrieving, storing and passing data to others), and was part of an unbroken sequence of events from the legitimate to the illegitimate. There was sufficient connection between S's employment and his wrongful conduct for D to be held vicariously liable for that conduct.

The judge granted permission to appeal on the vicarious liability point. D will, however, be aware of the hazards of taking vicarious liability to the higher courts. D lost in the Supreme Court's most recent exploration of the area (*Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11). But having lost at first instance, there is no alternative if it is unhappy with the decision.

PRIVATE INTERNATIONAL LAW

NON-ENFORCEMENT

Serving a freezing order is not enforcing the order.

The concept of enforcing a foreign money judgment in England is easy to grasp. The foreign judgment is treated as if it were an English judgment, and third party debt orders and the like can then be sought from the English courts in order to try to secure payment of the judgment debt. But how do you enforce a foreign injunction? What does it mean? The issue is, perhaps, less developed because other courts, particularly in EU member states, are generally less gung-ho about injunctions than English courts, and also tend to lack a theory of contempt.

But the Cypriot courts are closer to the English courts in this regard, as was revealed in *Cyprus Popular Bank Public Co Ltd v Vgenopoulos* [2018] EWCA Civ 1. C (aka Laiki Bank, in "resolution") obtained a worldwide freezing injunction in Cyprus against D. C then applied, without notice to D, for a declaration of enforceability in England under article 39 of the original Brussels I Regulation (the need for this exequatur has gone under the recast Regulation). After a bit of judicial head-scratching (why had C not applied for interim protective measures under article 31? the need for an undertaking in damages?), this declaration was made. But the declaration was not served on D. If it had been, D would then have had two months to appeal (article 43(5)), during which "no measures of enforcement shall be taken other than protective measures" (article 47(3)).

Sometime later, C served the Cypriot injunction on a bank in London, arguing to the bank that, with the registration order, the Cypriot injunction took effect as if it were an English injunction and, as a result, that the bank could not allow any payments to be made from D's account. The issue was whether this notification to the bank was a "measure of enforcement", which could not be taken because the appeal period hadn't expired, or whether it was something else.

The Court of Appeal (reversing Picken J) decided that the registration order did indeed make the Cypriot injunction enforceable as if it were an English injunction, subject to the bar on "measures of enforcement" during the appeal period. That was what Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929) said. Sending a copy of the registration order and the injunction to a bank did not constitute a measure of enforcement, even if accompanied by threats of contempt if the bank ignored the injunction, any more than sending notice of a money judgment enforces that judgment. Service on a bank of an injunction might lead to enforcement measures, but enforcement measures are, probably, confined to court processes.

That begs (at least) two questions. First, what is a bank served with a foreign freezing injunction obliged to do during the appeal period? In this case, the bank in fact froze the account in question. The appellants accepted that committal proceedings were measures of enforcement, which could not be taken during the appeal period, but does that mean that the bank is not obliged, at least entitled, to freeze the account? The freezing injunction has the same force and effect as if it were an English injunction if registered. Can committal proceedings be taken after the appeal period in respect of conduct during the appeal period? At the least, does a foreign freezing injunction provide a defence to a claim by the accountholder?

Secondly, what is the position under the Brussels I (recast), which does away with the need for registration of EU judgments (though a certificate and the judgment must be served on the judgment debtor before enforcement: article 43)? The original version of the SI mentioned above said that "a judgment registered under the Regulation shall, for the purposes of enforcement, be of the same force and effect… as if the judgment had originally been given by the registering [ie English] court". The Order now says that a "judgment to be enforced under the Regulation shall, for the purposes of enforcement be of the same force and effect [etc]". Does this mean that a foreign freezing injunction can simply be served on a bank in England, which must comply, without any need for English enforcement measures (or perhaps the English court must first be provided with the documents required by article 42)? That would rather undermine the need and ability to obtain interim measures in support of foreign proceedings.

It is perhaps fortunate that most other EU courts don't generally deal in worldwide freezing injunctions.

SERVING WITH AUTHORITY

Only rarely will an agent have implied authority to accept service of an arbitration notice.

A notice commencing an arbitration must be served. The arbitration agreement will, generally, contain permissible (even mandatory) methods but, if not, section 76 of the Arbitration Act 1996 allows service on a company at its registered or principal office. In *Sino Channel Asia Ltd v Dana Shipping & Trading Pte Singapore* [2017] EWCA Civ 1703, C didn't bother to serve D in this way but instead sent the notice (by email) to the person with whom it had had all its dealings in relation to the contract. That person was not in fact at D but at a company (B) with which D (unknown to C) had a back-to-back contract. But C got away with it on the facts, with the Court of Appeal deciding that B had implied (or, if necessary, ostensible) authority to accept service of the arbitration notice.

The Court of Appeal accepted that it would only be in rare cases that a person had implied actual authority to accept service of an arbitration notice. Service of originating process is a serious matter, distinct from normal commercial communications.

Nevertheless, on the facts of this case, D had left to B all dealings with C, relying on B to protect D's interests. The Court of Appeal thought that the special facts were enough to conclude that D had clothed B with authority to accept service of an arbitration notice. But it was a close-run thing (the Court of Appeal overturned the first instance decision), and C must have been relieved since it had proceeded through the arbitration (in D's absence) and secured an award. If the arbitration notice had not been properly served, C would have had to start again.

The arbitration claimant in *Sino Channel Asia* might be thought to have been a trifle fortunate. In *Glencore Agriculture BV v Conqueror Holdings Ltd* [2017] EWHC 2893 (Comm), the court was less benevolent towards the arbitration claimant.

In *Glencore*, C sent the notice of arbitration and all subsequent correspondence to the email address of an employee of D who had been involved, albeit in a juniorish kind of way, in the events leading to the arbitration. C received no reply to this email or to any subsequent emails about the arbitration but ploughed on regardless, securing an award from its appointed arbitrator. D challenged the arbitration award on the basis that the notice of arbitration had not been properly served.

C argued that since the email address was in the form name@D, that was sufficient service on D. Popplewell J did not agree. Service on a personal email address of this sort was to be treated as if the individual had been handed the arbitration notice in person, which raised the question of whether the person in question was authorised to accept service. This was a matter of agency. Authority to do business is not the same as authority to accept service of legal process.

In this case, the employee in question was a junior employee, who had neither express nor implied authority to accept service, nor did he have ostensible authority. The arbitral award was therefore set aside, and C will have to start again.

UNQUALIFIED SUCCESS

A lawyer is not qualified to be an arbitrator.

> "… the arbitral tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance."

Does this allow a QC, with ample experience of insurance law, to be an arbitrator?

No, according to Teare J in *Tonicstar Ltd v Allianz Insurance plc* [2017] EWHC 2753 (Comm). Teare J might have reached the opposite conclusion if left to his own devices, but there is another first instance decision, dating from 2000, which had concluded that a clause in this form was meant to create a trade arbitration, not a legally led one, so the arbitrators had to be insurance practitioners, not insurance lawyers. One first instance judge should generally follow the rulings of another first instance judge unless satisfied that there is a powerful reason not to do so. Teare J could not find a reason of sufficient potency, and so felt obliged to go with the flow.

DEATH ON THE NILE

Jurisdiction over tort claims is wide.

Four Seasons Holdings Incorporated v Brownlie [2017] UKSC 80 failed because C sued the wrong person. The claim arose from death and personal injury suffered by Britons (including the distinguished academic and public international lawyer, Professor Sir Ian Brownlie QC) in a car crash in Egypt whilst on an excursion arranged through the Four Seasons Hotel in Cairo. C sued the ultimate parent of the hotel group (a Canadian company) but, on closer examination (though it took the Supreme Court to extract the necessary information), it was clear that the hotel was owned and managed by different entities through a chain of contracts. Whoever operated the hotel or had arranged the excursion, it was not D, which was a holding company only.

The more interesting point in the case is the obiter discussion as to whether the English courts would have had jurisdiction over the tort claim had the correct entity been sued. For non-EU defendants (and, maybe, after 29 March 2019, all defendants), the English courts have jurisdiction if "damage was sustained within the jurisdiction" (PD6B, §3.1(9)).

Lords Sumption and Hughes regarded it as self-evident that the damage in question was the physical injury, which was all that was necessary to give a cause of action and which had been sustained in Egypt. The pecuniary measure of that damage might depend upon things that happened elsewhere (losses suffered in England because the victims lived in England), but that did not constitute the relevant damage. Any other outcome would, they considered, give the English courts near universal jurisdiction to entertain claims for injuries suffered by any Englishman or Englishwoman when abroad. That was not the purpose of England's jurisdictional rules (cf France).

Lady Hale, along with Lords Wilson and Clarke, differed. They considered that as long as some detriment was suffered in England, then the English courts had jurisdiction. Any jurisdictional overreach could, they thought, be resolved by the application of forum non conveniens principles. They did not accept that forum non conveniens is concerned with the practicalities of the conduct of English litigation, whereas jurisdictional principles are concerned with the connection of the underlying claim to England.

The majority's view is unquestionably good for the business of the English courts, but whether it is theoretically sound is a different question.

COURTS

SECURITATE

An ATE policy is not enough to refuse security for costs.

The question of whether an after the event insurance policy, covering liability for the other side's costs, is sufficient to prevent or dissuade the court from ordering security for costs has been around for a number of years, with different approaches and answers. The Court of Appeal addressed the point in *Premier Motorauctions Ltd v PricewaterhouseCoopers LLP* [2017] EWCA Civ 1872, but has not put it to bed. It will be around for a number of years yet.

The court has jurisdiction to order security for costs if, inter alia, there is reason to believe that a corporate clamant will be unable to pay the defendant's costs if ordered to do so (CPR 25.13(2)(c)). The courts have deprecated any attempt to paraphrase or restate "reason to believe"; it means what it says.

Regarding ATE insurance, the argument runs that the policy is an asset of the corporate claimant sufficient for the court to conclude that there is insufficient reason to believe that the claimant will be unable to pay the defendant's costs, even though the defendant will have no direct claim on the policy. This, as the Court of Appeal recognised, requires a consideration of the terms of the policy itself.

The policy in question in *Premier Motorauctions* included a long list of grounds upon which the insurer could decline to pay out, including the usual material non-disclosure and misrepresentation. The Court of Appeal was of the view that, on the facts before it, there was a risk that the policy would be avoided and, as a result, that there was reason to believe etc.

Some ATE insurance policies include anti-avoidance provisions, which usually say that an insurer will only avoid a policy for fraudulent misrepresentation. The Court of Appeal considered that a policy in those terms had a better chance of beating a security for costs application than one that did not, but it will still depend upon the individual case.

Having crossed the jurisdictional threshold, the Court of Appeal decided that it was normal to order security for costs against a company in liquidation, as C was in this case. So it did.

NORMAL CONQUESTS

Indemnity costs will be ordered for conduct that is out of the norm.

The test for whether to award indemnity costs against an unsuccessful litigant is whether there is something in the conduct of the action or the circumstances of the case that takes the case "out of the norm": *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879.

In *Whaleys (Bradford) Ltd v Bennett* [2017] EWCA Civ 2143, the Court of Appeal confirmed that "out of the norm" is not a quantitative assessment of the number of people who behave in a particular way but a qualitative assessment of whether there is conduct outside the ordinary and reasonable conduct of proceedings. Lots of people may bring dishonest claims or support claims by dishonest means, but such conduct is still out of the norm and, as such, justifies indemnity costs.

SAFE AND SECURE?

Security for costs can be awarded against litigation funders for more than the amount of their funding.

In *Bailey v GlaxoSmithKline UK Ltd* [2017] EWHC 3195 (QB), the Cs alleged harm caused by one of D's drugs. Their Public Funding Certificate was withdrawn at the end of January 2011 and they then entered into a funding arrangement with Managed Legal Solutions Ltd (M). D sought security for costs against M on the basis that it didn't seem to have any money. Indeed, M admitted that it was balance sheet insolvent and would need to borrow to provide any security ordered.

But, said M, (1) its 49% shareholder was good for any costs award, particularly as his eight-year prison sentence for "serious dishonesty involving many millions of pounds" was over and done with and he was now free again, (2) there was ATE insurance which should cover the recoverable costs if D succeeded, and (3) any award of security should take into account the '*Arkin* cap'. This cap refers to the part of the judgment in *Arkin v Borchard Lines Ltd (Nos 2 and 3)* [2005] 1 WLR 3055, which said that a professional funder who finances part of a claimant's costs of litigation should be potentially liable for the costs of the opposing party, but only to the extent of the funding provided. In *Bailey*, the funding (£1.2m) was somewhat less than D's projected costs of £6.8m.

The judge decided that the *Arkin* cap would not arise until the conclusion of the proceedings, if it applied at all. The court could not conclude that it would necessarily apply, and could therefore order security that exceeded it.

Then, in the sort of judge-maths that is often applied to costs budgets, the court decided that the figure of £6.8m would not be reasonably recoverable on assessment. The court would take 66% of that sum, £4.5m, as a reasonable working figure, and order security for 50% of that sum. That was £2.25m, which should be reduced a bit because of the ATE insurance policy, but that amount should be discounted by one-third to reflect the risk of the policy being avoided. That was £500k, which left £1.75m to be provided by way of security. Better than nothing, but if costs really are £6.8m, it still leaves D with a big costs risk.

DISCLOSURE PROBLEMS

Reforms to the disclosure rules have been proposed.

When disclosure (then called discovery) was invented, most documents were written by hand. There were relatively few of them, and copying meant writing them out in hand again (indeed, a whole industry existed for that purpose). Disclosure was necessarily a limited exercise.

But the advent of photocopiers and faxes increased the number of documents people created, and now digital communications has caused an explosion in their number, making disclosure potentially far more onerous and, in particular, far more expensive. The technology that has spawned the explosion can help in handling, even assessing, the documents but the bottom line is that there are exponentially more documents than there used to be.

Disclosure remains a valuable tool in litigation, but those who run the courts are aware that disclosure can also be disproportionately expensive and burdensome, particularly for businesses. This is not a new realisation. For example, the Jackson reforms of 2013 tried to get away from the idea that the same sort of discovery is required in all cases, but the reforms did not make any real difference in practice. Judges still tend to default to ordering standard disclosure as the safe option.

A fresh attempt at reforming disclosure is now on the cards. Draft rules have been published, which (if the rule-makers agree) are intended to be "piloted" for two years across the whole of the Business and Property Courts of England and Wales (ie the Commercial Court, the Chancery Division, the TCC and other courts).

The proposals again seek to force parties and judges to consider what disclosure is really appropriate for the fair disposal of the case. With this in mind, parties are required at the outset to disclose the key documents on which they have relied and the key documents that are necessary for the other parties to understand the case they have to meet. Parties must then seek to agree new papers for the court, such as a list of issues for disclosure, and to exchange details of where documents might be found. With this information at hand, the judge will order disclosure appropriate to the particular case before him or her.

These additional steps will, initially at least, increase the cost of disclosure because they are just that – additional steps that the parties must take. The reforms will only achieve their aim of reducing the cost of disclosure if these additional steps result in savings later in the process. Savings later in the process will only eventuate if the courts are prepared to cut back on the width of disclosure ordered, eg to reduce the number of custodians whose emails must be searched or to narrow the date ranges involved so that fewer documents emerge from the initial searches and reviews.

And there's the rub (or, at least, one of the rubs). Will the courts buy into the laudable aspirations behind the proposals? Jackson LJ couldn't persuade enough judges to do so. These reforms might work, but the risks are such that a proper pilot would be prudent in order to assess whether they will do so in practice. A two year pilot over the whole of the Business and Property Courts is not really a pilot at all because the changes will, absent manifest disaster, slide into permanence. Nor is there, currently at least, any criteria against which or means by which the success or otherwise of the proposals will be assessed.

Reform is hard, particularly when dealing with something as inherently conservative as the legal system and lawyers. The tacit assumptions of years of practice must be shed if anything is to be achieved. For example, reducing disclosure isn't necessarily unfair to one party, nor does a party requesting more limited disclosure necessarily have something to hide. Aims can be good, but there are often unintended consequences, as both the Woolf and Jackson reforms have shown. Let's try to improve disclosure and cut costs, but let's make sure first that any reforms really will achieve those aims.

PRIVILEGE

THE TOOLS OF INIQUITY

A third party's iniquity will rarely oust privilege.

2016 and 2017 were bad years for privilege. 2018 has started better. Hopefully, it will continue in that way.

Accident Exchange Ltd v McLean [2018] EWHC 23 (Comm) involved an outfit that indulged in "perjury on an industrial scale" in providing evidence of car hire rates for defendants in personal injury claims. They sought to show that the rates included a credit charge, which is not, in many cases, recoverable as damages.

After this perjury emerged, C, a company that provided cars to road accident victims in return for whatever damages the victims obtained for the cost of car hire, sued directors of the outfit concerned, together with a number of firms of solicitors, for conspiracy and deceit on the basis that they were parties to schemes to produce false evidence.

The specific application concerned documents held by the solicitor defendants but in respect of which they asserted privilege on behalf of their clients. C claimed that the iniquity exception to privilege applied to these documents (ie privilege does not cover communications criminal in themselves or intended to further a criminal purpose). The catch was that the iniquity in question was not that of the people who owned the privilege, ie the solicitors' clients, but rather that of a third party.

The judge accepted that the iniquity exception can apply where the iniquity is that of a third party, but only where the client, though innocent, has been used in his dealings with the lawyer as the wrongdoer's "tool". To establish whether a lawyer's client was the tool of a malefactor, it was necessary to ask whether the iniquity of the third party took the relationship between client and lawyer outside the ordinary course of the lawyer's engagement.

The judge accepted that this was a vague test but thought that it would generally only be satisfied if the wrongdoer and the innocent client had a relationship separate from the dealings with the solicitor, and that relationship was used by the wrongdoer to advance his wrongdoing. This was not the case in *Accident Exchange*. The clients (or their insurers) instructed solicitors following a road accident. The wrongdoing was parasitic upon that existing solicitor/client relationship, which was entirely normal. As a result, the clients were entitled to assert privilege.

Accident Exchange also involved common interest privilege. The issue was whether a recipient of privileged information belonging to a third party was then entitled to waive that privilege by disclosure to a fourth party. The judge accepted that the parties could agree whatever they wanted, but, absent agreement, it was highly unlikely that a sharing of privileged information would impliedly include the right to waive the privilege.

THE FIGHTBACK BEGINS?

In which *ENRC* is quietly doubted.

The reason why the last two years have not been good for privilege is the decisions in the *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) and *SFO v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB), in both of which the first instance judges took an exceedingly limited view of the scope of privilege. *ENRC* is going to the Court of Appeal where, hopefully, privilege will be put back on an even keel.

Bilta (UK) Ltd v Royal Bank of Scotland plc [2017] EWHC 3535 (Ch) does not say that *ENRC* is wrong, nor does it address entirely the same issues, but it does gently suggest that all judges do not necessarily take the hostile approach to privilege of those cases.

The case concerned whether interview transcripts and other documents underlying a report by solicitors for D (which was given to HMRC, under reservation) were privileged against a third party, B. B accepted that litigation between D and HMRC was, at the relevant time, reasonably in contemplation and that the litigation would be adversarial. The only question was whether the dominant purpose of the report was the conduct of the litigation.

Sir Geoffrey Vos, Chancellor of the High Court, was careful to decide the case on the facts. He thought the dominant purpose was the prospective litigation, and that the report was, in effect, D's response to HMRC's equivalent of a letter before action. The closest he got to criticising *ENRC* was to observe that one could not draw a general legal principle from Andrews J's view that attempts to avoid or settle litigation were not the conduct of litigation for privilege purposes. The Chancellor thought that the finding of the facts by D and the conduct of the litigation were all part and parcel of the same process and could not be divided up.

Bilta is not earth-shattering. It does not change the caution required in the light of the two unfortunate decisions referred to above. The greatest hope is that the Court of Appeal will fix things.

C L I F F O R D

C H A N C E

CONTACTS

Simon James
Partner

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

Anna Kirkpatrick
Senior PSL

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

Susan Poffley
Senior PSL

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