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CONTENTIOUS COMMENTARY

A REVIEW FOR LITIGATORS

NOVEMBER 2019

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

CONTENTIOUS COMMENTARY – NOVEMBER 2019

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

CONTRACT

GOODBYE TO GOOD FAITH

Good faith is not to be implied into a detailed contract.

UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch) is a case of resort to law in the hope that the courts would rescue a party from a contractual gamble that went wrong. The courts declined the offer to intervene and, in doing so, resisted the current trend in favour of good faith.

The case concerned control of the eponymous football club. When the club was languishing in the third tier of English football, the owner (C) sold 50% to a Saudi prince (D), who turned out to be a lot less rich than expected. Funding issues ensued, and C and D fell out. In late 2017, C decided to exercise the pre-emption rights in the sale agreement.

A pre-emption notice was required to offer to buy the other's shares at a price of the offeror's choosing, with the catch that the offeree was entitled in response to buy the offeror's shares at that same price. C pitched his offer at £5m in knowledge that if D chose to buy rather than to sell, D would also be obliged, as the holder of 75% of the shares in the company, to buy from C the club's real estate assets (the ground, training facilities etc) at a fair market value. C thought, or hoped, that D could not afford to do so and so would not exercise his counter-option.

D had other ideas. He served notice to buy C's shares at the price proposed by C, but also sought to have the shares put into the hands of nominees, arguing that he did not then own 75% of the shares and thus did not need to buy the property assets. D started legal action arguing, mainly, that D owed a duty of good faith, because the agreement was a quasi-partnership or because it was a relational contract, and that D was in breach of that duty.

Fancourt J decided that a standard entire agreement clause was enough to dispose of the quasi-partnership argument. If the agreement represented the entire agreement, there could not be an extra-contractual quasi-partnership that imposed additional obligations.

C went on to argue that the contract was "relational" and, as a result, that a duty of good faith should be implied as a matter of law (*Yam Seng*, *Bates v Post Office* etc). The judge considered that it was wrong to ask whether the contract was a relational contract, and from that conclude that there was a duty of good faith. Rather, the court should ask whether, applying normal implication principles (necessity for the proper working of the contract), there was an implied duty of good faith; if there was, the contract might be relational.

Fancourt J decided that no such implied duty was necessary. It was a carefully drafted contract that included some express obligations of good faith, which made it hard to imply a general duty. Further, in the circumstances that arose (options to take control), it made no sense to imply a duty of good faith since the parties were at that stage looking after their own interests rather seeking to achieve a joint objective. Duties of good faith cannot apply in a uniform way to all contractual rights and obligations.

C therefore failed on the good faith point, but the judge decided that D's attempts to circumvent his obligation to buy the property assets similarly failed. In context, shares held by a nominee for D were to be treated as held by D. C accepted D's failure to buy the real estate assets as a repudiatory breach, and terminated the underlying contract. The judge concluded that this did not get C out of his obligation to transfer the shares to D. The exercise of the option to buy created a separate contract, which C had not terminated. Specific performance of that separate contract was therefore granted.

As the case was reaching trial, Sheffield United secured promotion to the wealth of the Premier League, which made the club worth north of £100m. D understandably decided that he would buy the real estate assets after all – buying 50% of the club, with control, for a tenth of its value is a good deal, leaving enough cash to buy the land and be rid of C entirely (and to mint a good profit).

Sheffield United is a useful counterbalance to cases, such as *Bates v The Post Office*, which show undue enthusiasm, if analytical fragility, for the imposition of a duty of good faith. It also shows that impoverished (relatively) Saudi princes can be better at playing the roulette of football finances than a local lad made good.

NETHERLANDS NEGATIVE

Negative interest is not payable under the ISDA CSA.

The ISDA Credit Support Annex can require one party to provide cash collateral to the other in support of underlying derivatives transactions. The CSA is clear that the recipient of cash collateral must pay interest on the collateral it receives. But if interest rates are negative, the CSA does not display that same clarity on whether the payer must pay interest to the payee of that collateral. When

the CSA was drafted, in 1995, no one gave a second's thought to the possibility of negative interest rates. But the effect of the global financial crisis has been to turn some interest rates negative for protracted periods.

In *The State of the Netherlands v Deutsche Bank AG* [2019] EWCA Civ 771, the interest rate specified for cash collateral was negative for long periods. The Netherlands, as the recipient of the collateral, argued that the provider was obliged both to transfer the cash collateral and to pay interest on that collateral (or, strictly, that the value of the collateral went down with the deduction of negative interest, reducing what would, all being well, be returned to the payer).

The Court of Appeal was not enamoured by Robin Knowles J's first instance judgment ("too simplistic"), but it reached the same conclusion: negative interest is neither payable nor accrues (deccrues?) on cash collateral. However, the Court of Appeal's reasoning is, if anything, even more oblique than the first instance judge's. The Court of Appeal's excuse may be that it had no real alternative since it is abundantly clear that those who drafted the CSA did not have negative interest in mind. The Court of Appeal was faced with the task of trying to infer an answer from the minimal hints it found in the words used (or, largely, not used) in the CSA.

The real point, as the Court of Appeal acknowledged, is that since the CSA doesn't contemplate negative interest and since it is not clear what the authors would have wanted had they thought about it, negative interest can't be payable. If you want something from a contract, especially a market standard contract, you need to say so expressly. Market standard terms are interpreted strictly.

DISRUPTED CLEARING

A term requiring compliance with market practice is rejected.

At 9.30am on 15 January 2015, the Swiss National Bank announced that it was removing the limit on the value of the swiss franc against the euro. Exchange rates went, for a short time, all over the place. This triggered 27 automatic trades between C and D which, at the market prices at 9.47am, averaged 0.18. Later in the day, some banks in a similar position to D adjusted the prices of trades made earlier in the day to 0.85 or higher, but D only offered 0.75. C sued on the basis that D was under an express or implied obligation retrospectively to adjust prices or cancel trades done at a time of severe market disruption. In *CFH Clearing Ltd v Merrill Lynch International* [2019] EWHC 963 (Comm), Moulder J found for D.

The trades were done under an ISDA Master Agreement, but C's principal argument was based on D's standard terms. These terms said that transactions "were subject to all applicable laws, rules, regulations howsoever applying and, where relevant, the market practice of any exchange, market, trading venue and/or any clearing house". C argued that this imported market practice into the contract as a term, and market practice required repricing.

Moulder J rejected this argument. She considered that if market practice was to be imported into the contract, then the whole of applicable laws, rules and regulations, as well as market practice, would be imported. This was much too uncertain and cannot have been the parties' intention. She decided that the effect of the "subject to…" language was to exempt the parties from their obligations if performance would infringe laws, rules, market practice etc; its effect was not to import a mass of overriding rules into the contract.

C also argued that even if there was no express term, there was an implied term to the same effect. Moulder J dismissed this peremptorily. The transactions were done on the terms of the ISDA Master Agreement, which contains extensive and comprehensive terms, and is widely used in the market. The incorporation of market practice was neither necessary for business efficacy nor so obvious that it went without saying.

C went on to argue that, despite having been done at market prices at the time of execution, the trades infringed D's obligation of best execution, or that there was conflict of interest. Moulder J had no truck with such stuff. If you trade in a disrupted market, don't expect to be bailed out retrospectively.

DURALITE LASTS LONGER

Good faith prevents lawful act duress.

The Court of Appeal's aim in *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2019] EWCA Civ 828 was to rein in less robust members of the judiciary, who might want to strike down contracts entered into following what they regard as unacceptable, but lawful, pressure by one of the parties. The common law requires parties (and judges) to be made of sterner stuff. If a party exerts lawful pressure to achieve a result to which the person exerting the pressure bona fide believes it is entitled, that pressure cannot constitute illegitimate economic duress however unreasonable the grounds for that belief.

Times Travel concerned a firm of travel agents (C) whose main business was selling flights to Pakistan. D was the only supplier of direct flights from the UK to Pakistan. D was in dispute with various of its travel agents, including C, over the effect of fuel surcharges on the commission due under the agency agreements. In the course of this dispute, D terminated all the agreements in accordance with their terms, and offered a new agreement with different commission provisions but which also, critically, included a waiver of past commission claims.

C accepted the new agreement, feeling that it had no choice but to do so if its business was to avoid collapse. C then sued D for the past commission to which it said it was entitled, arguing that the new agreement was not binding because it had been procured by the exercise of illegitimate economic duress.

The first instance judge found for C, but the Court of Appeal reversed that decision. There was no finding by the judge that D did not believe in good faith that it was entitled to secure the waiver of the past claims as part of a new deal. Where the threat was of lawful action (here, terminating the contract), it was not the threat that mattered but the legitimacy of the demand the threat supported; and the demand would be legitimate if the person genuinely believed that he was entitled to make that demand, however unreasonable that belief. The Court of Appeal rejected any reasonableness test because, it considered, it would be too uncertain.

The Court of Appeal's aim in trying to cut the scope of economic duress in the interests of commercial certainty may be laudable. A mismatch of bargaining power is a fact of life and, absent statutory intervention, the Court did not think that the courts could or should do anything about it. Statute, not the courts, controlled monopoly suppliers like D. But quite what good faith or entitlement means in a commercial context may be as uncertain, if not more so, than any question of reasonableness.

TO INFINITY AND BEYOND

A market contract entered by computers is not vitiated on grounds of mistake.

There are a numerous instances of internet retailers listing items for sale at way below the price they intended, only to find the offer snapped up by eager shoppers. The legal principles for enforceability of the resulting contract are reasonably clear – essentially, did the shopper know that the price was a mistake.

In *B2C2 Ltd v Quoine Ltd* [2019] SGHC(I) 03, the Singapore International Commercial Court had to consider a comparable scenario in a human-free environment – computers had entered into the contracts all on their own because that was what their algorithms required; (real) people only found out after the event. What is more, the sale was of one cryptocurrency for another (Bitcoin against Etherium).

D was a trading platform for cryptocurrencies operated entirely by algorithm. The algorithm decided that the positions of one trader needed to be closed out (a mistake, in fact), so it went into its digital market place to identify relevant bids from market participants. The computer went down the list of bids on the system, matching enough to effect the close out. All very normal.

Unfortunately, a glitch had been introduced into D's algorithm a couple of days earlier which no one had spotted. This meant that there was very little liquidity in the market. This resulted in seven of the close-out contracts being made on bids from C that were many times above the market rate (10 BTC to 1 ETH rather an 0.4 BTC to 1 ETH). The reason these bids were in the D's system was that C's trading algorithm needed always to have some bids there to avoid the algorithm falling over, so the programmer included prices that were way off the market but at which C would be happy to trade because it could not fail to make money. Equally, the programmer knew that it was thoroughly unlikely that anyone would in fact trade at that those prices.

After the trades were executed, people at D found out about the trades and purported to undo the contracts, including reversing the transfers between the accounts. The Singaporean judge (Simon Thorley, an English QC) decided on fairly orthodox contractual grounds that D had no contractual right, whether express or implied, to reverse the trades (D's terms of business did not provide such a right). Prima facie, therefore, the trades were binding and D was wrong to undo them.

D's main argument to justify its conduct was that the contracts were void or voidable for unilateral mistake. D argued that C knew or must have known that no one would enter into contracts at the prices posted, and so there had been insufficient meeting of (digital) minds to form a contract.

The judge decided that the minds in question were those of the authors of the computer programs, that there were good and sound technical reasons for including bids at this off-market level, that C's programmer did not give any real thought to what might lead someone to trade at this level, and that the levels were set to ensure that C made a profit if trades were (unexpectedly) done at that level. In short, the programming was "opportunistic but it is in no respect sinister". C's mental state was

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therefore insufficient to void the contracts, whether at law or equity.

The judge also accepted (though the parties did not argue to the contrary) that cryptocurrencies could be the subject of a trust because they had "the fundamental characteristic of intangible property as being an identifiable thing of value".

For rather less satisfactory reasons (hardship to D), the judge refused to order specific performance of the underlying contract, ie to unreverse the cryptocurrency transfers made by D. He decided that damages (in normal fiat currency) were a sufficient remedy. In this way, the judge, intentionally or otherwise, placed a clear dividing line between cryptocurrencies and real currencies. C is trying to claw this back by claiming an account of profits in equity, but the decision on this awaits another day.

PAYING THE FERRYMAN

Payable means whatever you want it to mean.

Minera Las Bambas SA v Glencore Queensland Ltd [2019] EWCA Civ 972 concerned what "payable" meant, as in the sellers of a company would indemnify the purchasers for tax "payable" by the company. The issue was that a Peruvian tax assessment established a liability for tax, but the tax authorities could not force the taxpayer to discharge that liability until all appeals had been exhausted. Did the indemnity obligation arise on the assessment or only after all appeals had taken place?

The Court of Appeal decided that "payable" was not a term of art, its meaning depending entirely upon context. The Court therefore refused to cite any of the many cases to which it had been referred on what "payable" meant in other contexts, or even to go through the 34 other instances in the contract in question where "payable" was used. They simply observed that in ordinary language "payable" could be used in either of the two senses argued for, but concluded that, in this context, it meant after the exhaustion of appeals. This was because: the obligation in question was an indemnity aimed at preventing a party from suffering loss, and no loss was suffered until actual payment (an accountant might not agree); and the indemnitee had no need for money until the obligation became enforceable, which might never happen.

Compare and contrast *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, in which it has decided that, in a reinsurance contact (also a contract of indemnity), "actually paid" did not require cash to change hands but were only words of measurement. Concepts of paid, payment, payable etc can be slippery things.

OBJECTIVELY SIDE-LINED

Rectification does not depend upon an objectively determined mutual intention.

Leggatt LJ does not ascend into the firmament that is the Supreme Court until April next, but he used *FSHC Group Holdings Ltd v Glas Trust Corporation Ltd* [2019] EWCA Civ 1361 as practice for his ultimate appellate role: a lofty judgment seeking to resolve issues of law; a historical sweep of the case law; and a departure from the views of a distinguished judge in the House of Lords. In doing so, he followed the first instance judge in generously rescuing solicitors from a problem.

FSHC concerned common mistake rectification and, in particular, the correctness of Lord Hoffmann's dictum in *Chartbrook v Persimmon Homes* [2009] UKHL 38 that rectification on this ground requires an objectively determined common mistake, the parties' subjective intentions being irrelevant. The Court of Appeal decided that Lord Hoffmann was wrong, except in circumstances where the contract to be rectified was entered into pursuant to a requirement in an earlier contract. Absent a prior contract, rectification requires a common intention known to both parties (an intention held by both but not subject to any mutual expression is not enough), but there is no requirement that the common intention should be objectively deduced from communications passing between the parties or from their actions.

The case arose from the solicitors' discovery that their client had failed to provide the security over an intra-group loan required under financing arrangements. This failure was an event of default. The discovery came at a time when the client was considering restructuring the financing, but also when it was shortly required to certify that there were no events of default. Confessing to a default would have weakened its bargaining position.

So two partners at the solicitors came up with a cunning plan: rather than executing a bespoke security document, the client could accede to an existing security deed put in place for other security required in the structure. This, they thought, would raise fewer questions at the security trustee or elsewhere, and could be done quickly and without negotiation. Unfortunately, no one actually read the existing security deed. Had they done so, they might have appreciated that, while it did the job of creating the necessary security interest, it also imposed other seriously detrimental obligations on the client and which the client was not obliged to accept

as part of the security package it needed to put in place

When this did emerge, the client sought rectification to strip out the unwanted obligations. The client succeeded on the basis that both the client (through its solicitors) and the security trustee only intended to cure the lack of security, and both knew that the other had this same intention; no one intended to impose the additional obligations.

The Court of Appeal followed the first instance judge in deciding that this common intention was manifested objectively (even though this was unnecessary as a matter of law) but that it was also a common subjective intention understood by both parties, which was sufficient for rectification. This may be right as a matter of law (Lord Hoffmann's dictum has been heavily criticised) but it seems generous on the facts. Not reading a document does not generally offer grounds to vary that document, even if the parties really only wanted certain parts of it. Is common ignorance of what they were actually signing a common mistake?

NOTICING ERRORS

Notice provisions in contracts will be interpreted strictly.

Sale and Purchase Agreements invariably require notice of warranty claims by a specified time. Like all other limitation periods, these provisions give rise to numerous claims. Parties scrabble around at the last minute and, sad to say, lawyers can get it wrong. Such a case is *Stobart Group Ltd v Stobart* [2019] EWCA Civ 1376.

The SPA in *Stobart* had two relevant provisions: one (para 6.3) made it a condition precedent to a warranty claim that the purchasers gave notice of the claim to the vendors within seven years of the SPA; the other (para 7.1) required the purchasers to give notice to the vendors as soon as reasonably practicable after becoming aware of a claim against the sold company that could give rise to a warranty claim.

The purchasers knew that they had to give a notice under the SPA before the seven year deadline, and the vendors were expecting a notice on the issue in question. But the notice that arrived through the vendors' letterbox, ten days before the deadline (not very last minute by normal standards), only referred to para 7 of the SPA and not to para 6.3. Was it nevertheless, in context, a para 6.3 notice?

The Court of Appeal, like the first instance judge, took a hard line. Courts might have sympathy with the incompetent, but that doesn't mean that courts will necessarily throw them a rubber ring. The commercial imperative of certainty means that clarity is required. The meaning of a notice is determined objectively, and objectively this notice looked like a para 7.1 notice rather than a para 6.3 notice. That being so, it was only a para 7.1 notice; the time limit for the warranty claim imposed by para 6.3 had passed; and so the vendors skipped away £3.8m better off than they might otherwise have been.

A SIGN OF THINGS TO COME

An automatic email signature can be a signature.

When two solicitors agree to settle a piece of litigation on behalf of, and with authority from, their clients, courts are likely to strive to enforce it. In *Neocleous v Rees* [2019] EWHC 2462 (Ch), the judge acknowledged this inclination but added that it must not, of course, be allowed to affect the legal position. He still enforced the settlement.

The dispute between C and D was about rights of way to a piece of land owned by D that was only accessible (other than by water) over C's land. The parties agreed to settle by C buying the piece of land from D. The terms for the purchase were set out in an email from D's solicitor to C's. D's solicitor ended the email "Many thanks", allowing Outlook to insert his name and contact details under those words in the usual way.

D then changed her mind about the settlement. She argued that her solicitor's email failed to meet the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. This requires a contract for the sale of land to be "signed" on behalf of each party; C argued that the email was not signed. (Section 2 also requires a single document or counterparts, but it was accepted that an email chain is a single document for these purposes.)

The judge decided that the document had been "signed" for the purposes of the Act. He accepted that "signed" should bear an ordinary meaning, but he thought that this meaning was not the same as in 1989. People would now accept that a typed name was enough and, further, that the automatic addition of a name at the end of an email was a signature (Microsoft even calls it a signature). He rejected the argument that the automaticity of the insertion undermined the argument that the words were intended to authenticate the contents of the email. It is necessary for a user to set up an email signature and, having set it up, the sender will know that it is inserted as a matter of course in each email.

The bottom line is that if you don't intend something sent by email to be binding, you need to use the traditional wording of "subject to contract". But in this case, the contract was intended to be binding; it was just that D later changed her mind.

PRIVATE INTERNATIONAL LAW

RAGE AGAINST THE MACHINE

Parent companies can be sued England.

The predominant driver of *Vedanta Resources plc v Lungowe* [2019] UKSC 20 was the Supreme Court's irritation (to put it at its lowest) at having to hear the case at all. It launched the judiciary's customary (if naïve – again, to put it at its lowest) attack on challenges to the jurisdiction of the court, condemning the supposed lack of proportionality. This led the Supreme Court to discourage applications, at least appeals against first instance decisions, by repeating that first instance evaluations can't be challenged and facts can't be re-considered.

The case involved a claim by 1,826 Zambian citizens that they had been damaged by toxic discharges from a copper mine in Zambia owned by a Zambian company (D1) in breach of Zambian law. To procure D1's presence in the English courts, the claimants sued D2, D1's English incorporated parent, on the basis that it too owed duties under Zambian law to those injured.

The Supreme Court could have used the case to look at the vexed issue of the liability of parent companies for the sins of their subsidiaries, but it declined to do so in its rage against the case. It decided that there was no new law to be made in this point at all. The liability of a parent apparently simply involves the application of normal negligence principles (corporate veil anyone?). It was all a matter of fact, and as the first instance judge had concluded that there was a sufficiently arguable case to defeat summary judgment against the parent, that was the end of the matter in the Supreme Court. The English courts had jurisdiction over D2 under the Brussels I Regulation as the courts of D2's domicile, and could not decline to exercise that jurisdiction on discretionary grounds (*Owusu v Jackson* [2005] QB 801).

The Supreme Court rejected the argument that joining D2 was an abuse of EU law. For this, the sole object of joining D2 had to be to deprive D1 of a right under EU law (possibly collusion is required too). The judge had decided that, while getting D1 into the English courts was a principal reason for joining D2, it was not the sole reason. But more fundamentally, D1 was not being deprived of any rights under EU law since it wasn't domiciled in the EU. The joinder of D1 to proceedings against D2 was, the Court considered, effectively a situation like that contemplated by article 8(1) of Brussels I (suing a number of defendants in the domicile of one of them), which was an accepted norm rather than an abuse.

D1 was joined to the proceedings on the basis that it was a necessary or proper party to the claim against D2 in accordance with PD6B, §3.1(3). Unlike jurisdiction under Brussels I, forum non conveniens is available where jurisdiction depends on PD6B. But the courts have recently treated the fact that they cannot stay the claim against a party domiciled in England as a sufficient reason not to stay proceedings on forum non conveniens grounds against a non-EU party. Horror at the risk of duplicate litigation and conflicting judgments overrode all other factors.

On this point, the Supreme Court reluctantly conceded that there might be a recessive legal issue that it could not avoid. The Court accepted that on any normal basis, Zambia was the appropriate place for the case to be tried. It concluded that if (as it had done) D2 agreed to submit to the jurisdiction of the Zambian courts, any risk of inconsistent judgments would flow from the Cs' decision to proceed in this country, and the Cs could not rely on the risk resulting from that decision in order to drag D1 into the English courts. *Owusu* therefore ceases to be a trump card in a forum non conveniens application.

This would have led the Supreme Court to stay the case against D1 but for one additional factor. The first instance judge had decided that there was a real risk that the Cs would not obtain substantial justice in Zambia. Reverting to its rage against the case, the Supreme Court would not overturn that first instance assessment. The issue was not that Zambian judges were not independent, nor that the Zambian courts had no experience of large, class-like claims. It was the lack of funding for large claims and the lack of lawyers with appropriate experience that swayed the decision.

DUEL JURISDICTIONS

Different jurisdiction provisions in documents for the same transaction should be read disjunctively.

A loan agreement requires the borrower to enter into a swap to hedge its interest rate risk. The

borrower duly does so. The loan agreement provides for the exclusive jurisdiction of the Turin courts; the swap (on ISDA terms) provides for the jurisdiction of the English courts (and also says that the loan agreement prevails in the event of conflict). The swap counterparty starts proceedings in London seeking declarations that it has no liability for anything related to the swap; the borrower starts proceedings in Turin. Which jurisdiction clause applies?

In *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* [2019] EWCA Civ 768, the Court of Appeal decided that the English jurisdiction clause was the applicable one. The Court of Appeal's starting point was that, in this kind of situation, a jurisdiction clause in one contract is probably not intended to capture disputes naturally arising under related contracts, and that sensible business people are unlikely to intend that similar claims should be the subject of inconsistent jurisdiction clauses. As a result, potentially competing jurisdiction clauses are, where possible, to be interpreted on the basis that each deals exclusively with its own subject matter and that they do not overlap (but, if that is not possible, the result may be that either clause can apply rather than that one clause applyies to the exclusion of the other).

The Court of Appeal concluded that the declarations sought by C in England related to the swap (in the main, they echoed the wording of the Master Agreement), and thus fell within the English jurisdiction clause. The resolution of conflicts provision in the swap had no application because there was no conflict between the two clauses – each clause dealt with its own subject matter. So the Italian courts were again denied the opportunity to consider complaints by an Italian local authority, Turin in this case, about the consequences of entering into swaps.

In *Airbus SAS v Generali Italia SpA* [2019] EWCA Civ 805, the Court of Appeal applied the same principles and reached the same conclusion, albeit in different circumstances. But the overwhelming lesson from cases like these is that the most efficient course is to choose one jurisdiction to resolve all disputes arising from a single relationship rather than have different jurisdictional provisions in the different documents that make up the relationship.

BEWARE OF JUDGES BEARING GIFTS

Foreign defendants need not comply with English court pre-action procedures.

If you apply, without notice, for an extension of time in which to serve a claim form on a defendant out of the jurisdiction and succeed, it is easy to relax and think that that's that. But it isn't necessarily the last word. D can apply to set aside the extension, and the application will be a rehearing de novo, not an appeal. If the extension and, with it, service is set aside, that will be the end of the case if the limitation period has passed. An application for an extension must, therefore, be as carefully prepared and justified as if it were on notice to the other side.

That is the lesson from *Al-Zahra (Pvt) Hospital v DDM* [2019] EWCA Civ 1103. C obtained an initial extension (of eleven months on top of the normal six) in which to serve process in Dubai because medical evidence was not yet complete and because it can take over twelve months to serve process in Dubai. The Court of Appeal was satisfied that these were sufficient reasons to grant an extension.

But C later came back for an extension of another eight months, the application being based on "sparse" information but in reality because C's solicitors had been distracted by other cases and hadn't got on with this one. The Master initially granted the extension, but later set it aside on D's application. The Court of Appeal agreed with the Master's second thoughts, and said that the further extension should not have been granted even though the limitation period had passed and it was a medical negligence case. C should have progressed the case with greater diligence.

The Court of Appeal was particularly dismissive of C's solicitors' whinge that they couldn't progress the case because D was not being cooperative. The Court said that, while a defendant within the jurisdiction had to comply with pre-action protocols and such like, a claimant could not assume that a foreign defendant would do so: "until proceedings are validly served on a foreign Defendant, that party is under no obligation to respond at all". That, perhaps, overstates the position somewhat, but it does emphasise that a claimant can't expect a foreign defendant immediately to appreciate the wisdom, joy and delight of litigation in the English courts.

DISC WORLD

An EU court cannot stay proceedings in favour of a non-EU court chosen by the parties.

It is rare for defendants to resist being sued in the courts of the country in which they are domiciled. But it does happen. For example, the law applied in another court might be more favourable, the other court might be admirably slow, the case might simply not happen elsewhere (eg lack of funding) or a judgment of another court might not be enforceable in the defendant's domicile.

If *Gulf International Bank BSC v Aldwood* [2019] EWHC 1666 (QB) is right, it will happen even less. A Deputy Judge has decided that, unless the requirements of articles 33 and 34 of the Brussels I Regulation (recast) are met (or the Hague Convention on Choice of Court Agreements applies), a court in an EU member state cannot stay proceedings against someone domiciled in that state in favour of a court outside the EU even if the parties have agreed to the exclusive jurisdiction of the non-EU court. Article 4(1) of Brussels I imposes jurisdiction on the courts of the defendant's domicile, and the only grounds to escape that jurisdiction are those set out in the Regulation itself. There is no ability to decline jurisdiction in favour of non-EU courts beyond the discretion given by articles 33 and 34.

This is not a new issue. Under the unrecast Brussels I, first instance English courts generally took the view that, by giving "reflexive effect" to the Regulation, they could stay proceedings in favour non-EU courts if the parties had agreed to those non-EU courts (eg *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm)). This involved treating the non-EU court as if it were an EU-like court in order to do the sensible thing. This concept of "reflexive effect" is an invention of the civil law because, where all law is codified and there is no law outside the code, gaps in the code must be filled by finding an answer in the code even if this can only be done by reflecting the provisions of the code into its dark, silent regions.

In the case of Brussels I, this was the pragmatic, and right, answer to the fact that the Regulation largely ignores the outside world. If parties have agreed that the courts of, eg, New York should have jurisdiction, why would the EU (in the shape of Brussels I) want to override that party autonomy when the Regulation gives effect to that same autonomy if exercised in favour an EU court? Party autonomy should not stop at the EU's borders.

The judge in *Gulf International Bank* would not, in any event, have gone along with this reflexive effective – he thought that *Owusu v Jackson* [2005] QB 801 ruled it out, and he was dismissive of the academic and judicial support for it. But the judge considered that the insertion, in January 2015, of articles 33 and 34 into the recast Brussels I put the matter beyond argument.

Articles 33 and 34 allow courts in EU member states to stay proceedings on the same or related causes of action in favour of non-EU courts if certain conditions are met, including that the non-EU court is seised first. This, the judge concluded, codified any reflexive effect that could otherwise be given to Brussels I, ruling out anything wider.

The conditions in article 33 were not met in *Gulf International Bank*, so the judge decided that he had no ability to stay the case, against a defendant domiciled in England, in favour of the Saudi courts even if the parties had agreed to the exclusive jurisdiction of the Saudi courts (the Hague Convention on Choice of Court Agreements did not apply).

In fact, the judge decided that the clause in question, in a guarantee, provided for one-sided exclusivity, which was unobjectionable in principle and did not prevent C from suing in another court with jurisdiction, such as the English courts. But, he concluded, if the Saudi courts did have exclusive jurisdiction and the judge had discretion to stay the English proceedings in favour of the Saudi courts, he would have done so.

In *JSC Commercial Bank v Kolomoisky* [2019] EWCA Civ 1708, the Court of Appeal took a more favourable approach to reflexiveness in a case on the Lugano Convention. The effect of articles 33 and 34 of the Brussels I recast did not arise in *Kolomoisky*, but the Court seemed to be somewhat sceptical as to whether these articles could have the effect that the judge in *Gulf International Bank* attributed to them. But this is a serious issue that the CJEU will, at some point, have to resolve.

HAGUE ENCORE

A new treaty on the enforcement of judgments has been agreed.

The Hague Conference on Private International Law has agreed its 37th Convention (numbered as its 41st output) - the second under its judgments project - this time on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. If and when this new Convention comes into force, it will be a useful complement to the Convention on Choice of Court Agreements, which could be significant for the UK in a post-Brexit world.

The temporal passage of the Convention on Choice of Court Agreements is, however, instructive when considering the likely progress of the new Convention into practical usage. The Conference's judgments project started in 1992; after a stop/start process, the Choice of Court Convention was agreed in 2005; it was signed by the EU in 2009; the EU brought it into force in 2015; the Convention currently has four participants (the EU (which could count as 28), Mexico, Montenegro, and Singapore); and the US, China and Ukraine have signed the Convention but not ratified it.

Snails, rather than light, therefore provide the ready analogy for the pace at which matters move in this field of private international law. Even if the UK could be persuaded to sign up after Brexit, it will require significant others also to do so for the new, Enforcement, Convention to have an impact. History does not suggest that this will happen soon.

The scope of the Enforcement Convention is a slimmed down version of the Brussels I Regulation. It covers civil "or" commercial matters, but excludes, for example, defamation, privacy, anti-trust, intellectual property, family law, carriage of passengers and goods, internal corporate matters, the activities of armed forces and law enforcement agencies, sovereign debt restructuring through unilateral state measures, and insolvency.

Unlike Brussels I, the Convention does not prescribe or proscribe the bases upon which courts can take jurisdiction. Giving mandatory jurisdiction to the courts of a particular country (à la Brussels I) requires trust in the judicial processes of that country, which trust is not present globally. Instead, the Convention allows courts to take jurisdiction on any basis they like but provides that the resulting judgment will only be recognised and enforced if jurisdiction was taken on one of the bases set out in article 5. The aim of these bases is to identify a sufficient link to the state of the court giving judgment such that it is reasonable to enforce resulting judgment. Broadly, this link can arise from the judgment debtor's location, the nature of the claim or consent.

The bases in article 5 echo loosely the jurisdictional foundations of Brussels I. For example, the bases include: the judgment debtor being habitually resident in that state (in which case cross-border enforcement is unlikely to be necessary); the judgment debtor having a branch in that state and the judgment arising from the activities of that branch (ditto); consent to jurisdiction (except exclusive consent, which remains under the earlier Convention); and a contractual obligation required to be performed in that state, unless it "clearly did not constitute a purposeful and substantial connection to that State" (ie payment to an account in a particular state will not on its own be sufficient?). Article 5 does not, for example, offer the ability to drag other defendants into the domicile of one of them.

The Convention stresses that the merits of the judgment may not be reviewed on an application for enforcement, but provides the usual general grounds for refusing enforcement (eg fraud, public policy, judgment contrary to an agreement to litigate elsewhere, or a judgment inconsistent with other enforceable judgments). Enforcement may also be refused "if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss" (article 10) – a poke at the US practice of awarding triple damages (though the US has no treaties in force on the mutual enforcement of judgments and is unlikely, particularly under its current management, to into rush this one).

The procedure for enforcement will not be as streamlined as Brussels I. Documents need to be produced, and the court must consider whether one of the bases for jurisdiction is present. There is scope for delay if a judgment debtor so desires and the enforcement court is cooperative or inefficient. There is also no means to produce across participating states a common interpretation of the Convention – the most the Convention can do is to note "the need to promote uniformity in interpretation" (article 20).

So, the Convention is well-intentioned and potentially useful, but don't hold your breath waiting for it.

SINGAPORE SLING

A convention on international mediation has been signed.

To much fanfare, the United Nations Convention on International Settlement Agreements resulting from Mediation was agreed in Singapore on 7 August, and was signed by 46 countries (though it has not yet been ratified by any of them).

The Convention provides that if parties have an international commercial dispute that is settled by an agreement reached through mediation, "[e]ach Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention" (article 3). It must be proved that the settlement agreement was reached through mediation by, for example, the mediator's signature on the settlement agreement.

A party can refuse to enforce a settlement agreement in certain circumstances, such as: its being null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it; its terms not being "clear and comprehensible"; or the mediator having misbehaved.

The meaning of the Convention is, on its face, a little obscure. Does it require the enforcement of mediation-induced settlement agreements as contracts, but with limited grounds for refusal (ie summary judgment is easy), or is the settlement agreement elevated to the status of a quasi-judgment? If the latter, how are non-money terms to be enforced? And what about the usual grounds for objecting to a contract (eg misrepresentation, mistake and such like) which don't always make the

contract null and void (inoperable?)? What standards of behaviour are expected of mediators?

Some have objected to the Convention on the ground that, by focusing on enforcement, it takes away the commerciality of the process, rendering it more formal and court-like. And some mediators have said that the last thing that they want to do or should do is to sign a mediation settlement, perhaps implying their approval of it or, at least, associating themselves with it (as Professor Dame Hazel Genn memorably put it, mediation is not about just settlement; it's just about settlement).

The UK is not amongst the 46 signatories to the Singapore Convention because the EU has been unable to decide whether the Convention falls within the EU's exclusive competence or whether the EU's member states should sign individually (with or without the EU).

REGULATION

UNCHAINED MELODY

Holding shares through a chain of custodians does not block a claim under s90A of FSMA.

"If Tesco is correct in its submissions… there is a fundamental hole in FSMA", according to Hildyard J in *SL Claimants v Tesco plc* [2019] EWHC 2858 (Ch). Would he find that there was such a hole? Of course not.

The case involved a claim under section 90A of Financial Services and Markets Act 2000 by persons who claimed to have suffered loss as a result of a misleading statements or dishonest omissions in published information relating to securities traded on a regulated market. This requires a person to have acquired, continued to hold or disposed of securities in reliance on that information (paragraph 3(1) of Schedule 10A), for which purposes the acquisition or disposal of securities includes the acquisition or disposal "of any interest in securities". Tesco plc is quoted on the LSE, so no particular problem there.

But there is a problem because of the way which securities are now held and traded. Paper is, or soon will be, no more. Shares are traded through CREST, where there are custodians, who commonly hold the shares for sub-custodians, who might hold them for sub-sub-custodians etc until eventually, under the sub^{n}-custodian, you reach the person with the real economic interest in the shares. And it gets more complicated still – for example, a sale might be effected by an entry on a sub-custodian's records or through clearing at a custodian.

So, said Tesco, the client of the top custodian has an (equitable) interest in the securities for these purposes, but clients of a sub-custodian and lower don't - they only have an interest in the more limited rights that their sub^{n}-custodian has in the rights of the sub^{n-1}-custodian, who only has etc etc all the way back up to the top. Also, said Tesco, a change of economic interest lower down the chain doesn't involve the acquisition or disposal of securities.

Hildyard J wasn't impressed. He accepted that the person at the bottom of the chain does not have a direct proprietary interest in the security itself, and could not enforce any rights against the issuer. He also accepted that an interest in securities required more than a contractual or economic interest. But he thought that a person who has a right against a right against a right etc that eventually reaches the securities has a sufficient interest in the securities for the purposes of FSMA - the chain of (sort of) beneficial interests is enough.

And if the person with the interest at the bottom of the chain has an interest in the securities, it's not hard to conclude that the same person is acquiring or disposing of an interest in the securities.

Tesco's case depends ultimately on a judge being prepared to take a strict view of what an "interest" means and to conclude that it is for Parliament, not the judiciary, to sort out. That might be thought ambitious.

COURTS

MASTERS OF THE UNIVERSE

The CAT must consider again whether a class action can proceed.

Merricks v Mastercard Inc [2019] EWCA Civ 674 is a vast claim. C wants to represent an opt-out class estimated to comprise 46.2 million people (near 70% of the UK's population) and to claim £14.098bn in damages (or £305.15 per head). Not surprisingly, D is fighting it hard. D persuaded the Competition Appeal Tribunal that the class claim should not be allowed to proceed (with the result that the action would die), but the Court of Appeal has decided that the CAT approached the issue of class certification on the wrong basis, and has sent the case back to the CAT to look at again - unless the Supreme Court decides otherwise.

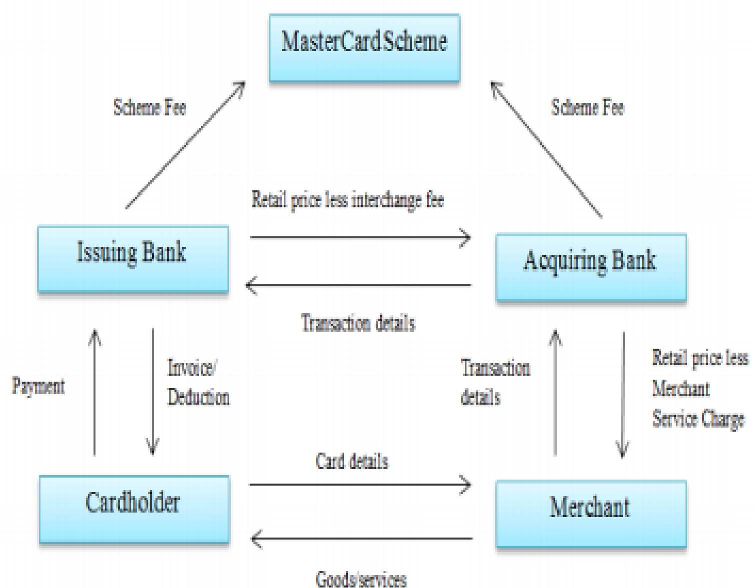
The claim arises from the European Commission's decision in 2007 that Mastercard's setting of a minimum "multilateral interchange fee" between banks was a breach of EU anti-trust law. As illustrated to the right (a diagram taken from the judgment), when a consumer used a Mastercard, the consumer's bank deducted this fee from the sums it passed to a shop's bank, which then deducted that fee (and a bit more) from the amount it paid to the shop. The shop therefore got less than the price paid by the consumer, and (it seems to be accepted) would have increased its prices overall in order to compensate for this reduction in revenue. Consumers therefore paid more for everything they bought (whether on a card or otherwise) than they would have done had there been no minimum MIF. But for any single consumer to calculate the loss that he or she suffered between 1992 and 2008 (when the offending conduct took place) as a result of this mark-up is near impossible, and a claim is certainly far too costly for any individual to bring.

Enter the Consumer Rights Act 2015. By amending the Competition Act 1998, this allows opt-out class ("collective") actions to be brought in the CAT on behalf consumers in these circumstances. The claims of the class members must raise the same, similar or related issues of fact or law and be suitable for collective proceedings. Critically, the CAT "may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person".

C's approach was that he would somehow work out an economy-wide average mark-up as a result of the unlawful fee, calculate a total, and then distribute that total amongst the 46.2 million class members based on the length of time between 1992 and 2008 that each class member was over 16. The Act provides that sums not claimed by class members must go to charity.

The CAT decided that the case was not suitable for a collective action because it was sceptical whether it was possible to assess the level of any price increase as a result of the unlawful fees and because the approach to the distribution of damages proposed offended the fundamental principle that damages are compensatory. The distribution of damages would be largely random, whereas in fact high spenders would have paid much more by way of mark-up than low spenders.

The Court of Appeal decided that the CAT had been too demanding at the preliminary stage, when all it had to decide was whether the case was suitable for a collective action. The case needed to have a real prospect of success (ie it wouldn't fall over in the face of summary judgment), but that was all. The CAT didn't need to be convinced at the collective action certification stage that it would in fact



be possible to work out the damages as proposed. If it proved impossible, that could be sorted out later.

The Court of Appeal also considered that since the Act allows damages to be awarded without assessing each individual's loss, the CAT was wrong to hark back to the compensatory principle when considering the appropriateness of C's proposed distribution of those damages. The Act removed that requirement, both for the assessment of damages and, for the subsequent distribution of those damages.

This is not to say that, at a second look (Supreme Court permitting), the CAT will consider the case suitable for a collective action or, even if it does, that the case will ultimately succeed on this basis. But the Court of Appeal sought to expand the bounds of anti-trust collective actions. The Government might appreciate a £14bn boost to the economy.

DATA WIN

A representative action can be brought against Google.

Lloyd v Google LLC [2019] EWCA Civ 1599 follows the trend of encouraging class-like actions set by *Merricks v Mastercard Inc,* above. *Google* involved an attempt to bring a US-like class action, under the guise of representative proceedings this time, against Google for improperly harvesting in 2011-12 information about the browsing habits of the 4 million or so iPhone users in the UK. The claim failed on all counts at first instance, but the Court of Appeal had other ideas. Civil law and damages might, alongside regulators, be granted a role in vindicating wrongdoing and enforcing the law.

The claim was for breach of the Data Protection Act 1998 (now replaced by the GDPR and the Data Protection Act 2018). Google was, sufficiently arguably, in breach of the Act. Section 13 of the Act (now article 82 of the GDPR) allows the court to award compensation to "an individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act". The damage alleged was users' loss of control over their personal data. The putative representative claimant disavowed any losses based on individual circumstances, arguing only that each iPhone user suffered the same damage from the same wrongful act and should get the same fixed sum as compensation. No distress or other loss arising from the breach was pleaded.

The Court of Appeal considered that loss of control over personal data was "damage" for the purposes of the Data Protection Act. Prima facie, therefore, there was a claim. Further, the Court considered that the claims met the specifications for a representative action under CPR 19.6. These require all those represented to have the same interest in the claim, which the Court thought was the case once all claims based on personal circumstances were excised.

Google (subject to the Supreme Court) opens up the possibility of numerous claims against companies that hold data (particularly IT companies) and have misused or lost the data. If you had an iPhone in 2011-12, make sure you keep proof of it so you can collect your bonus if the case is eventually successful.

UNCAPPED CRUSADERS

The *Arkin* cap on funders' liability in costs is not a rule for all cases.

Arkin v Borchard Lines Ltd [2005] 1 WLR 3055 is generally taken to have decided that a commercial litigation funder which finances a losing case can be liable for the winner's costs under section 51 of the Senior Courts 1981, but that the funder's liability is limited to the amount that it put up by way of funding. Funders approve of this because it provides a limit to their liability and certainty as to their exposure.

Think again. In *Davey v Money* [2019] EWHC 997 (Ch) Snowden J decided that this *Arkin* cap is not a rule but is only one way for the court to exercise the general discretion given by section 51. In *Davey*, Snowden J had already reduced C's substantive case to rubble (despite there being a QC's opinion giving the various parts of the claim 55% to 75% chances of success). He awarded indemnity costs against C, which basis of costs (following *Excalibur* [2017] 1 WLR 2221) flowed through against the funder. He was not about to allow the funder to avoid, in practice, the indemnity costs through the application of the *Arkin* cap. The judge therefore awarded uncapped costs against the funder.

The basis for uncapping the costs was not solely the indemnity award of the costs. Snowden J cited numerous reasons that led to his conclusion: the entirely commercial nature of the funder's involvement; the conduct of the litigation, which was out of the norm (the indemnity costs point); the funder's knowledge that C could not pay the costs if she lost and its waiver of an original requirement that C obtain ATE insurance cover; the high level of profit that the funder would receive, making it a prime beneficiary of the litigation; and a refusal to believe that funders in general would flee the market if the *Arkin* cap ceased to be automatic.

The only relief for the funders was that the judge confined their liability to costs incurred after they entered into a funding agreement with C, which was well after the commencement of proceedings.

CLIFFORD CHANCE

FREEDOM OF ACTION

Courts have unfettered discretion to order disclosure of documents lodged at court.

CPR 5.4C allows a non-party to obtain from court records statements of case and, with permission, anything else in the court's records. CPR 39.3 allows a non-party to obtain the transcript of a hearing. CPR 32.13 allows a non-party to inspect during the course of the trial a witness statement that stands as evidence in chief.

You might think that these express rules set the limits of what non-parties can get from the court. If so, you would be wrong. In *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38, the Supreme Court treated it as obvious to the point of requiring no explanation that the CPR are not exhaustive of the court's right to grant access to documents it holds.

The courts have, according to the Supreme Court, inherent jurisdiction to allow access to any document in court, whether or not read by the judge. Anything in court bundles is vulnerable, not to mention openings, skeletons and everything else. Open justice requires this but the Court considered that it will require a balancing exercise in each particular case. An applicant must show that allowing access will advance open justice and that there are no countervailing factors. An application made during the trial may be treated with greater sympathy than one made afterwards

The Supreme Court did, however, concede that the CPR might require some reconsideration in the light of its judgment. For example, how long after a hearing should the parties have an obligation to keep documents or supply them to interlopers?

PROPORTIONALITY CUT BACK

The Court restricts the application of "proportionality" but offers no guidance as to its meaning.

Costs judgments can be eccentric, and *West v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220 is on this spectrum for it appears to ignore the rules.

West concerned an exception to the general rule that ATE insurance premiums are not recoverable as costs. This exception applies to ATE cover that insures against the risk of claimants having to pay from their own pockets the cost of experts reports in clinical negligence cases (section 58C(2) of the Courts and Legal Services Act 1990). This exception was introduced, contrary to Jackson LJ's recommendations, because the Government was persuaded that these expert reports are necessary but expensive, and rendering irrecoverable the cost of insuring the risk of not getting the cost back would prevent access to justice.

The two cases in *West* were low value: they settled for £10k and £4.5k respectively, with total costs of £31,744 and £18,376. The ATE insurance premiums in each case were £5088 due under a block policy taken out by the solicitors. The premiums were not based on the individual circumstances of the cases in question. The Ds challenged the reasonableness and proportionality of the premiums.

The Court of Appeal had before them an assessors' report on the ATE insurance market. In the light of this, the Court appears to have been concerned that, if it reduced the premiums, the market would disappear and the Court would be pilloried for denying court access to those who suffer mistakes on the operating table. As a result, the Court concluded that a premium payable under a block policy is effectively incapable of challenge on grounds of reasonableness even though it had nothing to do with the individual case (a policy for an individual case might have a better chance of being challenged, but it will still be seriously uphill).

Further, the Court of Appeal decided that a reasonable ATE premium (as most will, by definition, now be) is not subject to assessment on grounds of proportionality. How this can be squared with the wording of the CPR is anyone's guess – CPR 44.3(2) says that all costs awarded on the standard basis are within the proportionality review.

Overall, the Court considered that when assessing costs, a judge should: go through each line item to assess its reasonableness; but a judge might in this process conclude that an item is disproportionate (even though proportionality is generally regarded as applying to the total, not individual items) and dock it accordingly; the total of all reasonable (and, to some extent, proportionate) line items will then be assessed for its proportionality and adjusted accordingly; but, any reduction for proportionality should exclude "items of cost which are fixed and unavoidable, or which have an irreducible minimum, without which the litigation could not have been progressed", such as court fees and reasonable ATE insurance premiums

Jackson LJ must be spinning gravely in his retirement. Although the Court of Appeal denied it, this is at least a partial reintroduction of the approach in *Lownds*, under which necessary costs were recoverable even if disproportionate. The Jackson reforms were meant to result in even necessary costs being disallowed if they were disproportionate; no more.

PRIVILEGE

INADVERTENT WAIVERS

Without prejudice is treated as having been waived in correspondence.

The goings on at a mediation, which was entirely without prejudice, were referred to in a letter headed "without prejudice save as to costs". In *Willers v De Cruz Solicitors* [2019] EWHC 937 (Ch), Andrews J regarded the failure to challenge outright the ability to use without prejudice material in costs (or other) applications – indeed, an assertion of the right to rely on the correspondence – constituted an implied agreement that without prejudice should no longer apply to the matters discussed in the letter. Beware.

Andrews J also offered a useful summary of the WP rules as follows (citations omitted):

1. The "without prejudice" rule is a rule governing the admissibility of evidence. It is separate from, and independent of the rules relating to legal professional privilege. Although "without prejudice" negotiations have sometimes been referred to in the authorities as "privileged", that is simply shorthand for the protection afforded them, which is similar to the protection afforded to privileged communications.

2. The rule is founded partly in public policy (the encouragement of parties to speak freely with a view to promoting settlement) and partly in the agreement of the parties.

3. It applies to render inadmissible evidence of what was said and/or done during the course of negotiations genuinely aimed at settlement.

4. It is not limited to admissions made against a party's interest, although the protection of admissions against interest is its most important practical effect. Thus, "without prejudice" negotiations will normally be inadmissible in their entirety.

5. The rule is not limited to statements made in the course of settlement negotiations with the other party to those negotiations. It protects statements that were made to reach settlement with a different party within the same litigation, irrespective of whether settlement was achieved.

6. The rule also extends to: a) statements made in settlement negotiations in earlier proceedings between the same parties concerning a matter that remains in issue between them; b) proceedings between one of the parties to the negotiations and a third party concerning the same subject-matter as the proceedings in respect of which the settlement negotiation took place.

7. The rule is an important one whose boundaries should not be lightly eroded. The protection afforded by the rule should be enforced unless it can be shown that there is a good reason for not doing so (or, as it is sometimes put, "justice clearly demands it").

8. Insofar as the rule depends on the agreement of the parties as well as on policy considerations, there is no reason why the parties cannot enter into an agreement varying its effect (by, for example, broadening or narrowing its scope).

9. It is not open to one party to "without prejudice" negotiations to waive the protection afforded by the rule unilaterally. The other party may expressly or implicitly consent to the deployment of the "without prejudice" material in evidence or they may accept a repudiatory breach of the implied contract that neither party will rely on what was said and done in the negotiations as bringing that contract to an end, freeing them to deploy the previously protected evidence themselves.

10. The rule is not an absolute one and there are several recognised exceptions to it.

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