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Contentious Commentary

A review for litigators

Contract

Silence is not golden

Estoppel prevents a party from relying on contractual provisions.

There is no duty of good faith in English contract law or a duty to speak, save in rare circumstances. But the Court of Appeal edged crabwise towards one in *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353 through the means of estoppel. Whatever the theoretical justification, the immediate message is clear that if another contracting party asserts a position with which you do not agree, silence is a dangerous response.

Ros Roca concerned a success fee due to an investment bank on its finding an investor in a business. The first issue was how the success fee should be calculated, which raised an issue of construction. The Court of Appeal overturned the first instance decision, taking a literal approach to the contractual provision. The Court of Appeal considered that the ability to use construction to correct a mistake should be narrowly confined, and generally was in the *Rainy Sky* interpretative school (words mean what they say) rather than the *Sigma*, or Humpty Dumpty, school (words mean just what a judge chooses them to mean).

But having been conservative on construction, the Court of Appeal became radical on estoppel. Before the success fee could be calculated, D needed an estimate of the fee. D sent C its estimate. C spotted that on one view (which turned out to be right), its fee could be far higher. C didn't say anything to D in order to avoid a fuss, allowing the estimate to be used, though nothing much turned on the use (and, in fact, the lower estimate was helpful to D).

The Court of Appeal considered that this created an estoppel by convention that prevented C from later claiming the higher amount (Rix LJ preferred promissory estoppel, but none of the judges really cared what the estoppel was called). There was a common assumption as to the level of the fee, and it was unconscionable for C to go back on it. Conventional grounds of unconscionability, usually detrimental reliance, were not easy to find. May and Stanley Burnton LJJ said that C and D were engaged in a joint project, and each was entitled to assume that the other would act consistently and not conceal information. Rix LJ said that C had a duty to speak because it was a financial adviser. The estoppel therefore aose from the nature of the relationship between the parties, rather than anything else, perhaps placing financial advisers under a particular burden, even in a commercial context.

The issue going forward is whether *Ros Roca* is an isolated hard case, or whether it really does mark a significant shift in approach by the courts. Only time will tell.

Wrong removes right

A party cannot rely on its own failures as a ground to terminate a contract.

A contract between C and D required certain consents to be obtained from a third party before the main parts of the contract came into force. C undertook to use all reasonable endeavours to obtain those consents. The contract went on that either C or D could terminate the contract if those consents were not obtained by a particular date. The date passed with no consents. Can C terminate the

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contract even if it has not used all reasonable endeavours to obtain the consents?

According to Vos J in *Extra MSA Services Cobham Ltd v Accor UK Economy Hotels Ltd* [2011] EWHC 755 (Ch), no. It is a general principle of construction that the parties cannot have intended that either should be able to rely on its own breach of contract in order to obtain a benefit under the contract or to terminate it, unless the contract clearly allows that. Despite the lack of any express conditionality in the right to terminate, Vos J was satisfied the contract did not displace the general rule sufficiently clearly (ie it didn't address the point expressly). As a result, if it were demonstrated that C had failed to use all reasonable endeavours, it could not terminate.

(This is related to the "prevention principle" identified in *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm) and *Multiplex v Honeywell* [2007] EWHC 447 (TCC), namely that a promisee cannot insist upon performance of an obligation which he has prevented the promisor from performing.)

Failed escapology

A contract does not have to say that it is executed on behalf of a company if that is obvious.

Formalities remain rare in English law, the major exception being contracts for the sale of land, which must be executed by or on behalf of the parties. Under section 44(2) of the Companies Act 2006, a contract is executed by a company if, amongst other bases, it is signed on behalf of the company by two authorised signatories. Under section 44(4), a document signed in accordance with section 44(2) "and expressed, in whatever words, to be executed by the company, has the same effect as if executed under the common seal of the company."

In *Williams v Redcard Ltd* [2011] EWCA Civ 466, D sought to get out of a contract to buy property in Barnes by arguing that C, the seller, had not executed the contract properly under those sections. There were three sellers - two individuals and a company - who, together, were defined as "the Seller". The execution block in the contract simply said "Signed… Seller". The two individuals signed. The two individuals were also authorised signatories of the selling company. Has the company executed the agreement?

The Court of Appeal considered that it had done so. Reasoning for this conclusion is hard to find, but the Court of Appeal decided that the contract was "expressed, in whatever words, to be executed by the company" because the company and the individuals were jointly defined as the seller. It was not necessary to state expressly that the contract was executed on behalf of the company. This was despite the analogy of section 44(6), which requires two signature blocks if a contract is executed for two companies even if the signatories are the same.

The Court of Appeal's somewhat carping judgment suggests that it found the case rather tiresome. But formalities are like that. Did Parliament impose them in the expectation that the courts would undermine their effect?

Equity

A world of mirrors

Fiduciaries do not hold bribes in trust.

Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd [2011] EWCA Civ 347 is probably right, but it has its unsatisfactory aspects - it reveals a key equitable principle of property law to be obscure, and it portrays the rules of stare decisis as lacking in clarity.

The case involved a ponzi scheme. The guilty parties had used sums held in trust to ramp the price of shares in a company, which they sold at a huge profit. The issue was whether the beneficiaries had a proprietary interest in the profit made on the shares, or only a personal claim against the criminals (ie in practice, whether the beneficiaries ranked ahead of or behind the criminals' secured creditors - the usual battle as to which of two innocent parties should lose).

The Court of Appeal treated the case as if it were on all fours with the receipt by an agent of a bribe. *A-G v Reid* [1994] 1 AC 324 tells us that a bribe is held in trust for

More more of the same

Arguments about sums due under the ISDA Master Agreement show no sign of abating.

Until the last quarter of 2009, cases in the English courts on the meaning of the ISDA Master Agreement were rare. Then the flow started, and it shows no sign of ebbing. The most recent case, *Pioneer Freight Futures Co Ltd v TMT Asia Ltd* [2011] EWHC 778 (Comm), concerned how Loss should be calculated, but still featured the controversial section 2(a)(iii), which ISDA has undertaken to review following the court's rejection of ISDA's interpretation of the section in *Firth Rixson*.

In *TMT Asia* one party suffered an event of default. Its counterparty was therefore relieved of its obligation to pay that party by virtue of section 2(a)(iii). There was a subsequent Automatic Early Termination, bringing everything to an end, and the question was whether the payments not previously made because of section 2(a)(iii) should be taken into account in calculating the sum due on automatic termination.

Gloster J had little difficulty in concluding that they should be included in the calculations because, she considered, the wording was clear. She also, obiter, took the Briggs J view, rather than the Flaux J view, that section 2(a)(iii) suspends a payment obligation, which can be revived if the event of default is later cured, rather than extinguishing it. She drew a distinction between the existence of indebtedness, and whether it is payable. Section 2, she thought, dealt with the payment obligation, not when or how the debt arose.

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the principal. But *Reid* is a Privy Council case, which is inconsistent with a number of earlier Court of Appeal decisions that would in normal circumstances bind the Court of Appeal. So the first question was whether the Court of Appeal should follow *Reid* or its own decisions. The Court of Appeal's answer was that it could follow the Privy Council if it wanted to, though in most cases it would not do so. The Court of Appeal shunned a clear rule of easy application, even though precedent is fundamental to the common law system. What amounts to a discretion as to which precedent to follow will generate uncertainty.

In *Sinclair Investments*, the Court of Appeal chose to ignore the Privy Council because it thought that the Privy Council was wrong. Unless an asset is or has been beneficially owned by the beneficiary or acquired by taking advantage of an opportunity that was properly that of the beneficiary, the beneficiary has no proprietary claim. The beneficiary's remedy is a personal one of account only, which does not enable it to jump ahead of the trustee's other creditors. The Court of Appeal hinted that the personal claim might include profit, but a proprietary remedy would go too far.

In *Sinclair Investments*, the shares were not acquired with the beneficiary's money or ever held in trust. The use of the beneficiary's money within the company to make it seem as if the company was worth something did not give rise to a proprietary interest in the shares.

That disposed of the case, but the Court of Appeal dealt with two further questions. First, D argued that there could be no proprietary interest because the trust monies had been so hopelessly mixed with other monies that it was impossible to identify them for tracing purposes. The Court of Appeal said that the onus of proving that mixed monies included the trustee's own monies rested on the trustee. If the monies were so mixed up that it was impossible on normal tracing principles to identify whose money was whose, the beneficiaries got the lot.

Second, any proprietary interest would be defeated by a bona fide purchaser of the legal estate without notice of the beneficiary's interest. The Court of Appeal decided that notice meant notice both of the facts and of the legal consequences. In this case, the question was whether it was reasonable for persons with the attributes of the recipients (large banks) to have appreciated that a proprietary claim probably existed or should have made enquiries. The answer was a clear no.

Insolvency

Double dipping

The Cross-Border Insolvency Regulations 2006 allow the English court to apply English insolvency law going back to the start of the foreign insolvency.

In *Larsen v Navios Shipping Inc* [2011] EWHC 878 (Ch), D sought to exploit a temporal gap between English and Danish insolvency law. This gap would have allowed D to win when D would have failed under either English or Danish insolvency law on its own. Norris J considered this far too tricksy, and decided that the purported gap was a mirage.

D owed money to C under various freight forward agreements governed by English law and which gave exclusive jurisdiction to the English courts. C, a Danish company, then entered an insolvency process in Denmark. D took an assignment of debts owed by C to a third party and claimed to set off those debts (legally, ie on judgment) against the sums it owed C. This was ineffective under Danish insolvency law. It would also have been ineffective under English insolvency law if done after insolvency proceedings had started (Insolvency Rule 4.90).

C sued in England. D alleged set off. C then sought recognition of the Danish insolvency as foreign main proceedings under the Cross-Border Insolvency Regulations 2006. Recognition was duly granted. C then asked the court to "grant... additional relief that may be available to a British insolvency officeholder under the law of Great Britain" (article 21(1)(h) of the Regulations). That relief was the application of Insolvency Rule 4.90, which would stop D relying on set-off. D argued that article 21(1)(h) of the Cross-Border Insolvency Regulations only allowed the English court to apply English insolvency law as if an English insolvency had started at the time the Danish insolvency was recognised in England. If so, rule 4.90 would not prevent set-off.

The judge observed that the Cross-Border Insolvency Regulations said nothing about timing. Nevertheless, he considered that the spirit of internationalism meant that he had a discretion to apply English law as if an insolvency had been started in England at the time the insolvency proceedings were in fact started in Denmark. This being so, Norris J had no doubt that he should exercise his discretion to apply rule 4.90, which prohibited set-off. The temporal gap was therefore slammed shut before D could get any part of its corporate anatomy through it.

Deprived of life

A settlement agreement cannot remove the right of payment on insolvency.

Having been dormant for many years, the anti-deprivation principle remains in a state of seemingly permanent arousal, at least pending the Supreme Court's exploration of it in the *Belmont* case, the hearing in which took place in early March. Though anti-deprivation is frequently raised, it seldom succeeds, but one case in which it did find success was *Folgate London Market Ltd v Chaucer Insurance plc* [2011] EWCA Civ 328.

Folgate concerned a settlement agreement. In simple terms, C agreed to indemnify D against sums due to a third party. The third party already had judgment on liability, with quantum to follow. The agreement provided for payment within 21 days of final determination of the sum owed by D, but added that if D went into any form of insolvency before the date for payment arrived, D's right to an indemnity would cease with immediate effect. D duly went into administration, and C resisted payment of the amount due to the third party.

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The anti-deprivation principle exists to prevent parties contracting out of the Insolvency Acts. It is against public policy for anyone to be deprived of assets on insolvency because those assets must be handled in accordance with the Insolvency Acts. But, as the right to terminate contracts, leases etc shows, it is not that simple. If a right is granted subject to the inherent condition of solvency, the principle is not offended.

In *Folgate,* C argued that its obligation was not a bare payment obligation but part of a continuing relationship. C had to indemnify D, but C also took over the defence of the claim by the third party. D was obliged to provide assistance required by C for that purpose. So, argued C, its obligation to indemnify was dependent on continuing support in the litigation from D, which could not be guaranteed post-insolvency. As a result, it was acceptable for the indemnity to disappear on insolvency.

The Court of Appeal rejected this argument as fanciful. It defied commercial reality to say that the indemnity obligation was contingent on co-operation in defence of the litigation. By the time the settlement agreement had been entered into, the third party had already obtained judgment on liability, and D could provide no help to C in relation to quantum. The settlement agreement provided D with a right to payment, but then took that right away if D became insolvent. That was a clear breach of the anti-deprivation principle.

The message is that to avoid tripping over the anti-deprivation principle, there must be continuing mutual obligations that will be significantly hampered by one side's insolvency (like the case of a derivatives contract, with continuing mutual payments: *Firth Rixson*). Less than that, and problems will arise (subject to *Belmont*).

Companies

Subsidiary points

A subsidiary will cease to be so if its shares are subject to a legal mortgage.

Literalism is not something normally associated with the Supreme Court. But literal it was in *Farstad Supply A/S v Enviroco Ltd* [2011] UKSC 16 in construing the Companies Act 2006 to achieve a result that even the Supreme Court accepted was "certainly odd and possibly absurd".

The issue was whether D could defeat a claim brought by C by relying on an indemnity in a contract between C and A, which was associated with D. That contract benefited D only if D and A were subsidiaries of a common parent within the meaning of what is now section 1159 of the Companies Act 2006 (then section 736 of the Companies Act 1985).

The part of section 1159 that D relied on said that a company was a parent of another if "it is a member of it and controls alone, or pursuant to an agreement with other shareholders or members, a majority of the voting rights in it." The latter part of this definition was fulfilled because A's parent did control the majority of the voting rights in D. The problem was whether or not A's parent was a "member" of D. It had been a member, but it had charged its shares in D to secure borrowings. Because D was incorporated in Scotland, this was done by a legal mortgage under which the shares in D were registered in the name of a nominee of the lending banks (in England, the bank would probably have been secured by an equitable charge, leaving the original shareholder on the register and thus avoiding the problem). A's parent continued to control the voting rights, but it did not feature on D's register of shareholders.

The Supreme Court took the strict line that, in the Companies Acts, "member" means someone who appears on a company's register of members. A's parent did not appear on D's register of members and, as a result, was not a member of A. A and D were therefore not affiliated. D tried to rely on a provision that

Arbitration

The Western front

A declaratory arbitration award can be converted into a judgment.

The Front Comor (aka *West Tankers*) has already led to the unfortunate decision that anti-suit injunctions cannot be given to restrain proceedings brought in another EU member state in breach of an arbitration agreement. The parties are now revving up for the next round, or next round but one, namely how to cope with conflicting arbitration and court decisions.

The action arose as a result of the eponymous vessel's hitting a pier in Sicily in 2000. The parties were bound by a London arbitration clause, but D decided to opt out of the arbitration and to start proceedings in the Syracuse courts. Hence the failed attempt to obtain an anti-suit injunction. With D not participating in the arbitration, C obtained a declaration that it had no liability to D for the accident. But that left the Italian court proceedings. What would D do with the judgment it would, presumably, obtain in those proceedings?

C was concerned that D would seek to enforce its judgment in England under the Brussels I Regulation. C's only defence would be public policy, a notoriously unruly horse. C therefore sought to bolster its position by converting its award into a judgment under section 66 of the Arbitration Act 1996. Under article 34 of Brussels I, a foreign judgment cannot be enforced if it is irreconcilable with a judgment given in a dispute between the same parties in the state in which recognition is sought.

But, D argued, section 66 is concerned with enforcement, and you can't enforce a declaration in a meaningful way. Field J thought otherwise. An arbitration award can be converted into a judgment if there is benefit in doing so. Improving the possibility of resisting enforcement of a conflicting foreign judgment is amply sufficient benefit for these purposes.

This is not the end. The judge did not decide whether an arbitration award converted into a court judgment counted as a judgment for the purposes of article 34 of Brussels I (there are some ECJ suggestions that it might not) or, if not, whether public policy would block enforcement. Issues for the future - assuming, of course, that the Syracuse courts behave as expected.

said that "rights" held by a person as nominee for another were to be treated as held for the other. The Supreme Court dismissed this airily, saying that the rights in question were clearly voting rights, and membership was not a right in that sense.

So the Supreme Court reached the conclusion that A and D were not subsidiaries of a common parent, even though the rest of the world would regard them as such. Interestingly, A and D do have a common parent for accounting purposes because there is a different definition of subsidiary for that purpose, which includes a provision that a person is to be treated as a member of another company if shares are held for that person. It looks as if the Parliamentary draftsman intended to make the two definitions of subsidiary the same, but forgot to delete this additional provision, which he or she thought was unnecessary because it was already covered by the existing wording. Since the Supreme Court has now decided that it was not covered, this was a serendipitous drafting error, avoiding the need for an emergency legislative correction.

Financial services

Penalty try

The FSA's Policy Statement on PPI complaints resists a challenge by the BBA.

In *R (British Bankers Association) v The Financial Services Authority and The Financial Ombudsman Service* [2011] EWHC 999 (Admin), C challenged the lawfulness of a Policy Statement issued by the FSA in respect of the assessment and redress of Payment Protection Insurance complaints. PPI policies provide insurance against the risk that a borrower will be unable to maintain loan repayments. They are widely sold but the court stated that sales of the policies "have generated tens of thousands of complaints by customers".

The FSA's Policy Statement set out a package of measures, which included amendments to its Handbook rules, guidance about how PPI sales complaints should be handled and the basis on which they should be decided. C claimed that the Policy Statement was unlawful because:

- it treated the FSA's Principles as giving rise to obligations owed by firms to customers, leading to compensation being payable for the breach, when the Principles are not actionable at law;
- the FSA had specific rules governing the manner in which PPI policies are sold, and those rules were designed to incorporate the Principles, so the FSA could not say in its Policy Statement that a customer might be entitled to redress by reference to Principles which conflicted with those specific rules; and
- the Financial Services and Markets Act 2000 ("FSMA") prescribed a specific statutory procedure for dealing with the issue by way of an application under section 404 for a consumer redress scheme, and the Policy Statement could not be used with the intent or effect of circumventing that specific statutory scheme.

C also complained that the FOS had acted unlawfully in publishing and maintaining guidance on its website, which stated that the Principles would be taken into account in the FOS's decisions as to whether compensation would be "fair and reasonable".

C's claim was dismissed. Ouseley J decided that although section 150 of FSMA says that the Principles are not actionable as breaches of statutory duty, "it leaves intact any other function or effect which a non-actionable rule might have. The clear words of the section are wholly inapt to prevent rules which are not actionable giving rise to obligations between firms and customers." Nor was there anything in the provisions dealing with the FOS's scheme that contained the sort of limitation on the operation of non-actionable rules for which C argued. It would be a breach of statutory duty for the FOS to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable.

Ouseley J also concluded that there is no reason in principle why the specific obligations in the rules should not be subject to the wider role of the Principles. The specific obligations are not to be seen as exhausting the requirement to comply with high level Principles.

Finally, judge said that while in the circumstances the FSA could have asked for a scheme order under section 404 of FSMA, that did not mean that the FSA could not act in any other way to deal with the misselling of PPI: "It would be absurd if the regulatory powers diminished in range and scope the more serious the circumstances in which they were needed. Neither the language of section 404 itself nor its role as part of the overall regulatory framework could warrant the implication in it of a restriction on all other powers merely because those circumstances were satisfied."

The banks have announced that they will not be appealing against Ouseley J's decision.

Courts

Translated agreements

The Court of Appeal has emphasised the importance of agreeing translations of key documents at an early stage.

Much litigation today has a foreign element, which may include documents in languages other than English. In *Gemstar-TV Guide International Inc v Virgin Media Limited* [2011] EWCA Civ 302, Jacob LJ noted that "a lot of expense and time" had been wasted on several translations at trial, and reiterated that "[i]n principle, whenever a party relies on a document in a foreign language, the translation should be sorted out at an early stage. Ideally the party relying on the translation should send it to the other(s) with an express request for agreement within a reasonable time. If the document is quite long the key passages relied on should be identified so that the other side can concentrate on these. If the translation is agreed, well and good. But if not, the Court at the case management stage should

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normally insist upon agreement or early resolution of the translation dispute, if necessary by a hearing for that purpose."

Or, put another way, courts don't like disputes about translations or one side trying to slip something past the other. If you want to rely on a foreign language document, you have to translate it and give it to the other side at an early stage.

Generic advice

The ex turpi causa rule remains obscure.

In *Les Laboratoires Servier v Apotex Inc* [2011] EWHC 730 (Pat), the judge undertook a lengthy review of the authorities on the ex turpi causa principle (ie you can't bring an action based on your own wrong) before concluding that "the application of the ex turpi causa rule depends upon the circumstances of the case". This might be thought to be a statement of the obvious - is there any rule the application of which does not depend upon the circumstances? The issue is what circumstances are relevant.

To be fair to Arnold J, he is only a first instance judge who was faced with issues that those higher up the judicial tree have conspicuously failed to resolve. He also went on to suggest that the knowledge of the claimant was relevant, as was whether the illegality involved intentional or negligent conduct, and whether the conduct was induced by the defendant.

Les Laboratoires Servier concerned an application for compensation pursuant to the undertaking in damages given by C in order to obtain an interim injunction. C lost at trial because the patent breach of which the injunction prevented was held to be invalid. D therefore claimed the profits it would have made had it been able to sell the relevant products between interim injunction and judgment. D's problem was that while the European patent upon which the English litigation was based was invalid, a Canadian patent for the same product remained enforceable. If D would have manufactured the product in Europe, Canada wouldn't have mattered, but D was manufacturing in Canada in defiance of Canadian law. Does the ex turpi causa rule bar D's claim to damages?

Yes. D argued that only a criminal offence or something involving dishonesty or other moral turpitude was sufficient to trigger the principle. The judge rejected this, saying that D's state of knowledge at the time of committing the act in question was relevant. If, as was the case, D knew the material facts, particularly if D acted intentionally, the principle would apply. In this case, D knew of C's Canadian patent and that its manufacture would be illegal if the patent was valid, and it acted deliberately (even though it believed it had a respectable chance of defeating the Canadian patent).

Les Laboratoires Servier doesn't advance the law greatly. The aim of the ex turpi causa principle is consistency in the law. Courts can't condemn behaviour in one breath while awarding compensation for it in the next. But joint tortfeasors can claim contributions between each other, and motor insurance is compulsory. So where is the line?

Open justice

The parties' private interests may outweigh the public interest in the handing down of a judgment after settlement.

Most civil litigation settles, some at the door of the court, and some after trial but before judgment has been handed down. Often, there will be a public interest in a judgment being handed down notwithstanding the settlement. The Court of Appeal confirmed in *Prudential Assurance Co Limited v McBains Cooper* [2000] 1 WLR 2000 that judges have a discretion to hand down a judgment circulated to the parties in draft before they announced that they have settled the matter, even though the parties had agreed with one another that the judgment should not be published.

A similar scenario occurred in *Renaissance Capital Limited v ENRC Africa Holdings Limited* (unreported, 7 April 2011), but in that case the judge held that he would not publish the judgment because the parties' private interests prevailed over the public interest. The parties wished to continue in a commercial relationship and, if the judgment was published and details of the dispute given, that could damage their relationship. Further, the case contained nothing that would develop the law or assist in the settlement of other cases. Nor were there findings of fraud or other factual issues which required the judgment to be published.

It is, however, risky to assume that you will be able to keep a draft judgment from publication, as there is a strong public interest in the parties, witnesses and other third parties being able to understand the judge's reasoning, and an interest in case law being developed and in judges' work being scrutinized

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