CLIFFORD CHANCE

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Contentious Commentary

Contract

If it ain't brokered

Brokers owe limited duties on closing out a client's positions.

The regulatory authorities are in the process of imposing a requirement that a range of financial contracts be cleared through central counterparties in order to mitigate risk and contagion in the system. Central counterparties (like those through which exchange-traded contracts are now cleared) will require margin from those they contract with (brokers), who will in turn require margin from their end-user customers. A failure to pay margin will lead to positions being closed out and, with it, much irritation, aggravation and possibly litigation. Assuming that the right to close out exists, clarifying what duties are owed when effecting the close-out is therefore potentially important because there could be a lot more of it about.

And this important service was carried out in *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm) (Clifford Chance LLP acted for SEB). Absent contractual terms imposing different duties, Gloster J was very clear that, in closing out a client's positions, a broker is entitled to put its own interests first and, as such, only owes the client an implied duty to act honestly and in good faith, and without arbitrariness, capriciousness, perversity and irrationality. The court's role is to review the broker's conduct in order to ensure that there has been no abuse of discretion, not to undertake a detailed investigation of what the broker did and to impose the court's own view as to what might in retrospect have been reasonable.

In reaching this conclusion, Gloster J followed with the zeal of a convert the Court of Appeal's decision in *Socimer International Bank Ltd v Standard Bank London Ltd (No 2)* [2008] 1 Lloyd's Rep 558, in which the first instance judge, one Gloster J, was firmly overruled down for suggesting that more stringent tortious, equitable or implied contractual duties of care might be owed. The only obstacles in her newly enlightened way were three first instance decisions involving Fluxo-Cane in which it was, or might have been, assumed that a duty of care in negligence was owed. In none of the cases was *Socimer* cited or was the point really argued, so Gloster J had no difficulty in concluding that they did not offer any basis upon which *Socimer* could or should be distinguished.

The curse of interesting times

In which the Court of Appeal takes a literal approach to a professionally drafted contract.

Interpreting contracts does not get any easier. On a traditional view of the wording of the shareholders' agreement in *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWCA Civ 179, the answer was clear; but, taking a bigger picture, that answer perhaps produced an odd result. The difficult issue is when an odd, possibly uncommercial, result trumps the wording.

McKillen concerned pre-emption rights in a shareholders' agreement and, in particular, the Barclay brothers' attempts to gain control of a company that owns three posh London hotels without triggering those rights. A trial of an unfair prejudice petition and a conspiracy claim will follow but, in *McKillen*, the Court of Appeal addressed a preliminary issue as to the meaning of the shareholders' agreement.

The agreement imposed pre-emption procedures if any shareholder wished "to transfer one or more Shares (or

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any interest therein)". The shares in dispute were owned by a company. That corporate shareholder did not sell its shares but, instead, the ultimate controllers of that corporate shareholder (the Greens) sold the corporate shareholder to the Barclays. The corporate shareholder remained legally and beneficially entitled to the shares; a company's shareholders have no interest in their company's assets; and so no shares or interest (in the sense of a legally recognised beneficial or other proprietary interest) in the shares had been sold. Pre-emption rights therefore avoided. All very simple. And so the Court of Appeal held.

But this construction might be thought to drive a moderately sized vehicle through the pre-emption rights. That is especially so as the other parties to the shareholders' agreement were individuals and, as such, they could not use this neat means to sell their shares. This construction of the shareholders' agreement therefore left the parties' rights seriously imbalanced, C argued, and could not therefore be right.

The Court of Appeal accepted that there was an imbalance, but said that it could not conclude from this that the imbalance was a mistake or not what the parties intended. Perhaps the Greens would only enter the agreement on these terms. How should any additional restriction on transfer be phrased? The court's role was not to improve an agreement, and the reasonable man with knowledge of the relevant background would not necessarily conclude that the agreement did not mean just what it said.

This conclusion was reinforced, the Court of Appeal considered, by the terms permitting the corporate shareholder to transfer its shares to an affiliate without triggering the pre-emption rights, but then re-applying pre-emption rights if the affiliate was transferred out of the Greens' control. The agreement did not, however, deal with the possibility of the original shareholder company being transferred out of the Greens' control. Does that indicate that the drafters had the point in mind, but remained silent, or that they missed the point (the Court of Appeal thought the former)? Does the construction of "interest" as confined to property rights lead to an uncommercial result, which should be judicially shunned, or does it indicate the parties' true intention? Were the Greens better negotiators? Did they have better lawyers?

All very tricky. Most of the arguments in one direction have mirror arguments pointing in the other direction. You just have to guess which way the judiciary will lean.

A unnoticeable notice

A notice given under a contract must make clear what it is.

A contract allowed termination 20 days after "written notice of default". One of the parties wrote a discursive letter to the other in which it pointed out that certain sums were overdue, but did not refer to the possibility of termination or to the clause in question. Without warning, it then purported to terminate rather more than 20 days later. Was it entitled to do so? No, according to *Jet2.com v Tarom* [2012] EWHC 622 (Comm). The judge considered that the parties' intention cannot have been to allow termination on notice without the recipient having any reason to appreciate the potential significance of the notice. The nature and purpose of the communication had to be made clear if it was to take effect as a contractual notice.

Cable stitched up

Contractual warranties prevent a misrepresentation claim

In *Bikam OOD v Adria Cable Sarl* [2012] EWHC 621 (Comm), a fairly typical share sale agreement included warranties by the seller, and went on that the buyer's sole remedy for breach of warranty was as set out in the agreement. The agreement capped liability for breach of warranty, and added that the buyer waived its rights for all warranties and representations not set out in the agreement. The acquisition proved disastrous, and the buyer tried to claim against the seller without reference to the cap on liability by asserting that the seller had made representations outwith the final agreement in prior drafts of the agreement and at a meeting. The buyer argued that the agreement was not sufficiently clear to exclude liability under section 2(1) of the Misrepresentation Act 1967, and so the cap could be ignored.

Simon J did not agree. He rejected the argument that he should construe any limitations of liability narrowly. Commercial parties are entitled to allocate risk as they see fit, and their attempts to do so should be construed in the normal way. He thought it plain that the agreement intended to codify the position with regard to all claims for breach of the warranties. The wording might have been better (eg it might have included no reliance language), but he considered that it was sufficient. It mattered not how the buyer framed its claims in law - breach of contract, misrep, negligence - the contract applied to them all. The seller's liability was therefore capped as provided by the agreement.

In similar vein, in *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), Cooke J paid lip sevice to his obligation to follow the curious Court of Appeal decision in *Bominflot v Petroplus* (*The Mercini Lady)* [2011] EWCA Civ 1145, but found grounds to distinguish and to give effect to the parties' intention.

In *Bominflot*, the Court of Appeal reached the conclusion that a clause that purported to exclude all warranties and other obligations that were not set out in the contract was ineffective to do so because it did not mention conditions and therefore did not exclude conditions. The Court of Appeal reached this conclusion despite acknowledging that it was obvious that the parties intended to exclude anything other than the express provisions of the contract, and did not have in mind the somewhat archaic distinction between contractual conditions and warranties.

Air Transworld Ltd was based on very similar wording, but Coooke J concluded that the wording before him had a sufficient scent of difference from that in *Bominflot*, to allow him to conclude that there was no ambiguity in the parties' intention and that he should give effect to that intention. Undoubtedly the right decision, echoing the dominant philosophy in the Commercial Court that commercial parties should be left to decide what is in their interests without retrospective interference from the judiciary.

Cooke J went on also to conclude that the contract, for the sale of a private jet, was an international supply contract, dismissing technical objections based on the poorly drafted definition in the Unfair Contract Terms Act 1977. Because the contract was an international supply contract, UCTA did not apply. He was therefore able to apply the terms agreed by big boys, which he thought were reasonable anyway.

Lonsdale belted

Retrospective justification for terminating a contract does not bring loss of bargain damages.

The most recent round of the protracted *Leofelis SA v Lonsdale Sports Ltd litigation,* [2012] EWHC 485 (Ch), raises two interesting points. The first might be right; the second, concerning the damages for repudiatory breach, is more doubtful and is potentially of more far-reaching concern.

There were two actions between the same parties. In the first, the 2005 action, C claimed damages for breach of the exclusivity granted by a trade mark licensing contract. C sought damages covering the duration of the contract, potentially to 2014. In the second, the 2009 action, C claimed damages for D's subsequent repudiatory breach of the same contract, which C had accepted in 2007, bringing the contract to an end. The problem in the second action was that it had already been decided that the breach that C relied on to terminate the agreement was not repudiatory. C was therefore forced to rely on breaches of which it was unaware at the time in order to justify retrospectively its termination of the contract. In the light of *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) LR 39 Ch D 339, this is something C is entitled to do.

The first issue was the duration of damages that C could claim in the 2005 action. Damages are normally assessed as at the date of breach, but *The Golden Victory* [2007] 2 AC 353 indicates that, in some circumstances, subsequent events must be taken into account. D argued that the termination of the contract in 2007 was one such subsequent event. C could not claim damages running through to 2014 when everyone knew that the contract had in fact come to an end in 2007, whether through C's acceptance of D's repudiatory breach or, if C was wrong on that, through D's acceptance of C's repudiatory breach.

Roth J accepted that C's claim to damages was restricted to the period up to 2007. He could not ignore the actual facts, even if the cause of the contract's ending was D's breach, which therefore reduced the damages that D had to pay. That did not involve D gaining from its own wrongful act because C could still in principle claim damages in the 2009 action for the period from 2007 onwards, though for the 2007 breaches rather than the earlier ones.

What did allow D to benefit from its own wrong was the fact that C terminated the contract in 2007 for the wrong reason. C could rely on D's breaches of contract that were unknown to C at the time in order to justify its termination (and therefore avoid being liable to D for wrongful termination), but could C also recover loss of bargain damages running through to 2014? Roth J could find no authority directly addressing the point. On principle, he decided that C could not recover loss of bargain damages. The reason was causation. D's breach, unknown to C at the time of termination, did not cause C to terminate the contract. The unknown breaches cannot therefore have caused the loss of bargain damages for the balance of the contractual term. If the breach relied on did not cause the loss, the loss cannot be recovered. The fact that C's termination letter was expressed to be without prejudice to other breaches did not, in the judge's opinion, help C.

So D was able to benefit from its own breach by ensuring that C was unaware of the breach and so unable to rely on it to terminate the contract. Not intuitively correct. It does, however, show the need to draft termination letters accepting a repudiatory breach as widely as possible. Even if there is one obvious breach, the kitchen sink needs also to be cast in the defendant's direction.

Trust in me

A beneficiary of a discretionary trust can be a decision-maker for the trust.

Rectification of a contract generally requires a mistake. With individual contracting parties, the individuals must make the mistake. With corporations, it is necessary to look for the decision-maker to see if he or she was mistaken, applying rules of attribution in accordance with *Meridian Global Funds v Securities Commission* [1995] 2 AC 500. But where the corporation is the professional trustee of a discretionary trust which does what the principal discretionary beneficiary says, it is more difficult. Can that beneficiary be the decision-maker for the trustee for the purposes of rectification even though he has no formal position within the trustee and his "decisions" must be confirmed by the trustee?

Yes, according to *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2012] EWCA Civ 55 (Clifford Chance LLP acted for the claimant). The trust was selling shares in a company that was, effectively, controlled by the principal beneficiary (though without any formal position in the company, but with the use of two corporate jets, a helicopter and a catamaran). The beneficiary negotiated the sale of the company, but it was the trustee who signed the agreement. The beneficiary was mistaken as to the terms, the trustee having no view other than that it wished to enter the agreement on the terms negotiated and agreed by the principal beneficiary. The judge held that the trustee was mistaken because the agreement did not give effect to these terms. Since the buyer was also mistaken, rectification was ordered.

Illegitimate pressure

A settlement agreement is avoided because of duress.

Duress has not generally been of interest to commercial lawyers. Commercial life is a rough and tumble process, in which one party will invariably have the upper hand for one reason or another. Courts have been slow to allow the party in the weaker bargaining position to use its weakness to escape its contractual obligations. But in *Progress Bulk Carriers Ltd v Tube City IMS LLC*

Derivatives

Flaux O, Briggs 4

Section 2(a)(iii) of the ISDA Master Agreements suspends, rather than extinguishes, the payment obligation.

The rash of recent decisions about the ISDA Master Agreement turned into a battle between Flaux J, on the one hand , and Briggs J (supported by Gloster J) on the other. The Court of Appeal has now intervened and, in *Lomas v Firth Rixson* [2012] EWCA Civ 419 (Clifford Chance LLP acted for BEIG Midco Ltd, one of the successful parties), has sided firmly with Briggs J. The bottom line is that the Agreement does what it says on the tin, with no need for implied terms.

In summary, the Court of Appeal concluded that (see our briefing entitled *The ISDA Master Agreement: from here to eternity* for more details):

- Section 2(a)(iii), which makes it a condition precedent to payment that there has been no Event of Default, affects the payment obligation, not the existence of the underlying debt.
- That payment obligation is only suspended, not extinguished.
- The payment obligation is not even extinguished on maturity of the transactions. The EoD can, therefore, be cured at any time (the Court of Appeal reached a conclusion contrary to both Briggs and Flaux JJ on this point, but one favoured by ISDA).
- There can be "early" termination after maturity.
- Section 2(a)(iii) offends neither the anti-discrimination nor the pari passu principles.
- Calculations on close out must include debts owed, but not payable because of section 2(a)(iii), to a defaulting party, whether the calculation is done before or after maturity.

The decision that the section 2(a)(iii) condition precedent can be fulfilled at any time between now and the end of time may mean that Lehman entities will search for a way to come out of insolvency and purge themselves of other events of default in order to trigger the suspended payment obligations. That will, however, be another story.

[2012] EWHC 273 (Comm), Cooke J allowed one party to do just that.

The case concerned the charter of a vessel to carry scrap from the US to China. Shortly after the charter was agreed, D (the owner) suggested a change of vessel. C (the charterer) needed the approval of the buyer of the scrap to change vessel, and did not agree. D nevertheless sent the vessel elsewhere, placing itself in repudiatory breach of the charter. C did not accept that breach, but D promised to find an alternative vessel and to compensate C for all damages arising from the failure to provide the correct vessel. In reliance on this, C did not itself look for a new vessel.

D suggested a new vessel, with a later shipping time, but C's buyer declined to agree to this unless the price of the scrap was reduced by $8 per tonne. C put this to D, and they haggled a bit before D offered a take it or leave it reduction in freight charges of $2 per tonne, with a waiver of all other claims. C accepted, feeling it had no choice, but then sought to escape the $6 per tonne loss built into the settlement agreement on grounds of duress. Duress requires illegitimate pressure (plus causation). The issue was what constitutes illegitimate pressure.

Arbitrators, by majority, concluded that D had applied illegitimate pressure and, as a result, the agreement was not binding. Cooke J agreed. He concluded that illegitimate pressure did not require an unlawful act but, absent an unlawful act, the courts should be slow to find that pressure was illegitimate. In this case, however, D had committed an earlier unlawful act (the repudiatory breach of the charter), had then strung C along with promises of a new vessel and compensation, before finally springing on C a take it or leave it offer. This was, Cooke J thought, illegitimate.

Progress Bulk Carriers looks as if it lowers the threshold for illegitimate pressure. Contract breaking in the shipping industry is hardly a rare occurrence, and some might suggest that C simply failed to look after its own interests, handing to D the ability to exert a bit of commercial pressure. C could have accepted the repudiatory breach, found its own replacement vessel, and then sued for any loss it suffered. Was C's exploitation of the bargaining position it had been given really illegitimate or enlightened self-interest?

Arbitration

Mobile arbitrations

A court has power to restrain an arbitration but will seldom do so.

C has a substantial, but unpaid, arbitration award against D. D is fighting battles on as many fronts as it can open in order to avoid payment, including starting two new arbitrations which, according to C, seek to undo the first arbitration. Can the court grant an injunction to stop the new arbitrations or does that have to be left to the arbitrators in the new arbitrations? In *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), Andrew Smith J decided that he could grant an injunction, but that he would not do so.

C's argument was that the new arbitrations constituted a collateral attack on the first award. The judge accepted that there is an obligation to honour an arbitration award, and that it is breach of an arbitration agreement to make an unlawful attempt to invalidate an award (eg by litigation in courts other than those for the seat of the arbitration) or mount a collateral attach on an award. Prima facie, therefore, the court had power under section 37 of the Senior Courts Act 1981 to injunct D.

D argued, however, that this power had been removed by section 9 of the Arbitration Act 1996, which requires the court to stay proceedings in respect of any matter that is to be referred to arbitration. Andrew Smith J did not think that this was sufficient to revoke his power to grant an injunction under section 37. The new arbitral tribunal was able to reject D's claims because they had merged with the initial award or because of res judicata, issue estoppel or even abuse of process, but that did not remove the court's supervisory jurisdiction to protect the original award and support its enforcement. An overlap of the court's powers with those of the tribunal did not force the court to surrender to the arbitrators.

But being able to injunct does not mean that the power to do so should be exercised. Andrew Smith J decided that he would not grant an injunction largely because there was one issue that had not been not covered in the first arbitration, though it could have been included. He thought he should leave this new issue to the arbitrators and, since the arbitrators would be engaged anyway, he might as well leave everything to them. Not necessarily the strongest way to protect an arbitration award.

Location, location, location

The "venue" of an arbitration will usually be its seat.

An arbitration clause in an agreement, governed by Indian law, between German and Indian parties for a joint venture in India provided that the "venue of the arbitration proceedings shall be London... The provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply." Is the seat of the arbitration England, giving the English courts supervisory jurisdiction, or is it India?

In *Enercon GmbH v Enercon (India) Ltd* [2012] EWHC 689 (Comm), Eder J decided (obiter) that the seat was England. Where the seat of an arbitration is not expressly set out, the starting point is that the venue is the seat, unless there are significant contra indicia. Eder J thought this finely balanced but, in the end, concluded that there were insufficient indications to the contrary. For example, the reference was to arbitration proceedings, not hearings, and London was neutral and inconvenient for everyone, which must indicate that it should have overall supervisory power. The reference to the Indian legislation was, he thought, a reference to the enforcement provisions of the Act or to those elements that were not inconsistent with its English counterpart; either way, he managed to convince himself that an English seat did not render the reference meaningless.

Jurisdiction

Leaning backwards

A judge refuses a reference to the CJEU despite contradictory English and Italian judgments.

Italian local authorities were quite big in the swaps world at one time but, when things went wrong, they followed their English brethren in trying to get out of their transactions. In Italy, this does not hinge on the single question of intra or ultra vires. Italian public bodies have a more flexible remedy of self-redress that allows them to cancel with retrospective effect prior decisions to enter into transactions. Pisa exercised that power regarding swap transactions and, what is more, persuaded an Italian administrative court (subject to appeal to Supreme Court, not expected to be determined this year) both that it had validly done so and that the Italian court had power to determine the effect of the annulment on the contract because that was an administrative matter, not a civil and commercial matter within the Brussels I Regulation and therefore for English courts.

The problem in *Depfa Bank plc v Provincia di Pisa* [2012] EWHC 687 (Comm) was that the English court had already decided that it had jurisdiction over the dispute about the enforceability of the swap by virtue of the parties' submission in the contract. Indeed, both parties had accepted in the English court that the matter was civil and commercial within Brussels I. The claimant banks in England were therefore faced with a risk that they might get judgment in England but the judgment would be unenforceable in Italy because of a prior Italian judgment. The banks therefore asked the English court to refer to the CJEU the question of whether the action on the validity of the English law swap was a civil and commercial matter within Brussels I or an administrative matter for the Italian courts outside Brussels I. In the light of *Berliner Verkehrsbetriebe v JP Morgan Chase Bank NA* (12 May 2011), the banks probably also thought that they would get a positive response from the CJEU long before anything wound its way from Italy over the Alps to Luxembourg. Getting a reference from the English courts would, therefore, speed the progress of the cases.

Teare J declined to play his allotted role in this attempt to side-step the Italian courts. Nothing in the English proceedings turned upon whether the proceedings were civil or administrative; the point when that mattered had passed, with both sides accepting that the case was civil. The issue mattered for the jurisdiction of the Italian courts, and any reference should therefore come from Italy, not from England.

Financial services

Broad and deep

The Court of Appeal's decision on Lehman client money is upheld by the Supreme Court.

In *Re Lehman Brothers International (Europe)* [2012] UKSC 6, the Supreme Court has upheld the Court of Appeal's decision on the application of the FSA's (then) client money rules in Lehman's insolvency. The FSA's rules (CASS7) created a statutory trust over client monies, and required their segregation from Lehman's own monies. The rules allowed that segregation to be carried out one day in arrears, ie client monies could be received into an office account one day, a reconciliation done the following morning, and an appropriate amount then transferred into a client account. Once a Primary Pooling Event (here, insolvency) occurred, all client monies were pooled and shared rateably by the clients entitled to those monies.

This should have provided clients with a high level of protection, and a quick and easy way to get their money back. However, Lehman's conduct has resulted in a failure of these objectives on a "truly spectacular scale". For example, Lehman didn't segregate monies it should have segregated (particularly from affiliates, but also in relation to derivatives), and it placed client monies with its German banking affiliate, which also went bust. There is thus a huge shortfall in client monies, with clients scrambling around to improve their recoveries. The Supreme Court, following the Court of Appeal, has maximised the claims on client funds, but also potentially maximised the amount of those funds.

In short, the Supreme Court held:

- unanimously, that client monies were held on trust by Lehman from the moment of receipt, regardless of whether the monies were actually segregated;

- by 3-2, that the client monies to be shared between clients are any monies held in trust by Lehman, regardless of whether segregated;
- by 3-2, that the clients entitled to share in these monies are any clients whose money should have been segregated, regardless of whether in fact segregated.

The result is that the administrators cannot simply hand any monies left in client accounts back to those clients whose monies were segregated into those accounts. Instead, the administrators must reconstruct Lehman's records to see whose money should have been segregated and then determine whether any money that should have been, but was not, segregated can be traced and, if so, they must share the traceable proceeds of that money, plus what was actually segregated, amongst all clients who had client money at Lehman. This doubtless has endless scope for dispute about the nature of tracing and so on. It places the emphasis on the administrators to do the work rather than on individual clients to assert the ability to trace into particular assets, but it will not be quick.

See our two client briefings in March 2012 for further information about the Supreme Court's decision and its implications.

Fiduciary duties

Hinkley Confidential

Employees cannot be barred from a job because they have confidential information.

"Once the former client has established that the defendant firm is in possession of information which was imparted in confidence and that the firm is proposing to act for another party with an adverse interest... the evidential burden shifts to the defendant firm to show that there is no risk that the information will come into the possession of those now acting for the other party." (*Bolkiah v KPMG* [1999] 2 AC 222, 237) But does this precautionary approach stretch to non-solicitors and their like? Can it be used to stop an employee with commercial information who is moving to a potentially litigious customer from being involved in any way in the dispute?

In *Caterpillar Logistics Services (UK) Ltd v Huesca de Crean* [2012] EWCA Civ 156, the Court of Appeal decided that an employee cannot be injuncted from being involved at her new employer in the dispute (though she can be injuncted from using the confidential information). This was a policy decision. The Court of Appeal considered it unfair on employees to be restricted from future employment because of the possession of confidential information. If employers wish to restrict employees in this way, employers must do so by an express contractual term. That contractual term will be in restraint of trade, and therefore subject to judicial control as to its reasonableness.

The interesting aspect of the case is the legal basis for distinguishing between solicitors and employees. Both may hold confidential or even privileged information (as in *Huesca de Crean*). A solicitor can be injuncted from risking adverse use of the information; an employee cannot. On which side of the line do others, such as bankers, fall?

The Court of Appeal hinted at the importance of privilege and the legal process, and that all employees may not be fiduciaries in the same way as solicitors, but the reasoning is rather opaque. What leaps off the page is Stanley Burnton LJ's outrage at a big international employer trying to oppress an innocent employee, cowing her into submission (though Maurice Kay LJ accepted that she had behaved suspiciously). Commercially bankers are closer to solicitors in this context, but legally the position may not be so clear. If a former client tries to stop an investment bank from popping up on the other side, *Huesca de Crean* may offer some interesting arguments - though these days outrage is more usually directed at bankers than against them.

Courts

Big E spells big trouble

E-disclosure needs proper project management.

Disclosure of electronic documents (emails etc) can be one of the most costly, complex and time-consuming tasks in commercial litigation. Even where all sides approach the exercise systematically and co-operatively (in accordance with Practice Direction 31B), there is ample scope for trouble. Where they do not, that scope is greatly magnified.

Construction disputes are notoriously document-heavy, so it is no great surprise to see two notable e-disclosure judgments in quick succession emanating from the Technology and Construction Court. In the first (*West African Pipeline Company Limited v Willbros Global Holdings Inc* [2012] EWHC 396 (TCC)), the parties had spent most of 2011 arguing about disclosure. Whilst Ramsay J clearly considered C's efforts to be the least satisfactory, his interim disclosure orders (with costs "in the case") did not suggest anything exceptionally deserving of censure.

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However, by March 2012, when the disclosure failings of C and its solicitors came back to court, D not only wanted the court to revisit previous orders and to be awarded its costs "in any event" but it also wanted compensation for C's shambolic disclosure, via a wasted costs order to the tune of £1.8m.

Applying his discretion under CPR 3.1(7) and/or the parties' "liberty to apply" (with guidance from *Roult v North West Strategic Health Authority* [2010] 1 WLR 487), Ramsay J amended one of two earlier orders to give D its costs. The litany of C's failures (to gather its documents; to assess relevance correctly; to de-duplicate; to redact consistently and appropriately; and to meet the disclosure timetable) also entitled D to wasted costs. Final quantum was reserved, but C was ordered to pay £135,000 on account.

The same solicitors might have been forgiven for not relishing the immediate prospect of another hotly contested disclosure application in the TCC. But three weeks later, on the very eve of such an application, they came on the record for C in *Phaestos Limited v Peter Ho* [2012] EWHC 668 (TCC)). By that stage, following protracted but "desultory" inter-party correspondence and a number of inconclusive court hearings, C was already drinking in the last chance saloon.

C's silk also having gone on "no doubt a well-deserved holiday", junior counsel attempted heroically to defend a hopeless position. In response to his submissions about the scale of the task, data protection and control issues, and the desirability of agreeing keywords, Akenhead J said that enough was enough. The last straw was that, having indicated that it would press ahead with a timetable for remaining disclosure, C offered no argument on the scope of the order. Absolving C's past and present legal advisors from culpability, the judge awarded D his costs of the application on the indemnity basis.

The scenarios in both cases were arguably not completely one-sided: *West African Pipeline* (certainly) and *Phaestos* (probably) were instances of asymmetrical disclosure, with the claimants facing a disproportionate burden. However, their problems were compounded by a number of issues. In the first matter, for example, the technological failure to de-duplicate was itself a significant cause of inconsistent redaction; and inadequate quality control of an outsourced first level review explains why a defendant's request for a single missing document resulted in an extensive re-review and disclosure of a further 8,000 documents. Taken together, these judgments are a reminder of the need for early and thorough consideration of disclosure issues, and above all for proper project management.

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