CLIFFORD CHANCE

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Contentious Commentary

Contract

Irish at sea

The court strikes down an exit consent scheme to restructure bonds.

Exit consent is modern technology to assist in the restructuring of bonds and notes. However, as with all technologies, some will want to push it up to and beyond its limits. And when that happens, technology commonly crashes.

So it was in *Assénagon Asset Management SA v Irish Bank Resolution Corporation Ltd* [2012] EWHC 2090 (Ch), which concerned the Irish Government's attempt to use exit consent to impose on the holders of subordinated notes issued by Anglo Irish Bank losses the Government considered to be commensurate with the notes' status rather than the noteholders being bailed out by the inundated Irish taxpayer. Briggs J decided that the Irish had pushed the technique too far and that it was ineffective on the documents in question.

This contrasts with the earlier case of *Azevedo v Imcopa Importacao, Exportaacao e Industria de Oleos Ltda* [2012] EWHC 1849 (Comm), in which a milder consent solicitation scheme had passed muster.

Exit consent works by a troubled issuer offering to exchange existing bonds for new bonds of, invariably, an inferior kind. Those who accept the exchange offer also commit to vote at a subsequent bondholders' meeting in favour of a resolution that strips the existing bonds of value. Accordingly, holders are "encouraged" to accept the exchange offer because, if they don't accept the offer but the requisite majority (usually 75%) does, they will suffer grievously. Holders don't have time to find out how others are going to vote.

In *Assénagon*, the exchange offer involved swapping existing notes for new notes with a face value of 20% of the existing notes but with a better interest rate, no longer subordinated and guaranteed by the Irish Government. The incentive to accept the exchange offer was a resolution that would change the terms of the existing notes to allow the issuer to redeem those notes at 0.001% of face value, an effective expropriation that was aggressive even by the standards of past exit consent schemes. 92% of the noteholders accepted the exchange offer and, accordingly, the resolution was passed. The dissident 8% received the princely sum of €170 for their €17 million in face value of notes.

Needless to say the dissidents were not amused, and one of their number, which had bought notes at about 42% of face value, contended that the noteholders' resolution was not valid on three grounds.

First, the dissident argued that the terms of the notes did not allow the majority to vote to change the terms in this way. The terms permitted the majority to sanction an "abrogation" of the notes. Briggs J accepted that he should give clauses of this sort a restrictive interpretation, but since the provisions about quorums expressly referred to a resolution that reduced or cancelled the principal payable on the notes, the judge felt compelled to conclude that what was proposed was an abrogation within the meaning of the clause.

Secondly, the dissident noteholder argued that those who accepted the exchange offer were not entitled to vote on the subsequent resolution because the terms of the notes disenfranchised notes held beneficially by the issuer or for its account. Briggs J accepted this argument. He considered that it applied on the date of the vote, not on the earlier acceptance of the exchange offer. On that date, noteholders who had accepted the exchange offer had also offered to sell their notes to the issuer, which offer the issuer had accepted. That contract of sale was, thought Briggs J, specifically enforceable because damages would not be an adequate remedy for breach. As a result, the notes were held beneficially for the issuer and could not be voted on the

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resolution. The resolution therefore failed.

Would it have been different if, as is common, the issuer had not accepted the noteholders' offer to sell before the resolution was passed? Possibly not, because Briggs J indicated that, even if the issuer did not have a proprietary interest in the notes tendered for the exchange, an economic interest, in the sense of the noteholders being obliged to transfer the notes to the issuer at the issuer's option, would have disenfranchised those notes.

This second point was enough to decide the case, but Briggs J went on to address the third argument in view of its general importance. Briggs J concluded that even if the resolution had been passed by noteholders entitled to vote, it was invalid because it involved an abuse of power by the majority.

The judge decided that a term was to be implied by law into the notes that the power given to the majority to amend the terms of the notes should be exercised bona fide for the purpose of benefitting the noteholders as a whole and not merely individual members (cf *Redwood Masterfund Ltd v TD Bank Europe Ltd* [2006] 1 BCLC 149, in which Rimer J thought that this term could only be implied in fact). What this entails is ambiguous despite the frequency with which the phrase is trotted out. It doesn't seem to mean that noteholders must ignore their own interests, but rather that there must be no discrimination between the minority and majority (*Greenhalgh v Aderne Cinemas* [1950] 2 All ER 1120).

Briggs J havered on the point, but ultimately decided that by the time the vote was taken, there was a majority who had accepted the exchange offer and a minority whose notes would be expropriated. The purpose of the resolution was not to achieve the restructuring – the exchange offer did that – but rather to prey on the apprehension of each noteholder that, because it could not know how others would vote, its notes would be expropriated. The majority could not lend their votes to the issuer to enable the issuer to coerce the minority in this way. This oppression of the minority was exactly what the principles restraining the abuse of power were aimed at (though it is unclear whether Briggs J considered that it was the coercive purpose of the resolution that was bad or its effect in dividing noteholders into two categories).

Briggs J found the case hard, especially as the Delaware courts have ruled in favour of exit consent schemes. Briggs J accepted that the only way this minority protection could be invoked was through an implied term rather than as a matter of overriding law. Because the term is a matter of implication, the parties can expressly unimply it, but doing so might make notes less attractive to buyers. The implied term guarding against abuse therefore glowers by default over issuers, daring them to remove it.

The Court of Appeal probably beckons but, as matters stand, the terms of the bonds have not been amended and the minority's bonds have not been expropriated. The bonds are presumably now in default, and the Irish Government will have to decide what to do about them. That might be simply to allow the minority to do their worst (though there could be cross-default issues), it might be to pay them off (though that might leave the majority seriously aggrieved) or it might be to do something else altogether.

Bean and gone

A consent solicitation scheme to amend the terms of a bond passes muster.

In *Assénagon* (above), a scheme to induce noteholders to amend of the terms of their notes failed. However, in the earlier case of *Azevedo v Imcopa Importacao, Exportaacao e Industria de Oleos Ltda* [2012] EWHC 1849 (Comm), a consent solicitation scheme by a soya bean producer passed muster. What was the difference?

The restructuring scheme in *Azevedo* involved noteholders foregoing interest but, in return, those who voted in favour received a payment, which was denied to those who voted against. C, who voted against, argued that this constituted bribery, and, as a result, that the issuer was in repudiatory breach of the terms of the notes.

C's argument was difficult because it is well-established that payments in return for noteholders' votes are acceptable as long as they are fully disclosed (*Goodfellow v Nelson Line Liverpool Ltd* [1912] 2 Ch 324 and *British American Nickel Corporation Ltd v MJ O'Brien* [1927] AC 369). In *Azevedo*, the payments were disclosed, they were payable equally to everyone voting in favour, US courts have approved schemes of this sort, and they have been used for a long time. Hamblen J was therefore satisfied that the payments did not constitute impermissible bribes.

Similarly, Hamblen J decided that the payments did not breach the requirement to treat noteholders pari passu. All noteholders forewent interest in the same way (the solicitation payment was not interest). The payments "did not involve the conferral of benefits on some but not all noteholders, but the payment of consideration to those voting in favour

Agency

Bedknobs and bootstraps

An agent with no authority to approve a transaction may still have apparent authority to represent that the transaction has been approved.

In *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717, the House of Lords declined to accept "the general proposition that ostensible authority of an agent to communicate agreement by his principal to a particular transaction is conceptually different from ostensible authority to enter into that particular transaction." In *Kelly v Fraser* [2012] UKPC 25, the Privy Council dismissed *The Ocean Frost* as being dependent on its facts and "not authority for the broader proposition that a person without authority of any kind to enter into a transaction cannot as a matter of law occupy a position in which he has ostensible to tell a third party that the proper person has authorised it". Distinctions and differences?

The Privy Council followed *The Ocean Frost* in stressing that an agent cannot have authority to communicate his principal's decisions just because the agent says that he has that authority; there must be some holding out by the principal. But if the principal holds out a minion as having authority to communicate that a transaction has been approved, and the minion does so communicate, that can create an estoppel if a third party relies on the representation. That reliance could be loss of an opportunity to take an alternative course of action to protect the position, and does not have to be a measure of the relief granted or commensurate with loss should the principal resile.

in return for their agreement to the consent solicitation" (though where substance ends and form begins in this point may be a little obscure). The offer was made openly to all noteholders, not pursuant to an obligation, and was not made by the trustee but by the issuer. Hamblen J concluded that the payments were not unfair or oppressive.

In *Assénagon*, Briggs J accepted that, at least at first sight, there was "some similarity" between the schemes in *Assénagon* and in *Azevedo*. However, he distinguished *Azevedo* on four grounds.

First ("and foremost"), the resolutions to postpone interest in *Azevedo* were what the issuer wanted to achieve, but in *Assénagon* the resolutions were only a negative inducement to accept the exchange offer. Secondly, in *Azevedo*, the inducement to vote in favour was offered by the issuer, but in *Assénagon* it was the effect of the noteholders' vote. Thirdly, the resolutions in *Azevedo* were capable of being beneficial to noteholders since they facilitated the reconstruction of the issuer, but in *Assénagon* there was no conceivable benefit to the noteholders. Fourthly, in *Azevedo* the argument centred on bribery, not oppression or unfairness, whereas in *Assénagon* it was the reverse.

Conclusions are not easy to draw from *Assénagon* and *Azevedo*, but perhaps the focus should be on the resolution on which noteholders actually vote. Can that resolution be of benefit to the noteholders or is it the equivalent of sending the Kray twins to stand at the shoulders of the noteholders as they decide what to do? If the resolution is pure menace, the scheme might be in difficulties. But there may well be a more subtle and subjective calculus behind the issues, namely does the scheme look and feel decent, honest and truthful. If so, it will turn out to be legal.

Rectification revivified

The background admissible to construe a contract will be limited if the contract is addressed to third parties.

Many have proclaimed the death of rectification at the hands of the expansive possibilities allowed by corrective interpretation (see, eg, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 WLR 1101). However, in *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, the Court of Appeal (Arden LJ dissenting) argued that reports of rectification's death were much exaggerated and that there was still a role for rectification. More significantly, perhaps, in doing so the majority sought to restrict the impact of relevant background material in construing certain contracts.

The case concerned a deed of charge. By statute, a charge includes a power of sale, but that power can be extended by the parties in the charge itself (section 101(3) of the Law of Property Act 1925). The parties didn't do this. However, they did try to extend the power to sale in the facility agreement that created the debt secured by the charge. The facility agreement might, indeed, have indicated that the parties (mistakenly) thought that they had also included the extension in the charge. A question arose which turned on whether the facility agreement's extended power of sale was available. C argued that the deed of charge should be construed as including the extended power of sale allowed by the facility agreement.

The Court of Appeal accepted that the facility agreement was admissible evidence on the construction of the charge. The question was what weight would the reasonable person give to that evidence. A deed of

charge must be registered and is available to third parties wishing to check title. The register is intended to be near conclusive. The registered documents are therefore addressed to anyone who wishes to inspect the register. It would not have been apparent to those third parties that they should ask after the facility agreement (nowhere mentioned, nor given to the Land Registry) in order to understand the deed of charge. In those circumstances, the majority considered that reasonable readers would not give any weight to the facility agreement in interpreting the charge.

It might have been more convincing if the Court of Appeal had concluded that the facility agreement was inadmissible because it was not reasonably available to addressees of the deed, but the majority felt unable, in the light of binding authority, to reach that conclusion. But they nevertheless reached their desired outcome that if there was to be an extended power of sale, rectification was the only way.

This case could be confined to public registers, like the Land Registry. But the majority was conscious that it went wider than that. Longmore LJ (quoting Sir Kim Lewison's book on the *Interpretation of Contracts*, which Lewison LJ properly didn't mention) said that the approach extended not just to public documents but also to "negotiable contracts", which he thought were different from contracts that could only affect the parties to the contract. The question is how far this goes. For example, standard LMA loan agreements contain provisions about transfer: does that mean that the background - to the extent not apparent to a potential transferee - should be disregarded? If so, the words once more take a more decisive role. The contrary views of such as Arden LJ may, however, not be confined to history quite yet.

Veiling the contract

Piercing the corporate veil does not lead to liability in contract.

The Court of Appeal has upheld Arnold J's first instance decision that piercing the corporate veil cannot lead to liability in contract. In *VTB Capital plc v Nuritek International Corp* [2012] EWCA Civ 808, a bank claimed that it had loaned money to a company on the basis of fraudulent representations as to the ownership and value of another company that the first was buying. The bank claimed to pierce the corporate veil of the borrower, rendering the fraudsters liable on the contract as well as in tort. This mattered because it would help secure jurisdiction in the English courts. The Court of Appeal was, however, dismissive of the idea (overruling Burton J's decision to the contrary in *Antonio Gramsci Shipping Corp v Stepanovs* [2011] EWHC 333 (Comm)). The Court of Appeal could see no basis in principle or authority for concluding that the fraudsters should be treated as parties to the contract, whether by analogy with undisclosed agents or otherwise.

Speculating on speculation

The Court of Appeal recognises that the difference between hedging and speculation is thin to the point of non-existence.

It is common for corporations, not least public corporations, to plead ultra vires when derivatives contracts turn out badly. This frequently involves arguing that they were speculating when they only had power to hedge. In *Standard Chartered Bank v Ceylon Petroleum Corporation* [2012] EWCA Civ 1049, the Court of Appeal wrote a little essay pointing out that hedging involves speculation, that speculation involves hedging and that it is impossible to draw a hard dividing line between the two. The Court of Appeal went on to conclude that the oil derivatives transactions entered into by D were either highly speculative hedges or speculations with elements of hedging about them.

More significantly, the Court of Appeal declined to divide D's capacity according to whether the court categorised the transactions as hedges or speculations. The issue was whether the transactions fell within the scope of the business that D was incorporated to carry out. The Court of Appeal had no doubt that they were within that scope. D was a state oil company, and the derivatives were in relation to the price of oil. D was not carrying out a separate business in oil derivatives distinct from its physical activities. The transactions might not have been prudent, but that did not make them ultra vires.

Freezing injunctions

Borrowed assets

Borrowing does not infringe a freezing injunction.

In *JSC BTA Bank v Ablyazov* [2012] EWHC 1819 (Comm), Christopher Clarke J was faced with a contemnor on the run from gaol who had borrowed £40m from various companies, the proceeds of the loans being paid to his lawyers and others. C alleged that this borrowing was a breach of the freezing injunction that had been granted against the contemnor: the right to borrow under a contract is a chose in action; by borrowing, the contemnor was dealing with the chose in action; and that is what a freezing injunction expressly prohibits.

The judge did not agree. The purpose of a freezing injunction is to secure assets against which a

judgment can later be enforced. A judgment cannot be enforced against a right to borrow, which has no realisable value to other creditors. As a result, Christopher Clarke J concluded that the contemnor could borrow. He couldn't himself receive the fruits of that borrowing because he would then have another asset - the cash - which would be caught by the injunction, but as long as the borrowings were directed to others, that was fine.

Jurisdiction

Grime and the City

An anti-suit injunction is refused for dirty hands.

The battle between the financing bank and Highland over a CDO that never was has been long and bitter. The bank lent money so that the SPV could buy assets, on which the loan was secured; the SPV was then to issue notes to the public, whose subscription monies would repay the bank. Stage one happened, but stage two did not because of the credit crunch. The bank therefore enforced its security, and then sued for the shortfall. The bank obtained summary judgment on liability, and then judgment on quantum. In the quantum judgment, the Burton J was critical of the way in which the bank had exercised its security and of its witnesses, describing the process as a sham. He made no order as to costs. Appeals against his decisions failed.

D then opened up a Texas front, both against the bank and also its key employees, alleging fraud and other related allegations commonly found in US proceedings. This led the bank to seek an anti-suit injunction from the English courts, which begat further disclosure (including of otherwise privileged material), which in turn begat an application to set aside the earlier judgments because of lies supposedly told by the bank's staff.

In *The Royal Bank of Scotland plc v Highland Financial Partners* [2012] EWHC 1278 (Comm), Burton J found in favour of the bank on most points. Unfortunately for the bank, it had to succeed on all points.

Burton J declined to set aside either his liability or his quantum judgment because the new material revealed on disclosure did not affect those judgments. He had already been critical of the bank, and he was now even more critical, accusing its key witness of lying. The new material reaffirmed his views rather than changing them.

Burton J then decided that the jurisdiction clauses in the relevant agreements covered the claims made against the bank in Texas, giving the clauses a contemporarily broad interpretation. He also decided that the jurisdiction clauses conferred exclusive jurisdiction on the English courts. He went on to conclude that the clauses bound the assignee of some of the claims against the bank. He even decided that the clauses gave the bank sufficient reason to restrain not only the proceedings in Texas against the bank itself but also the proceedings there against its employees (a wide and useful interpretation of a fairly standard jurisdiction provision; cf *Morgan Stanley v China Haisheng Juice Holdings* [2009] EWHC 2409 (Comm) on a different (ISDA) form of clause). So far so good for the bank.

But Burton J ultimately declined to grant the anti-suit injunction because of the bank's dirty hands, despite the Texas proceedings constituting a breach of contract. The principal bank witness had, in the judge's view, lied. This was sufficiently serious for the judge to turn the case over to Texas, even though the Texas courts would be asked in substance to re-open his judgments, subject to Texan concepts of res judicata. It also begged the question of potential damages for breach of the exclusive jurisdiction agreement, which is a matter of right not of judicial discretion and which may lead to a return to the English courts to undo what Texas has done. Perhaps a curious outcome whatever the bank's conduct.

Mining a rich vein

Disclosure is ordered in relation to a jurisdiction dispute.

Various South African claimants have sued a South African company in respect of illnesses suffered in South Africa. A case for the South African courts, you might think. Except that a campaigning English law firm is involved, and it is trying to found jurisdiction in the English courts on the basis that D is indirectly wholly-owned by an English company, and, as a result, that D's central administration or principal place of business is in England. If so, the English courts have jurisdiction under article 2 of the Brussels I Regulation, jurisdiction they cannot decline.

When D challenged the jurisdiction of the English courts, C applied for disclosure in relation to jurisdiction and also an order that the company provide further information under Part 18. In *Vava v Anglo American South Africa Ltd* [2012] EWHC 1969 (QB), Silber J ordered the disclosure but not the further information.

In order to defeat the jurisdictional challenge, C will have to show that it has a good arguable case that the English courts have jurisdiction, ie that it has a much better argument on the jurisdictional point. In order for the court to require disclosure for the purposes of a jurisdictional challenge, the judge considered that C must show that it has an arguable case on jurisdiction (ie on quick perusal, it might on further consideration turn out to be an arguable case).

Silber J decided that the test for the location of a company's central

administration is where its management decisions are made and where entrepreneurial decisions take place, all irrespective of where its economic activities occur place. In contrast, the principal place of business is the centre of the economic, industrial or commercial activity and where most employees and business assets are situated.

Silber J concluded that C had an arguable case that there was a good arguable case that D's central administration was in England because D represented a significant portion of its parent's business, because D had regard to its parent's strategy, because D had few board meetings, because D had a close relationship with its parent, and because of the role of the parent's group executive committee. Is that just a parent behaving as such rather than leaving its subsidiaries to fend for themselves? Silber J did, however, decide that C had no arguable case that the principal place of business was in the UK.

Having reached this conclusion, Silber J ordered the company to disclose certain documents, but not to provide the further information sought. He recognised that it was rare to require disclosure for the purposes of a jurisdiction application, but he thought the circumstances sufficiently exceptional. The reason appeared to be little more than that, on the one side, were employees without much information about corporate doings and, on the other, was a multi-national. Some might have characterised it more as a fishing expedition tied to forum shopping.

Sovereign immunity

Trial separation

It is difficult to claim the assets of a state-owned entity in discharge of the state's debts.

If a parent company owes money, you can't generally enforce the debt against its subsidiaries' assets unless you can lift the corporate veil, which is very difficult. And so it now is with states, as a result of the Privy Council's confusing decision in *La Générale des Carrières et des Mines Sarl v FG Hemisphere Associates LLC* [2012] UKPC 27. If a state owes money, it will now be practically impossible to enforce that debt against the assets of an entity (at least a commercial entity) owned by the state. Good news for other creditors of state-owned enterprises; bad news for creditors of the state.

The case involved an attempt to enforce two arbitration awards against the Democratic Republic of the Congo against a Congo state-owned enterprise. The Jersey courts examined the status of the enterprise, and decided that it was an alter ego of the state because it was wholly within the state's control. The Jersey courts therefore allowed enforcement against the company's assets.

The Privy Council regarded control as nowhere near enough. The Privy Council adopted a functional approach. A state-owned entity can enjoy immunity if it is carrying out acta jure imperii; if so, a creditor might be able to look through the entity to the state. But that does not mean that a creditor of the state can look to the entity for satisfaction of the state's debts.

Though anything but clear, the implication appears to be that a state-owned entity and the state will only be treated as the same if the entity is carrying out historically traditional state functions, such as war, diplomacy and policing.

As it is, the Privy Council has given states good protection for their assets. Debts can be incurred by the state itself, but as long as the state puts its assets in separate entities, those assets are likely to be safe (though putting an army into a separate entity won't work, but there would in any event be immunity in that case). Unlike corporate groups, there will commonly not even be any shares owned by the state against which enforcement measures can be taken, nor can a state be wound up. Good protection for states - at a time when some might need it.

This protection has been reinforced by the Supreme Court's decision in *SerVaas Inc v Rafidain Bank* [2012] UKSC 40. Absent waiver, the assets of the state are immune from enforcement unless in use for commercial purposes. The Supreme Court followed the US approach in concluding that the "use" of a debt depends upon the use to which the proceeds will be put rather than upon transaction giving rise to the debt. It will therefore be incumbent on creditors to show that the proceeds of, say, particular bank accounts are invariably used for commercial purposes, and that may be hard.

Stating the obvious

The act of state doctrine does not apply to foreign judicial decisions.

Mikhail Khordorkovsky might remain in gaol in Russia, but the international fight over the expropriation of Yukos's assets continues unabated. In *Yukos Capital SarL v OJSC Rosneft Oil Co* [2012] EWCA Civ 855, the Court of Appeal refused to strike out on grounds of act of state Yukos's claim to enforce an arbitration award, regarding much of the act of state doctrine as anachronistic in a world in which international legal standards are increasingly the norm.

Yukos obtained an arbitration award in Russia against what became Rosneft, but that award was rapidly overturned by the Russian courts. The Amsterdam Court of Appeal nevertheless enforced the arbitration

award because it refused to recognise the Russian court decision, which it condemned as neither impartial nor independent. Yukos then tried to enforce the award in England, but Rosneft argued that the English courts could not do so because the act of state doctrine prevented the English courts from reviewing the Russian court's decision.

The Court of Appeal examined the act of state doctrine at length, viewing it with restrained distaste as a relic from a different era (an era that included, for example, absolute state immunity). Rosneft was in effect saying that the English courts were obliged to give effect to the Russian decision even if the Russian court had acted in a manner that flouted international standards applicable to the behaviour of courts. That assertion did not sit easily with the numerous cases in which English courts have reviewed the past and likely future conduct of foreign courts for the purposes of, for example, forum non conveniens and asylum applications.

The Court of Appeal therefore got home in this case on the ground that the act of state doctrine did not apply to allegations of impropriety against foreign court decisions, whether in relation to particular decisions or to a systemic dependency on the dictates of the government. It was open to the English court to review whether the Russian court decision met the required standards for recognition.

But the Court of Appeal rejected Yukos's argument that this point had already been decided in the Netherlands, and that Rosneft was therefore estopped from arguing that the Russian decision was impartial and independent. The Dutch court had decided that, as a matter of Dutch public policy, the Russian judgment should not be recognised. That was not the same issue as whether, as a matter of English public policy, the Russian judgment should not be recognised. The English court must therefore address the circumstances of the Russian judgment itself.

Courts

Jackson's way

The Ministry of Justice announces more about its plans to implement the Jackson reforms.

The MoJ has issued a press release giving further details about how it will implement the reforms proposed by Jackson LJ. The MoJ has said that qualified one way costs shifting (QOCS) will apply in all personal injury cases, with the result that a losing claimant will not have to pay the defendant's costs unless the claim is struck out or is fraudulent. QOCS will similarly not apply if a claimant fails to beat a defendant's Part 36 offer, though in that case the claimant's costs liability will be capped at the level of any damages recovered by the claimant.

More generally on Part 36, a defendant who rejects a claimant's Part 36 offer that the claimant then beats will be punished by being ordered to pay an additional 10% of any damages awarded, subject to tapering for awards of over £500k in order to cap the maximum penalty at £75k. The press release refers only to "damages", but the same will, presumably, apply to debt claims. If damages are not in issue, the sanction will be an extra 10% of costs.

The Court of Appeal has also done its bit in implementing the Jackson reforms. It seized on *Simmons v Castle* [2012] EWCA Civ 1039 to announce that, from 1 April 2013, general damages in tort would be increased by 10%.

The Civil Justice Council has recommended that, in commercial cases, there should be no cap on the amount lawyers can charge on damages based agreements (ie contingency fee agreements), unlike in personal injury claims, where the cap will be 25%.

Exaggerating the court's powers

Courts can strike out a claim after a trial, but rarely will.

Insurers complain of an epidemic of exaggerated and fraudulent claims. The number of road accidents is declining but the number of personal injury claims is increasing. In *Fairclough Homes Ltd v Summers* [2012] UKSC 26, insurers tested the courts' mettle in combating this litigation culture. The insurers will have found that mettle wanting.

In *Fairclough*, the judge decided that C had fraudulently exaggerated the effects of an accident in which he had genuinely been injured. D applied to have the claim struck out after trial, the effect of which would have been to deprive C of those damages to which he was entitled as a punishment for his fraudulent exaggeration.

The Supreme Court accepted that there was power under the CPR to strike out a claim after trial as an abuse of process, but made it plain that it struggled to think of any circumstances in which it would be appropriate to do so. Having been through a trial, the court could decide what damages C was genuinely entitled to, and could penalise exaggeration in costs and interest. Striking out the whole claim at that stage for penal reasons would seldom, if ever, be the right thing to do.

The Supreme Court stressed that it was only concerned with strike out after trial where there was a genuine underlying claim. But the tone was that it would seldom be appropriate before trial either where there was a genuine claim, at least unless the

claimant's conduct made a fair trial impossible, though there could be a vestige of an argument based on wasting the court's time.

Lucky litigators

Strict rules on confidentiality may, or may not, apply to inhouse litigators.

In *Generics (UK) Limited v Yeda Research & Development Co Ltd* [2012] EWCA Civ 726, C and D were litigating over a patent. During the course of the dispute, an in-house patent attorney (B) employed by D went to work for C. D sought an injunction restraining C from using B in relation to the matter. At first instance, an injunction was granted. The Court of Appeal discharged it, holding that the information known to B was not sufficiently confidential.

The Court of Appeal then considered, obiter, what the correct principles to apply would have been had there been any confidential information. In *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, the House of Lords decided that, where a person seeks to restrain his former solicitor from acting for another client: (1) it is for that person to establish (a) that the solicitor possesses confidential information, and (b) that the information may be relevant to the new matter in which the interest of the other client may be adverse to his own case; and, if so, (2) the court will intervene unless the former solicitor discharges the evidential burden of showing that there is no real risk of disclosure.

In *Generics*, Sir Robin Jacob held that the principles in *Bolkiah* applied with equal force to an employed litigator as they did to an independent litigator. Etherton LJ, on the other hand, held that the *Bolkiah* principles did not apply to a lawyer employed in-house because, if they did, it would be up to the new employer to satisfy the court that there was no real risk of disclosure. There were good reasons why the burden should rest with the former employer to show that there was a risk.

Ward LJ declared himself reluctant to decide between the "characteristically forceful common sense judgment" of Sir Robin Jacob and the "characteristically erudite judgment" of Etherton LJ, noting that there was a "thicket of confusion" about the issue, which had not been fully argued. However, Ward LJ appeared to side with erudition over forcefulness. He observed that "we should not generate a modern state of commercial slavery (especially for young solicitors keen to advance their careers by changing jobs)" and, as a result, that the "search for justice should not require a former employed solicitor or an assistant solicitor to prove a negative and show there is no risk that confidential information will fall into the possession of those with an adverse interest to his former employer/client as required by *Bolkiah*."

Contentious Commentary is a review of legal developments for litigators

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