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Contentious Commentary

Contents

- Security trustees must beware of conflicts of interest
- Conciliation clause to uncertain to be enforced
- Term implied as to time of performance
- How to exclude liability in negligence
- Administration not analogous to liquidation for GMRA
- Dispossession required for Financial Collateral Regs
- Bringing a derivative claim against a limited partner
- Property means the same throughout the legal system
- Future questions on damages based agreements
- No property in an email
- Negative declaration in tort wins jurisdiction race
- Settling with one joint tortfeasor may release the others
- The boundaries of vicarious liability expand

Contract

Commercial truths

The obligations of parties to complex commercial transactions are to be found in their complex commercial documents. But beware conflicts of interest between lenders and security trustees.

Saltri III Ltd v MD Mezzanine SA [2012] EWHC 3025 (Comm) involved an acrimonious battle between senior and mezzanine lenders to a business that could no longer support the level of debt accrued as a result of a leveraged buy-out. The business was sold and the mezzanine lenders recovered nothing. They were aggrieved, and sued the security trustee which, in order to effect the sale, had enforced the security it held for both senior and mezzanine lenders.

On documents in fairly market-standard form - the rights of the mezzanine lenders were subordinated to those of the senior lenders - Eder J found for the security trustee (and the senior lenders, though they were not parties to the litigation in this country; there is also litigation in Germany). The judge decided:

- If sophisticated parties have chosen to govern their relationship through arms-length commercial contracts, the scope and nature of their duties are shaped by the terms of those contracts (ie don't expect equitable doctrines to rescue you if the agreement doesn't do so).
- Loss was an essential element of the mezzanine lenders' cause of action. If the value of the security is worth less than even the senior lenders' debt, the mezzanine lenders have no claim against the security trustee whatever mistakes the security trustee may have made in the realisation of the security. In other words, mezzanine lenders can be ignored if it is clear that they will recover nothing.
- The Intercreditor Agreement restricted the security trustee's obligation to those that would be owed at general law. According to Eder J, this required the security trustee (a) to take reasonable care to obtain the true market value of and/or the best price reasonably obtainable for the security at the time of the sale and (b) to exercise the power of sale bona fide and for its proper purpose. What is required depends upon the facts, and Eder J refused accept that there were any rigid rules as to what a security trustee had to do in order to comply. It is for the security trustee to decide how to go about the sale (eg public auction or private treaty), and it will be allowed a margin of error as long as it exercises its power reasonably, only being liable if its conduct is "plainly on the wrong side of the line".

There was one area in which Eder J was critical of the security trustee. The security trustee was a member of a bank group that included a senior lender. The security trustee and lender were separate legal entities, but the people involved for the bank qua lender and those involved qua security trustee were the same. At a relatively early stage, the lawyers acting for the senior lenders recognised that they could not also act for the security trustee, which therefore appointed its own lawyers. However, the people involved on both sides within the bank remained the same, and the legal advice received by the security trustee was shared with the senior lenders, but not with the mezzanine lenders.

Eder J considered that a Chinese wall should have been erected between the part of the bank that was the

lender and the part that was the security trustee because of the conflict of interest between the bank as senior lender and as security trustee. The former needed only to have regard to its own interests, while the latter had obligations to both senior and mezzanine lenders. This made no difference to the outcome of *Saltri III*, but beware for the future.

Uncertain success

A conciliation clause is be too uncertain to be enforced.

In *Wah (aka Tang) v Grant Thornton International Ltd* [2012] EWHC 2198 (Ch), D argued that a provision of its own membership agreement was too uncertain to be enforced. Anything else would have called into question its ability to enforce an arbitration award against C because the arbitrators' jurisdiction depended upon the unenforceability of the relevant provision. Hildyard J agreed that the clause was too uncertain.

The provision required the conciliation of disputes, first by the Chief Executive of the global group and then by a panel appointed by the Board. Only then could there be arbitration. A one month time limit was put on each stage, but no procedure was laid down other than that its purpose was to attempt to resolve the dispute. Hildyard J considered that the lack of any procedure rendered the process too uncertain to be enforced, with the result that it could be ignored.

A little harsh, perhaps. The provisions might have been construed as giving discretion to the chief executive and then the panel of the Board as to how they went about their tasks, as long as they were doing so in order to bring about an amicable settlement. The time limits were certain. But Hildyard J aligned conciliation with mediation, for which procedures are required if an obligation to mediate is to be enforceable rather than discarded as a mere agreement to agree.

Time and time again

A term requiring performance within a reasonable time will be implied.

Refund guarantee provided by a seller expires on 30 June. The previous December, the parties agree that the guarantee would be extended by 23 months. By early on 29 June the guarantee has not has not yet been extended. Can the buyer terminate for repudiatory breach because the guarantee has not been extended? An extended guarantee is provided late on 29 June.

Generally yes, but no on the facts, according to Cooke J in *Wuhan Ocean Economic & Technical Cooperation Co Ltd v Hansa Mercia* [2012] EWHC 3104 (Comm). The judge accepted that a term was to be implied requiring the guarantee to be provided within a reasonable time. He also accepted the arbitrators' view that a reasonable time was 14 days before expiry of the old guarantee. He even accepted the arbitrators' view that the implied term was an innominate term rather than just a warranty sounding only in damages. A serious breach of the term could therefore give a right of termination.

But, on the particular facts of the case, Cooke J did not accept that the breach was repudiatory. The guarantee provided that it would be extended automatically if an arbitration was started. The failure to provide the guarantee did not therefore go to the root of the contract because the buyers could reinstate the guarantee themselves by starting an arbitration.

Unruly rules

Whether liability in negligence has been excluded does not depend upon ancient technical rules.

The rule in *Canada Steamship Lines Ltd v The King* [1952] AC 192 is as follows: if a contractual clause expressly exempts someone from liability in negligence, effect should be given to that clause (now subject to the Unfair Contract Terms Act); if negligence is not expressly mentioned in the clause, are the words used sufficiently wide to cover negligence; if yes, is there another ground of liability to which the words might apply; if yes, the words apply to that other ground and not to negligence. The basis of this rule is the implausibility of one party agreeing to excuse the other from liability in negligence.

But judges don't like rules, still less rules for the construction of contracts. So rules are downgraded to principles, which in turn mutate into guidelines. In *Mir Steel UK Ltd v Morris* [2012] EWCA Civ 1397, the Court of Appeal confirmed that the rule "ought not to be applied mechanistically and ought to be regarded as no more than guidelines. [It does] not provide an automatic solution to any particular case. The court's function is always to interpret the particular contract in the context in which it was made." Which is to say that the rule (or principles or guidelines) will be applied if it leads to the result the court wishes to achieve, but it will be set to one side with suitable sagacity if it doesn't. But if you want to exclude liability for negligence, it remains safer to do it expressly.

Liquid refreshment

Administration is not a process analogous to liquidation.

Under the much-used GMRA form of agreement, notice of termination following an event of default is required unless the event is liquidation or analogous proceedings, in which case termination is automatic. In *Re MF Global UK Ltd* [2012] EWHC 3068 (Ch), the judge was faced with a spat between different parts of the MF group as to which was the defaulting and which the non-defaulting party. If administration is analogous to liquidation, the UK company was non-defaulting; if not, it was the US company.

David Richards J decided that the essence of liquidation is the sale of the assets of a company in order to distribute the proceeds to the creditors. A liquidator cannot in general carry on the business of the company. An administration may result in the realisation and distribution of assets, but it may also result in the rescue of the company as a going concern. The two are not, therefore, analogous, still less special administrators appointed under the Investment Bank Special Administration Regulations 2011. As a result, there had been no automatic termination of the GMRA, and the UK company was the non-defaulting party.

Financial services

A picture of dominant Gray

The control required for financial collateral remains a vexed area.

Can you create a lien over intangibles? Liens depend on possession, and only physical things can be possessed. Is a statement that there is to be a lien over an intangible therefore simply of no effect? According to Briggs J in *Re Lehman Brothers International (Europe)* [2012] EWHC 299 (Ch), the right approach is to see what the "lien" does, and then to classify it according to the English legal taxonomy. In *Re Lehman*, the "lien" created a right for various parties to have the intangibles applied in satisfaction of debts. That is what a charge does. Ergo, the "lien" is a charge whatever the parties may have called it. On the facts, it was a floating charge.

It made no difference that the charge in favour of one contracting party applied also to debts owed to third parties. Further, the fact that those third parties were referred to generically as members of the Lehman group did not render their identities too uncertain to allow enforcement. Identification might be difficult, but that is not the same as uncertainty such that no sensible content could be given to the provision.

Having established that the security did not fail at the first fence, *Re Lehman* turned to the vexed subject of the Financial Collateral Arrangements (No 2) Regulations (SI 2003/3226). In *Gray v GTP Group Ltd* [2010] EWHC 1772 (Ch), Vos J limited the practical availability of the Regulations by applying old-fashioned English law on floating charges to what is essentially an EU instrument. Cue screeds of outrage from the City; even the author of a book on which Vos J had relied has changed his mind. Briggs J was, however, undeterred. He retreated a bit from Vos J's position, but not as much as most wanted.

The Regulations, which implement an EU Directive, dispense with many of the formalities required of security. The purpose is to make collateral in the financial markets clear and simple to enforce, avoiding systemic problems. The Regulations apply to collateral "delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral-taker". In *Gray*, Vos J decided that intangibles could not be possessed, and therefore that they had to be in the control of the collateral-taker. Control, he thought, meant the strict requirements for a fixed charge (*Spectrum Plus* [2005] 2 AC 650 etc), despite the Regulations clearly intending to apply to floating charges.

Briggs J accepted that possession of an intangible was possible for the purposes of the Regulations, but refused to accept that the reference to possession or control was a description of the effect of delivery rather than an additional test. Not only must the collateral be delivered etc to the collateral-taker but, following delivery, the collateral-taker must have sufficient control so that the collateral-giver has been dispossessed. Whether that is so depends on an analysis of the particular facts (but Briggs J added that he thought that the decision in *Gray* was right on its facts).

In *Re Lehman*, the collateral-giver had the right to the return of surplus collateral. LBIE was therefore entitled to keep sufficient collateral to cover its present and future debts. That would have been enough to establish control, according to Briggs J, but it was undone by the reference to LBIE's affiliates. The lien/charge secured debts owed to both LBIE and its affiliates, but there was no right for LBIE to retain collateral up to the amount due to the affiliates. The charge was a single charge, rather than one charge in favour of LBIE and

one in favour of the affiliates. The inability to retain sufficient to meet affiliates' debts meant that the collateral-giver was not sufficiently dispossessed. The collateral therefore fell outside the Regulations and was invalid. All remains up for grabs if, as seems likely, the case goes higher.

Courts

For auld Laing syne

Bringing a derivative claim removes a limited partner's limited liability.

Derivative claims are eccentric. They involve one person bringing for the benefit of another a claim owned by that other. Generally they are brought where there is wrongdoer control of a company, which, to the detriment of its shareholders, will not pursue a claim against, eg, the controlling directors (sections 260 to 264 of the Companies Act 2006). CPR 19.9ff applies to derivative claims involving bodies corporate, and also trade unions. But derivative claims have wider existence than just corporates. They can apply, for example, to trusts and, according to Cooke J in *Certain Limited Partners in Henderson PFI Secondary Fund II LLP v Henderson PFI Secondary Fund II LP* [2012] EWHC 3259 (Comm), to limited partnerships established under the Limited Partnership Act 1907.

These wilder derivative claims have not been tamed by a statutory framework and so it is for judges to do so. The leash to be applied is that there must be "special circumstances" that justify one person bringing for the benefit of another claims owned by that other. Cooke J found special circumstances to exist in *Henderson* but, having so found, he decided that a limited partner which brought a derivative claim exposed itself to unlimited liability, a decidedly unattractive prospect.

Henderson PFI Secondary Fund II LP was brought into existence to buy the Laing group, which held extensive investments in PFI projects but also some other investments. Takeover rules prevented the promoters from telling investors that this was the purpose. The prospectus therefore talked generally about PFI investments. When things were not as successful as hoped, the investors decided that they wanted to sue the manager of the Fund for breach of mandate in buying the Laing group. The manager and the general partner were both members of the Henderson group, and one was therefore unlikely to sue the other. The claim was, however, a partnership asset, and so the investors brought a derivative claim on behalf of the partnership.

The Fund argued that the investors were not entitled to do this because it was contrary to the investment agreement, which required management to be in the hands of the general partner, and because the investors had an adequate remedy of removing the general partner and appointing a new one who would sue the manager. Cooke J rejected this. These were factors to be taken into account, but he was persuaded that removing the general partner was impracticable in the circumstances. Ultimately, the conflict of interest between the general partner and the investors was such that justice required a derivative claim.

But statute then intervened to render that derivative claim potentially impracticable. Section 6(1) of the Limited Partnership Act 1907 provides that a limited partner must not take part in the management of the partnership but the section goes on that, if a limited partner does so, the limited partner becomes liable for all the debts and obligations of the partnership incurred while it is taking part in the management. The limited partners therefore sought declarations that bringing a derivative claim would not make them liable under section 6(1) or, if it did, that the liability only extended to the costs of the litigation.

Cooke J declined to oblige. He considered that running litigation on behalf the partnership was manifestly being engaged in the management of the partnership. Section 6(1) therefore applied, and the partners with conduct of the litigation ceased to be limited. Further, the cessation of limited liability applied not only to liabilities incurred as a result of their involvement in the partnership's management but to all liabilities incurred during the time they were interfering in the management (and, as such, putting themselves in the position of a general partner).

Cooke J also decided that the limited partners could not bring derivative claims directly against the general partner because they each had contractual claims of their own against the general partner. No special circumstances required a derivative claim. He also rejected the argument that any derivative claim should be funded from partnership assets, and made various declarations in the Fund's favour as to the meaning of the partnership agreement.

Clifford Chance LLP acted for the manager and the general partner of Henderson PFI Secondary Fund II LP.

Darwin's finches

Property is the same wherever you might be in the court system.

Petrodel Resources Ltd v Prest [2012] EWCA Civ 1395 was a straightforward case. It turned on section 24(1)(a) of the Matrimonial Causes Act 1973. This allows a court to "order that a party to the marriage shall transfer to the other party… property to which the first-mentioned party is entitled, either in possession or reversion". Does this section allow the court to order a husband to transfer to the wife property of a company that is, ultimately, wholly owned by the husband? Clearly not (absent, as was lacking in *Petrodel*, grounds to pierce the corporate veil). The husband might own or control shares in the company, but a shareholder is not entitled to the company's property, whether in possession or reversion. A company is a separate legal entity with its own assets and liabilities. See well-known cases like *Salomon v Salomon* [1897] AC 22.

Petrodel Resources Ltd v Prest is also a curious case that exposes the Darwinian nature of the courts. The Family Division is an isolated island in the sea of courts, removed from the rest of the system. This separation allowed Family Division judges to develop their own notion of "property", distinct from the principles found elsewhere. It wasn't that the Family Division was unaware of the principles applied in other courts, but it regarded those principles as tiresome technicalities that could be ignored in the rough and tumble world of divorce. According to the Family Division, property to which a spouse was entitled in section 24(1)(a) didn't mean property as other lawyers would understand it but rather it had a wider meaning of "power equals property" (in the denunciatory words of Rimer LJ): a husband has power over a company; therefore he has power over the company's property; therefore he can dictate what the company does with its property; therefore the company's property is his property; therefore he can be ordered to transfer the company's property to the wife under section 24(1)(a).

But who is the fittest? Once decisions leave the safe shores of the Family Division, they become vulnerable to the predators outside. The panel in *Petrodel* included Thorpe LJ, a long-time Family fellow, but he was squashed very firmly by two Chancery chaps, Rimer and Patten LJJ. What is more, this is not the first time the Chancery Division has exterminated Family fledglings. The Family Division had developed its own rules regarding the seizure by one spouse of the other's documents out of concern that the other was not to be trusted on disclosure (the *Hildebrandt* rules). In *Tchenguiz v Imerman* [2010] EWCA 908, those rules were condemned with equal ferocity by a Court of Appeal also led by two Chancery lawyers (including the now President of the Supreme Court).

Thorpe LJ's dissenting judgment in *Petrodel* has a whiff of the rant about it. He recited the husband's egregious failure to comply with court orders, his lies and his evasions, all of which were designed to deny his wealth despite the family living in a mansion in Little Venice and owning through companies seven other properties in London. These unartful

A glimpse of the future

Solicitors are not liable in costs merely by acting for an impecunious claimant on a CFA with no insurance in place. Yet.

Tinseltime Ltd v Roberts [2012] EWHC 2628 (TCC) foreshadows what is to come. The case involved an application by a successful defendant that the claimant's solicitors be ordered to pay D's costs under section 51(3) of the Senior Courts Act 1981 because the solicitors had acted for C on a conditional fee agreement knowing that C was insolvent and had no insurance cover for its potential liability in costs. The solicitors even funded the disbursements themselves. The judge rejected the application because, he said, there could only be liability if the solicitors were acting outside the normal role of solicitors. Public policy pointed strongly in favour of solicitors acting for the impecunious. So much, so orthodox (eg *Hodgson v Imperial Tobacco* [1998] 1 WLR 1056). It was only if the solicitor acted in a manner outwith the traditional role of a solicitor that liability would ensure.

The position will, however, need to be revisited after 1 April 2013, when the Jackson reforms come into force. Solicitors will then be able to enter into contingency fee agreements ("damages based agreements", or DBAs), which will place them in a position similar to third party litigation funders, who can be liable in costs merely because they have provided funding. Should solicitors enjoy a commercial advantage over third party funders through not being liable for the other side's costs if the case is lost? If not, should conditional fee agreements (which will continue to be available) be different? A battle royal awaits.

attempts at dodging were enough to dictate the result for Thorpe LJ. Unless orders in respect of the companies' properties were made, the husband might not honour his obligation to pay the requisite sums to the wife; the orders must therefore be made. End of story.

For the majority, the property to which a spouse was entitled for section 24(1)(a) purposes meant property that the spouse owned legally or beneficially in a manner that the rest of the legal world would understand. The companies owned the properties, not the husband. End of a different story.

Warming to their theme, the majority asked about the companies' creditors (they were trading companies). Who would deal with a one-person company if its property could be snaffled by a spouse on divorce? What about company law, which prevents shareholders taking a company's property through rules such as capital maintenance? As Rimer LJ put it, a "one-man company does not metamorphose into the one-man simply because the person with a wish to abstract its assets is his wife." The constrictions of corporate existence must apply in the divorce courts as in other courts.

It may be that divorce legislation should allow orders to be made directly against properties controlled by a spouse (though that raises policy questions over the rights of third parties and practical enforceability), but it doesn't. The Matrimonial Causes Act has been amended on numerous occasions since it came into force. It might require amendment again, unless the Supreme Court intervenes. There are only two family lawyers in the Supreme Court.

Media

Property is theft

There is no property in the content of an email.

In *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC), C had obtained an ex parte injunction against the Ds, requiring them not to delete or otherwise interfere with emails sent or received by D1 while he was acting on behalf of C.

D1 was not employed by C, but by a Jersey company which contracted with C for his services. Emails sent to D1 at his C address were automatically forwarded to his email address with the Jersey company and deleted from C's server. Emails sent by D1 were not sent via C's server, which meant that C had no record of what D1 had done on its behalf.

C's claim against the Ds (D2 being the Jersey company's ISP, which took no part in the proceedings) was based on its proprietary right to the content of the emails. D1 contended that C had no such right, and applied for the injunction to be discharged. If a letter is written, issues as to the property in the paper on which it is written arise, as well as the copyright in the text. Electronic "paper" is not so easy.

Edwards-Stuart J said that, notwithstanding C's "beguiling" argument that information was property, it was clear that "the preponderance of authority points strongly against there being any proprietary right in the content of information" and that this must apply to the content of an email, "although I would not go so far as to say that this is settled law".

The judge considered the alternatives, if the contents of emails were property:

(1) title to the content remains throughout with the creator;

(2) title passes to the recipient when an email is sent, by analogy with the transfer of property in a letter when one person sends it to another;

(3) as for (1), but the recipient of the email has a licence to use the content for any legitimate purpose consistent with the circumstances in which it was sent;

(4) as for (2) but the sender of the email has a licence to retain the content and to use it for any legitimate purpose; or

(5) title to the content of the message, once sent, is shared between the sender and the recipient and, as a logical consequence of this, is shared not only between them but also with all others to whom subsequently the message may be sent.

The practical difficulties with all of these options are immediately apparent, and the judge concluded that he could "find no practical basis for holding that there should be property in the content of an email, even if I thought that it was otherwise open to me to do so. To the extent that people require protection against the misuse of information contained in emails, in my judgment satisfactory protection is provided under English law, either by the equitable jurisdiction… in relation to confidential information (or by contract, where there is one) or, where applicable, the law of copyright." For various reasons C had not included those heads of claim, so the injunction was discharged.

Jurisdiction

Negativity rewarded

An action seeking a declaration that no tort has been committed is sufficient to establish jurisdiction under the Brussels I Regulation.

The ECJ is clear that legal proceedings in which C seeks a declaration that it is not liable in contract to D are sufficient for the purposes of article 27 of the Brussels I Regulation to stop courts seised later from hearing the case at the instance of D, at least until the court first seised has decided that it does not have jurisdiction (eg *The Tatry*, Case C-406/92). In *Folien Fischer AG v Ritrama SpA* (Case C-131/11), the CJEU extended this to tort. Article 5(3) of the Regulation gives jurisdiction in tort to the courts of the place where the harmful event occurred (ie the place where the damage occurred or the place of the event giving rise to the damage), and that is so even if the action seeks a declaration that no tort has been committed.

Tort

All or nothing

Take care when settling with one joint tortfeasor.

There is, or used to be, a rule that a settlement with one joint tortfeasor operated to release all joint tortfeasors, unless the settlement was a covenant not to sue. There is a single claim against numerous joint tortfeasors; a full and final settlement with one joint tortfeasor therefore extinguishes the claim against all. The courts are, however, reluctant now to reach that conclusion, and treat it as a matter of construction as to whether the intention of the settlement was to release other tortfeasors. In *Ansari v Knowles* [2012] EWHC 3137 (QB), Eady J showed that it will take a lot to persuade a court that claims against other joint tortfeasors have been lost. But better to make it clear in the settlement agreement that further claims can be pursued, if that is the intention.

Vicarious victorious

Vicarious liability used to depend on whether a tort was committed during the course of employment. Not no more it don't.

The law on vicarious liability has moved and is still moving. As Lord Phillips put it in *The Catholic Child Welfare Society v The Institute of the Brothers of the Christian Schools* [2012] UKSC 56, vicarious liability is "a doctrine designed for the sake of the claimant, imposing liability incurred without fault because the employer was treated at law as picking up the burden of an organisational or business relationship which he had undertaken for his own benefit" and "the policy objective… is to ensure, so far as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim..." In pursuing this aim, the courts will no longer be tied down by technical rules that, eg, require an employer/employee relationship in order to give a claimant a remedy.

According to Lord Phillips, vicarious liability now requires a two stage test. First, is the relationship of D1 (who did the tortious act) and D2 (his "employer") capable of giving rise to vicarious liability? Secondly, if so, is there a sufficient link between D1's tortious act and the relationship of D1 and D2.

The first stage of the test used to depend upon employment, which in turn depended on control. No more. The issue is whether the employee is doing something for the employer, whether or not technically an employee. Indeed, it is now possible for two "employers" to be liable for one "employee", and the Supreme Court loosened the test for this, requiring each employer to be looked at independently to assess its relationship with the employee rather than with any bias against dual employment. The issue is whether the workman is working on behalf of an enterprise or on his own behalf and, if the former, how central the workman's activities are to the enterprise and whether these activities are integrated into the organisational structure of the enterprise. Is there a common purpose? This could potentially be enormously wide, but the Supreme Court probably didn't really mean that to be the case.

The second stage used to be the "course of employment" issue, but again it is now wider. *Catholic Child Welfare* involved child abuse by people who were not employed at all, let alone to abuse children. But they were all involved in the Brothers' educational enterprise and so the Brothers' were liable for their acts.

In most cases, employment of the conventional sort will remain the key requirement for vicarious liability. But just because there isn't a traditional employer/employee relationship doesn't mean the end of a case.

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

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