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Contentious Commentary

Contract

The terminator

Accepting a repudiatory breach for the wrong reason may seriously reduce recoverable damages.

Deciding whether or not to accept what looks like a repudiatory breach of contract in order to terminate the contract is nerve-racking. What if the breach you rely on is not in fact repudiatory and, as a result, there is no right to terminate the contract? If the breach is not repudiatory, purporting to terminate the contract in reliance on it will place the acceptor - the putatively innocent party - in repudiatory breach. The non-innocent party will then, in the blink of an eye, accept that repudiatory breach, depriving the innocent party of the future benefits of the contract.

One lifeline an innocent party can cling to is that even if the repudiatory breach it relied on proves not to be so, it can jump on to another repudiatory breach that might emerge from the woodwork in order retrospectively to justify its termination of the contract (*Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 38 Ch D 339).

But we now know from *Lonsdale Sports Ltd v Leofelis SA* [2012] EWCA Civ 985 that the relief offered by *Boston Deep Sea Fishing* is palliative only. As Lloyd LJ put it, the actual repudiatory breach gives the innocent party a shield against a claim for damages by the non-innocent party, but not a sword to claim damages. If an innocent party terminates for the wrong reason when there was also an (unknown) right reason, it will not have to pay damages to the non-innocent party, but it will not itself be able to claim full loss of bargain damages for the remaining term of the contract. The innocent party will, therefore, lose the future benefit of the contract - even the secondary benefit of a claim in damages.

The reason is causation. The actual repudiatory breach did not cause the innocent party to lose the benefit of the rest of the contract. The innocent party's purported acceptance of the non-repudiatory breach did that. The contract terminated regardless of the repudiatory breach, with the result that damages are restricted to those due up to the time of the termination of the contract.

A severe doctrine, putting a premium on a non-innocent party ensuring that the innocent party does not find out about its actual misdeeds. Also a doctrine philosophically at odds with recent statements by the Supreme Court in *Société Générale v Geys* [2012] UKSC 63, such as "the common law should favour the direction that is least likely to do harm to the injured party" (Lord Hope).

More practically, it is a doctrine that requires the innocent party to carry out detailed investigations before accepting a repudiatory breach of contract as terminating the contract. If there is the remotest doubt whether a known breach is repudiatory, the kitchen sink must be added to any acceptance of that breach in order to try to ensure that whatever might eventually turn out to have been a repudiation is covered. In *Lonsdale*, the Court of Appeal refused to accept that the ritual line that termination was "without prejudice to any other breaches on which our client may be entitled to rely" was enough for these purposes. The innocent party had still relied on a non-repudiatory breach, and this wording did not enable it to say that it had in fact terminated on the basis of the actual repudiatory breach. Its damages were therefore time-limited up to the termination.

Other courts will have to test quite how far this doctrine goes (sale of goods?) but it adds greater stress to the already stressful process of accepting a repudiatory breach.

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Reasonable self-interest

Exercising a discretion in a reasonable commercial manner means looking after your own interests.

A contract gave a party a right to terminate the contract in certain circumstances, but only with the consent of the other party. The saving grace was that, in deciding whether to consent, the other party was obliged to act "in a commercially reasonable manner". But what does acting in a commercially reasonable manner mean? It is a phrase found not just in bespoke contracts but also in, eg, the ubiquitous ISDA Master Agreement.

In *Barclays Bank plc v Unicredit Bank AG* [2012] EWHC 3655 (Comm), Popplewell J decided that acting in a commercially reasonable manner imported an objective test rather than being bounded only by arbitrariness, capriciousness or perversity (as in the absolute discretions under consideration in, eg, *Socimer Bank Ltd v Standard Bank Ltd* [2008] EWCA Civ 116).

But that was as good as it got for the intending terminator. Popplewell J considered that the test was whether a reasonable commercial man might have reached such a decision. In deciding what to do, the reasonable commercial man would give his own commercial interests precedence over the other party's interests: there is no need for a balancing exercise. It is only if the gains that result from the decision are so disproportionate to the other's resulting obligations that no commercially reasonable man would have reached the decision that the decision will be called into question. In reaching this conclusion, Popplewell J followed the landlord and tenant cases (and *Porton Capital Technology Funds v 3M Holdings Ltd* [2011] EWHC 2895 (Comm)).

The case concerned three guarantees given by C in 2008 to help D's regulatory capital position. D could terminate the transactions, and stop paying C's fees, if the guarantees no longer had the capital advantages they were intended to give. When D's regulator decided in 2010 against the transactions, D sought to terminate the transactions, but C refused unless it was paid five years' fees.

Popplewell J decided that C was behaving in a commercially reasonable manner. C reasonably believed that the deal was that it would receive five years worth of fees come what may (though that was not in fact D's understanding). Even leaving that aside, D struggled to suggest reasons why it was unreasonable for C to demand the fees up to the time when D could have terminated the transactions without hindrance.

The judge also rejected the argument that an entire agreement clause prevented C from relying on its extra-contractual understanding of the deal.

As ever, the application of phrases like "commercially reasonable" will depend upon the facts, but, even though the test is objective, the reasonable person looks primarily after his or her own interests.

Representational art

A warranty will not operate as a representation.

If a contract contains express warranties, can the recipient of those warranties rely on them as representations that induced it to enter into the contract, claim damages under section 2(1) of the Misrepresentation Act 1967 and, by doing so, evade contractual limitations on liability? The answer ought to be an obvious no. The warranties didn't induce the other party to enter into the contract but only arose as a result of its doing so. They can't be detached from the contract and sued on separately.

In *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch), Mann J sort of said that, but without the robustness that might have been desirable. In particular, he relied on the fact that the relevant provisions were described only as warranties, and not also as representations, which he regarded as legally different. The judge seemed to accept that if there had been express representations, they might have then been detachable from the contract because that was what the parties intended. If so, then the judge might have had to resort to the solution offered in *Bikam OOD v Adria Cable Sarl* [2012] EWHC 621 (Comm), ie that the only remedies for breach of something in the contract is under the terms of the contract because that was what the contract said. But this general lack of clarity does suggest that the use of the term "representations" in a contract might open up unwelcome avenues for argument. Best avoided?

As is, where is

Technicalities can still be found in the construction of contracts, especially shipping contracts.

The interpretative battle between judges who favour the background over the words of a contract and those who take the reverse view is well-established. But there is another more stark battle between those who cling to ancient technicalities and those who would discard them. In *Bominflot v Petroplus Marketing (The*

Mercini Lady) [2010] EWCA Civ 1145, the Court of Appeal went highly technical in concluding that an exclusion of all warranties did not exclude conditions implied by the Sale of Goods Act 1979; in *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), Cooke J was bound by *The Mercini Lady* but, not liking it, found a way to distinguish it; but now in *Dalmare SpA v Union Maritime Ltd* [2012] EWHC 3537 (Comm), Flaux J has sided with the technicalists, who seem to flourish in the shipping arena.

The detailed issue in *Dalmare* was whether a contract for the sale of a ship excluded the term of satisfactory quality implied by the section 14 of the SGA. The contract recited the buyers' inspection of the vessel and its records, and provided for delivery "as she was at the time of inspection". This, said the sellers, was the same as an "as is, where is" clause, which was inconsistent with the implied term. Section 55(2) of the SGA says that an "express term does not negative a term implied by this Act unless inconsistent with it."

Flaux J wrapped himself in ancient case law on construction in order to conclude that the clause in question, even if it had expressly said "as is, where is", was insufficient to exclude the term implied by section 14. He thought that section 55(2) required something extra, that excluding terms implied by law required the clearest wording, and in any event that he should "read down" the clause so that it only excluded the right to reject the vessel, not to claim damages.

You don't have to be an arch anti-technicalist, like Lord Hoffmann, to regard *Dalmare*, along with *The Mercini Lady*, as rather curious. The words of the contract were not read as the reasonable person would do so but with a detailed technical knowledge of historic and ambiguous case law leading to a result that was quite probably the reverse of that which the reasonable person might expect. Technicalities aren't necessarily a bad thing, but this may push them beyond their proper scope.

Empirical evidence

Guarantees and bonds remain protected species.

Aviva Insurance Ltd v Hackney Empire Ltd [2012] EWCA Civ 1716 is a useful reminder of the force of what is termed the rule in *Holme v Brunskill* (1878) 3 QB 595, namely that any change to the terms of the underlying indebtedness discharges a guarantor.

The case concerned a bond given by an insurer to support a building contract (quaere whether it was technically a guarantee). During the course of the contract, the builder got into difficulty, and the employer advanced him money. That did not save the situation, the builder went bust, and the contract was terminated. The insurer argued that the loan varied the terms of the contract, and thus discharged the bond.

The Court of Appeal disagreed. The Court of Appeal recognised that varying the terms of the contract would have discharged the insurer. Whether an advance to the builder did so depended upon whether it was in fact a variation to the contract or a separate arrangement outside the original contract. But if the advance was a separate agreement, the bond would not be discharged but at the price of the repayment of the advance not being covered by the bond.

A bondsman is not, however, discharged if it agrees to the variation or there is an "indulgence" clause in the bond covering what has been done, ie the usual sort of clause found in guarantees stating that variation of the contract will not discharge the bondsman. It is, however, necessary to be sure that, as a matter of construction, the indulgence clause is sufficiently wide to cover what has actually happened.

Jurisdiction

Insuring recognition

Procedural decisions are as entitled to recognition under Brussels I as substantive decisions.

An Icelandic shipping company was sued by two German insurers in Antwerp, but succeeded in staying the proceedings on the basis that the relevant contract gave exclusive jurisdiction to the Icelandic courts. The shipper must have been peeved then to be sued by the same insurers in the German courts and for the insurers to argue that the Belgian decision was not entitled to recognition in Germany because it was only procedural or because it only decided that the Belgian courts had no jurisdiction.

In *Gothaer Allgemeine Vesicherungen AG v Samskip GmbH* (Case C-456/11), the CJEU gave the Germans short shrift. Judgment is defined in article 32 of the Brussels I Regulation in very wide terms. There is no basis for limiting it to certain types of judgment. Any Belgian judgment was entitled under the Regulation to recognition in Germany, and should have the same effect there as a German judgment would have. Further, the judgment that the jurisdiction clause was effective was binding on the German courts, which accordingly had to follow the Belgian courts in declining jurisdiction.

Times they are a-changin'

English proceedings are stayed in favour of foreign proceedings brought in breach of a settlement agreement. But the position will be different under the recast Brussels I Regulation.

Amendments to the Brussels I Regulation have been agreed that will strengthen the effect of jurisdiction agreements. These amendments (in Regulation 1215/2012) will only apply to proceedings started on or after 10 January 2015, and the problems with the old regime remain clear for all to see in *Starlight Shipping Co v Allianz Maritime & Aviation Versicherungens AG* [2012] EWCA Civ 1714. At first instance, Burton J made some dubious orders that tried to circumvent these problems, but the Court of Appeal restored orthodoxy by overturning his measures.

The case concerned an insurer's failure to pay out on a lost vessel. The owners sued, and alleged that the insurers had sought to persuade the crew to perjure themselves, had spread false rumours in the market about the owners and generally behaved badly. English law favours insurers, and attempts to claim more than the insurance limit were refused. The case settled through a Tomlin order under which the insurers paid the full amount insured (though no interest or costs) and which included a jurisdiction clause in favour of the English courts. End of story.

Or not. Three years later the owners sued in Greece for the equivalents of malicious falsehood and defamation (they had also included a claim for damages for failure to pay punctually on the insurance policy, but were forced to abandon that because it had already been decided in England).

The insurers lifted the stay on the original English proceedings, as well as starting new ones, to enforce the terms of the Tomlin order by seeking a declaration that the proceedings in Greece breached the settlement agreement and an order that the owners set up an indemnity fund in England to meet the insurers' costs of the Greek legal adventure. The owners responded by arguing that both original and new English actions had to be stayed under articles 27 or 28 of the Brussels I Regulation (same or related causes of action, the Greek courts being first seised).

The owners' first problem in the Court of Appeal was that they had abandoned reliance on article 27 at first instance. The Court of Appeal nevertheless allowed them to reintroduce it. CPR 11 prevents a challenge to the jurisdiction of the English courts unless it is made within 14 days of acknowledging service. However, the Court of Appeal decided that reliance on articles 27 or 28 was not a challenge to the jurisdiction of the English courts. The English courts had jurisdiction but were obliged to stay, or had a discretion to stay, their proceedings because of earlier proceedings elsewhere.

This is doubtful because CPR 11(1)(b) expressly states that it applies to an argument that the court should not exercise its jurisdiction. That is precisely what an application under article 28 is for. Under article 27, there is no discretion and the court is obliged of its own motion to stay proceedings if another court was first seised of the same cause of action. However, article 24 provides that a court has jurisdiction where a defendant has entered an appearance other than purely to contest jurisdiction, as was the case in *Starlight*.

Having dubiously so decided (albeit avoiding the owners being tripped up on a technicality), the Court of Appeal then concluded that the causes of action in the original proceedings in England and in Greece were not the same. The English proceedings were in contract; the Greek proceedings were in tort. The Greek courts were therefore first seised, and the English courts were obliged to stay their proceedings. The Greek courts must decide whether the claims before them fall within the jurisdiction clause in the settlement agreement and, if not, whether the settlement agreement covered the claims in question.

An unfortunate result, but one that would, at least, not be the same under the recast Brussels I Regulation. Under that recast, a court named in a jurisdiction clause is not obliged to stay its proceedings in favour of another court even if that other court is first seised. The reverse is the case. As a result, in *Starlight,* the English courts could have decided whether the jurisdiction clause applied to the claims made in Greece, and the Greek courts, despite being first seised, should have stayed proceedings pending the English decision. The recast Regulation is, in this respect at least, a significant improvement.

Courts

Fessing up

The provenance of dubious evidence must be revealed ex parte.

Dar Al Arkan Real Estate Development Company v Al Refai [2012] EWHC 3539 (Comm) is a reminder of what can go wrong with an interim injunction if the evidence isn't up to scratch. The Cs were suing D1, a former employee who had left

C1's employment and allegedly set up a website containing many confidential documents belonging to the Cs. The other Ds were alleged to have assisted him in doing this.

The Cs sought interim injunctive relief against the Ds, and were granted non-disclosure orders against all the Ds, together with document delivery orders, disclosure orders and a worldwide freezing order against D1. Part of the evidence for the application was contained on two hard drives which had mysteriously appeared at C1's offices, and which contained a considerable number of emails taken from email accounts operated by D1. The Cs applied to the court under section 55 of the Data Protection Act 1998 for permission to use this information, whilst not admitting that permission was actually required.

The Ds applied to have the orders discharged, on the basis that the Cs had failed to make full and frank disclosure to the judge who had granted them, but, "on the contrary, misrepresented matters to him and thereafter… have failed to correct the untruths, errors and inadequacies in their presentation." They also alleged that the Cs were in breach of an order made by the court that they should deliver up the hard drives to their solicitors for safe keeping.

The judge found that there were fundamental problems with the evidence in support of the injunction. Noting that one of the deponents had failed to state the source of his information, despite it being made clear by the Court of Appeal in *Masri v Consolidated Contractors International Co SAL* [2011] EWCA Civ 21 that deponents should do so, the judge continued: "This is a recurrent deficiency in the claimants' evidence, both that adduced at the ex parte hearings and later affidavits and statements, although all the witnesses have routinely and inaccurately stated that they give the source of information about facts and matters not within their own knowledge. This has much detracted from the quality of their evidence."

There was also a dispute between the parties as to the origin of the hard drives, and what the Cs had done with the information on them. They said they had done nothing at all, but forensic evidence showed that they had deleted some data, and the judge said that the Cs' failure to tell the court about this was a breach of their duty to the court, as was their failure to disclose that one of the Cs' deponents was "closely connected" with the hacking of the emails that appeared on the drives.

Lastly, the Cs were alleged to have failed in their duty to the court as ex parte applicants for relief to provide to the court proper guidance as to the relevant law as well as to make a proper presentation of the facts.

The majority of the orders were therefore discharged.

Insouciance rewarded

Legal expenses insurers cannot restrict insureds' right to instruct their own lawyers.

"The facts of this case have revealed that the insurers exhibit an insouciance to their obligations under the Directive and the Regulations which leaves one quite breathless", according to Longmore LJ in *Brown-Quinn v Equity Syndicate Management Ltd* [2012] EWCA Civ 1633.

The Regulations in question are the Insurance Companies (Legal Expenses Insurance) Regulations 1990, made to implement an EU directive. Article 6(1) provides that where a legal expenses insured has recourse to a lawyer, the insured is entitled to choose that lawyer. Article 6(3) goes on that the contract must expressly recognise this. The insurance contract in this case was manifestly in breach of these provisions, but the immediate question was whether capping the hourly rates that the insurer was prepared to pay the insured's lawyers offended article 6(1).

The Court of Appeal decided that capping rates only breached article 6 if the remuneration to be paid to any lawyer chosen by the insured rendered the insured's supposedly free choice of lawyer meaningless. In this case, the Court of Appeal decided that there was insufficient evidence to conclude that the rates on offer - the rates paid to lawyers on the insurer's panel - had this effect. The rates were low but not such as to remove choice. If the insured wanted more expensive lawyers, the insured had to pay the difference.

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Contentious Commentary is a review of legal developments for litigators

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