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Contentious Commentary

Privilege

Consistency pays

A claim that litigation is anticipated needs to be supported by evidence.

At one time, a claim to privilege would go largely unchallenged. Now the courts treat such claims to "anxious scrutiny" (*Tchenguiz v SFO* [2013] EWHC 2297 (QB), [52]), looking at all the evidence and testing it, especially where litigation privilege is concerned. There are still remnants of the older doctrine that the courts will not go behind a witness statement asserting privilege, but those remnants look increasingly tattered.

In *Starbev GP Ltd v Interbrew Central European Holding BV* [2013] EWHC 4038 (Comm), privilege was claimed over two reports, one from a bank and one from accountants, into how a particular stratagem devised by a contractual counterparty affected sums due under the contract. Since the reports were by non-lawyers, they could only be privileged if litigation was reasonably in contemplation and they were created for the dominant purpose of the conduct of that litigation.

Hamblen J rejected the privilege claims. He decided that the reports were investigatory only. C might have had suspicions about its counterparty's activities but, until those suspicions were confirmed by the reports, there was insufficient reason to anticipate litigation. It was only if the outcome of the investigation was that the counterparty was seeking to avoid further payments under the contracts that litigation could reasonably be contemplated. Commissioning a report the conclusions of which would determine the likelihood of litigation was not done for the dominant purposes of the litigation.

The judge's approach is perhaps somewhat unworldly and certainly unhelpful, even circular. But it confirms that, without litigation, only advice from lawyers garners any privilege from subsequent disclosure.

One point made by D in *Starbev* was that C had not put in place a litigation hold. Under PD31B, §7, lawyers are obliged to advise their clients of the need to preserve documents as soon as "litigation is contemplated". There was no evidence that this advice had been given by the lawyers involved at the time (though the advice would have been privileged) or that a hold had in fact been ordered. This demonstrates the need for consistency. When trying to don a non-legal investigation with a cloak of litigation privilege invisibility, the person who commissions the investigation needs to set down on paper why s/he has done so (for the dominant purpose of anticipated and identified litigation) and to act consistently. Consistency might require a litigation hold, even if that results in potentially wasted costs.

Conflict of laws

Role reversal

Contempt proceedings can be served on people domiciled outside the EU.

The tables were truly turned in *Dar Al Arkan Estate Development Co v Al-Refai* [2013] EWHC 4112 (Comm). What started with a successful application by C for an ex parte injunction for breach of confidence and various economic torts has seen the injunction discharged for non-disclosure and replaced by applications by D to fine C for contempt of court and, more significantly, to imprison a director of C for aiding and abetting that contempt. The issue in the case was how to serve the contempt proceedings on the director since he was domiciled in Saudi Arabia and, perhaps unsurprisingly, declined to make service easy.

C's underlying claim was that a disgruntled ex-employee had run off with confidential information and was

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conducting a campaign against C that was damaging C's business. C had evidence to support its allegations in the form of emails extracted from two or three hard drives that had arrived, entirely unsolicited of course, in plain brown envelopes and that contained the email boxes of D and of associates of D. The emails were said to show D's complicity in the campaign. On the ex parte application, the source of this evidence was properly disclosed since criminal activity might have been involved in obtaining the emails. The judge ordered C to deliver the original hard drives to C's solicitors in London and required the solicitors to hold the drives.

C duly delivered the hard drives to its solicitors, but not before deleting two files that, it was suspected, implicated C in obtaining the emails, contrary to its claims of innocent, if delighted, surprise at the arrival on its doorstep of these bundles of joy. This and other things led to the injunctions being discharged and D seeking to commit C for contempt and a director of C for aiding that contempt.

C itself couldn't escape the jurisdiction of the English court since it had invoked that jurisdiction by starting proceedings. The director remained in Saudi Arabia and was not a party to the proceedings. Andrew Smith J decided that the rules allowing committal for aiding and abetting a contempt did have extra-territorial effect, unlike the jurisdiction to summon a director for cross-examination about assets under CPR 71.2 (*Masri v Consolidated Contractors (No 4)* 2009] UKHL 43).

The director still needed to be served out of the jurisdiction. D argued that permission was not required because article 22(5) of the Brussels I Regulation gave the English courts exclusive jurisdiction "regardless of domicile" over proceedings concerned with the enforcement of judgments. Andrew Smith J agreed that committal proceedings were concerned with the enforcement of a judgment.

The problem was a decision of the Court of Appeal, *Choudhary v Battar* [2009] EWCA Civ 1176, which decides that article 22 only applies to parties domiciled in the EU and has no application to parties, as in *Al-Refai*, domiciled elsewhere. *Choudhary* is based on a misunderstanding of how Brussels I works and is clearly wrong, as many have pointed out: "regardless of domicile" in article 22 means just that. *Choudhary* is also per incuriam a number of ECJ decisions not cited to the Court of Appeal.

Andrew Smith J agreed that

Financial services

ESMA survives

The UK's challenge to powers conferred on ESMA fails.

Challenging before the CJEU the validity of measures taken by the EU is generally a pretty forlorn exercise. Successful challenges, such as the *Tobacco Advertising* and *Cooperative Societies* decisions, come round only slightly more often than Halley's comet. The CJEU's reflex reaction is to find some reason to uphold - even expand - the EU's competence. So it was in *UK v Parliament and Council* (case C-270/12). The UK managed to persuade the Advocate General that the EU had overstepped the mark, and the CJEU generally follows the Advocate General. But not in this case. The CJEU adopted its default position of upholding measures taken by the EU.

The case concerned article 28 of Regulation 236/2012/EU, which confers on the European Securities and Markets Authority wide powers in relation to short selling in the financial markets. The UK argued that the powers went beyond the EU's ability to delegate legislative powers to executive bodies because the powers were too wide-ranging and overly discretionary. The CJEU (like the AG) rejected this. The powers were, the CJEU considered, highly circumscribed and required specific technical and professional expertise. Just the sort of thing that should be left to boffins on executive bodies.

The Regulation was made under article 114 of the TFEU, which permits the "approximation" (ie harmonisation) of member states' laws for the purposes of the establishment or functioning of the internal market. The UK (and the AG) said that since ESMA could direct measures to individual institutions, overriding local regulators, the Regulation did not harmonise the laws of the member states; it was specific regulation by ESMA of financial institutions, which is not within the scope of article 114. No, said the CJEU. The EU can choose how it harmonises; if it chose to harmonise this way, fine. Harmonisation doesn't have to be of general application. So all remains well with the European System of Financial Supervision.

Choudhary is wrong, but still felt obliged to follow it. The Court of Appeal might be able to decline to follow its own earlier decisions if made per incuriam, but Andrew Smith J concluded that this luxury was not afforded to judges, like him, who reside lower down the judicial pecking order.

But Andrew Smith J was still able to secure service on the director. The judge decided, since he was constrained to hold that permission was required, that the director was a necessary and proper party to the proceedings, that permission to serve out of the jurisdiction should therefore be given under PD6B, §3.1(3), and that the attempts to effect service already made should be retrospectively sanctioned.

Right answer; wrong route.

Swiss hard cheese

Swiss insolvency proceedings do not require a stay of an English action.

The Lugano Convention determines jurisdiction as between the courts of the UK and of Switzerland (and Iceland and Norway). Like the EU's Brussels I Regulation, Lugano excludes from its scope proceedings relating to insolvency (article 1(2)(b)). As a result, the existence of such proceedings in Switzerland does not require the English courts to stay subsequent commercial proceedings brought in England. But what are proceedings relating to insolvency for these purposes? The CJEU has taken a narrow view, holding that they are proceedings that derive directly from insolvency proceedings and are closely connected with those insolvency proceedings (*Gourdain v Nadler,* Case C-133/78). In *Fondazione Enarsco v Lehman Brothers Finance SA* [2014] EWHC 34 (Ch), the issue was whether Swiss proceedings akin to an appeal from the rejection of a proof of debt were sufficiently related to insolvency proceedings to fall within the exclusion in article 1(2)(b).

Enarsco concerned a squabble over the sums due on close out of a derivatives transaction following Lehman's insolvency. C claimed that D (Lehman's Swiss subsidiary) owed money to C; D claimed the reverse. Round one of the dispute involved the English court ([2011] EWHC 1822 (Ch)) upholding C's approach to calculation, but without determining the actual numbers. Nevertheless, D gave no indication that it would reject C's claim if the court decided, as it did, that C's approach to calculation was correct.

But when D published the list of the claims it admitted in its insolvency, C's claim was not included. Swiss law required an appeal against C's exclusion from the list within 20 days, which was done. C then started proceedings in England because the derivatives contract was governed by English law and gave jurisdiction to the English courts. D argued that the prior Swiss proceedings were civil and commercial proceedings within the Lugano Convention and, as a result, that the English courts could not proceed (article 27).

David Richards J disagreed. He decided that the Swiss proceedings were related to insolvency within article 1(2)(b) of the Lugano Convention and, as a result, that article 27 did not apply. He noted that the Swiss proceedings were integral to and only arose under Swiss insolvency law. The purpose was not simply to establish whether a sum was due but also any ranking issues and whether the sum should be reduced under insolvency law. Any decision did not even give rise to a res judicata.

So the English court will hear the case and, the judge considered, its judgment would be helpful to the Swiss court in deciding what is due to whom.

Clifford Chance LLP acted for one of the successful parties in *Enarsco*.

Treaty trouble

Service out by an alternative means will not usually be allowed where there is a service treaty.

C obtained a large judgment against D1, and applied for a third party costs order against the individual behind D1, ie D2. This required D2 to be joined to the proceedings and for the process to be served on D2. D2 was resident in Monaco, which is a party to the Hague Convention on service and appears only to allow service of foreign process by means of that Convention.

Third party costs orders are meant to be dealt with on a "speedy and summary" basis, but using the Hague Convention would have defeated this aim because its wheels turn exceedingly slowly. Conveniently, D2 also spent a lot of time in Connecticut and, although the US is a party to the Hague Convention, Connecticut does not object to service of foreign process by other means. So C applied for, and was given, permission to serve D2 by alternative means (ie not at his residence in Monaco) under CPR 6.15 by leaving the papers at D2's address in Connecticut, where his wife lived.

Having granted permission on the without notice application for service in Connecticut, in *Deutsche Bank AG v Sebastian Holdings Inc* [2014] EWHC 112 (Comm), Cooke J then set aside his earlier order. He recognised that service out should no longer be regarded as exorbitant or subversive of other countries' sovereignty (*Abela v Baadarani* [2013]

UKSC 44), but considered that the laxer approach to alternative means of service this might offer only applied where there was no treaty providing for service. Alternative service in Connecticut could not be used as a means to avoid the delays inherent in service under the Hague Convention. As a result, although the Supreme Court in *Abela* was unperturbed about allowing alternative service, this is not a sufficient reason to allow C to circumvent the frustrations of serving in Monaco under the Hague Convention. Treaties must not be subverted.

Dissolute judgments

A dissolved corporation is allowed to be sued.

Whether a foreign corporation exists is a matter for the foreign law in question. As a matter of English law, if a foreign corporation has been dissolved under its local law, it cannot be sued in England. But in *7722656 Canada Inc v Financial Conduct Authority* [2013] EWCA Civ 1662, a majority of the Court of Appeal reached the curious decision that a company that had been formed and then dissolved in Canada could nevertheless still be the subject of proceedings in England for market abuse.

The majority's view was expressed in terms that it could not overturn the Upper Tribunal, but hinged on the fact that Canadian law said that, although the corporation had been dissolved, it could still be sued for up two years after its dissolution. Unsurprisingly, service could not be effected on the corporation (it didn't exist), but on others, and the shareholders seemed to act for the corporation. This, as the dissenting Lewison LJ said, looks like a procedural provision in Canada, rather than undoing the dissolution to give the corporation renewed existence; procedure is a matter for the lex fori (ie English law), not the law of incorporation. Nevertheless, the majority decided that the company had sufficient existence in the shadowlands of Canadian law to be the subject of proceedings in England.

On the substance, the Court of Appeal decided that where a person placed orders for contracts for differences with a bank knowing that the bank's computers would automatically buy shares to hedge the position, the person in question was effecting a transaction in the shares for the purposes of section 118(5) of the Financial Services and Markets Act 2000. Shares are qualifying investments for the purposes of market abuse (derivatives are not), and so the transactions could be market abuse if they gave a misleading impression of the supply of, demand for or price of the shares. Further, even if the transactions were not trades in shares, the automaticity of the trades in shares meant that they were trades in relation to shares, which was sufficient under section 118(1) for the market abuse rules to apply.

Contract

Trust in me

Subsequent events do not affect the validity of a demand on a performance bond.

A seller demands in good faith payment from a bank on a performance bond on the basis of an alleged default by the buyer under a shipbuilding contract. The bank fails to pay. Some time later, an arbitration award is made to the effect that the buyer was not in default under the shipbuilding contract. Is the bank still obliged to pay under the performance bond or is any payment held on trust by the seller for either the bank or the buyer?

In *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA* [2013] EWCA Civ 1679, the Court of Appeal was clear that the bank remained obliged to pay. The Court of Appeal would have nothing to do with trusts and other equitable stuff. The seller's entitlement to payment was complete on demand being made under the performance bond, and the bank should have paid then. Subsequent events did not retrospectively invalidate the demand. There would have to be an accounting between buyer and seller as to the amounts actually owed by one to the other, but that did not affect the bank, still less did it create a trust of any sums paid by the bank in favour of the bank.

The Court of Appeal therefore issued a stern reminder that letters of credit and performance bonds are independent of the underlying contract. Absent fraud, an issuing bank cannot not rely on the underlying contract to excuse it from liability.

Bristol fashion

Monies held in escrow are not held in trust.

Bristol Alliance Nominee No 1 Ltd v Bennett [2013] EWCA Civ 1626 is a reminder that monies held in escrow are not held in trust (absent express terms to the contrary) and are not owned by either potential claimant to the monies. An escrow agent is simply a debtor under a tripartite contract with the two competing claimants and is obliged to pay one or other claimant in accordance with the terms of the contract.

In *Bristol Alliance*, monies were paid

by a tenant into an escrow amount pending surrender of a lease. The landlord was entitled to call for surrender at any time, in which case the tenant was obliged to execute documents that triggered payment to the landlord from the escrow account. The landlord called for surrender, but the tenant went into administration and the administrators did not sign the relevant documents. Absent a document signed by both the landlord and the tenant, the escrow agent had no obligation to pay anyone.

However, the Court of Appeal intervened to grant an order for specific performance against the tenant, requiring the administrators to execute the necessary documents. The administration order did not affect the tenant's obligation to execute the documents. The monies in the escrow account were not the tenant's monies and so the order was not stripping assets out of the tenant's insolvent estate. The tenant had to perform its obligations, whether before or after insolvency.

Courts

Damaged inadequacy

Exclusion clauses are not relevant to whether damages are an adequate remedy.

American Cyanamid [1975] AC 396 lays down that an interim injunction, like other injunctions, will not be granted if damages are an adequate remedy. But what does an adequate remedy mean (or, as it was put in *Evans Marshall & Co v Bertola* [1973] 1 WLR 349, when is it just that C should be confined to a remedy in damages)? In particular, does the existence of an exclusion or liquidated damages clause in a contract that will, in practice, limit damages below full compensation render those damages inadequate?

The judge in *AB v BC* [2014] EWHC 1 (QB) was torn. In *Bath & North East Somerset DC v Mowlem plc* [2004] EWCA Civ 115, the Court of Appeal said that a liquidated damages clause that, as things turned out, limited recoveries below to actual losses could result in damages being inadequate. However, other cases arguie that parties should not be able to secure an injunction in order to avoid the allocation of risks agreed in the contract.

Stuart-Smith J decided that he could distinguish *Bath & North East Somerset* because it was concerned with liquidated damages while he was concerned with an exclusion clause. He said that where parties included a liquidated damages clause, their intention was for the innocent party to be compensated in full even if, as matters transpired, they had underestimated the losses. But through an exclusion clause, the parties agreed that the innocent party should not receive full compensation. In the latter situation, the court should not re-balance the parties' bargain by ordering an injunction, but in the former they could.

Stuart-Smith J had the good grace to admit that this distinction is not entirely convincing; it was merely the best he could do in order to achieve his desired result. He granted permission to appeal.

Double trouble

A second claim is not necessarily an abuse of process.

A lawyer was sued for failing to pay out sums held in escrow. Breach of trust, dishonest assistance and other

Arbitration

No choice: stay where you're seated

The law of the seat governs the arbitration agreement in the absence of choice.

The Commercial Court has again considered how to determine the proper law of an arbitration agreement in the absence of choice by the parties. In *Habas Sinai v VSC Steel Co.* [2013] EWHC 4071 (Comm), Hamblen J followed the Court of Appeal's approach in *Sul América Cia Nacional De Seguros SA v Enesa Engenharia SA* [2012] 1 Lloyd's Rep 671 in holding that, absent express choice, the law governing an arbitration agreement (which is treated as an agreement distinct from the rest of the agreement of which it forms part) is the law of the seat, not the law of the underlying agreement.

In contrast to *Sul América*, in *Habas Sinai* there was no express choice of law in the underlying contract. A Turkish company failed to deliver high tensile steel to a Hong Kong company in breach of contract. D secured an award of $3m against C in a London-seated arbitration. C challenged the validity of the award on the basis that the arbitration agreement in the underlying contract was made by agents lacking authority to do so. The court held that the express choice of London as the seat of the arbitration was an "overwhelming" factor indicating that the parties intended the arbitration agreement to be governed by English law. The lack of a governing law clause did nothing to displace this indication. Nor did the fact that, applying the Rome Convention, the underlying contract was governed by Turkish law

Since English law governed the arbitration agreement, English law also applied to the question of whether C's agents had apparent authority (but not actual authority) to enter into the arbitration agreement. The judge decided that C's agents did have apparent authority, and the jurisdictional challenge under section 68 of the Arbitration Act (and another under section 69) therefore failed.

similar claims were thrown in for good measure too. The action was settled, the settlement agreement covering only the claims pleaded in the action. The claimant then dug a bit further, and discovered additional, larger, claims arising from the same escrow account, which could have been included in the original action. This further claim was not barred by the settlement, but was its pursuit an abuse of process?

No, according to Leggatt J in *Stirling Mortimer Global Property Ltd v ELS International Lawyers LLP* (1/11/13). A second claim is not necessarily an abuse of process. Whether it is an abuse requires "a broad, merits-based judgment... focusing on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it issues which could have been raised before" (*Johnson v Gore Wood* [2002] 2 AC 1, 31). Circular though this test may be, the emphasis is that there must be something peculiar in the second action to render it an abuse.

Leggatt J found nothing peculiar in the second action, not least because the settlement clearly did not cover the additional claims, leaving a reasonable reader of the settlement agreement to contemplate that further claims remained a possibility. But will the emphasis on proportionality and the efficiency of the courts lead to a tightening of this approach? Better still, draft the settlement agreement sufficiently widely.

No hearing for old men

There is no jurisdictional merits threshold for pre-action disclosure.

In order for the court to order pre-action disclosure, CPR 31.16 imposes jurisdictional requirements: that the applicant and respondent are likely to be (meaning may well be) parties to subsequent proceedings; that standard disclosure would encompass the documents sought; and that pre-action disclosure would be desirable for various reasons. But does this imply a jurisdictional requirement that the applicant's claim in the proceedings to which the applicant and defendant may well be parties passes some sort of test as to the merits of the applicant's underlying claim?

In *Smith v Secretary of State for Energy & Climate* [2013] EWCA Civ 1585, the Court of Appeal decided that there was no merits jurisdictional threshold for pre-action disclosure (overruling *Kneale v Barclays Bank plc* [2010] EWHC 1900 (Comm)). The court could, in theory at least, order pre-action disclosure even though the applicant's claim in the proceedings that may well be brought against the respondent is hopeless.

But, of course, the merits re-emerge in the exercise of discretion. The Court of Appeal considered that it was appropriate to ask at that stage whether the applicant had shown some reason to believe that he may have suffered a compensatable injury. If not, no disclosure. But this, of course, begs numerous questions. A wholly unconvincing reason is nevertheless some reason. What it really means is that everything flows into the discretionary pot allowing the wisdom of the judiciary to provide a sagacious answer to each individual case unhindered by tiresome rules.

Jackson Jacobins

The courts continue to take a tough line on rule breaches.

"It is time that equality bore its scythe above all heads. It is time to horrify all the conspirators. So legislators, place Terror on the order of the day! Let us be in revolution, because everywhere counter-revolution is being woven by our enemies. The blade of the law should hover over all the guilty." The English courts have taken to heart the words of revolutionary France, for the blade of the law continues to be honed on the whetstone of subservience in order to bring terror to counter-revolutionaries who dare to miss a deadline.

> "Terror is only justice: prompt, severe and inflexible; it is then an emanation of virtue…" But only if it's the other side that misses the deadline.

Webb Resolutions v E-Surv Ltd [2014] EWHC 49 (QB) involved an application for an extension of time to renew orally a paper application for permission to appeal. Time expired on 17 October, but the application was not made until 22 November. Even though there is no sanction in the relevant rule, and therefore CPR 3.9 is not relevant, Turner J decided that he should still apply the strictures laid down in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 153. He asked whether the breach of the rule was trivial: answer, no. He then asked whether any good reason for the breach had been offered: answer, no. Extension therefore refused. Moral: you must apply for an extension of time before time expires.

Turner J confirmed his Jacobin credentials by again taking a hard-line approach in *MA Lloyd & Sons Limited v PPC International Ltd* [2014] EWHC 41 (QB), in which he refused an extension of time to serve evidence

(echoing *Durrant v Chief Constable of Avon & Somerset* [2013] EWCA Civ 1624, in which the Court of Appeal left the police to fight a civil claim without any evidence on its side).

The Court of Appeal did likewise in *Thevarajah v Riordan* [2014] EWCA Civ 15 in reversing a deputy judge's order on a second application for relief from the sanction imposed by an unless order (the first application having been rejected by a different judge). The Court of Appeal was highly critical of the deputy judge's leniency, observing that the fact that D had done, albeit late, what was required by the unless order was not a change of circumstances sufficient to justify the grant of relief.

The Court of Appeal was equally strict in different circumstances in *Rehill v Rider* [2014] EWCA Civ 42. A hearing was listed for a day in the Court of Appeal, and was duly completed within that day. This meant that the court would usually conduct a summary assessment of the costs of the hearing. But neither side had filed a statement of costs for that purpose. In order to indicate its disapproval of this rule breach, and entirely of its own motion, the Court of Appeal decided that the successful party, who was awarded its costs, should pay the costs of any detailed assessment of those costs in any event.

The strict approach has even infiltrated the usually more leisurely arena of tribunals. In *HMRC v McCarthy & Stone (Developments) Ltd* (17 December 2013), the Upper Tribunal, Tax and Chancery Chamber, refused an extension of time for HMRC to file a notice of appeal, for which it had already been given permission. Due to internal problems, HMRC was 56 days late in filing its appeal. Tough, said the UT, applying *Mitchell*. Rules, even tribunal rules, must be obeyed. Litigants in person might be granted latitude, but not HMRC.

"Terror is only justice: prompt, severe and inflexible; it is then an emanation of virtue…" But only if it's the other side that misses the deadline.

Contentious Commentary is a review of legal developments for litigators

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