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Contentious Commentary

Conflicts of interest

A case of knives

Lawyers are prevented from acting because they held relevant confidential information.

Lawyers can act against their ex-clients, but not if the lawyers have relevant confidential information and there is a real, as opposed to fanciful, risk of that information being misused: *Bolkiah v KPMG* [1999] 2 AC 222. What constitutes a real risk for these purposes was explored in *Georgian American Alloys Inc v White & Case LLP* [2014] EWHC 94 (Comm). The judge's comments about ethical barriers (or screens) are unflattering to solicitors, and may make the barriers impractical in other businesses too.

D acted for P in a dispute with P's joint venturers. That work fizzled out and, thinking that the dispute had settled, a different group within D then acted on the restructuring of part of the joint venturers' business empire. This latter work involved due diligence and lots of investigation of the empire generally. Even before this work for the joint venturers had finished, D was again instructed by P in his dispute with the joint venturers, which hadn't in fact settled. This new work for P included trying to identify assets of the joint venturers and then preparing to issue both court and arbitral proceedings for P against the joint venturers. At this point D appreciated the potential conflict and put up an "ethical screen" between those acting for P and those who had acted for the joint venturers.

The joint venturers objected to D acting against them for P. D eventually withdrew from the arbitration, but argued that, given the ethical screen as well as physical separation, any risk of misuse of confidential information was fanciful. To demonstrate this, D interviewed all those acting for P to find out whether they had discussed D's work for the joint venturers with anyone who had acted for the joint venturers. The vast majority weren't aware, until the ethical screen was put in place, that D had acted for the joint venturers. No one who shouldn't have done so had accessed any documents created for the joint venturers.

Field J was very sniffy about this evidence, and granted a permanent injunction preventing D from acting for P against the joint venturers. Citing *Bolkiah*, he said that the presumption is that information moves within a partnership - even across different offices in different countries of a very large partnership. He noted in particular the period before the ethical screen was erected, when, he said, information might have moved. No one might have looked at electronic documents, but there could have been oral or inadvertent disclosure of the contents. There might be physical separation of the two groups, but individuals could have spoken on the phone or met at firm events. Those who acted for the joint venturers had not been interviewed.

Field J was determined to prevent D from acting for P. 89 people, including 50 lawyers, acted for the joint venturers, who were billed over $900k. 149 people, including 88 lawyers, acted for P. That might simply be too many people with too much relevant information on both sides, even within a large multi-national partnership. But the judge's dismissal of the evidence that there had been and would not be any leakage might mean that it is too late to set up an ethical barrier within any organisation when one matter has already started, whatever those involved say about their knowledge of the other side. At the very least, extensive steps are necessary to prove to a potentially cynical judiciary that there is no risk of leakage.

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Tort

A continuing problem.

A pre-contractual misrepresentation continues in effect until the contract is entered into.

In the course of negotiations over the lease of a grouse moor by D to E, D made a negligent misrepresentation to E about the number of birds on the moor. A week later, E informed D that any lease would be taken not by E but by C, a limited liability partnership formed for the purpose and of which E was the directing mind. C then leased the moor from D. Is C entitled to damages for the negligent misrepresentation despite the misrep having been made to E?

In *Cramaso LLP v Ogilvie-Grant* [2014] UKSC 9, the Scottish courts got themselves hung up on the timing of the misrep. The Supreme Court pointed out that representations made to induce a contract continue in effect until the contract is entered into (hence the obligation to correct). On the facts, there was no problem with the representation's continuing both from the time of its making to the time of the contract and from E to C, since E and C were in substance the same. D knew or should have known that C, as it took over from E, was relying on the misrep.

Under English law, it is not necessary to show a *Hedley Byrne* duty of care in these circumstances. The Misrepresentation Act 1967 would have given C a claim to damages even if no duty of care was owed. Scottish law requires a duty of care, but it was entirely obvious that D owed a duty of care to C in these circumstances. The Scottish courts were therefore put in their place.

Changing the rules

The test for vicarious liability continues to cause difficulties.

Sexual abuse has changed the law on vicarious liability (ie when one person is liable for a tort committed by another, traditionally an employee). The courts want to impose vicarious liability in these cases in order to ensure that someone with the means to compensate the victims is on the hook. But there are problems with the traditional bases upon which vicarious liability is invoked. A common abuser, churches under various guises, tends not to employ as such clergymen; the old requirements for an employer and an employee must therefore go. Similarly, sexual abuse is not within the scope of anyone's employment; that too must go.

But what should the ancient staples be replaced with? Currently, there is

Financial services

The final frontier

Decisions by the Financial Ombudsman prevent subsequent legal proceedings.

Complaint to the Financial Ombudsman. Complaint upheld, damages awarded. Complainant accepts the award and takes the money. Can the complainant then bring court proceedings seeking higher compensation? No, because section 228(5) of Financial Services and Markets Act 2000 says that, once accepted by the complainant, an award is "binding on the respondent and the complainant and final" (and, indeed, enforceable as if it were a County Court judgment).

In *Clark v In Focus Asset Management & Tax Solutions Ltd [*2014] EWCA Civ 118, the Court of Appeal overturned the first instance decision and decided that an award by the FO which the complainant elects to accept (the complainant can reject the FO's decision) is indeed the end of the line for the complainant. The complainant cannot take the money offered by the award in order to fund a foray into the courts.

The Court of Appeal didn't reach this conclusion because of section 228(5). They regarded the section as ambiguous as to whether the finality applied only to the proceedings before the FO or more generally. The Court of Appeal's reasoning was that the principles of res judicata apply as much to decisions by the FO as to decisions by the courts because FSMA does not exclude those principles. The FO need not decide matters strictly according to the law, but that does not, according to the Court of Appeal, prevent a res judicata arising with regard to causes of action covered by the facts considered by FO.

In *Clark*, C complained that D's negligence had caused losses of £300k. The limit on the compensation that the FO can award was then £100k. The FO awarded C £100k but recommended that D top that up to full compensation. D declined to do so, but C nevertheless accepted the FO's award, aiming to make use of the £100k to fund the subsequent litigation. The Court of Appeal said that that does not work. C should have rejected the FO's award, and used it as a bargaining chip to try to extract more from D in court proceedings. But is £100k (now £150k) in the hand worth litigation in the bush? Bit like a game show.

a two stage test (though "test" is a generous word in context). First, the relationship between the primary wrongdoer and the person alleged to be liable must be considered in order to decide whether the relationship is capable of giving risk to vicarious liability (*Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1). Secondly, if it is so capable, the issue is whether there is a sufficiently close connection between the wrongdoing and the "employment" such that it is fair and just to hold the "employer" vicariously liable (*Lister v Helsey Hall Ltd* [2002] 1 AC 215). Neither limb could be accused of a lack of vagueness.

In *Cox v Ministry of Justice* [2014] EWCA Civ 132, the Court of Appeal looked at the first limb. The case involved a prison catering manager who was injured when a prisoner negligently dropped a 25kg sack of rice on her. The prisoner was carrying the sack from the loading bay of the prison to the kitchen. The prisoner was not employed by the Ministry of Justice, but was under the control of the MoJ and, if prisoners were not used for this task, the MoJ would have had to employ someone else to do the manual labour. The Court of Appeal considered that this made the relationship between prisoner and MoJ sufficiently akin to employment that the relationship was capable of giving rise to vicarious liability.

The Court of Appeal looked at the second limb in *Mohamud v Wm Morrison Supermarkets plc* [2014] EWCA Civ 116. An employee at a supermarket garage took it upon himself to abuse verbally a customer in the shop attached to the garage, then followed the customer outside and attacked him physically. The Court of Appeal decided that the supermarket was not vicariously liable. The employee was employed to interact with customers, but had no obligation to keep order at the garage (he had been told to avoid confrontations) and had no power over the customer. The customer was not especially vulnerable. The employment provided the opportunity, setting, time and place for the attack, but that was not enough. For the connection to be sufficiently close, there must be some element of the employer granting the employee authority (eg night club bouncers), furthering the employer's aims or the inherence of friction in the course of the employment. Sounds a bit like the abandoned scope of employment test.

So where does that leave us? In the habitual location where every case depends upon its own facts.

Contract

Damaged goods

A party's own inadequate performance does not reduce the damages it must pay.

Tarom SA v Jet2.com Ltd [2014] EWCA Civ 87 involved D making the intriguing argument that because D had problems in performing its contractual obligations, C would not have put any work its way and, as a result, that C suffered minimal losses when C terminated the contract for D's repudiatory breach. The Court of Appeal didn't buy this. Damages should be assessed on the (fictional) basis that D was able and willing to carry out its contractual obligations.

The case concerned C-checks on aircraft (checks required every couple of years or so and which generally take a couple of weeks). Under the agreement between C and D, C was entitled, but not obliged, to send its aircraft to D for the checks. As D was not keen on doing this work because it had under-priced the contract, C obviously looked for alternative checkers even before it terminated the agreement as a result of D's failings. So, argued D, C would not in fact have sent any aircraft to D for the checks - at least fewer than the judge thought likely - over the remaining term of the agreement and, as a result, C suffered no loss as a result of D's repudiatory breach.

The Court of Appeal recognised that this argument meant that the worse D performed its obligations and the more it insisted that it did not want to do so at all, the lower the damages that D would have to pay. Unsurprisingly, the Court of Appeal did not find this argument attractive. The Court of Appeal decided that damages should be assessed by determining how many aircraft C would have sent to D for checks had D performed its obligations to the full.

Courts

Mitchell antithesis

Late provision of security for costs does not justify a claim being stayed permanently.

An order provided that unless security for costs was given by 4pm on 5 December, the action would be stayed. The security (a bond) was not available until the morning of 6 December. Action therefore stayed. D refused to accept the security until the stay had been lifted and, unsurprisingly, then contended that the stay should not be lifted in the harsh new world of *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537.

In *Summit Navigation Ltd v Generali Romania Asigurare Reasigurare SA* [2014] EWHC 389 (Comm), Leggatt J condemned D's approach, giving a

judgment which he hoped would discourage such attempts to turn to tactical advantage a short delay that had no impact on the efficient conduct of the litigation.

The judge accepted that an application was necessary to lift the stay and that the stay was a sanction for the purposes of CPR 3.9. But, he argued, a stay for failure to provide security for costs could only ever be intended as a temporary measure. The full *Mitchell* rigour should not therefore apply to an application to lift the stay (it would have been different if the order had been that the action be struck out for failure to provide the security). In contrast, Leggatt J thought that in *Mitchell* and the other cases following it the sanction had been intended to be permanent.

A distinction between different kinds of sanction requiring different approaches to their lifting is not easy to follow - there is no hint to that effect in *Mitchell* - but Leggatt J was perhaps on stronger ground with his next point. He said that even if *Mitchell* did apply, the breach was trivial (though Leggatt J criticised the Court of Appeal's choice of that word, preferring "minor"). Missing a deadline by one day was not of great consequence - unless you consider that the need for compliance trumps all, which was the approach in other cases. Leggatt J also considered that it would be unjust to stay the action permanently and so would not have done so in any event.

Rather than criticising D for seizing an opportunity proffered by the Court of Appeal on a silver salver to get rid of the case altogether - what else should D have done? - Leggatt J might have criticised the Court of Appeal for placing rule compliance above justice. But perhaps that what he was doing.

Stuart-Smith J also wobbled in *Bank of Ireland v Philip Pank Partnership* [2014] EWHC 284 (TCC). C put in its signed budget on time, but instead of setting out the statement of truth, the budget merely had "[statement of truth]" above the signature. Someone had forgotten to delete the parentheses and set out the statement of truth in full. This was rectified when the error was pointed out. Stuart-Smith J considered that this was an irregularity rather than something that rendered the budget a nullity. As a result, relief from sanction was not required but, even if it had been, he would have granted it because the breach was trivial.

Double jeopardy

A finding in an arbitration does not stop the loser arguing the same point in litigation with another party.

D was the respondent in an arbitration with P over the sale of oil. P made serious allegations against D, including deliberate wrongdoing, and won on most points. Unfortunately (for P), P lost on the fatal point that the cause of action vested in C, not P. C knew nothing about the arbitration.

When C awoke from its slumber, it sued D in the English courts. D then raised all the same defences to the claim that it had run in the arbitration. In *OMV Petrom SA v Glencore International AG* [2014] EWHC 242 (Comm), C argued that it was an abuse of process for D to try to argue the same points against C when the points had already been decided adversely to D in the arbitration between P and D.

Blair J decided that the facts that the prior decision was in an arbitration and was between different parties were not in themselves enough to prevent D's defence being an abuse of process. Nor was it enough that the relevant decisions were technically obiter. The test in these circumstances is whether it would be unfair to allow the re-litigation of the same issues or would bring the administration of justice into disrepute. The decisive issue for Blair J in concluding that D was not abusing the process of the court was the seriousness of the allegations. He regarded it as less unfair on C that D should be able to raise the issues already decided in the arbitration than

Privilege

Proof of the pudding

A claim to privilege must be detailed and clear.

In *Rawlinson & Hunter Trustees SA v Akers* [2014] EWCA Civ 136, the CA rejected Grant Thornton's claim to litigation privilege over certain reports produced as or for liquidators or similar officeholders. The bulk of the CA's judgment involved quoting verbatim from Eder J's first instance judgment, but two matters seem to have influenced the Eder J and the CA. First, privilege was only offered as a ground for non-disclosure late in the day, which is bound to arouse suspicion. Privilege is hardly an obscure doctrine, and the firm (later removed) that first failed to claim privilege was Simmons & Simmons, whose senior partner is the author of one of the leading books on the subject. Secondly, the claim to privilege was too vague. The CA clearly wanted as much chapter and verse as could be given without revealing the allegedly privileged content. Who commissioned the report? When? Why were there delays etc etc. A general witness statement by the solicitor then acting, well after the events in question, was insufficient.

it would have been on D had D not been able to do so.

Blair J added he was also influenced by the fact that while C was seeking to prevent D from challenging the arbitrators' conclusions, C reserved the right to challenge their conclusions on quantum. C could not expect the court to hold D to the parts of the award that C liked but not to hold C to those parts that C didn't like. The judge was also not impressed by delays in C making the application.

But the bottom line was that the allegations were of such seriousness that D should be able to challenge them for a second time. The logic of making the nature of the allegations the decisive element may not be obvious to all, though the outcome may look right.

Conflict of laws

Point de départ

Applying a foreign law does not require the application of foreign procedure.

It was always going to be ambitious to argue that an English court should adopt a French approach to procedure. But in *Wall v Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138, D argued that because the Rome II Regulation obliged an English court to apply French law in order to determine the damages due following a road traffic accident, the court should also apply the procedures that a French court would follow. This would mean that the court appointed a single expert (rather than the eight or ten that C wanted), who would talk to other relevant experts so far as necessary and produce a single report. Cross-examination would be next to non-existent - indeed, the expert couldn't realistically be cross-examined on those parts he or she had derived from the sub-experts.

"Ambitious" in this context means hopeless. The Court of Appeal decided that Rome II might require the application of French law to the assessment of damages, but that did not necessitate the adoption of French procedure. Procedure remains a matter for the lex fori.

The Court of Appeal did, however, conclude that "law", which is what must be applied, should be given a wide interpretation in these circumstances. It means not just the black letter stuff, but also any guidance habitually followed by the courts. The Court of Appeal had in mind in particular any equivalent of guidelines issued by English Judicial College as to damages.

Suspicious minds

Robust decision of arbitrator does not fail for appearance of bias.

In *Interprods Ltd v De La Rue International Ltd* [2014] EWHC 68 (Comm), Teare J rejected a challenge to an LCIA award for lack of jurisdiction and serious irregularity (sections 67 and 68 of the Arbitration Act 1996).

C acted as agent and distributer for the supply of bank notes made by D. C admitted that it used the commission it was paid by D to bribe Nigerian officials, as a result of which D terminated the agency contract. Teare J decided that termination for reasons of past or intended criminal offences did not take D's claim for a declaration of valid termination outside the scope of the (standard) arbitration clause.

The allegation of serious irregularity in the conduct of the arbitration resulted from an alleged breach of the sole arbitrator's duty to act impartially by reason of several counts of supposed apparent bias. For example, C was not present at a teleconference to fix a date for a preliminary hearing. However, C had been given ample opportunity to be represented. No clear reasons were given for not participating. The judge found that the arbitrator's decision was "robust but fair". Conducting the subsequent hearing despite C's no-show was not indicative of an appearance of bias.

Teare J also rejected the allegation that the arbitrator was not impartial because the solicitors who acted for D also acted for parties in two other LCIA arbitrations in which the same arbitrator had been appointed. Teare J asked whether an impartial and objective observer (regardless of nationality) would conclude that there was a real possibility of bias, that impartial observer being informed of the relevant facts and understanding how legal practice functions in this jurisdiction. Challenge dismissed – the arbitrator had not acted partially. Only the most suspicious minds would view his actions as appearing biased.

Time to go home

A late challenge to the jurisdiction of the court is allowed to proceed but then rejected.

CPR 11(4) requires an application challenging the jurisdiction of the court to be made within 14 days of the acknowledgment of service. In *SET Select Energy GmbH v F&M Bunkering Ltd* [2014] EWHC 192 (Comm), D was one day (or, possibly, sixteen days) late, perhaps because the proceedings were, eccentrically, brought in the Chancery Division rather than the Commercial Court, where the time limit is 28 days (the case was later transferred to the

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Commercial Court). As a result, D was deemed to accept that the court had jurisdiction to try the claim (CPR 11(5)). But article 27 of the Brussels I Regulation says that where a court within the EU is second seised of a claim, it must of its own motion stay its proceedings. There were prior proceedings in Cyprus. Which takes priority, the CPR or Brussels I?

Blair J followed *The Alexandros T* [2013] UKSC 70 in concluding that the time limit in CPR 11(4) is not inconsistent with EU law (even though, had it mattered in *The Alexandros T*, the Supreme Court would have referred the question to the CJEU). Prima facie, D had therefore submitted to the jurisdiction of the English courts. But Blair J then side-stepped the issue by retrospectively extending the time to challenge the jurisdiction of the court. He was met with the inevitable *Mitchell* argument on the need for compliance with the rules (and there wasn't even an application for relief from sanctions), but he considered that article 27 and the rules about mutual recognition of judgments all pointed in favour of extending the time.

Having allowed the jurisdictional challenge to be made, Blair J rejected it. The claim in England was for the price of bunkers sold and delivered by C to D. The action in Cyprus was for an injunction to stop a bank paying out on a bond in C's favour on the basis that C's call on the bond was fraudulent. Even though both claims arose from the same transaction and the same non-payment, the cause of action was not the same for the purposes of article 27. There might have been related issues for the purposes of article 28 of Brussels I, but that gave the court a discretion to stay proceedings rather than requiring it to do so. In *The Alexandros T*, the Supreme Court made it clear that the existence of a jurisdiction clause in favour of the English courts was a sufficient reason to decline to stay proceedings, and so Blair J declined the stay.

Contentious Commentary is a review of legal developments for litigators

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