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Newsletter April 2014

Contentious Commentary

Contract

Discretionary dalliances

A requirement to exercise a discretion in a commercially reasonable manner adds little control over the discretion.

If a party has a discretion under a contract, it must exercise the discretion in good faith and not arbitrarily, perversely or capriciously (eg *Socimer Bank Ltd v Standard Bank Ltd* [2008] EWCA Civ 116). But that is a low threshold, with the result that it is hard for the exercise of the discretion to be challenged successfully (though there are examples of success, eg *WestLB AG v Nomura Bank International plc* [2012] EWCA Civ 495).

But does an added requirement that the discretion be exercised in a commercially reasonable manner impose a greater burden on the decision-maker? Probably not, according to the Court of Appeal in *Barclays Bank plc v Unicredit Bank AG* [2014] EWCA Civ 302. The decision-maker is still entitled to give priority to its own interests, not least because Longmore LJ could not see how a banker, in this case, could be expected to balance the interests of the two parties. If a balance was required or true objectivity the aim, a third party should have been asked to take the decision.

Barclays involved the termination of a contract at an early stage. D was entitled to terminate the contract if the contract ceased to provide the capital advantages that D sought, but D could only do so if C consented, "such consent to be determined by [C] in a commercially reasonable manner".

The Court of Appeal was prepared to concede that C would not have been acting in a commercially reasonable manner if it had demanded a price that was higher than it could reasonably anticipate would have been a reasonable return on the contract, but that was all. It stopped C holding D to ransom, but not much more. C had requested a price based on the expected life of the contract, which did not fall within the ransom exception. D's challenge failed.

It was pointed out to the Court of Appeal that the words "commercially reasonable" are used in other contracts, notably in calculating the close-out amount under the 2002 ISDA Master Agreement. Eschewing the opportunity to take into account wider implications, the Court of Appeal merely said that the wording of a contract must be construed in its own context; the fact that words mean one thing in one context doesn't indicate that they mean the same in another. That may be true in principle, but it is somewhat evasive. Words are words, and individual specimens commonly mean at least something similar wherever used. The Court of Appeal anticipated this kind of criticism by saying sullenly that if people didn't like its interpretation of "commercially reasonable", they could use different words.

Commerciality confounded

An obligation to use reasonable endeavours to reach an agreement with a third party will seldom be enforceable.

An agreement between A and B that they will use their best endeavours to reach a further agreement between themselves is unenforceable because it is too uncertain: *Walford v Miles* [1992] 2 AC 128. It now appears that an agreement between A and B that B will use its best endeavours to reach an agreement with C is also generally unenforceable for the same reason. According to Andrews J in *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 817 (QB), an obligation to reach an agreement with a third party must meet two requirements to be enforceable: certainty of the object; and a yardstick by which to measure whether appropriate endeavours have been used. The latter will usually fail.

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In *Dany Lions*, C's obligation was to use reasonable endeavours to reach an agreement with a car restorer for work on a particular vehicle in accordance with attached drawings. The judge concluded that the object of the agreement was sufficiently certain. But the judge decided that there was insufficient certainty in the yardstick by which to assess whether C had used reasonable endeavours.

She was very doubtful about any case where the object was to reach an agreement with a third party (though she was forced, somewhat dubiously, to distinguish this from a situation where the object was not to reach that agreement but reaching an agreement might be the only way to achieve the object, eg planning permission). She refused to imply a term that C should accept a reasonable price from the restorer (price being the only real issue) because, she thought, the only market price was the restorer's price, who could charge what he wanted. The court had no basis upon which to say whether C should have accepted any particular price.

The oddity in *Dany Lions* is that, in case she was wrong on the first point, Andrews J went on to consider whether C had in fact exercised reasonable endeavours in seeking to reach an agreement with the restorer. She had no difficulty in concluding that C had exercised reasonable endeavours. Given this, it is hard to see how she could have regarded the yardstick for the exercise that she undertook as being too uncertain to allow the exercise to be undertaken. Might the yardstick is reasonable endeavours, with no need to specify it further?

Nevertheless, the outcome of *Dany Lions* is that, while it is not impossible that an agreement to try to enter into an agreement with a third party will be enforceable (eg if the bulk of the terms are already set out), it is only likely in an exceptional case.

Reasons to be cheerful

An exclusion clause does not mean that damages are an adequate remedy.

Is an exclusion clause (or a liquidated damages clause) a reason to grant an injunction or a reason not to do so? An injunction, whether interim or final, will only be granted if damages are not an adequate remedy. Does the fact that the parties have agreed to limit damages mean that, by reason of the limitation, damages are not an adequate remedy or that, having agreed on the level of damages, a party cannot claim that the damages are inadequate?

In *AB v CD* [2014] EWCA Civ 229, the Court of Appeal came down firmly in the former camp. The Court of Appeal decided that a party's primary obligation is to do what the contract says. The requirement to pay damages is a secondary obligation. An agreement to restrict the recoverability of damages in the event of breach cannot be treated as an agreement setting the price at which a party can buy its way out of performance.

So a clause limiting damages (in contrast to a clause that limits the primary obligation) may be a reason to grant an injunction - provided, of course, that all the other requirements for doing so are met and the court, in its discretion, decides that it is appropriate to grant an injunction.

Joint severed

A clause removing joint and several liability is upheld.

Accountants have for years railed against joint and several liability, ie two or more parties who have caused the same loss are each liable for the whole loss rather than its being split

Tort

Credit obligations

A finance company owes a duty of care in reporting defaults to a credit reference agency.

Durkin v DSG Retail Limited [2014] UKSC 21 received publicity because the final judgment was 16 years after the events in question - purchase of a laptop from PC World in Aberdeen - though a mere 10 after the litigation was started in Scotland. The point, perhaps, of most legal significance is that, in passing information to credit reference agencies, finance companies owe a duty of care to the debtor.

In *Durkin*, the company financing the purchase of the laptop knew that C claimed to have rescinded the purchase contract the day after entering into it because C told them so (and the Supreme Court agreed that he had indeed done so). In those circumstances, the finance company had a choice: it could not report C to a credit reference agency as being in default; but, if it chose to report C, it owed a duty of care to C. It should investigate C's claims and, unless they were clearly baseless, it should not make any report until the courts have said who is right. If it reports in any event, it is taking the risk on the outcome of any legal proceedings and is potentially liable in damages to C for harming his credit standing.

between them. The parties have rights of contribution inter se but this places the insolvency risk of each defendant on the other defendants rather than on the claimant. Accountants, like lawyers, have deep pockets and don't generally disappear in a cloud of debts, unlike some of their clients. To avoid this result, contract terms have been developed to side-step the effect of joint and several liability. In *West v Ian Finlay & Associates* [2014] EWCA Civ 316, the Court of Appeal upheld such a clause, even in a consumer context.

An architect included in a contract a term that said: "Our liability for loss or damage will be limited to the amount that it is reasonable for us to pay in relation to the contractual responsibilities of other consultants, contractors and specialists appointed by you." The works went wrong; the main contractor went bust. The trial judge construed the clause as not limiting the architect's liability in this case because the clause did not apply to the main contractor.

The Court of Appeal disagreed. It considered that the normal meaning of the words was clear. There was no obvious mistake, nor was including the main contractor uncommercial. The Court of Appeal was particularly critical of the judge's approach of concluding that there was an ambiguity and then applying regulation 7(2) of the Unfair Terms in Consumer Contracts Regulations (a strict version of the contra proferentum principle) to decide in favour of one interpretation.

The effect of the clause was, the Court of Appeal thought, to apply contractually the test in the Civil Liability (Contribution) Act 1978, reducing the architect's liability to the net sum he would pay if he could recover a just and equitable contribution from the main contractor.

The Court of Appeal went on to decide that the clause was, in the circumstances, fair under both the UTCCR and Unfair Contract Terms Act 1977. C was a sophisticated investment banker, who had as much idea of what was going on legally as the architect.

The Court of Appeal even reduced the interest payable to C. The judge had awarded 7% over base rate, but the Court of Appeal decided that 4.5% over base was appropriate. The object is to identify what people in the general position of C might have to pay to borrow money, not what C actually paid (with a Swiss Franc mortgage and currency losses resulting from it).

Subordinate clause

Contractual subordination knows few limits.

In an insolvency, liabilities are paid out in the following order: (1) fixed charge creditors; (2) expenses of the insolvency; (3) preferential creditors; (4) floating charge creditors; (5) unsecured provable debts; (6) statutory interest; (7) non-provable liabilities; and (8) shareholders. In most cases, looking beyond (5) is unnecessary - if you are likely to do so, the company probably isn't insolvent. But five years on from nearly causing financial Armageddon, the main UK Lehman company, LBIE, has proved to be solvent. So it does matter in its insolvency. LBIE is, for US tax reasons, an unlimited company, which creates additional issues.

In the Matter of Lehman Brothers International (Europe) [2014] EWHC 704 (Ch) therefore required the court to address some intricate issues of insolvency arising from LBIE's coming into the money. These included the following.

First, LBIE had issued contractually subordinated unsecured debt that counted as lower tier 2 capital under the Basel rules. The issue was whether this debt was only subordinated to other debts within level (5) above or whether the subordination took it down to level (8). David Richards J considered that, since the UK's insolvency scheme does not prevent a creditor from subordinating itself by contract to other creditors at the same level (*In re Maxwell Communication Corporation* [1993] 1 WLR 1402), there was no reason why a creditor could not contractually push itself down from level (5) to level (8). It was a matter of construction of the relevant documentation as to whether it had in fact done so. The judge concluded that it had.

Being pushed below statutory interest is significant. Contractual interest is payable until the commencement of an insolvency, but the statutory interest at level (6) is at the higher of the contractual rate and the rate under section 17 of the Judgments Act 1838. The Judgments Act rate is 8%, way above market rates over the last five years. Indeed, since it became clear that LBIE had a surplus, this extravagant rate of interest has, it was said, resulted in LBIE debt trading at high prices. The judgment will not have harmed the debt's price.

Secondly, claims in foreign currencies are converted to sterling at the commencement of the insolvency. By the time of payment, the exchange rate could be radically different, leading to a loss to the creditor. David Richards J decided that this exchange rate loss was a non-provable liability, which came in at level (7), again above the subordinated debt. (Does the insolvent estate have a claim if exchange rates go the other way?)

Thirdly, the judge decided that the members of LBIE are liable to contribute in order to pay in full both statutory interest and non-provable liabilities. Members are not confined simply to making whole those with provable debts.

Liening on a lamp-post

A lien cannot be exercised over a database.

A remedy available to a repairer or other person properly in possession of something is to refuse to return the something until due payment is made. The law recognises this as a lien. But what is the nature of the somethings over which a lien can be exercised? In *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, D argued that it could exercise a lien over a digital database until it was paid sums it claimed under a contract for the maintenance of the database.

Unfortunately for D, the Court of Appeal did not agree. It decided that a lien only applies to physical objects, and a database is not a physical object. The fact that a database must be stored on a disc is insufficient. The common law knows only choses in action and choses in possession. A database must be the former, which cannot be subject to a lien.

The result is that someone employed to maintain a car can keep hold of the car until paid, but someone employed to maintain a database must hand the database back even if not paid. Not obviously a consistent result. But the Court of Appeal was nervous of stepping into unknown territory, especially as the House of Lords had refused in *OBG Ltd v Allen* [2008] 1 AC 1 to extend the tort of conversion to choses in action. If a contractor wants to hold on to digital stuff until paid, it must provide that right by contract.

Conflict of laws

e-justice

Service of Particulars by email when not permitted is an error of procedure redeemed by CPR 3.10.

To serve court documents by email on the other side, it is necessary for the other side to have indicated a willingness to accept service by email and to have provided an email address (PD6A, §4.1(1)). An email address on a solicitor's writing paper is such an indication, but only where the solicitor has stated that the email address may be used for service (§4.1(2)). Even then, a party intending to serve by email must first ask if there are any limitations on the recipient's agreement to accept service by email (eg format of documents) (§4.2).

In *Integral Petroleum SA v SCU-Finanz AG* [2014] EWHC 702 (Comm), C's solicitors went through none of these hoops before serving Particulars of Claim by email on a French lawyer acting for D and named (without email address) in the Acknowledgment of Service. The solicitors had corresponded with the French lawyer through his email address, but had not even seen his writing paper, let alone asked whether he would accept service.

Popplewell J decided, perhaps a trifle benevolently, that emailing the Particulars to the French lawyer was sufficient service of the Particulars to start time running for service of the Defence. He decided that the failure to comply with PD6A, §4 fell within CPR 3.10, ie an "error of procedure" that does not invalidate the relevant step unless the court so orders. The judge considered that email service was something permitted by the rules; what the solicitors had done was therefore not so far from what was required as to fall outside the scope of CPR 3.10. He also thought that service of a document in the course of proceedings was not the same as service of a claim form initiating proceedings, which enabled him to give a wider compass to CPR 3.10. There was no doubt that D did actually know about the Particulars.

As a result, D had been served with the Particulars and was not entitled to set aside as of right the default judgment entered against it for failing to file a Defence. D had to fall back on the court's discretion. Here *Mitchell* (see further below) was inevitably cited. The judge considered that the12 weeks it took D to apply to set aside the default judgment was an unjustifiably long period and that there was no satisfactory explanation for the delay. However, he balanced this against C's numerous breaches of the rules, including filing an untrue certificate of service, failing to apply for an extension of the time to effect service, and serving by email. Popplewell J set aside the default judgment.

The decisive reason for setting aside the default judgment was not the mutual procedural failings but the underlying substance, not something that features in the reasoning of *Mitchell*. The contract on which the claim was based was signed by one person only on behalf of the Swiss corporate D. The Swiss commercial register made it plain that this person did not have authority alone to bind D. Actual authority is a matter for the appropriate corporate law, not the law of the contract (English law). D was therefore not bound by the contract. C made an effort late in the day to prove ostensible authority, which would be a matter of English law, but lacked credible evidence.

Freedom of information

Welsh marches

The Court of Appeal's decision casts doubt upon the legality of part of the Freedom of Information regime.

The Guardian newspaper (through its journalist, C) has been trying to get its hands on correspondence between The Prince of Wales and seven Government departments for years. An initial refusal to disclose the information was overturned by the Upper Tribunal, at which point the Attorney General (D) played his trump card under the Freedom of Information Act 2000: he issued a certificate under section 53(2), which essentially overrides any decision notice or enforcement notice previously issued. Although rarely used, and requiring "reasonable grounds" for its exercise, this power is naturally controversial.

D said that he considered that the public interest favoured withholding the information so as to preserve The Prince of Wales' political neutrality and ensure that he was not inhibited from corresponding frankly with Ministers: frank correspondence assisted his preparation for the exercise of the Sovereign's duties on his accession to the throne. While copies of some of the letters were in the public domain with the Prince's consent, this did not mean that all his communications could be disclosed without his consent. Disclosure would have a "chilling" effect on the frankness with which he and Ministers could communicate, and would also undermine the Prince's dignity

In *Evans v Attorney General* [2014] EWCA Civ 254, C argued that this was a most unsatisfactory state of affairs (although, as *The Guardian* favours a republic, its threshold for royalty-related dissatisfaction is possibly not high). C claimed that the certificate breached not only the FOIA but also the Environmental Information Directive and the Charter of Fundamental Rights.

C's main argument was that there were no reasonable grounds for the certificate. An independent and impartial tribunal had determined the matter after a fully contested hearing. This determination should be overridden by the executive only on cogent grounds, such a demonstrable error or a change of circumstances. The Court of Appeal held that it is not reasonable to issue a section 53 certificate merely because of disagreement with the decision. Something more is required, and the Court of Appeal agreed that a change of circumstances or a demonstrable flaw in fact or in law would be examples. The Court of Appeal went on to look at whether D did in fact have reasonable grounds, and found that he did not.

The Court of Appeal also agreed with C that section 53(2) of the FOIA was incompatible with the Environmental Information Directive insofar as the information to which a decision notice related was environmental information. The fact that the issue of a certificate is subject to judicial review is not sufficient to satisfy the requirements of the Directive, because judicial review is very different from a review by a court or other independent body. Even if it had been sufficient, the State had then given the executive a right to override the decision, which would mean that the decision was not final and binding. This was a breach of the principle of legal certainty.

Unsurprisingly, D plans to appeal further, so the contents of the letters remain secret for the time being. C must be hoping they say something newsworthy if that appeal fails.

Courts

Mitchell unbound

A claim is struck out because an application for an extension of time was not made before expiry of the relevant deadline, but the courts remain inconsistent.

Associated Electrical Industries Ltd v Alsthom UK [2014] EWHC 430 (Comm) is *Mitchell* in extremis (see December 2013). It looks as if even the judge thought that he may be going too far but, having been slammed by the Court of Appeal previously for undue leniency, he felt obliged to veer sharply in the opposite direction.

The case concerned service of the Particulars of Claim. They were due on 29 October. At 5.20pm on that day, C's solicitors asked for an extension of 14 days. On the following day, D's solicitors said that it was not for them to agree an extension because the time had already passed (though they thought, wrongly, that time had expired on 8 October). On 18 November, C's solicitors served Particulars. On 13 December, D applied for the claim to be struck out under CPR 3.4(2) for late service of the Particulars. On 30 January, C issued an application for a retrospective extension of time to serve the Particulars to 18 November.

Andrew Smith J accepted that if the application for an extension of time had been made before 29 October, it would probably have been granted. But it wasn't, and C was therefore in breach of the rules. Further, the judge accepted that, as between the parties, it was just and fair to grant an extension of time and that striking out was a disproportionate remedy for a delay of 20 days.

However, the judge also concluded that retrospective applications for an extension of time must be treated as if

they were applications for relief from a sanction, bringing with them the crushing weight of CPR 3.9 and *Mitchell*. The judge considered that C's delay in service could not be characterised as trivial, and that no satisfactory explanation had been given for the delay. The judge therefore decided that the claim must go, even though C's solicitors' conduct had been designed to save costs.

The judge then considered whether C could bring a new claim. He thought that a new claim was unlikely to be time-barred, nor could he assume that the claim would be struck out as an abuse of process. At the very least, his decision will bring a new claim, on which there will be satellite litigation, wasting court resources and costs.

Curious as *Associated Electrical Industries* may seem, the moral is clear: if you are going to need an extension of time for anything, you must apply before the expiry of the time limit.

Associated Electrical Industries contrasts with *Lakatamia Shipping Co Ltd v Nobu Su* [2014] EWHC 275 (Comm). D had been ordered to give disclosure by 17 January, failing which the defence and counterclaim would be struck out. D sent an email offering to exchange lists at 4.45pm on 17 January, and then sent its list at 5.16pm. The unless order did not specify a time, which meant that lists had to be exchanged by 4.30pm (Commercial Court Guide, §19.2). D was therefore 46 minutes late (not helped by thinking, like C, that the deadline was 5.00pm, but it missed even that).

Hamblen J granted D relief under CPR 3.9. Despite being required to assume that the unless order had been properly made and that the paramount factors to consider are the efficient conduct of litigation and enforcement of rules and orders, he regarded the breach to be trivial. 46 minutes was of no consequence to the conduct of the action, and he refused to take into account that D was a serial offender. If, however, he had considered that the breach was not trivial, he would have refused relief because he considered that D's solicitors' error as to the time for service was not a good enough reason to grant relief.

The deputy judge in *Clarke v Barclays Bank plc* [2014] EWHC 505 (Ch) even suggested that *Associated Electrical Industries* might have gone a bit far, though he was, perhaps more justifiably, strict himself. C failed to reveal until very late in the day that its expert could no longer appear at the trial and that C would therefore need a new expert witness if the case went all the way. C's solicitor was gambling on the fact that the case would settle, deciding for tactical reasons not to mention the expert problem. The case didn't settle, and if a new expert were to be instructed, the trial date would have to be put back. Perhaps unsurprisingly, the deputy judge decided that permission should not be given to change expert, C's evidence being confined at trial to the written report of its old expert.

Associated Electrical Industries also contrasts with *Porter Capital Corporation v Masters* (19 March 2014), in which a judge ordered an interim payment pending the taking of an account. C asked for an order that unless this sum was paid, C should be entitled to enter default judgment for its total claim. The judge demurred. He thought that because, following *Mitchell*, it was so hard to gain relief from sanctions, judges should consider carefully whether it was appropriate to impose a sanction. In this case, he considered that a non-payment might simply be due to a lack of funds rather than a blameworthy default, and an unless order should not therefore be made. We are not, he thought, in a "one strike and you're out" regime. Or are we? The courts are still trying to work that out.

Budgeting expands

Budgeting will apply to all claims of over £10 million, including in the Commercial Court.

From 22 April 2014, CPR 3.12 will be amended for claims started on or after that date to require the parties to submit budgets for all Part 7 claims unless the amount claimed is stated on the claim form to be at least £10 million or, where the claim is not quantified, the claim from contains a statement that the value of the claim is £10 million or more. This applies to the Commercial Court as well as to other courts.

Further, if budgets have been submitted, the court no longer has a general discretion whether or not to make a costs management order. CPR 3.15(2) will be amended so that, if budgets have been filed, the court will make a costs management order unless the court is satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective.

Bonded service

A third party debt order does not interrupt payments on a bond.

Creditors, not least vulture funds, like trying to intercept payments by judgment debtors on bonds for two reasons: first, public documents indicate when the payments are due and therefore when the debtor will be moving money to vulnerable locations; secondly, interrupting bond payments can put considerable pressure on a creditor because bondholders might

accelerate the principal due if they are not paid on time.

Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy [2014] EWHC 391 (Comm) shows that it is possible to draft round this risk. C was a judgment creditor of D, and saw that D was due to make interest payments on bonds on 30 September. D therefore had to get money to its paying agent in London before that date. C secured an interim third party debt order covering debts owed by the paying agent to D, which was served on the paying agent on 27 September. In fact, D had not paid the paying agent by then, so the debt order failed in limine.

However, Blair J held that it failed for a more fundamental reason, namely that even if D had paid its paying agent before service of the order, there was still no "debt due or accruing due to the judgment debtor from the third party", ie from the paying agent to D, as required by CPR 72.2(1) in order to obtain a third party debt order. This was because the Agency Agreement, which governed the mechanics of payment on the bonds, provided that the paying agent was obliged to apply receipts from D to pay bondholders and was expressly not obliged to repay those sums to D unless the bondholders' claim became void (which only happened on expiry of the limitation period). There simply was no debt due from the paying agent to D that C could attach.

In fact, things got rather messy. D paid a further sum to the paying agent in order to ensure that its bondholders were paid and thus to avoid a default. C obtained further interim third party debt orders. That left the original sum with the paying agent. D and the paying agent agreed that this sum would be held on the terms of the Agency Agreement. C argued that D must have some right to repayment since the bondholders had been paid. Blair J did not agree. The paying agent might as a matter of discretion repay D but it was under no obligation to do so. A third party debt order could not therefore bite on the sums held by the paying agent.

Blair J would in any event have blocked C's claim as a matter of discretion. D had only paid the second time because acceleration of the total due on the bonds would have been a disaster. D was forced into this because C wrongly obtained an interim third party debt order. C should not be rewarded for the mayhem it caused.

Crash site

Reports by the AAIB are admissible in evidence.

The trend for years has been that all evidence should be admitted in civil cases, leaving it for the judge to decide what weight should be given to it. Hearsay, for example, is no longer inadmissible by reason alone of its being hearsay (section 1 of the Civil Evidence Act 1995). This trend was followed in *Hoyle v Rogers* [2014] EWCA Civ 257, in which a report by the Air Accidents Investigation Branch was admitted in evidence.

Insofar as it recited facts, AAIB's report would be admissible, albeit hearsay, but the report also expressed opinions. The Court of Appeal rejected an argument, based on *Hollington v Hewthorn* [1943] KB 857, that the report would somehow usurp the judge's role or that it was unfair to admit a report because the evidence looked at by the AAIB could not always be identified or checked. The Court of Appeal considered that the AAIB was sufficiently expert to be able to express opinions, and that the judge could decide how much weight to give to those opinions.

The Court of Appeal also decided that CPR 35 is not a comprehensive code covering expert evidence. CPR 35 governed expert evidence commissioned by the parties, but not other expert evidence. The AAIB report did not have to meet the requirements of CPR 35 in order to be admissible.

The Court of Appeal rejected the argument of both the Government and IATA that admitting AAIB reports in evidence would make it more difficult for the AAIB to carry out its investigations, which are solely concerned with safety, not with attributing blame. Witnesses would be concerned about involvement in litigation, would become cautious and, worst of all, would consult lawyers. The Court of Appeal thought that people were made of sterner stuff, opening the way to the admission in evidence of not only AAIB reports but reports by other parts of officialdom too.

One paced

Production orders made under PACE must be made inter partes.

In *R (British Sky Broadcasting Limited) v Commissioner of Police of the Metropolis* [2014] UKSC 17, two police officers had passed information to K, a journalist with C. They were arrested. D informed C that a criminal investigation had begun and asked for disclosure of various documents, including copies of all emails between K and the officers. C refused to provide the documents, so D served an application for a production order under the Police and Criminal Evidence Act 1984.

At the hearing, the judge agreed to hear part of D's evidence in C's absence, despite C's objections. The judge made the order sought, stating

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that the evidence heard in this way did "not detract from or assist the arguments put forward by [C]." C sought a review of the order, and the Administrative Court quashed the order on the basis that the procedure adopted at the hearing was unlawful. The court held that C should have had access to the evidence on which the case against it was based, and thus an opportunity to comment on it and, if appropriate, to challenge it.

The Supreme Court agreed, noting that the legislation had originally proposed that a production order might be made ex parte, but that the proposal had met opposition and been dropped. "Equal treatment of the parties requires that each should know what material the other is asking the court to take into account in making its decision and should have a fair opportunity to respond to it. That is inherent in the concept of an "inter partes" hearing."

Arbitration

Unanswered question

Do emergency arbitrator provisions preclude availability of interim relief from the courts?

Section 44(5) of the Arbitration Act 1996 allows an English court to issue interim injunctions in support of an arbitration if the arbitral tribunal (or any other entity vested by the parties with power in that regard) has no such power or is unable for the time being to act effectively in that regard. So in *Seele Middle East Fze v Drake & Scull International SA Co* [2013] EWHC 4350 (TCC), C was able to secure an injunction because the tribunal had not yet been appointed.

More interesting is the future effect of rules like article 29 of the ICC's most recent Arbitration Rules (2012) on the court's willingness to grant support to arbitrations in this way. This article allows the appointment of an emergency arbitrator where a party needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal. Will this ability mean that the requirements of section 44(5) are no longer met before the tribunal is constituted?

Contentious Commentary is a review of legal developments for litigators

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