CLIFFORD CHANCE

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Contentious Commentary

Contract

Acting by the book

Inapplicable statutory provisions can be incorporated by contract.

If an agreement says, wrongly, that it is subject to the Consumer Credit Act 1974, are the Act's protections incorporated into the agreement by contract? According to Burton J in *NRAM plc v McAdam* [2014] EWHC 4174 (Comm), the answer is yes.

The issue arose because, before 2008, unsecured loans for over £25k were not subject to the Act. Northern Rock had a mortgage product under which borrowers could take unsecured loans of up to £30k. NR documented the loan in the same way whether it was under or over £25k, ie on the basis that it was subject to the Act. So the pre-contractual documents said that the loan was regulated by the Act, as did the loan agreement itself, and statutory notice of entitlement to cancel was given.

After the relevant loan agreements were entered into, the Act was amended to require all existing and future lenders of regulated loans to send periodic statements about the loan. NR did so, but got the form of the statement wrong. The consequence under the Act of this failure was that the borrower ceased to be liable for interest in respect of periods covered by the errant statements. On discovering this, the borrowers under non-regulated loan agreements argued that they were entitled under the contract to be repaid the interest for those periods.

Burton J decided that, by implication, the borrowers were given the rights and benefits of a regulated agreement whether or not it was a regulated agreement. Certain rights could not be conferred by contract (eg discretions given to the court) but, where this was possible, that was what the parties intended. The abrogation of interest was one such right, with the result that NR surrendered its entitlement to interest for the relevant periods. This was so even though the problem with interest arose from a change to the Act after the agreements were entered into.

Burton J also thought that the same result could be achieved through estoppel by convention or contractual estoppel.

Interestingly, 79 borrowers had complained to the Financial Ombudsman Service on the same grounds. The FOS decided against all of them. Burton J's decision will cost the taxpayer £258m.

The remains of the day

Late provision of close-out details cures an earlier lack of details.

In *Goldman Sachs International v Videocon Global Ltd* [2013] EWHC 2843 (Comm), C sought summary judgment for sums due on currency swaps following close-out under the ISDA Master Agreement that applied to them.

The application failed because C had not provided reasonable details of its calculation of the sums due as required by the Master Agreement. So C then provided those details, and applied again for summary judgment ([2014] EWHC 4267 (Comm)), this time successfully.

The principal argument against C was that the ISDA Master Agreement requires details of the calculation to be provided "as soon as reasonably practicable following the occurrence of an Early Termination Event", the payment becoming due when the notice with these details is effective. The details were provided over two years after the Early Termination

Contents

- A contract imports legislative protection
- Close-out calculations can be served late
- Rectification reaches the parts that interpretation cannot
- Wide evidence admissible to identify contractual parties
- Breach of consent requirement does not invalidate action
- Companies House liable for misstatement
- Saudi trust to be litigated in England
- Settlement agreement jurisdiction provisions supersede earlier terms
- Court determines arbitrators' jurisdiction
- Claim form against regional government must be served by diplomatic means
- EU to ratify choice of court convention
- Bond payments not caught by enforcement attempt
- The limits of the right to be forgotten
- English court to determine Indian independence dispute

Event, which was well beyond the reasonably practicable.

Teare J accepted that the details were provided late, but not that this prevented the notice from becoming effective. It became effective when the details were provided. If the details were provided late, D could claim damages for any loss it might have suffered as a result of the lateness but the failure to provide the details as soon as reasonably practicable did not mean that D could escape its obligation to pay. That would, the judge thought, be a commercially absurd conclusion.

Objective lessons

A contract means what it says, but it can be rectified.

Tartsinis v Navona Management Co [2015] EWHC 57 (Comm) involved a classic argument: the contract means such and such; but if it doesn't mean that, it should be rectified so that it does. The interpretation of a contract is an entirely objective exercise, with no evidence of negotiations admitted. Rectification is different, resting (so far as mutual mistake is concerned) on the expressed mutual intention of the parties, for which evidence of negotiations is admissible. As a result, rectification is often pleaded in order to put before the court otherwise inadmissible evidence of intention in the hope that it will covertly influence the court's interpretation of the contract (eg *Chartbrook Ltd v Persimmon Homes* [2009] 1 AC 1101, [99]) even if rectification, which is traditionally hard to prove, fails.

However, in *Tartsinis* Leggatt J kept the two issues rigidly separate, deciding that the agreement did not mean what one party contended, but then rectified the agreement so that it did.

Tartsinis concerned a price adjustment under share sale agreement. The price was to be adjusted from the provisional price according to the net asset value shown in the next accounts. The main asset of value in the accounts was various ships, but everyone knew that the accounts included the ships at cost price less depreciation, which bore no relation to their market value. The provisional price was produced on a wholly different basis.

Leggatt J accepted that there were reasons to conclude that taking the value of the ships from the accounts was commercially absurd but, he considered, the wording was entirely clear. There was no basis on which he could conclude that the words meant that the provisional valuation of the vessels was final. The judge also accepted that the accounts were not prepared in accordance with relevant accounting rules, but since the party complaining about the accounts was the one who prepared them, that party could not challenge the accounts.

Then came rectification. This requires: a common intention; an outward expression of that common intention; the continuance of that common intention to the execution of the contract; and, by mistake, the instrument does not reflect that common intention.

The judge referred to the gloss on this enunciated in *Chartbrook*, where Lord Hoffmann said that not only is it necessary for there to be a prior consensus that differs from the objective meaning of the words but that the meaning of this prior consensus is what a reasonable observer would have understood it to be, not what one or both of the parties understood it to be. Most regard this as going too far. Rectification is about what the parties actually intended, not what a reasonable person would have understood them to have intended (even though whether a contract has been formed is judged objectively).

Leggatt J shared the doubts about Lord Hoffmann's approach, but felt constrained to follow it - a path rendered smoother because it didn't affect the outcome of the case. The judge accepted that the requirements for rectification, with or without the Hoffmannite limitation, were met, and so rectified the contract.

Name and shame

The identity of contracting parties is not a matter of construction.

The interpretation of a contract is approached on a purely objective basis, with evidence of parties' subjective intentions being inadmissible (see above). But does this objective approach extend to establishing the identity of the contracting parties? According to Teare J in *Navig8 Inc v South Vigour Shipping Inc* [2015] EWHC 32 (Comm), yes and no.

A charter had a heading under which was to be set out the name of the disponent charterers. The name set out was that of the ships' owners' agent, not the ships' owners. The question was whether the owners were parties to the contract. Teare J decided that this was not simply a matter of construction, and he could therefore admit a wider range of evidence than would have been admissible on construction. However, he considered that the exercise remained objective, and, accordingly,

the subjective intentions of the parties were not relevant.

In the light of this, Teare J decided that the intention was for the owners to be parties to the charter, not their agent. However, the agent did not have actual or ostensible authority to bind the owners. All that was left was a claim for breach of warranty of authority against the agent.

Publish and pay

A requirement to seek consent is not necessarily a condition precedent.

The conventional wisdom is that if consent, not to be unreasonably withheld, is required to assign rights under a contract, any assignment made without asking for consent is ineffective. A party who hasn't even asked cannot say that the consent has been withheld, whether unreasonably or otherwise (*Hendry v Chartsearch* [1998] CLC 1382). Indeed, even if consent is sought and is unreasonably withheld, an assignment may still be invalid unless the court has declared that consent has been unreasonably withheld (*CEP Holdings v Steni AS* [2009] EWHC 2447 (Comm)). The position is, however, different where a lease of real property is involved. Real property is, by its nature, treated as capable of alienation. An assignment without asking for consent is effective to transfer title, but it is also a breach of the terms of the lease entitling the landlord to forfeit the lease.

In *BG Global Energy Ltd v Talisman Sinopec Energy UK Ltd* [2015] EWHC 110 (Comm), Cooke J was faced with a clause that said that D could not agree any amendment of a contract with T without C's consent, consent not to be unreasonably withheld. D did not ask for consent. C argued that the requirement to seek consent was a condition precedent to the amendments becoming effective, not just a breach of contract sounding in damages.

Cooke J disagreed. As a matter of construction of the particular contract before him, he concluded that the parties cannot have intended the requirement to seek consent to be a condition precedent. C might be entitled to damages for the breach, but it could not ignore the amendment made to the other contract.

The message was that everything depends upon the precise wording of the relevant clause and the context. The decision does not mean that an obligation to ask for consent can be ignored if the putative requester is confident that consent cannot always be reasonably withheld.

Cooke J also confirmed the conventional view that, when someone refuses consent to something such as an assignment, the onus is on the party arguing that consent has been unreasonably withheld to show that the withholding was in fact unreasonable.

Tort

Bad company

The Registrar of Companies owes a duty to the companies whose records he keeps.

Taylor & Son Limited was wound up by the court. However, Companies House registered the order against Taylor & Sons Limited, an unrelated company that was not in liquidation. The registration caused problems, leading to Taylor & Sons Limited going into administration. In *Sebry v Companies House* [2015] EWHC 115, the question was whether Companies House owed a duty of care to the company whose demise it caused.

Edis J decided that it did. He recognised that the law on negligent misstatement, particularly if made in the course of a statutory duty, is not easy to follow, but concluded that the best analogy was with intended beneficiaries under a will drawn up negligently by the solicitors. The solicitors owe a duty of care; and so does Companies House.

The judge dutifully analysed whether there was an assumption of responsibility (there was), the three stage test required by *Caparo* (foreseeability, proximity and fairness) (all met), and incrementalism (a mere fairy's footstep down the path from *Ministry of Housing v Sharp* [1970] 2 QB 223). The analogy with wills may be somewhat stretched, but the bottom line was that Companies House's negligence had destroyed a business, and Edis J could see no policy or other reason why Companies House should not pay for the privilege of its incompetence. If Companies House was not liable, the company would have no remedy.

Edis J was concerned to emphasise that the duty was owed only to the company for the action of stating, wrongly, that it had been wound up. He indicated firmly that duties were not owed to third parties who might have seen and relied on the statement, to employees or to anyone else. Perhaps no duty would even have been owed as a result of a failure to do something. But on the limited facts of his case, the judge regarded the answer as clear.

Conflict of laws

Global trust

The law applicable to a trust raises difficult issue.

The law applicable to a contract is determined in accordance with the Rome I Regulation. There is regular litigation about this. The law applicable to a trust is determined in accordance with the Hague Convention on the Law Applicable to Trusts, given the force of law in England by the Recognition of Trusts Act 1987. There is much academic writing on this, but little exploration in the courts. *Akers v Samba Financial Group* [2014] EWCA Civ 1516 has made a start, albeit a rather half-hearted one.

The case arose from declarations of trust made in favour of SICL, a Cayman company, by a Saudi individual (S) over shares in Saudi companies. After SICL entered insolvency, the individual sold the shares to D. SICL's liquidators sought the return of the shares from D under section 127 of the Insolvency Act 1986 (applicable under the Cross Border Insolvency Regulations 2006). D challenged the jurisdiction of the English court on the basis that C had no arguable case because SICL could have no beneficial interest in assets in Saudi Arabia, which does not recognise trusts.

The Convention provides that a trust is governed by the law chosen by the settlor, unless that law does not provide for trusts, in which case the default rules apply. The default rules provide that a trust is governed by the law with which it is most closely connected, which in this case arguably pointed to Cayman law. If so, the trust existed.

D argued that these choice of law rules were not relevant because of article 4 of the Convention. Article 4 provides that the Convention does not apply to preliminary issues relating to, inter alia, acts by virtue of which assets are transferred to the trustee. The transfer of equitable title in the shares was, D argued, therefore outside the scope of the Convention. The shares were situated in Saudi Arabia and, under common law rules, their transfer was subject to Saudi law. Transfer of an equitable interest is not possible under Saudi law, the beneficiary never obtained equitable title to the shares, and so the beneficiary could not complain about their subsequent transfer to D.

The Court of Appeal did not agree. Taking a purposive view, the Court of Appeal decided that article 4 only applied to the transfer of the asset to the trustee, not to the trustee's declaration of trust over that asset. Lex situs governs the transfer of title to the asset to the trustee, not the basis upon which the trustee then holds the asset.

That decision was enough for the Court of Appeal to decide that the English courts had jurisdiction, but it still leaves numerous questions for the trial. What, for example, is the effect of Saudi law's non-recognition of trusts, of the fact that non-Saudis cannot hold shares in Saudi companies, of the fact that Saudis cannot front for non-Saudis and so on. Much argument for another day

Double or quits

Jurisdiction provisions in a settlement agreement supersede those in an earlier contract.

Parties enter into a contract containing an arbitration clause. Disputes arise, and they then enter into an agreement to settle those disputes, terminating the earlier contract. The settlement agreement gives exclusive jurisdiction to the English courts. Years later, a party claims that it was induced to enter into the settlement agreement under duress or through misrepresentations, to set aside the settlement agreement and to resuscitate its orginal claims. Which dispute resolution provision applies?

In *Monde Petroleum SA v Westernzagros Ltd* [2015] EWHC 67 (Comm), Popplewell J decided that the presumption of one-stop shopping (ie that sane businessmen would want all disputes arising from any particular matter to be resolved before a single tribunal) led to the jurisdiction provision in the settlement agreement prevailing. The jurisdiction clause in the settlement agreement is distinct from the rest of the agreement, and the parties are likely to have intended it to supersede the clause in the earlier agreement and thus to apply to all disputes arising out of either agreement. The arbitrators can therefore pack their bags.

Sweet deal

Court determines an arbitral tribunal's jurisdiction, upholding an unsigned arbitration.

It is for the arbitral tribunal to determine whether it has the jurisdiction to hear a dispute arising under an arbitration agreement. However, where the parties agree or the tribunal requests it to do so, the court will determine this question if there is a significant cost saving, a good reason to do so and the application is made without delay (section 32 of the Arbitration Act 1996). Applications under section 32 have only been successful in a handful of cases.

In *Toyota Tsusho Sugar Trading Ltd v Prolat SRL* [2014] EWHC 3649 (Comm), the applicant sought to recover amounts for unpaid sugar deliveries through a London-seated arbitration. The defendant contended that there was no valid arbitration agreement, on the basis that it had been signed by an agent with no authority, and initiated proceedings against the applicant in Naples on different but related grounds. The applicant contended that the arbitration agreement was binding on the basis of the apparent authority of the agent. And there is no requirement for an agreement to be signed – only that it be evidenced in writing. With the prospects of the so-called "Italian torpedo" looming, the applicant swiftly sought clarification from the English court as to the status of the arbitration agreement (with the tribunal's consent).

Given the highly factual issues at play, the court was of the view that any decision that the tribunal made on its jurisdiction was likely to be appealed. It was therefore cheaper for the court to determine the issue in the first place. In a rare success under section 32, the application passed muster. The arbitration agreement was upheld.

The English court was undeterred by the ongoing Italian proceedings. The Brussels I Regulation (which governs when EU member state courts may take jurisdiction over disputes) expressly excludes arbitration. But the exact scope of this exception has been the subject of much debate, and has led to reforms of the Regulation in the form of the "recast" Regulation, which has applied since10 January 2015.

In this case, Cooke J was quick to clarify that he was not prohibited from rendering the declaration by the Brussels I Regulation or the recast Regulation (which at the time of judgment was yet to come into force). The speed of the application, the efficiency of the English courts and the comparatively laid back approach of the Italian courts may have helped the court come to this conclusion.

Had the Italian court already ruled on this point, the English court would not have been able to conclude so easily that the Brussels I Regulation did not apply (*National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397*).* This position is reversed under the recast Regulation since the recital (12) states that nothing in the Regulation should prevent a Member State court from determining whether or not an arbitration agreement exists, not even if a Member State has ruled on this issue already. Whether this clarification in fact raises more issues than it solves, by increasing the chance of conflicting judgments on the same issue, remains to be seen.

Mexican waves

The EU will ratify the Hague Convention on Choice of Court Agreements.

The EU has decided that, within one month of 5 June 2015 (no one should act too hastily), the EU will ratify the Hague Convention on Choice of Court Agreements, which will bring the Convention into force (Council Decision 2014/887/EU of 4 December 2014). Unfortunately, only Mexico so far has ratified the Convention, so earth-shattering it will not be.

The ultimate prize, however, will be won if the US converts its signature into a ratification. The Convention provides for the courts of the participating states to recognise and defer to exclusive choice of court agreements and then to enforce the judgment given by the chosen courts. Holding breath is not recommended.

Regional rights

Claim forms must be served on sovereigns through diplomatic channels.

When issuing an arbitration claim form against a party outside the UK, the norm is to ask for permission to serve on the lawyers in London acting in the arbitration (eg PD62.4). In *PCL v The Y Regional Government of X* [2015] EWHC 68 (Comm), such permission was, as is usual, granted. Unfortunately, the lawyers and the judge forgot that the section 12 of the State Immunity Act 1978 has special rules for service on sovereigns; the constituent territories of a sovereign state can rely on those rules (section 14(5)).

C applied under section 42 of the Arbitration Act 1996 for permission to enforce a peremptory order made by the tribunal requiring D to pay C $100m. C obtained permission to serve the claim form on D's solicitors in London, but D applied to set aside service on the grounds that section 12(1) of the SIA requires service of court process to be effected through the Foreign and Commonwealth Office. The advantage, to a sovereign, of section 12(1) is that service through diplomatic channels can take an eternity, and the sovereign then has a further two months to acknowledge service.

C argued that section 12 only applies to documents required to start proceedings. An arbitration claim form did not, it said, start proceedings but continued the existing arbitration. Hamblen J disagreed. The court proceedings were distinct from the arbitration, and an arbitration claim form clearly started the court proceedings.

Next C argued that D's solicitors' agreement to accept service of documents within the arbitration also covered the arbitration claim form. Again Hamblen J disagreed. Acceptance of service within the arbitration was very different from the service of court proceedings. Further, D's solicitors had declined to confirm that they had instructions to accept service of the arbitration claim form, which reversed any consent they might previously have given.

Then C raised section 12(3) of the SIA, which says that a state that "appears in proceedings" cannot thereafter object that service has not been effected in accordance with section 12(1). D had acknowledged service, stating that it intended to challenge the jurisdiction of the court. Acknowledgment of service in this form is a necessary pre-condition to any challenge the jurisdiction of the court (CPR 11(2)). So, said C, D had to acknowledge service in order to be able to rely on section 12(1), but by acknowledging service, D lost its ability to rely on section 12(1) because an acknowledgment of service is an appearance.

This Catch 22 was too clever by half for Hamblen J, who said that acknowledging service with a stated intention to challenge jurisdiction was not entering an appearance for the purposes of section 12(3). Section 12(3) had to be interpreted in an updating manner since parties had ceased to be required to enter an appearance in 1979, when the Queen's name disappeared from writs and acknowledgments of service replaces appearances before Her Majesty.

So C might have been successful in obtaining an award against D, but enforcing the award might be a different thing. D is only be a regional government, but it has its own oil, president and military forces.

Enforcement

Bonded service

Drafting defeats a third party debt order.

A third party debt order - the order formerly known as a garnishee - is a potentially powerful weapon to enforce a judgment debt, but it has its limitations. In particular, at the time of service on the third party of the interim order, the third party must owe a debt to the judgment debtor that is due or accruing due. Even if that is in substance the case, the drafting of a contract can avoid the consequences of a third party debt order.

In *Merchant International Co Ltd v Natsionalna Aktsionerna Kompania Naftogaz Ukrainy* [2014] EWCA Civ 1603, a judgment creditor saw that its judgment debtor was due to make an interest payment on public bonds through a paying agent in London. The judgment creditor therefore obtained an interim third party debt order, which it served on the agent. However, at the time of service the agent had not yet received any money from the debtor (the money arrived a few days later) and the order therefore failed. On no basis did the agent owe the judgment debtor anything at the time of service. (The Court of Appeal A added that applications for interim third party debt orders should be treated as without notice applications for an injunction to which the obligation of full and frank disclosure applies.)

The judgment creditor then obtained a second interim third party debt order, which it served on the paying agent. This also failed because the money by then held by the agent did not constitute a debt due to the judgment debtor. The Agency Agreement was clear that the agent's obligation was to pay the money received from the judgment debtor to the bondholders, not back to the judgment debtor.

Nevertheless, due to uncertainty as to the fate of this first payment and to avoid defaulting on the bonds, the judgment debtor sent the agent a second payment with instructions to pay that sum the bondholders. The agreement under which this was done provided for the first payment to continue to be held on the terms of the Agency Agreement. The bondholders were duly paid; the agent held on to the first payment.

The judgment creditor then went for its hat-trick, and obtained a third interim third party debt order, which it served on the agent. The bondholders had been paid, the judgment creditor said, so who did the agent hold the first monies for if not for the judgment debtor? But, upholding Blair J, the Court of Appeal decided that the money was still, as the agreement said, held on the terms of the Agency Agreement, under which the judgment debtor had no sufficient claim to the money. The fact that the judgment debtor had asked for, and been paid, the surplus of the monies held by the agent did not alter the position. The judgment creditor had no right to payment of the monies held by the agent.

Blair J had also decided that, even if otherwise wrong, he would, in his discretion, have refused to grant the order. The Court of Appeal declined to express a view on this. Nevertheless, it seems clear that third party debt orders work well for existing bank accounts, but are less effective if trying to catch a particular payment. Not only is it necessary to

serve the third party when it holds the relevant money, which could be a short window of time, but that it is possible to draft out of the risk, as the documents in this case did.

Data protection

The right to be forgotten

How can links be removed from search engines?

In May 2014, the Court of Justice of European Union handed down the decision in *Google Spain SLr v Agencia Española de Protección de Datos* (C-131/12), which quickly became known as the "right to be forgotten" decision. A Spanish citizen had complained to a Spanish newspaper and to Google about an article published many years previously relating to his financial difficulties. Those difficulties had been resolved and, he said, it was unfair, and a breach of his privacy rights, that the article kept showing up in Google's search results on his name. The CJEU agreed, holding that search engines are controllers of personal data and had to comply with EU data protection laws, which include the right to be forgotten. This right allows individuals to ask search engines to remove links containing personal information about them where the information is inaccurate, inadequate, irrelevant or excessive for the purposes of the data processing.

The case led to a rush of requests to Google by other people who wanted their information removed. According to Google's transparency log, the company has received nearly 200,000 requests in respect of over 700,000 URLs, and has removed about 40% of the URLs. This shows that making a request is no guarantee of removal. Google requires requesters to explain why the links are "irrelevant, outdated or otherwise objectionable" and seems to have taken a fairly strict line, declining to remove links about a person's arrests for crime committed in a professional capacity, links stating that a person was abusing welfare services and a link to an official state document recording that an individual was guilty of fraud.

A refusal by a search engine to remove links can be the subject of a complaint in the UK to the Information Commissioner's Office. The ICO has published guidance on the criteria that it will apply when considering complaints: https://ico.org.uk/for-organisations/search-result-delisting-criteria/. Among the issues the ICO will consider are whether the search relates to a natural person, whether the individual plays a role in public life, whether the subject of the search result is (or was at the time of original publication) a child, whether the data is accurate, whether it relates to the individual's working life, whether it is causing prejudice to the individual or putting him at risk and whether the data relates to a criminal offence.

However, even if a request is ultimately successful, it is important to understand what won't happen. Specifically, the links will only be removed from the results of a search on the person's name. They won't disappear from the website of the original publisher. Nor will they disappear from a list of results if another term is searched. For example, if Mr A and Mr B were both named in an article, it might be removed from a list of search results for "Mr A" if he complained, but it would still show up in a search for "Mr B". It is also important to remember that the purpose of the right to be forgotten is to protect private information, and not to remove results that are just defamatory of the individual in question.

Sovereign immunity

The empire strikes back

A waiver of sovereign immunity cannot be revoked, potentially enabling a dispute going back more than 66 years to be resolved.

In August 1947, India and Pakistan secured independence from the UK. Princely states within the sub-continent were given a choice whether or not to join the new countries. The Seventh Nizam of Hyderabad, a Muslim who ruled part of southern India, decided that his state should remain outside - albeit geographically surrounded by - India. India was not amused, eventually invaded ("Operation Polo") and, on 18 September 1948, the Nizam gave up his short flirtation with self-government. Hyderabad became part of India.

Two days after this surrender, a little over £1m was transferred by or for the Nizam to the High Commissioner of Pakistan in London. A week later, the Nizam sought to reverse the transfer on the basis that it was made without authority. Westminster Bank felt unable to return the money without the recipient account holder's consent, which was not forthcoming. The Nizam sued the bank and the ambassador, but Pakistan asserted sovereign immunity. The House of Lords decided that Pakistan was entitled to immunity even though it meant that entitlement to the money could not be resolved because the court could never give the bank a proper discharge (*Rahimtoola v Nizam of Hyderabad* [1958] AC 379). The money was frozen at the bank.

There matters rested for more than half a century, though the number of claimants to the monies has expanded to include Pakistan, India, the present (Eighth) Nizam, the

present Nizam's brother, an assignee of the brother, and other members of the extended family (the Seventh Nizam had up to 49 concubines and some 150 children). Settlement negotiations have got nowhere. The money has rested undisturbed in National Westminster Bank's coffers, growing to some £35m.

In June 2013, the current High Commissioner of Pakistan launched proceedings against the bank, initially seeking to lift the stay on the original (1950s) proceedings, and then by issuing a new claim form against the bank. Needless to say, the bank immediately said it would interplead, and the ever-growing band of rival claimants to the money piled in to assert their claims. Whoops, said Pakistan, tactical mistake. Shortly before the interpleader hearing, Pakistan therefore served a notice of discontinuance, with the intention of scampering back behind its sovereign redoubt.

Too late, cried the rival claimants as they charged the redoubt, applying under CPR 38.4(1) to set aside the notice of discontinuance. In *High Commissioner of Pakistan v National Westminster Bank plc* [2015] EWHC 55 (Ch), Henderson J agreed that it was indeed too late. By starting the proceedings, Pakistan had waived its sovereign immunity (section 2 of the State Immunity Act 1978), which waiver was irrevocable.

Pakistan claimed that it might have waived immunity against the bank, but that it had not done so against the other claimants to the money. Henderson J would have none of that either. Interpleader was the obvious and expected response by the bank, and the waiver extended to the interpleader proceedings, which were not separate. (Henderson J might have said that immunity against the others was irrelevant because they were all asserting claims against the bank, not against Pakistan.)

So, having rested on its sovereign status for over half a century, with the consequence that no one could get their hands on the money, a rush of blood to the head has led to Pakistan waiving its immunity, thereby allowing the courts of the former imperial power to determine what happened in the princely court so long ago - even though most or all of the actors can surely now only sing in the choir invisible rather than in the ethereal surroundings of the Royal Courts of Justice - and thus who gets the cash.

Unless, of course, the pressure brings about settlement, but there are lot of parties to reach a consensus.

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