Contentious Commentary

Contract

Compensatory principle rules

The compensatory principle in damages will rarely be ousted by contractual terms.

The traditional principle in English law is that contractual damages should be assessed as at the date of breach. This was undermined by *The Golden Victory* [2007] 2 AC 535, which emphasised that damages are compensatory; if taking into account events after the breach shows the true loss, then those events should be considered. *Bunge SA v Nidera BV* [2015] UKSC 43 has taken this approach one stage further, emphasising that the compensatory principle trumps almost everything else.

The case concerned a shipment of Russian wheat, due to be made in late August 2010. On 5 August, the Russia introduced a ban on the export of wheat to start on 15 August. On 9 August, the seller said that this constituted a prohibition under the governing GAFTA contract terms, and cancelled the contract. The buyer treated this as repudiatory breach of the contract, which it accepted. It seems to have been agreed/decided that the seller's cancellation was premature because Russia might have revoked the ban before shipment was due. Prima facie, damages were the difference between contract price and market price at the time of acceptance of the repudiation.

But in fact Russia did not revoke the ban. Was this relevant at common law to the level of damages and, if so, did the contract terms form a complete code that prevented subsequent events being taken into account?

The Supreme Court regarded the compensatory principle as paramount. Subsequent events showed that the buyer had suffered no loss as a result of the seller's premature cancellation of the contract because the seller could have cancelled in any event. The suggestion that damages should be assessed at the date of breach/acceptance of repudiation without regard to what in fact transpired was dismissed outright. Arguments that *The Golden Victory* only applied to contracts for multiple deliveries were also rejected. The date of breach might be a starting point for the assessment of damages, but that is all.

The Supreme Court also dismissed the argument that the GAFTA rules provided a complete code that ousted any need to consider subsequent events. The rules provided for damages to be "based on" the difference between contract price and market price at breach. The Supreme Court saw this as reflecting complementary common law principles, but not as excluding the ability to take into account subsequent contingencies. If you want a contract to be a complete code for the assessment of damages, you need to make it very complete or to say so expressly.

Selling non-existent goods

A contract for the transfer of title to goods that will have been used by the time of transfer is not a contract for the sale of goods.

The financial troubles of the OW Bunker group, as a result of losses caused by employee fraud discovered late last year, are generating a significant volume of litigation (see, eg, *SwissMarine Corporation Ltd v O W Supply & Trading A/S* [2015] EWHC 1571 (Comm) last month). The latest instalment in England is *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd* [2015] EWHC 2022 (Comm), on the question of whether a contract for

Contents

the supply of bunkers (to the layman, fuel for ships) was a contract for the sale of goods.

Prima facie, this is a categorisation issue of no real interest to common lawyers. However, C's argument was that if the contract was a contract for the sale of goods, D could only claim the price of the bunkers if the requirements in section 49 of the Sale of Goods Act 1979 were met; those requirements include the passing of title; and title in the bunkers never passed because of a retention of title clause in the contract and the consumption of the bunkers before payment was due. A neat point, had it succeeded (though D had other arguments).

C bought the bunkers from D. The contract contained a retention of title clause, which said that title in the bunkers did not pass until payment. Payment was not due until 60 days from delivery, by which time most, if not all, of the bunkers would have been used up as a result of the vessel plying its trade. Title cannot pass in something that does not exist, but the contract also gave C the right to consume the bunkers before payment was due. (There were, in fact, a chain of contracts under which D acquired the bunkers to sell to C, each with a retention of title clause.)

Males J considered that this was not a contract for the sale of goods within the definition in section 2 of the Act. The essence of a contract for the sale of goods is that it transfers property in the goods. Here, both parties knew that title could only pass in any bunkers that happened to be unconsumed after 60 days; the passing of title was not fundamental to the transaction. What C was buying was not title to the bunkers but the right to use the bunkers in the propulsion of the vessel to which they were delivered. C received this benefit even though it did not obtain title to the bunkers used by the vessel. As a result, D could claim the cost of the bunkers as a debt due under the contract without needing to meet the technicalities of section 49 of the Act because the contract was not subject to the Act.

The outcome is that, although everyone thought this was a contract for the sale of goods, as a matter of law it was not and, because it was not, C has to pay the price. This is the result most would have expected, even if the means of getting there might have been rather tortured. It would have been a curious twist if C had been able to escape its contractual obligation to pay the price because of the retention of title clause.

C still faces the risk of the vessel being arrested by the original owner of the bunkers (R), at the beginning of the supply chain, on the basis of its retention of title clause. Males J

Costs

Establishment solidarity

The recoverability of success fees was not incompatible with the European Convention on Human Rights.

Coventry v Lawrence [2015] UKSC 50 involved the question of whether the pre-Jackson (ie before 1 April 2013) scheme for conditional fee agreements and costs offended article 6 of the ECHR (right to a fair determination of civil rights). The Supreme Court decided that it did not, though only by a 5-2 majority.

The element of the pre-Jackson scheme under debate was the losing party's obligation in costs to pay the success fee and ATE insurance premium incurred by the winner and, in particular, the courts' inability to consider whether the addition of the success fee to normal fees rendered the total bill disproportionate. This scheme has now gone but, before its demise, it was found to be inconsistent with article 10 of the ECHR (freedom of speech) in *MGN Ltd v UK* (2011) 53 EHRR 5. The majority in *Coventry* considered that articles 6 and 10 raised different issues. For article 6 purposes, the UK was promoting a legitimate interest, ie access to justice in a world without legal aid, and was entitled to considerable latitude in doing so, particularly given the wide consultation it undertook. The pre-Jackson scheme might have been flawed (as, the Supreme Court recognised, is the Jackson regime) but the fact that it may operate harshly in some cases does not necessarily render the whole scheme disproportionate.

The minority considered that there was no way out of the ECtHR's previous judgment. The minority's main complaint was the arbitrary nature of the pre-Jackson scheme. It imposed these extra costs on a party who had the misfortune to lose a case to someone using a CFA rather than on litigants as a whole (and, the stronger the losing case, the higher the success fee). This rendered the whole scheme discriminatory, disproportionate and unfair, according to the minority. However, the minority could not bring the majority with them, so sparing the courts decades of losing parties trying to recover success fees paid years ago. That spectre may have been why the legal establishment - the Bar Council, the Law Society etc - all took part in the case in order in to urge the Supreme Court to reject the idea that the old scheme was not compliant with the ECHR.

decided that R had no claim against C because it was implied in its contract that the ultimate buyer could use the bunkers. But R was not a party to the arbitration leading to the court case or the court case itself, and R might wish to argue in some faraway court that that Males J was wrong.

Lost worlds

Damages under section 2(2) of the Misrepresentation Act 1967 are only possible if rescission is still available.

Section 2(2) of the Misrepresentation Act 1967 gives the court a discretion to award damages in lieu of rescission of a contract for a non-fraudulent or non-negligent misrepresentation. Rescission is a powerful weapon, because it undoes the contract. There are various bars to rescission (eg inability to restore the parties to their pre-contractual positions): if rescission is no longer available because a bar applies, does the discretion in section 2(2) also cease to be available?

In *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745, the Court of Appeal said yes. The discretion in section 2(2) is expressly stated to be in lieu of rescission. If the right to rescission has gone, damages cannot be a substitute for it, and so the discretion to award damages ceases to be available.

Stratstone involved a car bought in reliance on a representation that it was "brand new". It had only one previous registered owner (the selling garage) but it had been involved in an accident leading to significant repairs. It was not therefore brand new. D argued that rescission was not possible because C could not return a car with only a single registered owner and, further, C had used the car a not inconsiderable amount.

The Court of Appeal rejected this. The car returned would be the same car, and registration was only a legal construct. Similarly, the use of the car was not enough for rescission to be lost. Interestingly, the Court of Appeal indicated that if reversing the transaction would not place the parties in exactly the same position they were in before the transaction, the court could require a monetary adjustment to achieve the right outcome. The argument and evidence (or lack thereof) in this case were such that the Court did not need to explore this in any detail, but it suggests an increasingly flexible approach to what restitutio in integrum means.

The Court of Appeal also addressed whether delay alone is a bar to rescission, noting a degree of confusion as to whether this is the same as the loss of the right to reject goods under the Sale of Goods Act 1979 (and noting further that the Consumer Rights Act 2015 will change things). Whatever the position, the Court decided that C had not delayed unduly, not least because he only found out that the car was not new in the course of disclosure on his (then) claim regarding its unsuitable quality, amending his pleadings to claim rescission at that point.

Faith in the city

An obligation of good faith is not to be implied into a contract.

The rule in English law (despite contrary arguments by one judge) is that there is no general duty of good faith in contractual performance. This is often a selling point for English law in the international legal market place. However, a duty of good faith may be expressly agreed or may be implied in specific situations, unless excluded. It will be implied where a party has a discretion that involves making an assessment or choosing from a range of options, taking into account the interests of both parties, but it won't be implied where a party is deciding whether or not to exercise a contractual right (*Mid Essex Hospital Services NHS Trust v Compass Group* [2013] EWCA Civ 200). If a term is implied, it is usually that the party must act in good faith and not in a manner that is arbitrary, capricious, perverse or irrational (*Mid Essex*).

The question of what is a contractual right and what involves an assessment of this sort is not, however, easy. In *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC), Edwards-Stuart J decided that the ability of a council to award "Service Points" for failures by a contractor was an assessment rather than a contractual right principally because the number of points the council could award was not fixed; it could choose any number up to the maximum specified. If the council merely had the power to award a set number of points or not to do so, that would have been the exercise of a contractual right.

However, the judge went on to conclude that the term to be implied was not of the usual kind but rather was a duty to act honestly and on proper grounds and not in a manner that was arbitrary, irrational or capricious. He shunned good faith in his formulation because the parties had, in other parts of the contract, expressly required good faith, and, given the general rule in English law, he was reluctant to bring it back through implication. The absence of any express reference to good faith in this formulation probably makes little difference in practice (even though a lack of good faith is not synonymous with dishonesty). The emphasis on proper grounds is likely to achieve the same outcome.

Secret agents

Principals are entitled to their agents' papers.

It is common for a contract for the sale of a business to provide for the buyer to perform the seller's contractual obligations unless and until those obligations can be novated to the buyer. In doing so, the buyer acts as the seller's agent, benefitting from whatever is payable under the contract, but indemnifying the seller for losses suffered by the seller.

This was the arrangement in *Amec Foster Wheeler Group Ltd v Morgan Sindall Professional Services Ltd* [2015] EWHC 2012 (TCC). D was performing C's contractual obligations, but this led to two arbitrations with T, and also concern as to whether D's financial status might leave C with liabilities. C therefore decided that it wanted to see the papers relating to the arbitrations so that it could assess the risks it faced. D failed to provide the papers voluntarily.

Coulson J decided that it is a general incident of the relationship between principal and agent that the principal is entitled to require production by the agent of documents relating to the affairs of the principal. The agreement for the sale of the business could have excluded that right, but it would have to be express about it, which it wasn't (sufficiently). Similarly, any obligation of confidentiality arising in the arbitrations could not offer a reason not to produce the documents. D therefore had to hand over the papers.

Future imperfect

Too long notice invalidates termination.

An agreement under which C became a partner in an LLP provided that C could be forced out by six months' notice expiring not earlier than two years after C joined the LLP. C was given thirteen months' notice, the notice to expire on the second anniversary of his joining. Was that valid?

No, according to Henderson J in *Flanagan v Liontrust Investment Partners LLP* [2015] EWHC 2171 (Ch). The agreement didn't say that the LLP had to give at least six months' notice; it said six months, and the LLP had not given six months' notice. The LLP did not even face the practical problem that notice had to be given exactly six months before a particular date, which might make service of the notice difficult. The notice here could take effect at any time after the end of the two year period, and could be stated to be operative six months after service was effective rather than on a specific date. Henderson J therefore decided that the notice was invalid. (To compound matters, the LLP made two further attempts to terminate C's partnership, both of which were again invalid for various other reasons.)

Henderson J also decided that, as with normal partnership agreements, the doctrine of repudiatory breach does not apply to an agreement under section 5 of the Limited Liability Partnerships Act 2000 governing a limited liability partnership (at least if there are more than two partners). The LLP might have been in repudiatory breach of the agreement by putting C on thirteen months' gardening leave, but that breach did not allow C to terminate the partnership agreement.

The main reason for this conclusion was that the application of the doctrine of repudiatory breach would create chaos. The LLP (with its separate legal personality) would continue but with different partners subject to different agreements or to the default rules. In particular, C was running the imaginative argument that he had accepted the LLP's repudiatory breach of his contract; that contract therefore ceased to exist and, as a result, the relationship between him and the LLP fell back to the default rules in the Act (rules that did not apply to any of the other partners); the default rules gave C an equal share in the equity of the LLP, far more than his entitlement under the agreement.

Henderson J reasonably regarded as bizarre the idea that the disappearance of a membership agreement could radically increase a partner's entitlement to the LLP's profits and assets. However, because the doctrine of repudiatory breach does not apply to section 5 agreements, C's imaginative argument failed.

Demanding conditions

If it looks like a performance bond, it probably is a performance bond.

In *Caterpillar Motoren GmbH & Co KG v Mutual Benefits Assurance Company* [2015] EWHC 2304 (Comm), Teare J referred to "Paget's presumption", namely that where an instrument of guarantee (i) relates to an underlying transaction between parties in different jurisdictions, (ii) is issued by a bank, (iii) contains an undertaking to pay on demand (without or without the words "first" or "written") and (iv) does not contain clauses excluding or limiting the defences available to a guarantor, there is a presumption that it will be construed as an "on demand" bond or guarantee (ie like a letter of credit, not a conventional guarantee where the underlying liability must be proved).

Teare J rejected the argument that Paget's presumption was a gloss on the usual rules of contractual interpretation. He considered that, if these four factors are present, then a reasonable person would understand the instrument to be an on demand bond. It is then necessary to examine the background and wording to see whether the reasonable person would consider the presumption to be rebutted. In *Caterpillar*, Teare J took little time to conclude that it was not rebutted. The wording made it clear that the presumption was amply justified, even though the instrument was not issued by a bank but by a different sort of financial institution.

Mean what you say

The wording of a contract means what it says.

The documentation for a commercial mortgage backed securitisation provides that a Special Servicer may be removed if the rating agencies agree that removal will not result in a downgrade. All fine in 2007, but in 2012 one agency said that it would decline to give such confirmations. Does the agency's silence in response to a request prevent the Special Servicer's removal?

In *Deutsche Trustee Company Ltd v Cheyne Capital (Management) UK (LLP)* [2015 EWHC 2282 (Ch), Arnold J decided that it did have that effect. That was the natural meaning of the words. There was no ambiguity, nor was there any commercial absurdity, not least because the Special Servicer's removal was not wholly prevented because the documentation allowed the rating agencies' silence to be ignored if the appropriate noteholders passed a special resolution. The words were clear, and the court should give effect to the words. The judge therefore followed the strictures of the Supreme Court in *Arnold v Britton* [2015] UKSC 36 rather than the more purposive approach taken by some courts in earlier cases.

Clifford Chance LLP acted for the trustee in this case.

Conflict of laws

Locating the unlocatable

A letter of credit is located where the sum must be paid.

Determining the location of a chose in action is a frustrating, indeed usually futile, exercise. How can an intangible right - an artificial construct by a legal system - have a situs at all? Yet some rules require the situs of an intangible to be identified so, for example, that the law applicable to its transfer can be decided. This often involves the application of rules developed for, and understandable as regards, physical things to a wholly different situation.

One area where the situs of a chose in action matters is in relation to third party debt orders, which require a debt owed to a judgment debtor to be paid instead to the judgment creditor. In *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2015] EWCA Civ 835, the London branch of a French bank owed money to D under a letter of credit. D was subject to an adverse arbitration award. The money due under the LC was to be paid to an account at the Federal Reserve Bank in New York. The issue was whether the English courts could grant a third party debt order over the debt owed on the LC.

According to the Court of Appeal, the English courts cannot do so. The English courts do not have jurisdiction to make a third party debt order in respect of a debt situated outside England unless the law applicable in its situation would recognise the English order as discharging the liability of the third party to the judgment debtor (*Société Eram Shipping Co Ltd v Internationale de Navigation* [2004] 1 AC 260). Even though the general rule is that a debt is situated where it can be collected (ie usually where the debtor resides or, perhaps, where proceedings must be taken against the debtor), the Court of Appeal felt obliged by authority (*Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233) to hold that LCs are different. LCs are situated where the sum is payable, in this case New York.

The Court of Appeal had no evidence before it to the effect that New York law would treat an English third party debt order as discharging the bank and, as a result, was unable to make the order. Interestingly, the Court decided that the LC was governed by English law, but it was not argued that this was a reason why the English courts could make the order.

The Court of Appeal also declined to appoint a receiver over the debt. Receivership is not subject to the same jurisdictional bar as third party debt orders, but the Court decided that, for the similar reasons, that it was inappropriate to make the appointment.

The LC in question was, in fact, unusual. It required payment to an account of the Iraqi central bank, with the issuer specifically undertaking to both D and the central bank that it would make that payment. Moore-Bick LJ decided that the debt was owed to D, with the central bank only having a claim in damages if the payment was not made. Briggs and Sullivan LJJ disagreed, deciding that the debt was owed to the central bank with D having a claim in damages in the event of non-payment. This therefore took the debt outside the scope of third party debt orders to enforce D's obligations, as well as giving the debt immunity from execution by virtue of section 14(4) of the State Immunity Act 1978. A good wheeze for state organisations to avoid seizure of their assets to meet their debts.

Frozen out

Insolvency in Iceland blocks proceedings in England.

The philosophy of the EU's Insolvency Regulation and its counterpart for banks, the Credit Institutions Winding-up Directive, is that there should be one insolvency process within the EEA that binds all creditors (insolvency for banks is now largely replaced by resolution, but the approach is broadly the same). This insolvency process takes place in the company's centre of main interests or equivalent. With limited exceptions, there should not be separate national insolvencies, and there should certainly not be any opportunity for one creditor to gain priority over others by starting its own legal suit and snatching the insolvent's assets. As a result, whether and how proceedings can be taken against companies in insolvency depends upon the law governing the main insolvency (though proceedings in existence when the insolvency starts are different).

In *Tchenguiz v Grant Thornton LLP* [2015] EWHC 1864 (Comm), C sued various parties alleging numerous torts arising from C's arrest by the Serious Fraud Office in 2011 (C's direct claim against the SFO has settled). Amongst those sued was Kaupthing, a bank that has long been in an insolvency process in Iceland. Kaupthing applied to stay the English proceedings on the basis that, under Icelandic law, any claims against the bank can only be made by proof in the insolvency, with appeal to the Icelandic courts. C fulminated that Icelandic law couldn't possibly have the effect of stopping him from suing Kaupthing as one of several tortfeasors in proceedings in England when the English courts clearly had jurisdiction under the Lugano Convention.

Carr J decided that this result was exactly what was intended. Article 5(1) of the UK Regulations implementing the CIWUD states expressly that the law governing the insolvency takes effect as if it were part of the insolvency law of the UK. As a result, even if the Icelandic law prohibiting proceedings was not extra-territorial as a matter of Icelandic law, the implementation of the CIWUD gave it extra-territorial effect such that it bound the English courts. The English proceedings against Kaupthing therefore had to be stayed. C can pursue the other defendants in England, but he must pursue Kaupthing in parallel proceedings in Iceland.

Greek salad

Proceedings must be served despite doubts as to whether they relate to civil matters.

Whether or not with justification, Germany has not been portrayed recently as being a friend of Greece. However, Germany's Federal Justice Office has done its best at least to stall German legal proceedings against Greece. The Court of Justice of the European Union has put an end to these attempts at solidarity.

In 2012, Greece wanted to restructure the debts it owed to private sector creditors. Its bonds governed by Greek law did not include collective action clauses, ie clauses that allow a majority of bondholders to bind the minority. So Greece passed a law in effect imposing CACs on the bonds, secured the requisite majorities in votes, and treated the bonds as restructured (ie roughly halved in value).

Some German holders of Greek bonds were not best pleased, and sued Greece in Germany, including

An Italian job

Derivatives entered into by a municipality are unenforceable.

Attempts by foreign public authorities to escape from the jurisdiction of the English courts and then from derivatives that have turned disadvantageous have not, overall, enjoyed significant success. *Dexia Crediop SpA v Comune di Prato* [2015] EWHC 1746 (Comm) is an exception, though the victory will have little impact on other transactions

The municipality entered into a series of structured interest rate derivatives with the bank as part of the management of the municipality's debt. The transactions were governed by English law and subject to the ISDA Master Agreement. After the global financial crisis, they proved expensive.

The judge rejected the municipality's arguments that its entry into the derivatives broke Italian local government law. However, he accepted that, under Italian civil law, the bank should have given notice that the municipality could withdraw within seven days. The failure to do so rendered the transactions void.

These provisions of Italian law applied because of article 3(3) of the Rome Convention (now article 3(3) of the Rome I Regulation). They constituted mandatory rules of Italian law and all the elements relevant to the situation at the time of the choice of English law were connected with Italy only - the parties were Italian, they communicated with each other in Italy, the transactions were entered into in Italy, and the transactions were to be performed in Italy.

As a result, the failure to give the cooling-off notice rendered the transactions void, despite the transactions being governed by English law. Absent this Italian-centric fact pattern, Italian law would have been irrelevant and the transactions enforceable (though the municipality also had other arguments based on, for example, misrepresentation).

for sums due on the original bonds. The underlying argument is that the Greek law that purported to amend the bonds should, for various reasons, be disregarded. The German court papers were sent to the Federal Justice Office for service on Greece under the EU's Service Regulation. The Federal Justice Office refused to serve the claims because it wasn't satisfied that the claims were civil or commercial; if not, the claim fell outside the Service Regulation. *Fahnenbrock v Hellenic Republic* (Case 226/13 and others) went to the CJEU to decide the point.

Except that the CJEU took the entirely practical view that all it should decide is whether the claims were manifestly not civil or commercial. Greece was not represented, and whether the claims are civil or commercial, as opposed to acta iure imperii, is not easy. Proceedings should be served by national authorities unless manifestly outside the scope of the Service Regulation. After service, Greece can always object to service or to the jurisdiction of the German courts.

The Federal Justice Office has, however, bought Greece about three years. The proceedings will now be served (albeit that service will doubtless take some time); the real battle - over jurisdiction, justiciability, acta iure imperii and so on - can then commence.

Courts

A game-changer

The move from *Mitchell* to *Denton* is a sufficient reason to reverse a *Mitchell*ated decision.

Michael Wilson & Partners Ltd v Sinclair [2015] EWCA Civ 774 is pretty extraordinary. A judge of the Court of Appeal gave a decision applying another Court of Appeal decision, *Mitchell,* at a time when *Mitchell* represented the law. *Mitchell* was intended to "encourage" compliance with court rules by refusing relief from any failure to do so. But the Court of Appeal in *Michael Wilson* decided that the subsequent, less rigid, decision in *Denton* was such a material change as to merit their revoking the earlier order and reversing it.

In *Michael Wilson*, an appellant was given permission to appeal on terms that it paid a substantial sum into court by a particular date. If the appellant failed to do so, the appeal would be stayed automatically. The appellant did not pay the money into court. Sixteen weeks later, the respondent applied for the appeal to be struck out; the appellant paid the money into court and countered with an application for the stay to be lifted.

The applications came before Lewison LJ, who applied the principles in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 since the appellant was applying for relief from a sanction. He considered the breach of the order requiring payment into court was serious, there was no explanation for it, and so it followed nearly automatically from *Mitchell* that the application for relief must fail. Lewison LJ therefore struck out the appeal.

Then came *Denton v TH White Ltd* [2014] EWCA Civ 906 in which the Court of Appeal explained that everyone had been misunderstanding *Mitchell* (or, in reality, that *Mitchell* was proving too rigid and unpopular, and needed correction). In particular, it no longer necessarily followed from an unexplained serious breach that relief must be refused. The court must take into account all the circumstances in deciding what to do.

The Court of Appeal in *Michael Wilson* was satisfied that Lewison LJ had failed to take into account all the circumstances. In particular, they considered that he had failed to appreciate that the appeal had only been stayed, not struck out. A stay is inherently temporary, they considered, while strike out is more serious and permanent. A stay can be lifted and, the Court of Appeal thought, it should be lifted since no one would be seriously hurt by doing so.

But the Court of Appeal couldn't simply disagree with Lewison LJ. They had to revoke his order, which can only be done if there has been a material change of circumstances since his order (*Tibbles v SIG plc* [2012] EWCA Civ 518). A change in the law is not usually sufficient but, in this case, the Court of Appeal considered that the transition from *Mitchell* to *Denton* was "truly exceptional" - indeed, they thought that *Mitchell* had led to decisions that were "manifestly unjust and disproportionate" - and sufficient to allow them to invoke this exceptional jurisdiction. They therefore revoked and reversed Lewison LJ's order. One might assume that the members of this particular Court of Appeal were amongst the substantial chorus who considered that their brethren in *Mitchell* had gone seriously astray.

But is this a swing too far in the other direction? Few, if any, would wish to revert to the harshness of *Mitchell* but, on the facts of *Michael Wilson*, the Court of Appeal might be thought to have provided a rather limp response to the appellant's conduct. A lengthy breach of an order might be expected to be dealt with severely rather than the time limit being treated as of little or no relevance, leaving the other party in a state of uncertainty. Effectively the Court of Appeal seems to have been saying that a sanction in the form of a stay can always - at least usually - be undone. Their stress was that a stay is nothing like

CLIFFORD CHANCE

strike out. Moral: always seek strike out rather than stay of proceedings.

Perhaps conscious that other litigants might, in the light of the decision, look to overturn past *Mitchell* decisions, the Court of Appeal stressed that the application in *Michael Wilson* was made within a couple of weeks of *Denton*. But might penalising parties without the chutzpah to think that a court would use *Denton* to revoke a *Mitchell* order make the position worse?

Contentious Commentary is a review of legal developments for litigators

Contacts

Simon James
Partner

T: +44 20 7006 8405
E: simon.james
@cliffordchance.com

Anna Kirkpatrick
Senior PSL

T: +44 20 7006 2069
E: anna.kirkpatrick
@cliffordchance.com

Susan Poffley
Senior PSL

T: +44 20 7006 2758
E: susan.poffley
@cliffordchance.com

35245-5-69-v0.4