C L I F F O R D
C H A N C E

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Contentious Commentary

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Contract

Principal problems

What is principal and what is interest depend upon the context of the documents.

Typical securitisation documents run to hundreds, if not thousands, of pages, including reams of definitions. But the documents can't define everything. In *CBRE Loan Servicing Ltd v Gemini (Eclipse 2006-3) plc* [2015] EWHC 2769 (Ch) they didn't define either "principal" or "interest", and, as things transpired, it was, of course, on those words that the amounts due to the various categories of noteholders turned.

The securitisation involved loans secured on real estate. The securitisation servicer had to allocate recoveries from the loans to a principal account or to an interest account. Payments to the five tranches of noteholders depended upon what was in which account: if principal, the money went to the Class A noteholders, and no one else got a look in until the Class A noteholders had been paid their principal in full; if interest, the Class A noteholders still took priority but there was greater scope for the money to trickle down to pay interest to lower ranking noteholders. The junior creditors therefore wanted as much as possible to be categorised as interest.

Whilst the underlying loans were performing normally, the distinction between principal and interest receipts was easy to apply. But some of the underlying loans then started to go wrong. Some were accelerated and the security enforced through the appointment of receivers. The result of this enforcement was that the sums recovered by the receivers and paid to the servicer no longer fitted neatly into the categories of principal and interest. The recoveries included rent from tenants, surrender premiums paid by tenants wanting out of their leases and sale proceeds when the properties were realised. Everyone agreed that rent was income, but the question was how sale proceeds and surrender premiums should be categorised.

The junior noteholders argued that since there were no definitions of principal and interest, the common law approach should apply, namely, absent contrary indications, receipts should be applied first to meet outstanding interest and only then to principal. Henderson J considered that there were sufficient contrary indications (indeed, using a temporal approach would have categorised receipts according to the sums outstanding at the time rather than the nature of the receipts). In the light of the overall structure, the judge considered that both sale proceeds from properties and the surrender premiums paid by tenants constituted principal receipts rather than interest.

CBRE Loan Servicing might be seen as a move back towards a purposive approach to the interpretation of contracts and away from the literalism favoured by *Arnold v Britton* [2015] UKSC 36, but that is probably not fair on Henderson J. All sums recovered had to be categorised as either principal or interest even though the sums in question did not fall within any normal meaning of either word. Literalism was not an option. The judge had to do his best in the poorly drafted circumstances. Whether he was right in his allocation is, of course, a different question.

CBRE Loan Servicing is also one of an increasing number of cases in recent times that have involved complex securitisations (or similar) and waterfall structures. Once contract law was largely the product of shipping problems; now it is driven by finance.

Restricted meanings

A contractual bar on proceedings is procedural only and does not extinguish the underlying cause of action.

Practical completion of Bloomberg's offices in Finsbury Square occurred on 28 August 2000. On 8 July 2013, part of the cladding of the building fell on to the pavement below. Fortunately, this plunge occurred in the small hours of the morning, when no one was about, but it clearly necessitated remedial works to ensure that it was not repeated at more populated times.

Bloomberg contemplated suing the subcontractor, M, responsible for the cladding in order to recover the cost of the remedial works. However, the warranty given by M to Bloomberg provided that "no proceedings shall be commenced against [M] after the expiry of twelve years" from practical completion. Bloomberg recognised that this was a problem, so sued the main contractors and others involved in the project instead. M doubtless felt a warm glow of satisfaction in its prescient drafting, not to mention the convenient longevity of its fixings.

But the contractors then sought from M under section 1(1) of the Civil Liability (Contribution) Act 1978 a contribution towards any liability the contractors might have to Bloomberg. The Act would allow this if the contractors and M were both liable to Bloomberg for the same damage. The warm glow would have turned to frostbite as M was confronted with backdoor liability.

So M applied for summary judgment on, or strike out of, the contribution claim on the basis that it was barred by section 1(3) of the Act. Section 1(3) provides that a person is liable to make a contribution notwithstanding that he has ceased to be liable for the damage since the time the damage occurred "unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based". M had, it argued, ceased to be liable to Bloomberg because Bloomberg had not commenced proceedings against it within the prescribed twelve year period.

In *Bloomberg LP v Sandberg* [2015] EWHC 2858 (TCC), Fraser J accepted that section 1(3) applies to contractual limitation periods as well as to statutory ones. M's argument depended upon the clause in the warranty given by M to Bloomberg extinguishing M's liability to Bloomberg rather than merely barring Bloomberg's remedy in the courts. English statutory limitation periods are generally only procedural bars to a claim - they don't mean that the claim ceases to exist.

Even if some might think that Henderson J in *CBRE Loan Servicing* (above) departed from the strict, *Arnold v Britton* [2015] UKSC 36, approach to interpretation, no one could accuse Fraser J of backsliding in *Bloomberg*. The clause said that Bloomberg could not bring proceedings against M; it didn't say that M's liability to Bloomberg ceased or was extinguished. This was a procedural bar and thus not within the proviso to section 1(3).

The judge rejected M's argument that

Freezing injunctions

Don't bank on it

A right to draw under a loan agreement will in practice be caught by a freezing injunction.

The purpose of a freezing injunction is to preserve assets for enforcement if and when the claimant succeeds in its claim. No enforcement measures can be taken against a defendant's right to borrow under a loan agreement. So a freezing injunction does not affect a borrower's rights under a loan agreement.

Up to a point, Lord Copper. In *JSC BTA Bank v Ablyazov* [2015] UKSC 64, the Supreme Court accepted that rights as borrower under a loan agreement did not fall within the main paragraph of a freezing injunction, ie the one that prohibits the defendant from dealing with its assets. But the Supreme Court pointed out that the next paragraph of the standard freezing injunction expands the remit of what is caught by a freezing injunction to "any asset which [the defendants] have power, directly or indirectly, to dispose of, or deal with as if it were their own". Money a bank, or anyone else, lends under a loan agreement is the bank's money, but the borrower has power to direct its disposal and thus the money falls within this expanded scope of a freezing injunction.

The consequence of this was that the instructions given by the defendant in *Ablyazov* to his lender (which may, or may not, have been at arm's length) to pay US$16 million to its lawyers were given in contempt of court.

commercial common sense required a wider interpretation since the parties must have intended to give M certainty as to when its liability ceased and how long it had to maintain insurance cover. That, said the judge, was to invoke commercial common sense retrospectively, which Lord Neuberger had decried in *Arnold v Britton*. The limitation in the warranty might not have achieved what M would, had it thought about contribution, have wanted, but that was no reason to disregard the clear wording. The failure of the drafting to say that not only could Bloomberg not bring proceedings but also that M's liability allowed M to be pulled into the action through the back door.

Bunking off

Whether a contract is for the sale of goods is a matter of characterisation, not description.

Arnold v Britton [2015] UKSC 36 was also referred to by the appellants in *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd* [2015] EWCA Civ 1058 in support of the proposition that if the parties' language in a contract made it plain that they considered the contract to be one for the sale of goods, then the court should treat the contract as such and apply the Sale of Goods Act 1979. The Court of Appeal did not buy that proposition. Legal characterisation depends upon the legal concept in question and what the parties have actually agreed to do, not on the description they choose to apply. This is not the same as interpretation.

The argument in *PST Energy* was aimed at achieving the implausible result that a shipowner to whose vessel bunkers (fuel) had been delivered and who had used up the bunkers in the propulsion of said vessel did not have to pay the (insolvent) supplier for the bunkers. The argument ran that the contract was for the sale of goods within the Act; under the Act, a seller could only maintain an action for the price once property in the goods had passed (section 49(1)); and property in the goods did not pass because the contract said that title did not pass until payment. Indeed, property could never pass since the goods - the fuel - had been used up. The argument therefore had a neat circularity: we haven't paid; the goods have ceased to exist because we've used them; so we don't have to pay.

The Court of Appeal agreed with Males J at first instance that, since the shipowner had 60 days to pay for the bunkers, by which time both parties knew that the bunkers would have been largely used up, the contract was not for the sale of goods. The essence of contracts for the sale of goods is that title passes in return for payment. On this contract, title would never pass because title cannot pass in goods rendered non-existent by use. The contract was not a contract for the sale of goods; the Sale of Goods Act was not relevant; and the supplier could, therefore, sue at common law for the price due under the contract.

Settled law

A settlement agreement is sufficient to prevent a misselling claim.

In March 2008, a borrower entered into a swap to hedge its interest rate exposure on the loan. The low interest rates since the global financial crisis mean that the swap has proved expensive for the borrower, who also got into financial difficulties. In April 2012, the borrower and the bank entered into a settlement agreement, the bank accepting less than the principal due on the loan and certainly less than the swap was worth. The settlement was in typically wide terms, settling all claims whether foreseen or unforeseen.

In *Marshall v Barclays Bank plc* [2015] EWHC 2000 (QB), the borrower sought to claim against the bank for misselling the swap. The borrower threw everything at the bank, including fraud and public policy in addition to the more usual grounds aimed at recovering all monies paid under the swap. The problem was the settlement agreement, added to the fact that, when the settlement was entered into, the borrower was aware that he had or might have claims against the bank arising from the sale of the swap.

The judge was satisfied that the settlement agreement was binding and barred the subsequent claim. It wasn't like *BCCI v Ali* [2002] 1 AC 251, in which a settlement agreement was held not to bar a claim that neither party was aware of - indeed, which didn't exist as a matter of law - at the time the settlement agreement was entered into. The borrower knew what he was doing, and there was no basis upon which he could escape the terms he had agreed.

Third party funding

Costs on an internal transaction cannot be recovered.

A fixed rate loan agreement gave the bank an indemnity in respect of "any cost... incurred in the unwinding of any funding transactions undertaken in connection with the Facility". The borrower wanted to exercise a right to prepay, but the lender claimed £2.4 million under the indemnity as the cost of unwinding an internal swap that hedged the relevant profit centre within the bank against interest rate movements (it transferred the risk to a different division of the bank). In *Barnett Waddington Trustees (1980) Ltd v The Royal of Scotland plc* [2015] EWHC 2435 (Ch), Warren J

concluded that the costs fell outwith the indemnity.

The judge's reason was that, even if a swap could be described as "funding" anything, it was not a "transaction" because it was between two departments of the same legal entity. The judge considered that a transaction could only be entered into by two different legal entities. For similar reasons, he considered that the internal swap gave rise to no cost to the bank as a whole; it just shuffled money between different bits of the same entity.

The loan agreement could have been drafted to cover costs incurred on termination of an internal swap, or a theoretical loss on prepayment. But it wasn't, and so the internal costs were not recoverable.

Conventional wisdom

Forgetfulness can be enough to create an estoppel by convention.

In *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, the Court of Appeal decided that the fact that the parties all forgot the existence of pre-emption rights over shares was enough to estop any of them from asserting the pre-emption rights when the memorial mist lifted.

In general terms, estoppel by convention requires a common assumption as to a state of affairs, plus words or conduct that "cross the line" between the parties to show that the assumption is expressly, even unambiguously, shared between them. In *Dixon*, it was enough that all the parties proceeded as if there were no pre-emption rights rather than there being any actual cognizance of the rights or conscious foregoing of the rights.

Then the party said to be estopped must bear some responsibility for the common assumption, which the other must rely on. Whether responsibility requires more than merely being a party to the common assumption is not clear.

Finally, there must be detriment in going back on the assumption sufficient to make doing so unconscionable. In *Dixon*, the unconscionability arose from those now relying on the pre-emption rights having previously been able to transfer shares without reference to the pre-emption rights as a result of the common assumption.

It is difficult to know whether the Court of Appeal considered that it was tightening the rules on estoppel by convention, reinvented by Lord Denning MR in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] 1 QB 84, or loosening them. The Court of Appeal's words and attitude seemed to suggest a tightening, but the facts of the case perhaps indicated the reverse. The parties simply forgot that there was an agreement conferring pre-emption rights, and proceeded accordingly for a number of years. No one had any particular responsibility for the collective amnesia, but all just went along with it (such is the nature of forgetfulness). That was enough to stop a late exercise of the pre-emption rights even though the transfers of the shares had not yet been registered, especially by parties who had earlier taken the benefit of the memory loss.

Equity

Backwards looking

Money can be traced through an overdrawn account.

The conventional view of tracing is that money cannot be followed through an overdrawn bank account. Indeed, if money goes into a bank account, the most that can be claimed from that account is the lowest intermediate balance following the deposit because that is all that can be left of the deposit.

But in the *Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35, the Privy Council was not so sure. They accepted the logic of the conventional view, but thought that the courts should look at the substance of a transaction rather than the sequence.

Generally, the lowest intermediate balance rule still applies (similarly, asset X cannot be traced into asset Y if asset Y was acquired before asset X was disposed of). But if the acquisition of one asset in substitution for another was part of a "coordinated scheme", then it ceased to matter in what order the debits and credits happened to be made. The Privy Council was conscious that, if it were otherwise, tracing would be too easily defeated by, eg, acquiring an asset through use of an overdraft, but then paying off that overdraft with tainted funds, such as a bribe.

Conflict of laws

Unsurpassed jurisdiction

A claim that Italian proceedings were brought in breach of a jurisdiction clause succeeds.

English lawyers have generally gnashed their collective teeth about *Erich Gasser GmbH v MISAT Srl* [2005] QB 1, in which the ECJ required English courts to stay proceedings in favour of prior proceedings in the courts of another EU member state even if there was clearly an exclusive jurisdiction agreement favour of the English courts.

The need for gnashing has potentially now gone, since article 31(2) of the Brussels I Regulation (recast) allows the English courts to proceed in these circumstances. However, article 31(2)

only applies to exclusive jurisdiction clauses, and one-sided exclusivity may not be exclusivity within the meaning of article 31(2). The travails of the ancien Brussels I régime are not entirely behind us yet. It may, therefore, be fortunate that the English courts have found a partial means round *Gasser* (subject always to the CJEU blocking the route). This route was taken in *Barclays Bank plc v Ente Nazionale di Previdenza Assistenza dei Medici Degli Odontoiatri* [2015] EWHC 2857 (Comm).

Ente Nazionale involved the sale in 2007 of credit-linked notes by C to D. Years later, D sued C in Milan in tort/delict and/or restitution for various infractions of Italian law in the sale of the notes. The relevant agreements were, however, governed by English law and were subject to the one-sided exclusive jurisdiction of the English courts. C therefore sued D in England, claiming a declaration that the action in Milan was brought in breach of the jurisdiction provisions in the agreement. D sought to stay the English action on grounds that it involved the same cause of action as the Milan proceedings and, as a result, the English courts were obliged to stay the proceedings under article 27 of the old Brussels I Regulation (the action was started in 2014 and therefore the recast Regulation did not apply) or should exercise their discretion to do so under article 28.

Following the decision of the Supreme Court in *The Alexandros T* [2013] UKSC 70, Blair J declined to stay the English proceedings on either ground. Article 27 only applied if the same cause of action (in an autonomous EU sense) was being pursued in both London and Milan. A claim in tort for misselling in Milan is not the same cause of action as a claim for breach of contract in London. D did claim in Italy that the relevant agreements were invalid, but Blair J pointed out that jurisdiction agreements are treated as separate from the remainder of the agreement, and there was no direct attack on the jurisdiction agreement.

Similarly, Blair J declined to exercise his discretion under article 28 to stay the English proceedings even though they were related to the Italian law suit (ie there was a risk of conflicting judgments). The Supreme Court made it pretty clear in *The Alexandros T* that if the parties had agreed to the jurisdiction of the English courts, discretion should not be used to deprive one party of that jurisdiction.

C also applied for summary judgment on its claim that the Italian proceedings were brought in breach of the jurisdiction clause. An application for summary judgment (or, indeed, any other application) is not usually heard with a jurisdictional challenge because doing so would deprive the defendant of the ability to opt out of the proceedings and then fight enforcement elsewhere if it loses the jurisdiction point. However, Blair J decided that this was a rare case when he should do so, not least because all relevant evidence and skeletons had been filed.

Summary judgment was granted. The Milan claims fell within the scope of the wide jurisdiction clause, and the clause was exclusive so far as D was concerned. The fact that the English courts could not grant an anti-suit injunction was no reason for declining to give judgment for breach of contract. So C will presumably revert to Milan with its English judgment, using the obligation of the Italian courts to recognise that judgment to seek to convince the Italian courts that they must stay the Italian proceedings because of the jurisdiction clause.

French toast

The Cour de cassation wavers on unilateral jurisdiction clauses.

In *Ente Nazionale di Previdenza Assistenza dei Medici Degli Odontoiatri* (above), D did not argue that the one-sided jurisdiction clause was invalid under the Brussels I Regulation, despite the cogitations of the French Cour de cassation to that effect (such an argument is unlikely to succeed in England or, indeed, Italy).

In two cases, in 2012 (*Rothschild*) and 2015 (*Danne*), the Cour de cassation declined to uphold one-sided jurisdiction clauses that gave exclusive jurisdiction to named courts but allowed one party to sue in any other courts with jurisdiction. The court decided that these clauses do not meet the requirements of the Brussels I Regulation, but the reasons for this are not entirely clear. The issue came back before the Cour de cassation in a case involving eBizcuss.com and Apple (7 October 2015), and this time the court reached a different conclusion.

The clause in question in the *eBizcuss.com* case provided that "the parties shall submit to the jurisdiction of the courts of the Republic of Ireland. Apple reserves the right to institute proceedings against Reseller in the courts having jurisdiction in the place where Reseller has its seat or in any jurisdiction where a harm to Apple is occurring." This clause, said the Cour de cassation, was acceptable. The clause identified the courts, other than Ireland, where Apple could sue (even if only by reference to harm), and thus met the requirement of foreseeability ("prévisibilité") that, the Cour de cassation considers, jurisdiction clauses must have.

There have been some extra-curricular suggestions that the French courts construed the clauses in the

two earlier cases as seeking to confer jurisdiction on every court in the world rather than merely allowing one party to sue in another court that, under its local rules (including Brussels I in the EU), had jurisdiction. The (generally admirable) brevity of the Cour de cassation's judgments, however, makes it hard to tell.

Where that leaves us is an open question. But ultimately, the CJEU must sort it out.

Portuguese men of war

An English court can adjudicate upon whether foreign law has transferred an English law agreement.

The broad thrust of the EU's Bank Resolution and Recovery Directive (2014/59/EU) is that bank resolution measures taken by national resolution authorities in one country must be recognised throughout the EEA regardless of the location of the asset, liability or its governing law. The powers of resolution authorities are wide-ranging (eg transfer of assets and liabilities and the writing off of debts (so-called "bail-in")).

This requirement to recognise foreign law measures, which is contrary to customary private international law principles, was given effect in England by amendments to the Credit Institutions (Reorganisation and Winding up) Regulations 2004. The manner of recognition echoes the BRRD, which potentially raises many difficult issues because of the myriad of uncertainties and obscurities in the highly complex legislation.

A gentle start was made to resolving these uncertainties in *Goldman Sachs International v Novo Banco SA* [2015] EWHC 2371 (Comm), which concerned a loan made to a Banco Espirito Santo SA by an SPV (the loan later being assigned to C). A month later, on 3 August 2014, the Bank of Portugal placed BES in resolution and used its powers to transfer almost all of BES's assets and liabilities to a "bridge bank", ie to D. Under the measures taken by BoP, liability for C's loan to BES transferred to D unless the SPV was acting for C in making the loan and C held more than 2% of the shares in BES. C contended that the loan had transferred to D - being left as a creditor of BES, when its assets had gone elsewhere, would not be a happy place to be. However, in December 2014 the BoP resolved that there were serious grounds to believe that the loan was excluded, and resolved that the loan had not transferred in August. In February 2015, the BoP confirmed its December decision but added that certainty as to whether there had been a transfer could only be provided by a court.

Faced with these events, D did not pay sums due on the loan (nor, obviously, did BES), so C accelerated the loan and sued D in England based on the jurisdiction clause in the loan agreement. D challenged the jurisdiction of the English courts, arguing that no transfer had taken place.

The first question was whether the claim was "civil and commercial" within the meaning, and therefore scope, of the Brussels I Regulation (recast). Hamblen J was satisfied that it was. C relied on the BoP's administrative transfer of the loan from BES to D, but the claim was on the loan, which was distinctly civil and commercial. D's reliance on Portuguese public law in its defence was irrelevant for jurisdictional purposes. If the English courts had jurisdiction, it was therefore to be found in Brussels I.

This led to the question of whether the loan had in fact been transferred - if not, the jurisdiction clause did not bind D. Hamblen J considered this to be a question of fact, and was satisfied that C had the better of the argument on the point; indeed, D didn't really argue that C owned more than 2% of the shares in BES. The August transfer therefore took effect in English law under the Regulations. The BoP's subsequent resolutions might have had some effect in Portuguese law but did not alter the position in England because they were not the exercise of resolution powers in accordance with the BRRD. It is only the exercise of BRRD resolution powers that are required to be recognised in England.

Having decided that the English courts had jurisdiction, Hamblen J refused to exercise such discretion as he may have had (open to question), whether on the basis of non-justiciability/act of state or case management, to decline to exercise that jurisdiction.

Domestic and foreign contracts

The BRRD has requirements for foreign law contracts.

The BRRD allows a financial institution's liabilities to bailed-in, ie written down if the institution is failing or likely to fail so that the institution, or some semblance of it, can survive. That is fine for liabilities governed by an EU law, which must recognise bail-in powers exercised under other EU laws (see above). It's not so easy if the contract under which the liability arises is governed by a non-EU law. Typical conflict of laws rules (including English rules) don't allow legislation in one country to change the terms of a contract governed by the law of another country.

Hence article 55 of the BRRD, which should be brought into force by EU member states by 1 January 2016.

This requires EU financial institutions entering into contracts governed by a non-EU law to include a contractual provision allowing bail-in of liabilities by national resolution authorities. There are some exceptions (eg deposits, some short-term liabilities and trade debts for goods and services that critical to the functioning of the institution). This does, however, potentially leave a large number of non-EU law contracts entered into by EU financial institutions that must include bail-in provisions.

These include, for example, letters of credit. Working out whether a letter of credit is governed by an EU law or a non-EU law is often difficult, not least because LCs often do not include governing law clauses, referring only to UCP 600 (or its predecessors). Perhaps the BRRD should cause this practice to change.

Exclusive brethren

The word "exclusive" is not necessary for a jurisdiction clause to be exclusive.

Global Maritime Investments Cyprus Ltd v OW Supply & Trading A/S [2015] EWHC 2690 (Comm) is similar to *SwissMarine Corporation Ltd v O W Supply & Trading A/S* [2015] EWHC 1571 (Comm) (including Clifford Chance acting for the defendant - see July 2015). Both concerned derivatives entered into by a Danish company now in liquidation. In both cases, C was out of the money and was, in substance, trying to find ways to prevent D from taking action in Denmark under Danish insolvency law to close out the transactions and claim the resulting sum from C, or at least to reduce the effectiveness of D's doing so.

Unlike in *SwissMarine*, the transactions in *Global Maritime Investments* were not governed by the ISDA Master Agreement (though the agreement contained an equivalent of ISDA's section 2(a)(iii)). At issue, therefore, was not ISDA's non-exclusive jurisdiction clause but a clause that said that "with respect to any suit, action or proceedings relating to these general terms and conditions each party irrevocably submits to the jurisdiction of the English courts." Exclusive or non-exclusive?

Teare J decided that it was exclusive. It is a matter of the proper interpretation of the clause, and reasonable commercial persons who agreed to this clause, coupled with English governing law, would not regard it as permitting them to take proceedings outside England.

However, even if that were not so, the judge also considered that once proceedings were commenced in

Settlement

36 and out

A settlement offer is not a Part 36 offer for want of a formal amendment.

Part 36 is a carefully structured, highly prescriptive and self-contained code (*Gibbon v Manchester City Council* [2010] 1 WLR 2081). And in *Hertel v Saunders* [2015] EWHC 2848 (Ch), Morgan J certainly treated it as such in concluding that a letter that both parties originally agreed was a Part 36 offer was not in fact so, and, accordingly, that the automatic costs consequences of acceptance did not apply.

In *Hertel*, C sent to D draft amended Particulars of Claim adding a new cause of action. D indicated that it would not oppose the amendment but, before permission to amend was formally given, D offered to settle the new claim but not the rest. The offer letter said that it was a Part 36 offer. C accepted the offer and abandoned the remainder of its claim (which, at the time but not now, meant that C was entitled to all its costs). C contended that it was therefore entitled to its costs under what is now CPR 36.13.

Morgan J decided that the letter was not a Part 36 offer and therefore that CPR 36.13 did not apply. This was because CPR 36.5(1)(d) (then CPR 36.2(2)(d)) requires a Part 36 offer to state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and, if so, which part or issue. At the time of the letter, the amendments were not part of the "claim" for these purposes, and therefore the offer was not an offer to settle any part of the "claim". D argued that Part 36 offers can be made before proceedings have been commenced, and a claim that had not yet been formally included in the proceedings by amendment was in that position, but the judge would have none of it: the rule didn't say that.

C sought to argue that, if so, there was no settlement at all since it was vitiated by a common mistake that Part 36 did apply. Morgan J rejected that peremptorily on the basis that it was too late to raise the point since he was hearing an appeal from a decision that recited that the parties had agreed to settle the claim, which was common ground below (the fact that it was also common ground below that the offer letter was a Part 36 offer did not, however, deter the judge).

So the judge decided that the costs rules in Part 36 didn't apply. He therefore applied the general rules in CPR 44, and reached a conclusion very different from what would have applied under Part 36.

England, the clause obliged the parties to submit to the jurisdiction of the English courts, and prohibited them from starting parallel proceedings elsewhere.

Monaco grand prix

The court will not override an exclusive jurisdiction clause in favour of the Monaco courts.

A party resident in England decided to sue her Monegasque bank in England for failings in foreign exchange dealings. After starting the proceedings, it might be inferred that C's lawyers realised that the exclusive jurisdiction clause in favour of the Monegasque courts in C's agreement with her bank could cause difficulties. C therefore joined to the proceedings English entities in the same bank group on the basis that they had failed to deal properly with her complaints about their Monegasque affiliate. (The Brussels I Regulation does not apply to Monaco.)

In *Jong v HSBC Private Bank (Monaco) SA* [2015] EWCA Civ 1057, it was recognised that C was entitled under the Brussels I Regulation to sue the English entities in England. But that did not mean that she was also entitled to override her agreement as to the jurisdiction of the Monaco courts. The English courts can ignore jurisdiction clauses, but it requires a "strong reason" to do so.

In this case, the Court of Appeal accepted that the claim against the Monegasque bank was the main claim: to succeed against the English parties, C had first to prove her claim against the bank, which claim would probably be decided as a preliminary issue. Damages against the English entities could be no higher than those awarded against the bank from Monaco. The bank could meet any damages for which it was liable: would the claim against English companies really go ahead? C also criticised the procedures of the courts in Monaco, but the Court of Appeal dismissed those complaints since C had agreed to those courts.

So the Court of Appeal stayed the proceedings against the Monegasque bank in favour of the courts in Monaco. But the Court of Appeal's conclusion was ultimately rather limp. The Court of Appeal didn't say that the judge was clearly right (which he surely was) but merely that the judge had taken into account the right factors, ignored irrelevant ones, and reached a decision within the bounds of reasonableness. The Court of Appeal then added that "[w]hether a different judge might have reached a different decision is neither here nor there." The implication is that the Court of Appeal might have reached a different conclusion if left to its own devices, and/or that C was simply unlucky in the judge she got. This suggests a randomness in the outcome of cases that is rather difficult to justify.

Courts

Freedom of choice

If you are contemplating a second set of proceedings based on the same facts, you must tell the court.

In *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260, Thomas LJ, as he then was, laid down a rule for complex multi-party commercial litigation. He said that if a claimant is suing one set of defendants, and might want later to sue a second set in relation to the same matters, the claimant must inform the court so that the court can make a case management decision as to whether it is in the interests of the parties and in the public interest for there to be two sets of proceedings, or whether the claimant should be forced to pursue all at one time.

The consequences of failing to alert the court in this way were clear in *Okritie Capital International Ltd v Threadneedle Management Services Ltd* [2015] EWHC 2329 (Comm), namely that the defendants to the second set of proceedings will apply to strike out those proceedings as an abuse of process. *Okritie* concerned proceedings that had gone to a 45 day trial and a 200 page judgment, following which C decided to sue D on the basis that D was vicariously liable for the wrongs found to have been committed by one of the defendants in the first proceedings. Knowles J declined to strike out the second proceedings, finding good reasons for C's decision to split the claims, but it was a near thing. Better to have informed the court earlier.

That was certainly the case for the Cs in *Clutterbuck v Cleghorn* [2015] EWHC 2558 (Ch), for their claim was struck out for breach of the *Aldi* guidelines. As in *Okritie*, the judge accepted that breach of the *Aldi* guidelines did not mean automatic strike out, but breach was a heavyweight factor in any decision. In *Clutterbuck*, the influential additional factor was that various witnesses would have to give evidence for a second time and would again face attacks on their credibility. As in *Gladman Commercial Properties v Fisher Hargreaves Proctor* [2013] EWCA Civ 1466, this swayed the judge in the direction of strike out. The failure to comply with the *Aldi* guidelines therefore led to strike out - but it might have done so anyway on abuse of process grounds.

Received wisdom

Receivership steps in where a third party debt order failed.

C has a substantial judgment against D, which D is striving to avoid paying. D also had an outstanding bond on the London market, and paid money to its paying agent in London for

onward transmission to the bondholders. In *Merchant International Company Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy* [2014] EWCA Civ 1603 (see February 2015), C sought a third party debt order over the sum held by the paying agent. This was rejected on the basis that, under the bond documentation, D had no entitlement to payment of that sum; the paying agent's obligation was to pay the bondholders, and it owed no debt obligation to D. But because of uncertainty before the court confirmed that position, D paid its paying agent a second time in order to ensure that it was not in breach of the terms of the bond. The court also refused a third party debt order over the duplicate payment because, again, under the documentation, D had no entitlement to this money.

Roll forward a few months, and the bond has been paid off completely, leaving the paying agent holding the original payment. Having been scarred in its earlier attempts to secure a third party debt order, C this time went for receivership over such interest as D might have in the sums held by the paying agent. And this time C succeeded ([2015] EWHC 1930 (Comm)). D argued that it had no property or other relevant interest in or right to the money held by the paying agent, but the judge was not so sure. Was the paying agent really entitled to keep the money? The judge was satisfied that a receiver would assist C to recover its debt, and that was enough for him to grant the order.

The area where C may have been most vulnerable was discretion. D had only paid the second sum to its paying agent because of the interim third party debt order, which C should never have obtained. But for that, there would now be nothing left in London. In the earlier instalments of the case, Blair J indicated that he thought this might be enough on its own to refuse C any relief. However, the judge in this instance was more sympathetic to C, and did not consider C's earlier flawed applications as a sufficient reason to refuse to grant the receivership order.

New courts for old

The Financial List and the Short and Flexible Trials pilot are now in being.

Three new judicial initiatives came into being on 1 October 2015.

First, CPR Part 63A (and PD 63AA) now provides for the Financial List, within the Chancery Division and the Commercial Court (but applying largely Commercial Court rules). If you have a case which is finance related and involves over £50 million or which requires particular expertise in the financial markets, consider starting or moving the case to the Financial List.

Secondly, the Shorter Trials pilot, under paragraph 2 of PD 51N. This is intended to provide an accelerated route to a trial of no more than four days for cases that don't involve extensive disclosure or reliance on extensive witness or expert evidence (perhaps where the case isn't quite suitable for Part 8 or you can't quite get summary judgment).

Thirdly, the Flexible Trials pilot, under paragraph 3 of PD 51N. This requires the agreement of the parties, but allows them to avoid the normal route to trial and trial procedures if they wish. Whether parties will often be sufficiently in harmony to agree this is an open question, but it might be a route towards persuading the court to make less rigid, formulaic orders.

The claimant's lawyer's lot

A claim brought on behalf of thousands of parties is struck out for want of authority.

Bao Xiang International Garment Centre v British Airways plc [2015] EWHC 3071 (Ch) sheds an interesting light on how claimant lawyers seek to round up litigants in whose name they can sue. If you're gathering a class to start follow-on cartel proceedings, or any other bulk proceedings, the more claimants you can find the better because the potential damages look more intimidating to the cartelists, encouraging settlement. 64,697 must have seemed a gratifyingly daunting number of claimants; the reduction of this number to a mere 362 must have been disappointing; and the elimination of all claimants must have been rather than more disappointing nothing.

Bao Xiang rests on the European Commission's finding of an air freight charges cartel (though an appeal is pending). In order to find parties who had suffered a loss because of the cartel and who could therefore sue, a firm of solicitors, Hausfeld, joined forces with a Chinese trade organisation to spend a considerable length of time trying to round up Chinese exporters. After a couple of years wooing the exporters, the solicitors became concerned that a limitation period might be about to expire. The trade organisation therefore gave the solicitors a list of the 64,697 of its members who, it thought, might potentially have been affected. The solicitors started proceedings with all 64,697 as claimants.

The solicitors also signed the statement of truth on the Claim Form, which carries with it the warranty that the lawyer is authorised to sign, that he has explained to the client that the

signature confirms the client's belief in the truth of the facts and that the client has been informed of the consequences of not having an honest belief in the facts stated (PD22, §3.8).

However, when D began to press the solicitors as to their authority to start proceedings for the 64,697, the solicitors' position started to unravel. First, the Chinese trade organisation conceded that only 5,277 of the names given might actually have exported goods by air (others might have been exporters, but, eg, exporting banks wouldn't have been be affected by a freight charges cartel). Then the solicitors gave up the argument that the trade organisation had authority from its members to permit the commencement of proceedings in the members' names and, instead, relied instead on ratifications of the proceedings given by 362 of the original class of claimants (a mere 0.6% of the original class of claimants).

But Rose J then looked at the document of ratification and found it wanting, not to say misleading. It didn't acknowledge that proceedings had already been started in the ratifier's name; it said that the ratifier would not have to play any role in the proceedings, which was misleading; and it failed to explain the risks of the litigation. Ratification must be given with full knowledge of the material circumstances.

Rose J therefore decided that the solicitors had not originally been authorised to start the proceedings by the 64,697 and that the proceedings had not been properly ratified by the 362. The proceedings were therefore struck out for want of authority. Solicitors who start proceedings without authority are commonly ordered to pay the costs of the proceedings.

But that wasn't all. Rose J also struck out the proceedings as an abuse of process. It was "wholly irresponsible" of the solicitors to launch the proceedings for tens of thousands of claimants when there was no basis for signing the statement of truth that all had shipped goods by air. The solicitors' basis for believing that the trade organisation was authorised by its members to instruct the solicitors to issue proceedings in the members' names was "wholly inadequate". There was a "complete lack of candour" on the solicitors' part when D started questioning their authority to bring the proceedings. The terms of the ratification letter were "highly misleading". Generally, to allow the case to continue would be highly unfair to D and would "bring the administration of justice into disrepute among right-thinking people".

Hausfeld have said that they will appeal against Rose J's judgment.

Tort

Donoghue undone?

In which the Supreme Court is sniffy about proximity and fairness, as well as assumption of responsibility.

The tort of negligence is not easy, at least in novel areas, but in the commercial sphere it has been relatively quiet in recent years. To decide whether or not a duty of care applies, the trend has been to apply the *Caparo* test (foreseeability, proximity and fair to impose a duty) or to look for an assumption of responsibility. Courts ritually, if not entirely convincingly, say that the outcome would be the same whatever the test applied.

Though not a commercial case, it is worth noting that in *Michael v The Chief Constable of South Wales Police* [2015] UKSC 2, the Supreme Court was pretty scathing about both *Caparo* and assumption of responsibility. The majority of the Supreme Court said that neither proximity nor fairness were susceptible of any definition that would make them useful as practical tests. They were merely labels attached to features of situations which the law recognised as giving rise to a duty of care. The Supreme Court was also unenthusiastic about assumption of responsibility, saying it was really just a responsibility imposed by the court in particular circumstances.

All that leaves is the incremental approach, ie fairies' footsteps from existing categories of duty of care. And that was clearly where the Supreme Court felt most comfortable. The majority felt unable to propound any general principle save to remain within sight of the safe bosom of precedent. Sounds a bit as if Lord Atkin's attempts at generalisation in *Donoghue v Stevenson* 83 years ago may finally have foundered.

The caveat is that *Michael* was a claim against the police for failing to respond promptly to an emergency call; had they done so, a life would probably have been saved. The Supreme Court concluded that the police owed no duty of care in these circumstances. Whether the Supreme Court's policy-driven caution will seep from the public sector into the private sector remains to be seen.

Swapping claims

Banks may owe customers a duty of care in carrying out FCA reviews.

Suremime Ltd v Barclays Bank plc [2015] EWHC 2277 (QB) involved what appears to be a standard swaps misselling claim against a bank. C then applied to amend the claim to add three new causes of action, all based on the proposition that the bank had failed to carry out properly the swaps review it agreed with the

FCA and, as a result, had failed to offer C proper redress.

C argued that it was a third party beneficiary of the contract between the bank and the FCA under which the review had been carried out. That argument was abandoned when it was appreciated that the contract specifically excluded the Contracts (Rights of Third Parties) Act 1999.

C next argued that there was a contract between C and the bank as to the review. The bank had written to C inviting it to submit information to the review, which information the bank would take into account. The judge rejected this because there was no consideration for the supposed contract. The bank was going to carry out the review anyway under its agreement with the FCA; merely inviting C to participate did not create a further contract under which the bank promised C that it would carry out the review in accordance with the FCA's requirements if C submitted information.

However, the judge considered it sufficiently arguable that C had a claim in negligence against the bank for its conduct of the review. The basis upon which the judge determined that the bank might owe a duty of care is far from clear. He didn't say whether it was a *Caparo* basis, assumption of responsibility or incrementalism (see above). For example, since the bank specifically excluded contractual obligations to C, it is hard to see how the bank could realistically be said to have assumed responsibility in tort to the same effect.

The closest the judge got to an analysis was to suggest that the case was similar to *White v Jones* [1995] 2 AC 207, in which an intended beneficiary under a will was given a cause of action against solicitors who drafted the will in a manner that negligently excluded the beneficiary. The principal argument was that the solicitor's client (the testator) suffered no loss, so justice required that the disappointed beneficiary have a direct claim against the solicitor (even though the effect of the solicitor's negligence is in practice to increase the size of the estate). But that was not the case with the FCA and the bank. The FCA might not suffer a loss, but it has lots of remedies available to it.

The judge also failed to touch on cases like *Green v The Royal Bank of Scotland plc* [2013] EWCA Civ 1197, which establish that a regulatory duty does not of itself lead to an obligation in tort. Nor did the judge identify the nature of the duty that the bank might owe or what losses might flow from breach of whatever the duty was

The judge's real reasons, so far as discernable, appeared to be twofold. First, a trial would take place anyway, so there was no harm in adding in an extra claim arising from the same factual matrix. But whether the new claim does arise from the same matrix or opens up a whole new area of enquiry (ie the conduct of the review) is open to question.

Secondly, in numerous swaps misselling cases, claimants are now seeking to add claims based on the FCA's swaps misselling review. The judge did not want to strangle these claims at birth. But if there is no legal basis for the claims, won't allowing them to proceed just waste court time?

All rather unsatisfactory, but in keeping with the equally curious decision in *R (oao Holmcroft Properties Ltd) v KPMG* [2015] EWHC 1888 (Admin) to allow a judicial review to proceed against the independent person supervising the bank's swaps review.

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