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Contentious Commentary

Contract

Something in the air tonight

A commitment letter subject to satisfactory review and completion of documentation is binding.

D signed a commitment letter in which it agreed to provide the equity portion in an aircraft acquisition and leasing deal. The letter said that D's commitment "shall be conditional upon satisfactory review and completion of documentation for the purchase, lease and financing..." D withdrew from the transaction because it was concerned about the accounting implications of the deal (it was advised that it would have to consolidate the SPV that was to acquire the aircraft, including the SPV's bank debt). In *Novus Aviation Ltd v Alubaf Arab International Bank BSC* [2016] EWHC 1575 (Comm), the judge decided that D had undertaken a binding commitment, it had broken that commitment, and so should pay damages for the privilege of withdrawal.

The judge decided that the parties intended the commitment letter to be legally binding. It included a governing law and jurisdiction clause and it didn't say that it wasn't binding.

The judge then decided that, as a matter of construction, the condition was a single condition, not separate requirements of satisfactory review and of completion of the documentation. The condition was sufficiently certain, and it was a matter of fact as to whether D had withdrawn for the specified reason. In any event, D did not have free rein to withdraw. The judge (being Leggatt J) decided that the condition gave D a contractual discretion rather than an absolute right and, as such, the discretion had to be exercised in good faith for the purpose for which it was conferred and not in a manner that was arbitrary, capricious or irrational.

The commitment letter was signed by D but not by C despite the letter anticipating signature by both. However, the letter did not say that it would become binding only on signature by both. The judge therefore concluded that C could signal its acceptance by other means, which it had done by proceeding with the transaction. The judge didn't, however, think that the requirement for mutual assent was a stipulation in favour of one party only that it could waive (cf *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443, last month).

The general thrust of *Novus Aviation* is that if a document looks as if it is intended to be a binding contract, the courts will strain to find a way to make it so. Upholding, rather than destroying, bargains is the name of the game. If you want to ensure that something is not binding, you must say so expressly. And there's the rub.

The dying of consideration?

It doesn't take much for a promise to perform existing obligations over time to form a contract.

Everyone's first or second lesson in contract law covers consideration, including the decision of *Foakes v Beer* (1884) 9 App Cas 605 (a promise to do what you are already obliged to do cannot be consideration) and the "exceptions" to this rule established by the Court of Appeal, notably in *Williams & Roffey Bros v Nicholls (Contractors) Ltd* [1991] 1 QB 1 (a promise to make an extra payment to induce someone to do what it is already obliged to do can be binding). Not surprising that first year students find contract hard or give up law altogether. The distinctions and differences between the two situations are not easy to identify.

MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016]

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EWCA Civ 553 is another case to confuse the undergraduate. It may extend the *Williams & Roffey* idea a bit further. In *MWB*, a licensee was behind in its payments. An agreement was reached for the licensee to pay less initially, but then for increased payments to ensure that, over time, the arrears were cleared. This might have been analysed as a mutual variation to the terms since there was a reduction initially, followed by an increase, which will normally give consideration, but the Court of Appeal applied a *Williams v Roffey* analysis. The variation agreement had sufficient by way of benefit for the payee beyond merely receiving its arrears so as to provide consideration. Dangerously close to considering the adequacy of consideration.

Arden LJ also considered that there was a "collateral unilateral contract".

To add to the undergraduate intrigue, the Court of Appeal went on to consider another fraught area, promissory estoppel (*High Trees* etc). The rule, the Court of Appeal said, was that if one party to a contract promises not to enforce its legal rights and the other party relies on that promise, whether by altering its position or otherwise, the party cannot then enforce its rights if to do so would be inequitable in all the circumstances. Despite performance by the payer under the revised timetable, the Court of Appeal decided that it would not have been inequitable for the payee to enforce its rights.

In April, the Court of Appeal decided, obiter, that a contract could be varied orally despite a clause in the contract saying that it could not be so varied: *Globe Motors Inc v TRW Lucas Varity Steering Ltd* [2016] EWCA Civ 396. In *MWB*, the Court of Appeal reiterated this view, this time as ratio.

Hobgoblins and change of mind

A mortgagee cannot vary the terms set out in its offer document.

A mortgage offer document provided that the mortgage on a buy to let property would run for 25 years and that interest would be fixed for the first two years after which it would move to Bank of England base rate plus 1.99%. The offer document was incorporated into the mortgage itself, as were the mortgagee's standard conditions. The standard conditions provided that the mortgagee could, after the end of a fixed interest period, change the interest basis of the mortgage at will and could demand repayment of the principal on one month's notice. It also provided that if there was any inconsistency between the offer and the standard conditions, the offer prevailed.

In *Alexander v West Bromwich Mortgage Company Ltd* [2016] EWCA Civ 496, the mortgagee argued that it could exercise its rights under the standard conditions to vary the terms in the offer document. The mortgagor argued that the provisions in the standard conditions that allowed changes to the interest basis and required repayment on demand were inconsistent with the offer and therefore did not apply. The Court of Appeal agreed with the mortgagor.

The Court of Appeal decided that if there is a provision addressing possible inconsistency between two documents, the issue is whether the relevant clauses can fairly and sensibly be read together, which will be influenced by the importance or centrality of any specially agree terms. In *Alexander*, the specially agreed terms provided for a 25 year loan with an interest rate that tracked the BoE's base rate. It was inconsistent to

Limitation

Time, please

Use of corporate vehicles does not start time running.

Section 21(1)(b) of the Limitation Act 1980 provides that there is no limitation period for an action to recover from a trustee trust property or the proceeds of trust property in the possession of the trustee or previously received by the trustee and converted to his use. Otherwise, the limitation period is six years. But what if trust property is not received by a trustee but by a company wholly owned by the trustee? Does that mean that the limitation period is six years as a result of the simple expedient of inserting a corporate vehicle between the trust property and the trustee?

In *Burnden Holdings (UK) Ltd v Gray* [2016] EWCA Civ 557, the Court of Appeal concluded that section 21(1)(b) could not be evaded so easily. "... a construction which includes within its terms a transfer to a company directly or indirectly controlled by the trustee is within the meaning of this provision." One might, however, wonder how this construction is consistent with the hard line on corporate veils taken in *Prest v Petrodel Resources Ltd* [2013] UKSC 34.

Though allowing the appeal on the limitation point, the Court of Appeal made it pretty clear that the underlying claim was lacking in much merit.

provide in the general conditions that the mortgagee could ignore these features, whether by changing the interest basis entirely or by demanding repayment. A loan repayable on one month's notice is a very different beast from one that lasts, absent default, for 25 years. In simple terms, the mortgagee had to adhere to what it had specifically agreed.

Capital controls

The words of a market instrument should govern the instrument's meaning.

"This case is of considerable financial importance to the parties but raises no questions of wider legal significance." So said Lord Sumption in the opening words of his dissenting judgment in *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 plc* [2016] UKSC 29. The majority almost certainly agreed.

There are, nevertheless, perhaps three points worth drawing from the case, which involved a bank's successful upholding of the Court of Appeal's judgment that allowed the bank to redeem expensive notes because those notes had ceased to be as useful for regulatory capital purposes as they had been when they were issued in 2009.

First, Lord Neuberger said that when construing a contract which governs the terms upon which a negotiable instrument is held (in this case, a global note held subject to a trust deed, as is commonly the structure in note issues) "very considerable circumspection is appropriate before the contents of... other documents are taken into account." In other words, where a contract will, in effect, pass from hand to hand, interpretation can't take into account too much by way of factual matrix because those who become parties to the contract won't necessarily be aware of it.

Secondly, in partial detraction from the above, Lord Neuberger took into account as part of the background the capital requirements for banks at the time of the issue because improving the bank's capital position was the overt function of the note issue. He didn't go quite as far as Gloster LJ had in the Court of Appeal in saying that because the offering memorandum said that the notes were only appropriate for sophisticated investors, all investors should be taken to have a detailed knowledge of bank capital requirements, but he did say that "while the individual purchasers of the [notes] may not by any means all have been sophisticated investors, it is appropriate to assume that most of them would have had advice from reasonably sophisticated and informed advisers before they purchased such moderately complex financial products."

Thirdly, Lord Neuberger dismissed the contra proferentem rule as "very much a last refuge, almost an admission of defeat, when it comes to construing a document".

Where there's muck

Solicitors are negligent for failing to anticipate judicial corruption.

The tale of Trafigura's alleged fly-tipping of toxic waste in the Ivory Coast made the headlines over a long period, including in relation to the English litigation in which Leigh Day secured in 2009 a settlement of £30m from Trafigura for 30,000 claimants in the Ivory Coast injured by the dumping. *Agouman v Leigh Day* [2016] EWHC 1324 (QB) adds a coda to that tale, illustrating the problems of securing claimants in a country such as Ivory Coast and of distributing the proceeds of the settlement.

The claim in *Agouman* arose because the settlement sum was paid into a bank account in the name of LD in the Ivory Coast. As a result of what all parties accepted was a fraudulent court claim backed by corruptly obtained court orders, those monies were frozen by the Ivorian courts. LD eventually reached a settlement under which £6m was to be distributed to the injured parties not by LD but by the person who had fraudulently frozen the funds. Little of that £6m reached the true claimants.

One of the true claimants who missed out on compensation as a result of this fraud sued LD for breach of duty in failing to keep the monies outside the Ivory Coast and thereby out of the reach of corrupt courts.

Andrew Smith J accepted that LD owed a duty of care to make safe arrangements for receiving the settlement sum, for safeguarding that sum pending distribution and for distributing it to the proper recipients. LD were aware of the risk of fraud and corruption in the Ivory Coast, including interest by dubious parties in getting a share of the settlement sums. However, it didn't occur to LD that this might be done by bribing judges to grant freezing orders. Andrew Smith J considered that LD should have thought of this risk. Aside from the close involvement of the firm's principal, it appears that everything within LD was done by paralegals. The judge concluded that LD should have made a thorough and methodical assessment of the risks involved, but that the paralegals involved did not have the necessary knowledge or experience to do so. External advice should have been sought. LD was negligent because it had failed properly to safeguard the settlement monies. The judge was, perhaps, unfamiliar with the economics of this kind of litigation.

The judge also rejected the argument that the loss was not caused by LD's

negligence and that it was too remote. For remoteness, the type of loss has to be within the contemplation/ reasonably foreseeable. The particular loss or its extent does not have to be foreseeable. Here the type of loss was the result of fraud and corruption, which was sufficiently foreseeable even if this particular type of corruption (fraudulent legal claims and bribery of judges) was not.

Missed sale

Another misselling claim fails.

Finch v Lloyds TSB Bank plc [2016] EWHC 1236 (QB) is an interest rate swap misselling claim, but with one slight difference. Instead of there being a floating rate loan and an interest rate swap, there was a fixed rate loan with a clause providing for break costs if the loan was paid off early. C alleged that the bank had an obligation to notify it of this clause and the potential costs of early repayment, despite C's having its own financial advisers and lawyers. The judge could see no basis in contract or tort for any such obligation.

Jurisdiction

Exclusive jurisdiction

If service is required in an EU member state, it must be done in accordance with the Service Regulation.

Asefa Yesuf Import and Export v AP Møller-Maersk A/S [2016] EWHC 1437 (Admlty) confirms that if a document must be served in another EU member state, service must be effected under the EU Service Regulation (1393/2007/EC). It amplifies the restrictions explained by the Court of Justice of the European Union in *Alder v Orłowska* (Case C-325/11), namely that local law can't get round the Regulation by saying that service out is not required and, possibly, that the CPR provisions, like substituted service or removing the need for service, cannot be applied in an EU context.

In *Asefa Yusuf*, service was effected in Denmark by a solicitor delivering the documents to D. Article 15 of the Service Regulation says that service may be effected directly (as opposed to through official channels) by "competent persons of the Member State addressed". C argued that, under Danish law, individuals could effect service. The judge said that this was irrelevant. Article 15 referred to state officials (officials "of" the state), not lawyers. The Regulation did not allow service in the way effected, service had not therefore taken place, and (even if there was

Brexit: where are we now?

The UK's constitutional position with regard to the EU can be summarised as follows:

- In the UK's referendum on 23 June 2016, 51.9% voted in favour of leaving the EU and 48.1% in favour of remaining. The turnout was 72.2%, meaning that 37.5% of the total electorate voted in favour of the UK's leaving the EU.
- The referendum result is not legally binding. It is for the Government and/or Parliament to decide what to do in the light of the outcome of the referendum.
- The UK remains a member of the EU until it leaves the EU in accordance with article 50 of the Treaty on European Union.
- If the UK resolves to leave the EU in the light of the referendum, the UK must give notice to the European Council under article 50(2) of the TEU. It is for the UK to decide whether and when to give this notice. No notice has yet been given.
- It is uncertain whether the Government can decide to give notice under article 50(2) through use of the royal prerogative or whether legislation is required to authorise the Government to give of this notice. Legal proceedings in the UK are promised in order to resolve this uncertainty.
- If notice is given under article 50(2), the UK will leave the EU on the date of entry into force of a withdrawal agreement between the UK and the EU or, failing that, two years after giving the notice unless all EU members (including the UK) unanimously agree to extend this period.
- It is uncertain whether a notice under article 50(2) can be revoked before actual departure. The revocability of the notice is a matter of EU law, ultimately for the Court of Justice of the European Union.
- Any withdrawal agreement between the UK and the EU will cover arrangements for withdrawal, and must be approved by the UK and by a qualified majority of continuing EU member states, after obtaining the consent of the European Parliament. The withdrawal agreement should take into account the framework for the UK's future relationship with the EU, but any agreement(s) covering that future relationship are separate and, as such, may be concluded at the same time or subsequently. Depending upon its content, an agreement setting out the UK's continuing relationship with the EU might require unanimity within the EU or a qualified majority.
- If the UK leaves the EU, it could later apply to rejoin EU under article 49 of the TEU. Joining the EU requires unanimity amongst the member states.

power to correct it) there was nothing to correct.

What *Asefa Yusuf* really does is to emphasise the need for an agent for process in the England. If you can serve in England, the Regulation ceases to apply (recital (8)).

Time and again

Time for challenging the jurisdiction of the courts can be extended retrospectively.

A challenge to the jurisdiction of the courts must be made within 14 days of acknowledging service, failing which a defendant is deemed to have submitted to the jurisdiction of the court: CPR 11(4) and (5). According to the Court of Appeal in *Zumax Nigeria Ltd v First City Monumental Bank plc* [2016] EWCA Civ 567, an application can be made retrospectively to extend the time for challenging the jurisdiction. This is not an application for relief from sanctions under CPR 3.8 because submission to the jurisdiction is not a sanction. Despite this, the *Denton* principles apply (why was not explained), ie it is not an application for relief from sanctions, but it is treated as if it were. This requires the seriousness or significance of the breach to be assessed, the cause of the default, and consideration of all the circumstances so the court can deal with the application justly. Best to make sure that you make the application within time.

The Court of Appeal also said that for conduct by the defendant before expiry of the 14 days to be a submission to the jurisdiction of the English court, that conduct must constitute an unequivocal waiver of the right of challenge. That is a high hurdle, but the best course is to preface anything done in that period with the statement that it does not constitute a submission to the jurisdiction of the English court.

A Spanish omelette

English civil proceedings do not need to be stayed in favour of Spanish insolvency proceedings.

The facts of *Marme Inversiones 2007 SL v The Royal Bank of Scotland plc* [2016] EWHC 1570 (Comm) show the critical nature of luck. It concerned interest rate swaps related to the sale and leaseback of Santander's Spanish headquarters, which was completed on Friday 12 September 2008. If it had been planned for the following Monday, would it have happened? But the moving finger does not possess a reverse gear. If only Archduke Ferdinand's driver had not taken that wrong turning.

The interest rate swaps hedged liability on loans to buy the premises but, as C was the fixed rate payer, the swaps have proved expensive. C is in liquidation in Spain, and is seeking orders under Spanish insolvency law for the termination of the swaps with no further payments (akin to UK insolvency rules on onerous contracts). But C is also seeking to stay the Spanish proceedings (so far refused by the Spanish court) pending the outcome in England of its claim that it was induced to enter into the swaps because of misrepresentations by D as to EURIBOR. If the swap contracts are rescinded, the Spanish claim becomes redundant. D denies C's claim, and is seeking in England a declaration that the swap contract has been validly terminated. *Marme Conversiones* concerned whether this (in substance) counterclaim by D should, as C argued, be stayed in favour of the Spanish courts.

Blair J's short answer was no. The Spanish courts have jurisdiction over their proceedings under the EU Insolvency Regulation because those proceedings involve insolvency law and are therefore outside Brussels I. The English courts have jurisdiction over their proceedings because of the exclusive jurisdiction clause in the swap contract and the Brussels I Regulation. The argument turned on whether the Spanish and English actions were "related" within the meaning of article 28 of Brussels I (now article 30 of the recast Regulation), ie they gave rise to a risk of conflicting judgments. Blair J conceded that there was some possibility of conflict, eg, the Spanish court may have to consider contractual questions in order to reach its conclusion under Spanish insolvency law, but the risk of conflict was not sufficiently great to make the actions related. The discretion to stay under article 28 therefore did not arise.

As a result of this conclusion, Blair J did not need to answer the questions of whether the Spanish or English courts were first seised or whether insolvency proceedings subject to the EUIR could ever be related to civil proceedings subject to Brussels I.

In any event, Blair J was clear that, if he had been required to exercise his discretion, he would have exercised it in favour of continuing the English proceedings. There would be proceedings in England anyway, D's claims were subject to an exclusive jurisdiction agreement in favour of the English courts, and a decision as to the English law aspects might help the Spanish court. So full ahead on two fronts.

Repent at leisure

If you want an anti-suit injunction, don't hang around.

In *ADM Asia-Pacific Trading Pte Ltd v PT Budi Semesta Satria* [2016] EWHC 1427 (Comm), C challenged the jurisdiction of the Indonesian courts on the basis that there was a London arbitration clause. C won at first instance in Indonesia, but lost on appeal. A further appeal is extant, but

C then decided to apply for an anti-suit injunction from the English courts to restrain D from pursuing the Indonesian claim. Anti-suit injunctions are usually granted when proceedings are brought in breach of contract. But not in this case because C delayed too long in coming to the English courts. It might seem reasonable not to trouble the English courts while awaiting a decision by local courts on the local courts' jurisdiction, but not so. The delays engendered by a local challenge, coupled with the costs imposed on the other party (despite its breach of contract), offer sufficient reason not to grant an anti-suit injunction.

The arbitration is, of course, continuing in London in any event.

Enforced silence

A foreign injunction is enforced by giving notice of it to a third party.

The concept of enforcing a foreign money judgment in England is easy to grasp. The foreign judgment is treated as if it were an English judgment, and third party debt orders and the like can then be sought from the English courts in order to secure payment of the judgment debt. But how do you enforce a foreign injunction? What does it mean? The issue is, perhaps, less developed because courts in other EU member states tend to be less gung-ho about injunctions and to lack a theory of contempt.

But the Cypriot courts are closer to the English courts in this regard, as was revealed in *Cyprus Popular Bank Public Co Ltd v Vgenopoulos* [2016] EWHC 1442 (QB). C (aka Laiki Bank, in "resolution") obtained a worldwide freezing injunction in Cyprus against D. It then applied for a declaration of enforceability in England under article 39 of Brussels I (the need for this has gone under the recast Regulation).

After a bit of judicial head-scratching, this declaration was made on the without notice application. But it seems that the declaration was not served on D immediately. If it had been, D would have had two months to appeal (article 43(5)) pending the outcome of which "no measures of enforcement shall be taken other than protective measures" (article 47(3)).

A bit later, C served the Cypriot injunction and other documents on a bank in London, arguing to the bank that the injunction took effect as if it were an English injunction and, as a result, that the bank could not allow any payments to be made from D's account. The issue was whether this was a "measure of enforcement", which could not taken because the appeal period hadn't expired, or whether it was something else.

Picken J considered that notifying the bank of the injunction was a measure of enforcement. It might not involve a court order (eg a third party debt order) but enforcement could be effected without court involvement. Notification was therefore prohibited by article 47(3), and the bank could safely make payment from the account if requested (though, of course, D might suffer consequences in Cyprus for requesting that the bank do so).

The case is a little curious, not least because of C's failure to do the obvious, ie to apply for interim measures - an English freezing injunction - to support the Cypriot injunction rather than rely on enforcement. It also begs the more fundamental question of what enforcement of a foreign injunction means. If the injunction had been registered and an appeal against registration had failed, would it have been contempt of the English court for the bank to make payments in breach of the injunction? Questions for another day. Perhaps.

Courts

Regulatory progress

Regulatory appeals should not be stayed for criminal proceedings.

In *Bittar v The Financial Conduct Authority* [2016] UKUT 265 (TCC), Judge Herrington confirmed that there is a strong presumption against staying appeals/applications against regulatory decisions because of parallel criminal proceedings. The only reason for doing so is likely to be if the criminal proceedings would come very shortly after the regulatory hearings, but that, like other risks, can be managed by appropriate orders in the civil and criminal cases.

Contentious Commentary is a review of legal developments for litigators

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