GUILDHALL CHAMBERS

Commercial News

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Team news

The established position of the Guildhall Commercial Team as the leading Chambers for Commercial Litigation in the South West is confirmed by this year's Legal Directories. Eleven members of the Commercial Team are ranked in the 2006-2007 edition of *Chambers and Partners* directory, including two members ranked for the first time. Overall Chambers is a significant national player ranked 23rd in the country, with Guildhall barristers mentioned in 51 places. *Chambers and Partners* stresses the expertise offered in mainstream commercial litigation and dispute resolution, as well as in the associated fields of banking, financial services and insolvency. Neil Levy deserves special mention for his national ranking as a Banking specialist. Similarly the new *Legal 500* lists 10 members from Chambers' Commercial and other civil law teams.

With commercial contracts the best way of getting your terms in is to get the other party's signature on the document. Not only does this effectively incorporate the terms, it may also preclude any argument based on the *Interfoto* principle ([1989] QB 433) that particular onerous or unusual clauses are not effectively incorporated unless special attention is drawn to them ("the big red hand" species of argument). It may also now be a good way of precluding the other party from raising allegations of misrepresentation or seeking to revisit previous disputes which are effectively settled by the express terms. In this Newsletter we consider the important decision of the Court of Appeal in *Peekay Intermark v Australia and New Zealand Banking Group* in the investment advice context. An everyday problem is the common scenario of a contract which is alleged, usually by only one of the parties, to be partly oral and partly in writing, and often partly evidenced by conduct. The other is likely to insist the agreement is exclusively evidenced by writing. The question whether an agreement is exclusively contained or integrated in a written document, or has been reduced entirely to writing, is a question of fact, which has to be determined by the judge on the totality of the evidence. This is found inconvenient by many commercial actors and their advisers. It requires the judge to examine the totality of the evidence in search of arguable collateral terms. It allows one party to undertake an exercise in 'threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim' (in the memorable words of Lightman J in the *Inntrepreneur* case [2000] 2 Lloyd's Rep 611). In contrast, the commercial purpose of a detailed written contract is to obviate such inquiries and to promote certainty. Accordingly modern commercial contracts have spawned a suite of standard clauses – entire agreement, non-reliance, variation and waiver clauses – which are intended to protect the integrity of the written instrument, and so far as possible insulate it from easy qualification or variation. The Court of Appeal in *Peekay* have suggested the doctrines of "estoppel by conduct" or "estoppel by convention" may provide the vehicle for the enforcement of such "entire agreement" and "non reliance" provisions.

Also in this Newsletter, Hugh Sims considers recent authority in the context of civil procedure, focusing on interim remedies. Neil Levy and Jennifer Newstead consider recent cases in the banking and finance context. John Virgo considers the decision of the House of Lords in Law *Society v Sephton* which, disappointingly, leaves unanswered many difficult questions about when loss occurs in negligence claims for the purposes of section 2 of the Limitation Act 1980.

Please do not hesitate to contact me or any of the contributors with respect to any of the matters discussed in this Newsletter.

Gerard McMeel, Editor

Commercial Law Update

Signatures, Entire Agreement Clauses and Estoppel by Contract

Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd

Ltd [2006] EWCA Civ 386, [2006] 1 CLC 582 (CA: Moore-Bick and Chadwick LJJ and Lawrence Collins J)

The decision of the Court of Appeal in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 1 CLC 582 is a significant discussion of impact of signed declarations in contracts, with particular relevance to commercial and financial transactions.

The facts

The investor was an Isle of Man-based company, and was used as an investment vehicle by – it seems – wealthy and sophisticated investors based in the United Arab Emirates. ANZ had marketed an investment product described as a "structured US Dollar hedged Russian Treasury bill deposit". It was based on the performance of bonds issued by the Russian government. The Final Terms and Conditions contained many risk warnings, including the risk of sovereign default by the Russian government (which eventually occurred), and of emerging markets risk. A representative of the investor initialled each page and signed a "Risk Disclosure Statement," stating that it "confirms it has read and understood the terms of the Emerging Markets Risk Disclosure Statement as set out above."

First instance

The Deputy Judge, Richard Siberry QC, held that the bank fundamentally misrepresented the nature of the financial product by orally describing it as a direct proprietary investment in Russian bonds, whereas in fact it was a derivative or structured deposit contract. The investor had merely glanced through and initialled various contractual documents. Accordingly he held that the investor was held entitled to £250,000 invested as damages under section 2(1) of the Misrepresentation Act 1967. Nothing in the contractual documentation nullified or superseded the earlier misrepresentations.

The decision of the Court of Appeal

In contra st, the Court of Appeal attached much greater importance to the contractual documentation and the "Risk Disclosure Statement" signed by the investor. The accurate description of the investment concerned was "not buried in a mass of small print but appeared on the face of the documents as part of the description of the investment product." The Court of Appeal restated the importance of the "signature rule" as laid down in *L'Estrange v Graucob* [1934] 2 KB 394. According to Moore-Bick LJ: "It is an important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions far beyond the business community." (para [43]). The Court of Appeal reversed the judge's finding of inducement (this was one of those supposedly rare occasions where the Court of Appeal was willing to revisit the factual findings below): the investor had relied on his own misunderstanding of the nature of the investment product. Accordingly, on appeal, the claim failed in its entirety.

Contractual estoppel and estoppel by convention

The Court of Appeal was prepared to go further and indicated in *obiter dicta* that it may have been prepared to hold that the contractual documentation gave rise to a "contractual estoppel." Moore-Bick LJ (with the concurrence of Chadwick LJ and Lawrence Collins J) stated:

"It is common to include in certain kinds of contracts an express acknowledgment by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided they make their intention clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in *Colchester Borough Council v Smith* [[1991] Ch 448; affd [1992] Ch 421]. However, that particular question does not arise in this case. A clause of that kind may (depending on its terms) also be capable of giving rise to an estoppel by representation if the necessary elements can be established: see *EA Grimstead & Son Ltd v McGarrigan* (CA) (unreported, (27 October 1999). (para [57]).".

Moore-Bick LJ considered the risk disclosure statement about emerging markets and the signed declaration whereby the investor had assented to the proposition that he had satisfied himself that the transaction was suitable for its needs. His Lordship deduced: "As a result it was part of the contract between them that Peekay was aware of the nature of the investment it was seeking to purchase and had satisfied [itself] that it was suitable for its needs." (para [60]).

Analysis

The attraction of the hitherto obscure doctrine of "estoppel by contract" is that it appears to be sufficient that the agreement itself is contained in a written form, without the need to prove further reliance by the parties. The earlier "estoppel" route to the enforceability of "non-reliance clauses", as famously floated by Chadwick LJ in the earlier cases of *EA Grimstead & Son Ltd v McGarrigan and Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317; [2001] BLR 143 was difficult to apply in practice. Chadwick LJ had suggested that an acknowledgement of non-reliance was "capable of operating as an evidential estoppel." However Chadwick LJ went on to admit: "That may present insuperable difficulties; not least it may be impossible for a party who has made representations, which he intended should be relied upon, to satisfy the court that he entered into the contract in the belief that a statement by the other party, that he had not relied upon those representations, was true." Insuperable may be an understatement. The element of reliance can be difficult to prove when you know that your sales literature makes all kinds of promises, your representatives on the ground probably do the same, and that such material is in practice relied on. By knocking out the need for reliance the "estoppel by contract" device suggests in appropriate cases the courts can hold that, whatever was said in negotiations, the parties are contracting on the basis of the final document, and nothing but their signed final document.

Gerard McMeel

Law Society v Sephton & Co (a firm)

Every law student knows that for the purposes of the law of tort, time under s2 of the Limitation Act 1980 runs from the date a claimant suffers more than minimal damages as a result of a defendant's negligent act or omission. Although this rule is easy to state, experience shows that defining the precise moment at which loss accrues is not always straightforward. On 10 May 2006 their Lordships handed down judgment in *Law Society v Sephton & Co (a firm) [2006] UKHL*, which provides useful but incomplete guidance as to what may constitute ''accrual of damage.''

The facts

Between 1990 and 1996 Mr Payne, a solicitor practising near Solihull, misappropriated some £750,000 held in client account. During 1988 to 1995 he delivered to the Law Society an accountant's report in which Mr Ian Mascord, a partner in the firm of Sephton & Co, certified that he had examined Mr Payne's books and accounts and was satisfied that he had complied with the Solicitors' Accounts Rules 1991. Mr Mascord was negligent in that he could not have made a proper examination without discovering the misappropriations.

The Law Society relied on the reports by refraining from making the investigation it would have made if the reports had not been delivered or had indicated that something was amiss. In April 1996, however, a client complained to the Law Society of delay in payment. On 17 May 1996 the Society's investigating accountant discovered the deficiency. On 20 May 1996 it exercised its statutory powers of intervention. On 8 July 1996 the first of a number of claims was made by former clients of the firm against the Law Society's Compensation Fund. The first payment was made in October 1996. By 8 January 2003 the Fund had paid a total of £1,245,764.11. On 8 October 1996 the Society wrote to Sephton & Co saying that they proposed to hold the firm liable for payments which had to be made out of the Fund and which they said were attributable to the negligent reports signed by Mr Mascord. A claim form was not, however, issued until 16 May 2002.

Sephton & Co contended the proceedings were time barred and so the critical question was as to when damage was first suffered. Sephton & Co claimed that the Society suffered damage whenever Mr Payne misappropriated a client's money after a negligent report had been delivered. The misappropriation gave the client a right to make a claim on the Fund and liability to such a claim was damage. The Law Society argued in broad terms that it suffered damage only when a claim was made or if later when it resolved to make a payment.

The result

The Law Society's arguments in general prevailed. In particular, by virtue of the terms of the Solicitors' Compensation Fund Rules 1995, Mr Payne's misappropriations gave rise to the possibility of a liability to pay a grant out of the fund, contingent upon the misappropriation not being otherwise made good and a claim in proper form being made. This liability would be enforceable in public law and accordingly counted as damage. But until a claim was actually made, no loss or damage was sustained by the Fund. A contingent liability is thus not damage as such until the contingency occurs.

Critique

The decision however prompts two immediate observations: first, a caveat as follows. In some cases, the existence of a contingent liability may depress the value of other property belonging to the claimant or which the claimant was expecting to acquire. Such a claimant who is party to a bilateral transaction and receives less than he ought to have received or is worse off than if he had not entered into the transaction will suffer immediate loss.

Secondly, the decision in referring to the date when a claim was made on the fund, does not deal with the precise moment of accrual. Chronologically, the first claim was submitted on 8 July 1996; it was not, however, until October 1996 that the Society first resolved to exercise its discretion to make a payment out. Given the date of issue of the claim form, it did not matter which of these dates succeeded.

The view of the House was that the law should not treat purely contingent loss as sufficiently measurable, in the absence of any change in the claimant's legal position and/or of any diminution in value of any particular asset owned or intended to be acquired by the claimant. The conclusion that no cause of action in tort accrued in the Law Society's favour against Sephton & Co until it first received a claim on its Fund from one of Payne & Co's clients was sufficient to resolve the appeal. Thus, the House did not address the further argument that accrual was in any event postponed until whenever the Society resolved to meet a claim. This is unfortunate. It seems somewhat contradictory to hold that loss on a contingency is not damage until the contingency occurs, whilst simultaneously holding that the reservation of a contingent discretion not to make a payment at all did not delay the onset of accrual. Before any resolution to pay out, the most that could be said was that the Society had a duty to consider making a payment, which for a variety of possible reasons in any given case it might decide properly not to make and thus suffer no loss at all. Whilst providing some helpful further analysis of this issue, the decision leaves open much room for continuing argument.

John Virgo

Civil Procedure Update – Interim Remedies

In a large number of commercial disputes the decisive blows are struck at an interim stage. The classic example is the interim injunction application in the context of breach of confidence/IP cases. However even where the interim application may not be decisive it provides advisers, and their clients, with important indicators as to how any subsequent litigation may unfold. Such applications provide an opportunity for an early assessment of the opposing litigation team and how the Judge views the case. Investment of time and energy in the interim remedies game always pays dividends. This update therefore focuses on interim remedies as illustrated by four recent cases in the following areas: interim orders for sale; security for costs; injunctive relief and costs orders.

Sale of property where desirable to sell quickly (CPR 25.1(1)(c)(v))

Bank of Scotland v Neath Port Talbot County Borough Council & Another **[2006] EWHC 2276 (Ch)**
11 August 2006, David Richards J

In the main proceedings the Bank sought to enforce its charges over equipment forming part of a waste recycling facility on land owned by the Council. The facility was previously operated by a separate company (NPT), now in administration, under a PFI contract funded by the Bank. The Bank claimed the equipment was subject to its charges. The Council countered that the equipment had become part of the land owned by them and therefore was not within the Bank's security. The Council also argued that following its termination of the PFI contract, the equipment vested in it was free of the Bank's security in any event.

By reason of the Council's responsibilities to secure efficient and effective waste disposal facilities, and to minimise landfill, the Council concluded that the future of the facility needed to be resolved as soon as possible with a view to engaging a new provider to operate the facility. For that purpose a new procurement process needed to commence before trial and interested parties would need certainty as to whether the equipment would or would not remain in place. As a result the Council made its application for an order for sale of the equipment under CPR 25.1(1)(c)(v).

CPR 25.1(1)(c)(v) provides that the court may grant as an interim remedy an order: "...for the sale of relevant property which is of a perishable nature or which, for any other good reason, it is desirable to sell quickly."

The Council did not allege that the equipment was of a perishable nature and therefore the Court was required to consider what "other good reason" made it desirable to sell quickly. David Richards J concluded that the Council had crossed this threshold requirement by reason of the fact that the Council had good reason for commencing the procurement process for the facility as soon as possible and that it could not do so if the issue of good title to the equipment was left in limbo. In justification of this conclusion the Judge made a number of valuable general observations about the ambit of the jurisdiction:

- it is not necessary that the property should be depreciating (he noted in support of this conclusion that "land" is included in the definition of "relevant property")
- the power to make an interim order for sale is not restricted to those cases where there is potential prejudice to the property which is the subject of the application (for example by reason of the likelihood of them becoming worthless or significantly reducing in value) and could be justified by collateral considerations
- whereas previously under RSC Order 29, rule 4, the power was constrained to those circumstances where it was desirable to sell "forthwith", under the CPR it was only necessary to show that it was desirable to sell "quickly".

It is readily apparent, therefore, that the ambit of the power to make interim orders for sale has substantially increased. Whilst the public duties of the Council were obviously impressed on the Judge in this case there appears to be no reason to restrict the reasoning to public interest cases. In appropriate circumstances private litigants will also be able to show good reason why an interim order for sale before trial is desirable notwithstanding that the justification is based on the prejudice to be suffered by the party and is not related to the market value of the goods.

It is important to remember however that not only must the jurisdictional threshold be satisfied; the Court must also be satisfied that it is fair and just to exercise its discretion to make the order. Whilst the existence of a good reason for an early sale will be a strong factor in favour of making an order the Court should consider other relevant factors and carry out a balancing exercise (not dissimilar to that undertaken in interim injunction cases). The Judge noted that the mechanics of the sale might itself give rise to prejudice to one side such that it would not be appropriate to make an order.

The Bank advanced a number of arguments as to why the Court should not exercise its discretion, including the submission that the need for the order arose through the Council's own fault/dilatoriness. Delay is the enemy of any application for interim relief. Ultimately however, on the facts of this case, the Judge concluded that it would be just to make an order for sale even though it accepted that there was justifiable criticism on grounds of delay. He concluded that whilst delay was relevant it would not ordinarily lead to a refusal of an otherwise appropriate order. He ordered that sale should be conducted by an independent agent to be appointed pursuant to the order, with liberty to bid by either side.

In conclusion, it is clear this is a useful precedent for a prospective applicant. It contains guidance on the broad nature of the jurisdiction to make interim orders. It is also useful in its approach to the exercise of discretion, particularly given the deft manner in which the question of delay is dealt with.

Security for costs under CPR 25.12

Al-Koronsky & Another v Time-Life Entertainment Group & Another **[2006] EWCA Civ 1123**
28 July 2006, Sedley, Keene and Longmore LLJs

The Claimant was a Sudanese diplomat. A former domestic servant alleged the Claimant had kept her in his service, as a slave, against her will. The Defendant published a book which repeated those allegations. Libel proceedings were issued by the Claimant and his wife in which the Defendants pleaded justification as its defence. The Defendants applied for security for costs, based on the fact that the

Claimants were ordinarily resident outside the jurisdiction, which application was granted at first instance. The Court of Appeal dismissed the appeal.

The following general principles are confirmed and/or emerge from the judgment, which are of general application and are not confined to those cases where the claimant is resident abroad:

- Where a claimant opposes an application on the grounds of his own impecuniosity the onus is on him to put proper and sufficient evidence before the Court and in doing so he should make full and frank disclosure. In this respect the decision in *M V Yorke Motors v Edwards* [1982] 1 WLR 444 is affirmed
- Where insufficient evidence is provided the Court has the discretion to set a sum which it estimates to be appropriate and affordable
- The complaint that a claimant may be pursuing its claim in an extravagant manner was not relevant to a security for costs application; that complaint was to be dealt with by the use of the Court's usual case management powers
- The fact that a claimant or defendant has entered into a CFA is irrelevant
- The fact that a claimant has obtained an ATE (after the event) insurance policy may be relevant in assessing whether an order is necessary, though before any judgment could be made in this respect the circumstances in which the policy would (or would not) respond would need to be given careful consideration

The judgment also contained an interesting juridical and philosophical debate on the extent to which the UK Courts should make judgments on the attitude and approach of foreign courts. Those who take an interest in such debates are invited to read the transcript.

Injunctive relief – CPR 25.1(1)

***Singh v Anand* (unreported, Ch Div, Birmingham)**
17 March 2006, HHJ Norris sitting as a Judge of the High Court

In the proceedings the Claimant sought to establish, amongst other things, his entitlement to a shareholding in a company known as AIL as against the defendants who were the registered shareholders. Somewhat unusually, the Claimant's application for an injunction was made without notice during the trial of the claim. The Claimant sought an injunction to restrain the defendants from causing, procuring or permitting AIL to fund their legal expenses. The Judge concluded that it would be correct to grant it notwithstanding the time the application was made on the basis of the usual cross-undertaking in damages from the Claimant.

The Judge concluded that he should follow the reasoning of Mr Justice Lindsay in *Re A Company No 1126 of 1992* [1993] BCC 325, a section 459 case, when deciding whether or not it would be right for company funds to be used. In particular, aside from specific considerations which might arise in relation to a company's memorandum and articles, the overriding issue is whether or not it is in the best interests of the company to fund litigation between shareholders/alleged shareholders.

The Court noted it had to approach the matter on the basis of the balance of justice or, more accurately, the balance of injustice. If the Defendants' case was made good at trial then it would be open for them to cause AIL to ratify the expenditure. On the other hand if the Claimant established his case then he would have correctly prevented the continuance of misfeasance since *prima facie* the dispute between shareholders was not a matter for the company.

The issue of funding had been raised early in the proceedings. The Claimant's solicitors' request for confirmation that legal costs were being met personally and not from company funds was met by the response from the Defendants' solicitors that this was none of their business. The matter was not pursued further. In the course of giving evidence one of the Defendants disclosed that the defence costs were being paid by AIL. This precipitated the without notice application for an injunction during the course of the trial.

It is considered the Claimant was somewhat fortunate that the Judge was willing to entertain, and moreover grant, the application given the time it was made. It might well have been concluded the Claimant took the risk that the Defendants were funding their defence from company funds following receipt of the Defendants' solicitors' letter and it was not appropriate to deal with the application without notice. On the other hand the Claimant may be considered unfortunate that the application was not pursued at an earlier date based on the non-committal response from the Defendants' solicitors. Even if that application had been met by the answer/undertaking that company funds were not being used/would not be used, the Claimant should not have been at significant risk on costs (as to which see the following case), but he may well have secured a different attitude to the litigation from the Defendants.

The incidence of costs

***Fox Gregory Ltd v Hamptons Group Ltd* (unreported, CA Civ Div)**
4 October 2006, Tuckey and Arden LLJs

The full transcript is not yet available for this case so the case summary is necessarily brief.

A former employee of the Claimant left the Claimant to join the Defendant taking with her confidential information of the Claimant. The Claimant issued proceedings for an injunction against the former employee and the Defendant. Undertakings were offered and agreed, with the result that the proceedings were dismissed. The Judge at first instance ordered the employee to pay the Claimant's costs and the Claimant to pay the Defendant's costs. The reasoning for the latter costs order was that the application was premature and had substantially failed. The Claimant appealed against this aspect of the cost order.

The Court of Appeal concluded that the Judge had erred in principle. The Claimant had issued a pre-action letter to the Defendant which made it clear that the Claimant was alleging that the former employee had removed confidential information and the Defendant's response was non-committal. A better response from the Defendant could have resulted in the costs of applying being avoided. Moreover, and of general importance to all applications for interim relief, the Court of Appeal concluded that the correct test to apply was whether or not the application would have succeeded if the undertakings had not been given prior to the hearing. It concluded the Claimant was the clear winner as the Defendant had had to give the undertakings.

Hugh Sims

Banking law update

Mortgages and overreaching

The Claimant was a mortgagee of X's beneficial interest in a property. X jointly owned the property with Y. X and Y granted a mortgage over their legal interest in the property to the Defendant. The Defendant's legal mortgage overreached the Claimant's equitable charge thereby giving the Defendant priority over the proceeds of sale of the property. The Claimant sought to challenge the validity of the debt secured by the legal mortgage which allegedly arose from a loan, acknowledged by X and Y in the mortgage deed, made by the Defendant to X and Y. The Defendant argued that the terms of the mortgage deed were conclusive as to the existence of the debt and did not permit of any challenge by the Claimant. On appeal it was held (i) that the amount stated in the mortgage deed to be advanced is not conclusive affirming *Mainland v Upjohn* (1889) 41 Ch D 126, (ii) that a receipt clause in a mortgage deed is not conclusive between the parties as to the actual sum owing, and (iii) the Claimant, as mortgagee of X's beneficial interest in the property, was entitled to take any point on the state of the account on the legal mortgage that X could have taken on his own behalf. *Close Asset Finance Ltd v Derek Allan Taylor & Others [2006] EWCA Civ 788 (22.5.06)*

Banks & litigants in person

Where a litigant in person brought a claim against a bank relying upon a regulatory regime that was not, in fact, the regime that applied to the bank, it was incumbent upon the bank to bring the error to the litigant in person's attention as "... a regulated financial body should make clear which rules were applicable to it: [as] that is something peculiarly within its knowledge." Although the bank's defence succeeded in full, it was, in all the circumstances, appropriate to disallow the bank its costs of the regulatory claims. *Patricia Mary Wright v HSBC Bank PLC [2006] EWHC 1473 (QB) (23.6.06)*

Misrepresentation & mortgages

A mortgagor sought to set aside a mortgage that had been granted to secure the business debts of her eldest son on the basis that the son had misrepresented the amount secured by the mortgage. The mortgagee bank argued that the mortgagor had acquiesced in the mortgage by writing to the bank, in full knowledge of the relevant facts, and making proposals by reference to the full value of the secured sum, without challenging the validity of the mortgage. At first instance it was held (i) that the mortgage was procured by misrepresentation, and the mortgagor had an equitable right to have it set aside, and (ii) that the mortgagor had acquiesced in the mortgage. Acquiescence is a recognised defence to an equitable claim; however, such a defence can only succeed if it would be inequitable to set the mortgage aside due to the mortgagor's acquiescence. The burden of proving that it would be inequitable to set aside the mortgage lay with the mortgagee as the party seeking to raise the defence. It was necessary for the mortgagee to prove that it relied on the acquiescence to its detriment. The mortgagee failed so to prove. The decision was upheld on appeal. *Habib Bank Ltd v Nasira Tufail [2006] EWCA Civ 374 (7.4.06)*

Construction & *contra proferentem*

The Court was concerned with the construction of a clause in a contract which the Defendant argued discharged him from liability in return for the relinquishment of all his rights to the subject property. The Claimant, on the other hand, argued that the clause simply conferred on the Claimant the authority to sell the property and, thereafter, discharge the liabilities from the proceeds of sale. All things being equal, in that the clause did not, strictly, say either that which the Claimant contended for or that which the Defendant argued for, the Court of Appeal relied upon the *contra proferentem* rule and held that the clause discharged the Defendant's liability. *Lexi Holdings PLC v Garth Scott Stainforth [2006] EWCA Civ 988 (7.7.06)*

Banks and their duties

The Second Claimant had a bank account at the Defendant bank, and between 1991 and 1993 more than £130,000 was withdrawn under the signature of M Das who was, allegedly, a signatory to the account. In 1997 the Second Claimant commenced proceedings against the Defendant alleging that the Defendant had allowed the withdrawals in breach of its duty. These proceedings were struck out, for failure to comply with an unless order, and in 2002 the First Claimant issued proceedings against the Defendant. The subject matter of the second proceedings was the same as that in the first proceedings. The Court heard applications by both the Claimant and the Defendant, and struck out the second proceedings as an abuse of process, alternatively granted the Defendant summary judgment, pursuant to CPR 24, and recorded that the Claimant's applications were totally without merit. *(1) Mrs Dipa Das (2) Mr Sachindra Nath Das v Barclays Bank PLC [2006] EWHC 817 (QB) (11.4.06)*

Banks & ss. 328 and 335 Proceeds of Crime Act 2002

It was the Respondent Bank's case that to comply with the Applicant Customer's request to pay money out of its account would mean that the respondent became concerned in an arrangement which it suspected would facilitate the use of criminal property by the Applicant: Ss. 328 the Proceeds of Crime Act (PCA) 2002. In order to avoid committing a criminal offence the Respondent was required to make an authorised disclosure and obtain an appropriate consent: s.335 PCA 2002. The Applicant applied to the Court for an interim injunction requiring the Respondent to make the payment. The Court refused the Application and the Applicant appealed. The Court gave permission for HM Revenue and Customs and the Serious Organised Crime Agency to intervene in the application. The Court of Appeal held that the PCA made it temporarily illegal for the Respondent to perform its contract with the Applicant, i.e. to make the payment, and, accordingly, the contract was suspended until the illegality was removed, i.e. by obtaining the appropriate consent, and during that period the Applicant did not have a legal right upon which he could claim an injunction. The Court of Appeal clearly stated that it would be inappropriate for the Court to require the Respondent to do that which would make it criminally liable. In order to assist, the Court held that "suspects" in s.328 PCA 2002 required that "...he or she must think that there is a possibility, which is more than fanciful, that the relevant facts exist. This is subject, in an appropriate case, to the further requirement that the suspicion so formed should be of a settled nature..." The Court concluded that the PCA was a precise and workable balance between conflicting interests. *K Ltd v (1) National Westminster Bank Plc, (2) HM Revenue and Customs, (3) Serious Organised Crime Agency [2006] EWCA Civ 1039 (19.7.06)*

Creditor's application for administration order

This was an unsuccessful creditor's application for the appointment of an Administrator. The Court held, pursuant to paragraph 11 (a) Sch B1 Insolvency Act (IA) 1986, that the Respondent was unable to pay its debts because (i) the Respondent had failed to pay the sum of £30,000 which it admitted was due, and (ii) there was a good arguable case that the Respondent's assets were recoverable property under s. 304 (1) PCA 2002 and, accordingly, would not be available for the creditors. However, in light of point (ii) above, the Court was not satisfied that an administration order was reasonably likely to achieve the purposes of administration and, in addition, declined to exercise its discretion so as to make an administration order at this stage. Therefore, the Court adjourned the application to await the Interim Receiver's report concerning whether or not the Respondent's assets were recoverable property. *Ice Media International Ltd & Blue Point Media Ltd v Q3 Media ltd [2006] EWHC 1553 (Ch) (22.5.06)*

Construction & antecedent documents

This case concerned the relevance of antecedent documents in the construction of a clause in a contract. It was argued by the Second Defendant that the antecedent documents merely formed part of the background to and surrounding circumstances of the contract, and, that as such, they were both permissible and necessary as aids to the construction of the clause. However, the Court, relying upon *Prenn v Simmonds* [1971] 1 WR 1381 and *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, held that it was not entitled to look at antecedent documents as aids to construing the final document except in claims for rectification or mistake. *Nearfield Ltd v (1) Lincoln Nominees Ltd (2) Lincoln Trust Company (Jersey) Ltd [2006] EWHC 2421 (Ch) (9.10.06)*

Art Deco necklace & security

This case involved an Art Deco emerald and diamond necklace owned by Mr Hamilton. The necklace was placed by Mr Hamilton with the Second Respondent on a sale or return basis. The Second Respondent had an interest in a company, being the First Respondent, which was in financial difficulties. The Second Respondent obtained an £80,000 loan from the Appellant secured upon the necklace which he, the Second Respondent, had no authority to pawn. The Second Respondent returned the necklace to Mr Hamilton and, thereafter, the Appellant sued both the First and Second Respondents. The winding up, on 20th October 2005, of the First Respondent meant that the Appellant's case was amended to focus upon the Second Respondent. An application was made by the Appellant for summary judgment which was refused, and the appellant appealed against the refusal. The Court held that the Appellant could sue on the false representation i.e. that the Second Respondent had authority to pawn the necklace, created by the Second Respondent's non-disclosure, and granted summary judgment on the basis that the Defence was fanciful. *Advanced Industrial Technology Corporation ltd v (1) Bond Street Jewellers Ltd (2) Jonathan Rolf Condrup [2006] EWCA Civ 923 (4.7.06)*

Mortgages - power of sale

Where a mortgage did not expressly provide for interest to be paid by the mortgagor, interest would be allowed on the taking of an account, but until an account was taken interest could not be said to be in arrear within s 103 LPA 1925 so as to cause the mortgagee's power of sale to be exercisable because s 103 is directed to the non-payment of specific sums of money at specific times before the mortgagee's power of sale is exercisable and not with what sum will be payable on the taking of an account. But the grant of a lease by the mortgagor without the mortgagee's consent had been a breach of covenant which had caused the power of sale to become exercisable. In exercising the power of sale the mortgagor had not taken care to obtain a proper market price because there had been no proper marketing, so the mortgagee was liable to account for the difference between the price actually achieved and the price which should have been achieved. *Bishop v Blake [2006] EWHC 831 (Ch) (12.4.06)*.

Guarantees - discharge

If a guarantee is given for a debt payable within a specified time, the guarantor will not be liable if the creditor advances money or supplies goods on terms requiring earlier payment or agrees a variation with the debtor which requires earlier payment, unless the variation was incapable of prejudicing the guarantor. If the debtor chose to pay early without being bound to do so, the guarantor would remain liable. On the facts the guarantor had a real prospect of establishing that the debtor and creditor had made a binding agreement for early payment, or that by insisting on early payment the creditor had acted in breach of contract, thereby discharging the guarantor. *St Microelectronics NV v Condor Insurance Ltd [2006] EWHC 977 (Comm) (5.5.06)*.

Guarantees - formalities

A bank held security for a debt over a letter of credit and received only part-payment under that security because the paying party claimed a set-off for the balance. By accepting the part-payment and not suing for the balance, the bank did not prejudice the rights of a guarantor of the debt because the bank had not surrendered the claim to the balance. Nor did the fact that the guarantor was described only by its trading name in the guarantee provide a defence under s 4 of the Statute of Frauds 1677. Extrinsic evidence was admissible to show that the trading name was understood by both parties at the time of entering into the guarantee as referring to the guarantor. The court had also been entitled to find an allegation that the bank had promised not to call on the guarantee was incredible having regard to the guarantor's unexplained failure to mention the point earlier. *Union Bank (UK) Plc v Sunil Pathak (15.5.06)*.

Cheques - conversion

A bank which collected cheques payable in US dollars to "Architects of Wine" or "Architects of Wine Ltd" for the account of a English company called Architects of Wine UK Limited was liable in conversion to the claimant, an associated Cayman Island Company called Architects of Wine Limited which was the true owner of the cheques. Although the cheques had been collected on the instructions of the sole director of the claimant, on the facts it was to be inferred that the director had diverted the cheques to the English company to facilitate their dishonest misappropriation so the bank could not be regarded as having been authorised by the claimant to collect them. Nor could the Bank rely on a defence under s 4 Cheques Act because it had not exercised due care in collecting the cheques. There was no evidence that the names on the cheques were checked although they were ambiguous, and the English company's usual business had not involved dollar payments. *Architects of Wine Ltd v Barclays Bank [2006] EWHC 1648 (QB) (16.6.06)*.

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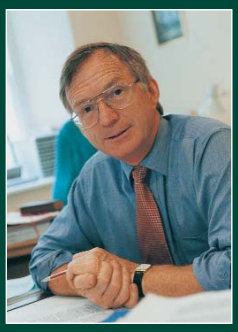

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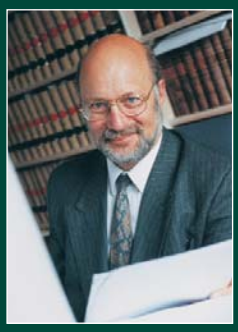

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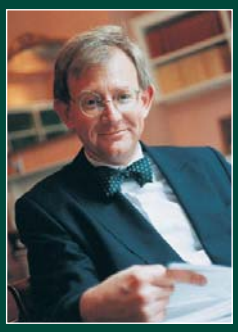

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