Guildhall
CHAMBERS

Newsletter

COMMERCIAL NEWS WINTER 2010/11

EDITORIAL

Welcome to the Winter edition of our Commercial Team newsletter. I hope I may be forgiven for quoting Chambers and Partners 2011 which states: *"Guildhall Chambers maintains its position as the major commercial set on the Western circuit. The sheer depth and range of its barristers' expertise is unmatched in the region, and it is recognised as having an outstanding clerking team.* Sources say: *'The clerking is very helpful and friendly and the Team is very well plugged in to the local solicitors' community.' The set as a whole is consistently involved in eye-catching work both locally and nationally, and is widely recognised for its financial services and banking expertise."*

In addition, Chambers was shortlisted for the prestigious "Chambers of the Year" award at The British Legal Awards 2010. We intend to build on that platform and continue to deliver excellent results.

Looking to the future, the Commercial Team welcomes a new pupil to the team, Oliver Lewis, a graduate in both Philosophy and Law from University College, London, City University and the London School of Economics. He will be working with Richard Ascroft and other members of the team over the course of the year. Looking back, October saw another successful Commercial Team seminar at the Watershed, chaired by His Honour Judge Havelock-Allan QC.

We intend to present another seminar in October 2011.

In this Newsletter, Stefan Ramel and Holly Doyle in the Commercial Law Update provide an overview on the Rome I Regulation and its implications for contracts with an international element. Ross Fentem considers the pitfalls of applications for pre-action disclosure in the Commercial Litigation Update. Lastly, Neil Levy provides his round-up of developments in the Banking Law Update.

If you have any comments or feedback please do not hesitate to contact me or one of the Civil Clerks.

Gerard McMeel

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COMMERCIAL LAW UPDATE

New Choice of Law Rules for Contracts

Introducing the Rome I Regulation

Since 1991 and the introduction of the Contracts (Applicable Law) Act 1990, the rules which had governed the choice of law in contractual matters in England and Wales were contained in the Rome Convention of 1980. On 17 June 2008, the European Parliament and the Council of the European Union adopted Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I). Because the United Kingdom had initially decided not to opt in to the proposed new regulation, it was not until some months later when the European Commission adopted Decision 2009/26/EC on the 22 December 2008 that the Rome I Regulation took effect in the United Kingdom.

The essentials: when does it apply?

The Rome I Regulation has direct effect in the whole of the European Union except for Denmark (recital 46). It applies to all contracts concluded as from 17 December 2009 (article 28). That wording is deliberate. Indeed it is important to note that, pursuant to a Corrigendum published on 24 November 2009, the wording of article 28 was amended from "contracts concluded after" to "contracts concluded as from". It is not thought that the change in wording will turn out to be controversial in practice (unless a contract happens to have been concluded on 17 December 2009); nevertheless it is worth being aware of the amendment, if for no other reason than as a way of ensuring that reference is being made to an accurate version of the Regulation!

By Article 1(1), Rome I will apply to "contractual obligations" in "civil and commercial matters" in situations involving a "conflict of laws". That first phrase was also used in the Rome Convention and is not new to the regulation. The phrases "civil and commercial matters" and "conflict of laws" are new to Rome I, albeit that the former first appeared in the 1968 Brussels Convention on jurisdiction and the enforcement of judgments and the latter appeared more recently in the Rome II Regulation on the choice of law in non-contractual obligations.

The case law, including the decisions of the European Court of Justice, which has developed as to the meaning of the phrase "civil and commercial matters" can confidently be expected to be applied to the interpretation of Article 1(1) of Rome I (e.g. *Eurocontrol* [1976] ECR 1541). Pursuant to Article 1(1), the regulation specifically will not apply to revenue, customs or administrative matters.

The phrase "conflict of laws" was considered by Owen J in *Jacobs v M.I.B* [2010] EWHC 231 (QB) (16 February 2010), a case on Rome II, in which he stated that "the injury to a UK national in Spain caused by the negligent driving of a German national in Spain. That is a situation involving a conflict of laws". However, for later appeal proceedings, see the decision of Moore-Bick LJ handed down on 27 October 2010 ([2010] EWCA Civ 1208). It was successfully argued on appeal that, contrarily to what Owen J had held at first instance, for narrow reasons related to other EU directives and regulations, despite appearances, the relevant situation did not actually give rise to a "conflict of laws"! The Court of Appeal's decision in *Jacobs v M.I.B* thus serves as a useful reminder to practitioners of the need to ensure that the threshold conditions of Article 1 which govern the applicability of Rome I are satisfied in any given case, before turning to consider the more interesting substantive provisions of the regulation.

The phrase "contractual obligations" appeared in the Rome Convention. The jurisprudence which has developed to consider that phrase is likely to be applied to Rome I. The expression has an autonomous community meaning - *Raiffeisen ZentralBank Osterreirch AG v Five Star Trading LLC* [2001] EWCA Civ 68 [2001] QB 825. Broadly, the expression is intended to identify obligations which are contractual as opposed to tortious or proprietary. For instance, a contractual obligation was described in *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316 [2005] 1 WLR 1157 as an obligation which "by its very nature… is voluntarily assumed by agreement".

Article 1(2) of Rome I contains a list of matters which are excluded from the scope of the regulation; the list includes, for instance, issues concerning the status or legal capacity of legal persons or issues relating to obligations arising under cheques, arbitration agreements, or the insolvency of individuals. The list of excluded subject matters which is contained in Rome I is virtually, but not entirely, identical to the list of excluded subject matters which was contained in the Rome Convention.

Once a situation involving a defined set of "contractual obligations" has made it through the applicability gateway of Rome I, then pursuant to Article 12 of Rome I, the law selected as a result of applying the substantive choice of law provisions of Rome I will govern the interpretation of the contract, the performance of the contract, the consequences of a total or partial breach of the obligations under the contract, and the various ways of extinguishing obligations under the contract and the prescription of actions in respect of the contract. It should be noted that Article 12 of Rome I substantially mirrors Article 10 of the Rome Convention. However, in an important difference, Article 12 of Rome I has the effect of including within the scope of the law applicable issues relating to the "consequences of nullity of the contract"; the same was not the case under the Rome Convention so far as England and Wales was concerned.

An overview of the scheme of the Regulation: the Guiding Principles

The same four guiding principles govern the scheme embodied in Rome I as governed the Rome Convention. They are essentially two opposing pairs of aims: autonomy vs protectivism and certainty vs flexibility. Rome I attempts to achieve a balance between these competing aims.

The cornerstone is party autonomy (see recital 11). In practice, this is achieved generally by the inclusion in a contract of express choice of law clauses, although neither the convention nor the regulation are so prescriptive. A further key objective is ensuring adequate legal certainty regarding the law that will apply to any given contract, to put an end to forum shopping: *"the proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict of law rules in the member states to designate the same national law irrespective of the country or the court in which the action is brought"* (recital 6).

The primary objectives of choice and certainty/forseeability are tempered by the perceived need for flexibility since: *"…the Courts should however retain a degree of discretion to determine the law that is most closely connected to the situation"* (recital 16), and the importance of protecting parties to transactions who are regarded as being weaker, and who require protection by rules which are more favourable to their interests that the general rules (see recital 23).

This balance is sought to be achieved by way of displacement provisions (substituting a broader test of connection in cases where the rules are considered as being inappropriate) and modifying the general rule of party autonomy for cases where one party holds significantly less bargaining power.

The general rule: the law chosen by the parties

In accordance with the cornerstone principle of party autonomy, the parties are free to choose which law should apply to their contract (Article 3(1)). By their choice the parties can select the law applicable to the whole or to part only of the contract. One point to note is that the working group on the convention rejected the notion of a presumption that the law chosen for one part of the contract should govern the entirety - the law applicable to the rest of the contract is ascertained by the rules on the applicable law in the absence of choice (see further below).

This general proposition is subject to a *caveat*: the parties can only chose the law of a country, not a non-national system of law. It is not possible, for example, to have a choice of law clause applying Sharia Law. However, it is possible for the parties to incorporate by reference provisions of a non-national body of law or an international convention into their contract (recital 13). Incorporation by reference must be distinguished from choice of law: it involves making reference to certain elements of a body of law which thereupon become terms of the contract, rather than the law applying to the contract. Incorporation may be effected by verbatim transcription or by a general statement that rights and liabilities shall in certain respects be subject to these provisions, but the provisions must be sufficiently identified.

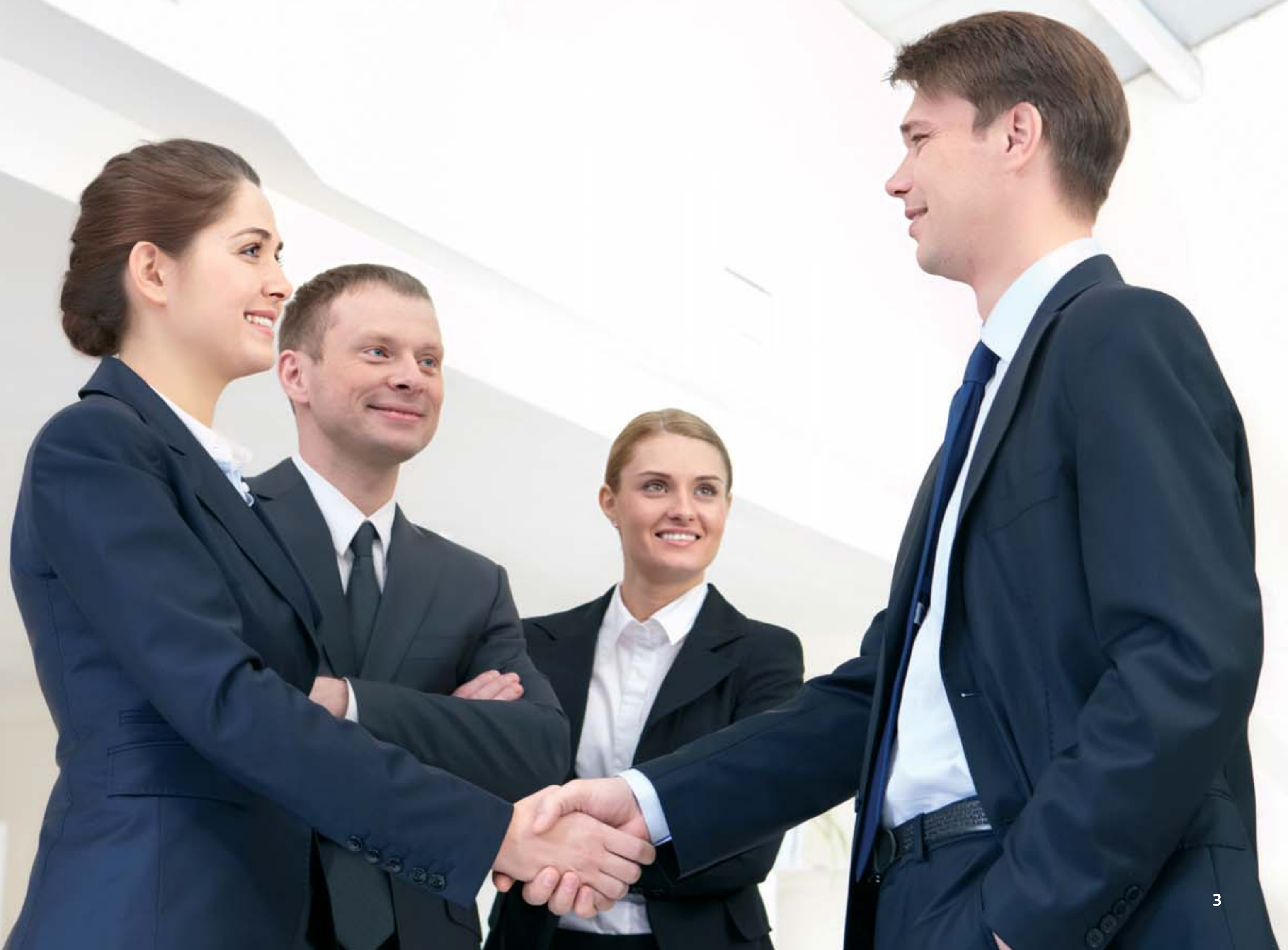
The parties can also chose a different country's laws for different parts of the contract, provided that the choices are logically consistent e.g, it is unlikely that repudiation of the contract for non-performance could be subjected to different laws for the vendor and the purchaser. It has been suggested that the contractual obligations governing the core of the parties relationship e.g. whether a contract is discharged by frustration or an innocent party can terminate for the other's breach can only be governed by one law (see Dicey and Morris, 12th edition, at page 1207).

The parties' choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case (Article 3(2)). There is a change in the wording between the convention and the regulation: the former required the choice to be "demonstrated with reasonably certainty", the latter requires it to be "clearly demonstrated". The regulation appears to require a higher standard and this was flagged by a respondee to the consultation paper (2 April 2008, "Rome 1, should the UK opt in?"). In its published response in January 2009, the ministry of justice said: *"Although there has been a change to the wording, which occurred through compromise in trying to find clarity of interpretation for all Member States, the Government believes that the overall effect of Article 3 should result in there being very little difference to that of the Rome Convention. The compromise reached provides a more uniform interpretation of the effect of this provision across all Member States. Any difficulties that could arise could easily be overcome by ensuring that contracts include a clause that sets out in clear terms what the applicable law to the contract will be."*

The parties' choice, where not express, can be demonstrated by the other terms in the contract or from the circumstances of the case. Examples of situations where the terms of the contract may support an inference as to the intended choice of law include where the contract is in a standard form known to be governed by a particular system of law, for instance a Lloyd's policy of marine insurance, where there is reference in the contract to provisions of a particular country's law and where the contract contains a choice of forum clause or an arbitration clause naming the place of arbitration in circumstances indicating that the arbitrator should apply the law of that place (see recital 12). Examples of situations where other circumstances may support an inference as to the intended choice of law include where an express choice of law has been made in a related transaction with the same or different parties: for instance it might be expected that the contract of carriage and the bill of lading were intended to be subject to the same law, similarly a contract and a contract of guarantee of obligations there under. By way of another example, where there was an express choice of law clause in the previous course of dealing between the same parties, unless circumstances indicate that a deliberate choice has been made not to include an express choice this time, it can be expected that that earlier choice of law would apply.

Importantly, where there is essentially a domestic contract which is turned into a conflict of laws case by virtue simply of the fact that the parties have chosen to apply a foreign law, Article 4(3) preserves the rules of the country in which all the other elements relevant to the situation at the time of the choice are situated in so far as they cannot be derogated from by agreement. Rules that are mandatory in a domestic context in a country will not be applied if they do not apply in that country when a foreign law is selected.

Further, Article 9 provides that the forum can apply its own overriding mandatory provisions (those regarded as crucial for a country safeguarding its public). Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.



The existence and validity of the consent of the parties as to the choice of applicable law shall be determined in accordance with Articles 10, 11 and 13 of Rome I. By virtue of Article 10 the existence and validity of a contract or any terms shall be determined by the law which would govern it under the regulation if it were valid. A party to the contract may rely on the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law which would govern it if the regulation were valid.

Article 11 deals with formal validity. Rome I is based upon a policy of avoiding the invalidation of contracts on the basis of formal defects. This aim is achieved by adopting a validating rule of alternative reference - recourse can be had to the law of the country where the contract was concluded, or of either country where the parties are in different countries when the contract is concluded, or of the country of habitual residence of either party. The country of habitual residence option is new to Rome I. It was considered that the convention was too restrictive in the light of the growing frequency of distance contracts.

Applicable law in the absence of party choice

If Article 3 of the Rome Convention and Rome I establishes the headline principle that a contract will be governed by the law chosen by the parties, Article 4 of both the Convention and the Regulation contains the rules which must be applied if the parties to the contract have not expressly or impliedly chosen the law which is to apply to the contract. It is important to note that the structure of Article 4 of Rome I is substantially different to Article 4 of the Rome Convention. It is clear from recital 16 of Rome I that, with a view to promoting legal certainty, the aim of Rome I is that the conflict of law rules should be "highly foreseeable".

The relevant test under the Convention required the identification of "the law of the country with which [the contract] is most closely connected." The same was presumed to be "the country where the party who is to affect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate … its central administration." (Article 4(2)). This in turn required the Court to determine which one of the obligations under the contract could be described as the "characteristic" obligation. However, there was an important saving which could result in the presumption being disapplied where "it appears from the circumstances as a whole that the contract is more closely connected with another country" (Article 4(5)). In this country, there is now a substantial corpus of jurisprudence which was aimed at resolving the conflict between the presumption of Article 4(2) and the overarching "most closely connected" test in Article 4(5), see *Credit Lyonnais v New Hampshire Insurance Company* [1997] 2 Lloyd's Rep 1, *Land Rover Exports Ltd v Samcrete Egypt Engineers and Contractors* [2002] EWCA Civ 2019 and *Ennstone Building Products Ltd v Stanger* [2002] EWCA Civ 916 [2002] 1 WLR 3059.

Article 4 of Rome I is engaged where the law of the contract cannot be determined by applying Article 3 of Rome I, and where the contract does not fall within one of the bespoke choice of law regimes which apply to conditions of carriage (Article 5), consumer contracts (Article 6), insurance contracts (Article 7), and individual employment contracts (Article 8).

Once Article 4 of Rome I is engaged, it is then necessary to consider whether (i) the contract in question falls within one of the 8 different categories of contracts which are set out in Article 4(1). If it does, then the applicable law "shall be determined" by applying the presumption which applies to that particular category of contract. For instance, if the contract is for the sale of goods or the supply of services, then the applicable law shall be the law of the seller / supplier's habitual residence. A franchise contract will be governed by the law of the franchisee's habitual residence.

Article 19 of Rome I contains a number of additional important provisions in relation to the expression "habitual residence". Pursuant to Article 19(3), it is the party's habitual residence at the time of the conclusion of the contract which is the relevant one; this is plainly intended to cater for a situation where a party migrates its habitual residence between the date of the conclusion of the contract and the time when a dispute has become apparent. Presumably, that provision is intended to discourage forum shopping. Article 19(1) fixes the habitual residence of a company and other corporate or unincorporated associations as the place of their central administration. Pursuant to Article 19(1), the habitual residence of a natural person acting in the course of his business activity is that person's principal place of business; there is, apparently, no definition of habitual residence for a natural person not acting in the court of his business activity.

However, if the contract doesn't come within one of the 8 categories or would come within more than one of the 8 categories, then (ii) the contract "shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence" (Article 4(2)). The concept of "characteristic performance" is therefore retained in the regulation. However, given that the architecture of Article 4 of Rome I is substantially different to the architecture of the mirror article in the Rome Convention, it is by no means certain that the case law which has developed on the issue of "characteristic performance" under the Convention can be unhesitatingly applied under the regulation. The expression "characteristic performance" is not defined in Rome I. Recital 19 of Rome I makes a half hearted attempt at a definition by reciting that contracts will sometimes consist of "a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract", in which case "the characteristic performance of the contract should be determined having regard to its centre of gravity." That is only marginally helpful: what is, and how does one determine, a contract's "centre of gravity"? Again, it is fair to point out that the expression "centre of gravity" has featured in case law in this country under the Rome Convention: see, e.g. *Definitely Maybe (Touring) Ltd v Marek Liebenberg Konzertagentur GmbH* [2001] 1 WLR 1745.

There will be situations where a contract does not lend itself to classification under Article 4 subsections (1) and (2). A loan contract is a good example. In that case (iii), Article 4(4) will apply: the contract shall be governed by the law of the country with which it is most closely connected. The mechanics of the close connection test appear to involve, essentially, that each party makes a list of all the possible factors connecting the matter to the country they are putting forward; the Court is then required to perform a balancing exercise.

Finally, Article 4(3) provides a flexible let out in difficult cases (iv). It is described in recital 20 as "an escape clause" covering the situation where the contract is manifestly more closely connected with a different country to that dictated by the other terms of Article 4. The addition of the word "manifestly" (which does not appear in the Convention) must be designed to underscore the exceptional nature of this let out.

Some concluding remarks

At the time of writing this article, we have not been able to identify any reported decisions on Rome I; that is not necessarily surprising given the provisions which govern the regulation's temporal applicability. Nevertheless, we can state with some confidence our view that, whilst Rome I does not radically change the conflict of laws landscape which previously existed under the Rome Convention, it is the case that Rome I is very different in a number of material respects. For that reason, it is necessary to be wary of unhesitatingly applying case law which was decided under the Rome Convention in an effort to resolve conflict of law situations which are now governed by Rome I.

Holly Doyle and Stefan Ramel

Breaking the Vicious Circle

Applications for Pre-Action Disclosure

Mr Kneale had a problem. He wanted to bring a claim against Barclays Bank plc, but did not know whether he had a claim to bring. He could not know whether he had a claim to bring unless the bank provided him with the material he would need to bring a claim against it. If he issued a claim without that material, his claim would be speculative at best. To break the vicious circle, he made an application for pre-action disclosure. Although he won at first instance before HHJ Halbert, the bank took an appeal to the High Court. Flaux J's demolition of Mr Kneale's argument provides a valuable reminder of when and how not to go about making such an application. *Kneale v Barclays Bank plc* [2010] EWHC 1900 (Comm).

The background was this. Mr Kneale had been a Barclaycard-user since March 1995. On 10th November 2008, he caught an episode of *Panorama* on BBC1 which contained an interview with a solicitor who estimated that a quarter of all the credit agreements he had seen were unenforceable. In the same month, he stopped making payments to the bank. He asked the bank for a copy of the agreement under s.78 of the Consumer Credit Act 1974. He wanted to see it so that his solicitors could let him know whether he could bring a claim for a declaration that the agreement was not "properly executed" and so irredeemably unenforceable. The bank responded with a copy of the pro forma documentation current in 1995, which as readers of this newsletter will know, is good enough for s.78: *Carey v HSBC plc* [2009] GCCR 9951.

It was not good enough for Mr Kneale. How, he asked himself, could he bring his proposed claim unless he had seen the agreement that he signed[1] so as to know whether any of the statutory prescribed terms were missing? So, in November 2009, he made an application for pre-action disclosure under CPR r.31.16, to force the bank to disclose his agreement. The vehemence with which the bank resisted the application may suggest to the cynically-minded that it would have had difficulties complying with an order.

In any event, Mr Kneale lost his application on appeal. Flaux J's dissection of the pre-action disclosure jurisdiction repays careful consideration.

Jurisdiction and Discretion

The starting point is always that a party has a legitimate interest in not disclosing documents before it would otherwise be obliged to do so by standard disclosure. CPR r.31.16(3) provides that a court *"may"* make an order for pre-action disclosure "only" where certain conditions are satisfied.[2] So there are two distinct stages. There is a threshold question of jurisdiction (are the conditions satisfied?), an affirmative response to which does not automatically result in the granting of the order: the court retains a discretion to refuse it: *Black v Sumitomo Corp* [2002] 1 WLR 1562. According to Flaux J in *Kneale* at [20], where the test of jurisdiction is made out, it will be appropriate to exercise the discretion in favour of the application *"only where there is some aspect of the case which takes it out of the ordinary run"*.

Standard of Arguability: Jurisdiction or Discretion?

As a matter of jurisdiction, CPR r.31.16(3)(a) and (b) provide that the order may only be made if the applicant and the respondent are *"likely"* to be parties to a subsequent set of proceedings. This means prima facie that if proceedings were to be issued, then the parties to the application may well be parties to the proceedings: *Black* at [72]. However, in *Kneale*, Flaux J was concerned with the question of whether those provisions did not only require consideration of whether the applicant was (subjectively) likely to issue a claim, but also whether the anticipated claim had merit, and if so, then what degree of *"arguability"* must be demonstrated: see [28].

On this question, there is some conflict in the authorities. In the one corner, the Court of Appeal in *Rose v Lynx Express* [2004] 1 BCLC 455 and David Steel J in *Pineway Ltd v London Mining Co Ltd* [2010] EWHC 1143 (Comm) suggested that it was necessary as a matter of jurisdiction for the applicant to show a "properly arguable" case, or even one with a real prospect of success. In the other, a differently-constituted Court of Appeal in Black (probably) and Patten J in *BSW Ltd v Balltec Ltd* [2007] FSR 1 (unambiguously) concluded that although some modicum of arguability must be demonstrated at the jurisdiction stage, the strength or otherwise of the proposed claim was principally a matter going to discretion.

Flaux J at [38] came to the view that the lower jurisdictional test was probably right: *"the applicant has to show some sort of prima facie case which is more than a merely speculative 'punt'"*. A higher test may place an impossible burden on an applicant at a stage which might necessarily come long before a considered basis of claim could be worked out, although the real strength

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[1] He accepted that he must have signed an agreement. If his evidence was that he had not, then he would have been able to seek his declaration of unenforceability without pre-action disclosure.

[2] The applicant and respondent are likely to be parties to proceedings; if proceedings were started, the documents sought would be discloseable under standard disclosure; and pre-action disclosure is desirable to dispose fairly of the anticipated proceedings, to assist the dispute to be resolved without proceedings or to save costs.

of the proposed claim might properly be considered in the exercise of the discretion. However, Mr Kneale could not even begin to demonstrate that his agreement was unenforceable and, as Flaux J pointed out, if his legal advisers had any grounds to suspect that the pro forma terms and conditions provided by the bank under s.78 were not in fact the terms of his agreement, they would have adduced evidence to that effect. They had, after all, made dozens of similar requests of the bank and would have known if more than one set of terms was in use in 1995. So Mr Kneale's application fell at the first jurisdictional hurdle.

Desirability of Disclosure: Jurisdiction

Mr Kneale would also have had to show that it was desirable to order disclosure in order to dispose of the anticipated proceedings fairly, to assist resolution without proceedings or to save costs: CPR r.31.16(3)(d). Again, Mr Kneale's argument of necessity ("how can I know whether to start proceedings if I don't have the true agreement?") failed to convince. He had adduced no evidence whatsoever to support a contention that the agreement was unenforceable. The most he could say was that if the terms differed from those in the pro forma documentation, he might have a claim.

In Flaux J's reasoning, it rather appears that the arguability issue re-emerged when considering "desirability". This might be thought a questionable approach. It does, however, make some sense. If the mooted claim is pure speculation, how can it assist to dispose of the proceedings fairly to order a party to provide a document which may only give fuel to a nuisance value claim? How would it assist resolution of the "proceedings" where the proceedings are nothing more than wishful thinking? And far from saving costs, it would only add to them.

Exercise of the Discretion

Even had Mr Kneale got over the jurisdictional thresholds, Flaux J would have refused to exercise his discretion in Mr Kneale's favour. The judge at first instance had wrongly failed to take into account the speculative nature of the application, let alone of the claim: the application was a pure fishing trip. Nor was it right that Mr Kneale really needed the agreement to know whether he had a claim for unenforceability: he ought to have been able to work this out from the documents the bank had provided. To cite the poetry of Donald Rumsfeld, Mr Kneale was really on the search for unknown unknowns ("I haven't got a clue what's out there, but there might be something").

This is not to say that the "vicious circle" argument is a bad one – pre-action

disclosure applications are often properly made where there is more than a mere suspicion of a claim but where the key information to crystallise the cause of action is held by the respondent alone. However, the proposed claim which cannot be complete without the missing information must be clearly evidenced and explained. An inchoate set of facts which may one day solidify into a claim is unlikely to persuade the court to exercise its discretion favourably: *Gwelhayl Ltd v Midas Construction Ltd* 123 Con LR 91. By contrast, a focused complaint and a request for clearly defined and limited disclosure is more likely to result in success: Black at [95].

Costs

The proper costs outcome of an application for pre-action disclosure is often forgotten. The general rule, only exceptionally to be departed from, is that the applicant pays the respondent's costs not only of the disclosure exercise but also of the application: CPR r.48.1(2)(a). Even where the respondent actively opposes the application, the usual order should generally be made: *SES Contracting Ltd v UK Coal plc* (2007) Times, October 16. Only where it is clearly unreasonable to oppose an application should the usual order be departed from.

At first instance in *Kneale*, HHJ Halbert had ordered costs against the bank on the basis that it would have been simple for the bank to have produced the agreement (if they had it) or to say that they did not have it and provide secondary evidence, without putting Mr Kneale to the expense of the application. But, once again, Flaux J found the reasoning wrong in principle. The bank had resisted the application on grounds of principle, which was not of itself an unreasonable position. Neither was there anything identifiably unreasonable in the manner in which it had conducted its opposition to the application. Flaux J contrasted the case of *SES Contracting*, in which even though the respondent was considered to have behaved unreasonably in its opposition, the costs order considered appropriate by the Court of Appeal was that each party bear its own costs. Bearing this result in mind, even had there been anything identified as unreasonable in the bank's conduct (which there was not), the very worst sanction would have been that it should bear its own costs – not that it pay Mr Kneale's.

As it was, of course, Mr Kneale lost his application. He was ordered to pay the costs of the bank, both at first instance and on appeal. The risks of his application crystallised in an expensive costs order.

Ross Fentem

Dishonest Assistance

Director's Personal Liability

A company was liable to account as a constructive trustee for knowing receipt of money representing part of the proceeds of a mortgage fraud. The money had been paid to the company by a firm of solicitors engaged in the mortgage fraud, in circumstances where there was no evidence to justify the payment to the company. The court refused to pierce the corporate veil to treat the receipt as that of the company's sole director/shareholder. But the director was liable for having dishonestly assisted the breach of trust, his conduct having been contrary to normally acceptable standards of honest conduct. *Law Society of England & Wales v Habitable Concepts Ltd* [2010] EWHC 1449 (Ch), 21 June 2010.

Payment by mistake

Recipient holding on constructive trust

A bank's customer had dishonestly conspired with a Swiss company to defraud the bank by causing it to pay £2.4m on forged instruments to the Swiss company. In equity, a dishonest recipient of money obtained by fraud is regarded as a constructive trustee. Both the customer and the recipient had full knowledge of the fraud and were therefore constructive trustees. *Bank of Ireland v Pexxnet Ltd* [2010] EWHC 1872 (Comm), 26 July 2010.

Set-off in court claims

Timing

Where the court gives money judgment on a claim and cross claim, it has a discretion under CPR r 40.13 and an inherent jurisdiction to order a set-off. The appropriate date on which to calculate the net sum due is the date when the two liabilities are established. Interest on each claim is to be allowed to that date. If the two sums are in different currencies, the smaller sum should be converted into the currency of the larger sum at that date to ascertain the net sum payable. The court also has a discretion to order set-off of costs against damages to do justice, even if equitable set-off was not available because of a lack of any close connection. *Fearns v Anglo-Dutch Paint & Chemical Co Ltd* [2010] EWHC 2366 (Ch), 23 September 2010.

Guarantee

Effect of variation "subject to contract"

A guarantee provided that the guarantors would only be liable to the extent that the debt owed by the principal debtor exceeded £2m. By agreement with the guarantors, the debt was reduced below £2m. The creditor prepared a letter varying the principal debtor's facility, which the guarantors signed, and an amended guarantee which was not signed and remained "subject to contract" when the principal debtor went into administration. The guarantors were not liable. The fact that the amended guarantee expressly contemplated that they would obtain legal advice before signing indicated that the subject to contract status of the document meant the parties did not intend the guarantors to be bound by any earlier oral agreement. *Investec Bank (UK) Ltd v Zulman* [2010] EWCA Civ 536, 18 June 2010.

Non-disclosure

The obligation to disclose unusual features of a transaction to an intending guarantor could extend to matters outside the terms of the contract with the debtor. It could therefore have required the creditor to disclose the fact that the affairs of an individual closely associated with the creditor were under investigation by the Swiss authorities so there was a risk that the authorities would, as they later did, block the bank account into which the money loaned by the creditor was paid. But on the facts the guarantor could be expected to have known of the risk, so the guarantee could not be avoided. In any event, clauses preventing the guarantor from being discharged from liability prevented the guarantee from being avoided for non-disclosure. In addition, the guarantor could not challenge a certificate as to the sum due because the guarantee provided for the certificate to be conclusive, and an increased interest rate payable on default was not a penalty. *North Shore Ventures Ltd v Anstead Holdings Inc* [2010] EWHC 1485 (Ch), 22 June 2010.

Undue influence

A wife guaranteed repayment of a loan advanced to a company in which her husband was the sole director, she was company secretary, and they each held a 50% shareholding. Following demand on the guarantee the wife resisted presentation of a bankruptcy petition on grounds that she had given the guarantee as a result of her husband's undue influence. Before the guarantee was signed the lender had written to the wife explaining the liability, advising her to take advice from a solicitor not acting for her husband, and asking her to complete a form nominating a solicitor. The wife had used the husband's solicitor, who returned the guarantee to the lender with a certificate that he had advised the wife, and with the form the lender had sent to the wife. On the form the wife indicated she would not be taking independent legal advice and left the name of the nominated firm blank. The wife's appeal against the making of a bankruptcy order was dismissed. The certificate from the solicitor had been sufficient to comply with the *Etridge* guidelines. A reasonable person, with the knowledge of the member of the lender's staff who received the documents from the solicitor, would have been satisfied from the documents received as to the independence of the legal advice given to the wife. *Kapoor v National Westminster Bank plc* (Unrep), 13 July 2010.

Whether equivalent to a demand bond

A lender sought summary judgment on the basis that a guarantee and indemnity was in the nature of an on-demand bond so that the guarantor

could not resist payment by setting up defences available to the principal debtor. It was held that on its true construction the language of the guarantee (and in particular a clause indicating that the amount to be paid by the guarantor would equal the amount to which the creditor would be entitled under the loan agreement with the principal debtor) indicated that the guarantor's liability was to be co-extensive with that of the principal debtor and not unqualified. Although the guarantee provided for the lender's certificate to be conclusive, the certificate was to be read as being conclusive of the sum advanced, not of the sum due. Any ambiguity was to be resolved in favour of the guarantor. Summary judgment was refused. *Carey Value Added SL v Grupo Urvasco SA* [2010] EWHC 1905 (Comm), 23 July 2010.

Consumer credit

Payment protection insurance

The borrower, who was self-employed, entered into a loan agreement to enable him to buy a car and pay off a previous car loan with the same lender. The agreement indicated that the borrower had taken out loan insurance at a premium of 20% of the value of the loan repayments. The borrower claimed the PPI had not been optional so the premium should have been shown as part of the total charge for credit and as it had not been the agreement was unenforceable. The lender claimed the borrower had voluntarily opted for PPI. The borrower succeeded because the evidence showed that the unexecuted agreement had been filled out by the lender's agent without discussion with the borrower, then sent out for signature by the borrower at a local branch where the borrower had been asked to sign and had not been given a chance to read the agreement through, so the borrower had no choice in the matter of the PPI. *Wollerton v Black Horse Ltd*, Transcript 26 March 2010.

Payment protection insurance

The relationship between a creditor and debtor under a CCA regulated agreement to provide a cash loan and finance a PPI premium was unfair within s 140A CCA where a premium of £15,000 had been charged for the PPI policy and the creditor failed to ensure that the broker discharged his duty to disclose the amount of the commissions earned by the broker and the creditor on sale of the PPI policy. In addition, the part of the loan to fund the PPI premium had been a separate facility forming a separate part of the loan agreement so the agreement was a multiple agreement within s 18 CCA. That part of the agreement was therefore improperly executed and the appropriate remedy was to rescind that part of the agreement. *Yates v Nemo Personal Finance*, 14 May 2010 (Manchester CCt).

Payment protection insurance

On the facts the lender's employee had not required the borrowers (who were husband and wife) to take out PPI as a condition of granting a loan. The employee had gone through the form with the husband, who had acted for the wife with her authority. The employee had not represented that the PPI was mandatory. The agreement was therefore enforceable. (Obiter) If the lender's employee had said PPI was a condition of the loan, the agreement would have been unenforceable, even though the written agreement stated that PPI was optional and could be cancelled within 30 days. Further, if the interest rate had been lowered as an incentive to take PPI, PPI would not have been optional but would have been required for that loan. In all cases PPI would either be part of the credit or total charge for credit, but could not be both. *Black Horse Ltd v Speak* [2010] EWHC 1866 (QB), 21 July 2010.

Broker administration fee

A "broker administration fee" of £875 was part of the total charge for credit and could not therefore be part of the amount of credit advanced under a Consumer Credit Act regulated agreement, even if interest was charged on it. *Southern Pacific Securities 05-2 plc v Walker* [2010] UKSC 32, 7 July 2010.

Pre-action disclosure of credit agreement

The holder of a credit card, who had been supplied with a "reconstituted" copy of the credit card agreement which he originally signed, sought pre-action disclosure of a copy of the original application form which he signed on the grounds that he needed to see it to establish whether it had been improperly executed and was unenforceable. The court refused to order disclosure. Although the applicant did not need to show a potential case with a real prospect of success to obtain pre-action disclosure, he had to show some sort of prima facie case which was more than merely speculative. He had enough information from the documents already provided to him to decide whether the agreement was unenforceable and there was no reason to think the signed original would be any different to the reconstituted copy. Nor had it been established that disclosure was desirable to save costs. *Kneale v Barclays Bank plc* [2010] EWHC 1900 (Comm), 23 July 2010.

Limitation period

When loss suffered

In a claim against solicitors for negligence in acting for the seller of a property who turned out to be a fraudster impersonating the true owner, time started running for Limitation Act purposes when the bogus sale was completed and the forged transfer delivered. That was when the true owner suffered measurable economic detriment which was not purely contingent, because his title was then vulnerable to being defeated by an onward sale by the fraudster to an innocent third party. *Nouri v Marvi* [2010] EWCA Civ 1107, 14 October 2010.

Part-payments keep time running

B&B loaned money on mortgage. After repossession and sale there was a shortfall which remained outstanding for more than 12 years before B&B brought proceedings against the borrower. The borrower complained that the sale had been at an undervalue, but the borrower had made some small monthly payments less than 12 years before the lender brought the claim. The borrower argued that because the payments were made under protest, they were not effectively acknowledgements of the debt sufficient to start time running afresh. It was held that part-payments start time running afresh regardless of whether the debtor acknowledges the debt. In any event the payments made by the borrower had also amounted to acknowledgments. It did not matter how much the alleged undervalue might be as it could not be contended that the payments made by the borrower had been clearly referable to an admitted part of the debt only and nothing more. *Ashcroft v Bradford & Bingley Plc* [2010] EWCA Civ 223, 10 March 2010.

Amending name of party after expiry

A valuation of a house in Essex was prepared for iGroup Ltd, which later changed its name to GE Money Mortgages Ltd. Just before the limitation period expired, a claim that the valuation had been negligently prepared was wrongly started in the name of GE Money Home Lending Ltd and wrongly referred to the property as a house in London. An application to amend the address of the property and the Claimant's name and to substitute GE Money Mortgages Ltd was refused. The mistake had been as to the Claimant's identity, not merely as to its correct name/designation, and the Defendant had not known the true identity of the Claimant until after the limitation period expired. The case did not fall within CPR r 19.5(3)(a). *GE Money Home Lending Ltd v H C Wolton & Sons Ltd* [2010] PNLR 28, 6 May 2010.

Ineffective loan agreement

Restitution

A bank made advances under swap transactions which turned out not to be binding on Norwegian counter-parties because they had no capacity to enter into them under Norwegian law. English Law governed the swaps, and on a proper reading of *Westdeutsche Landesbank v Islington LBC* (1996) the bank had a restitutionary claim for repayment of sums advanced. Although the Norwegian counter-parties had used the funds advanced in connection with the swap arrangements, that did not provide them with a change of position defence because (a) they knew the money would have to be repaid and was not in any sense being gifted to them and (b) they took the risk of investing the money in what turned out to be disastrous financial instruments. *Haugesund Kommune v Depfa ACS Bank & Wikborg Rein & Co* [2010] EWCA Civ 579 , 27 May 2010.

Solicitor's negligence

Damages

Lawyers advising the bank in connection with swap transactions had been negligent in failing to advise the bank that the advances were prohibited loans under Norwegian law. The banks would not have entered into the transactions if they had been properly advised. Since the rights conferred on the bank by the transactions were valueless, the lawyers were liable for the whole of the bank's losses, except to the extent that the losses had been reduced by recoveries made before the date on which the court assessed damages. The bank was not required to give credit for the value of its rights to claim money back from the counter-parties on a restitutionary basis. *Haugesund Kommune v Depfa ACS Bank & Wikborg Rein & Co* [2010] EWHC 227 (Comm), 12 February 2010.

Negligence

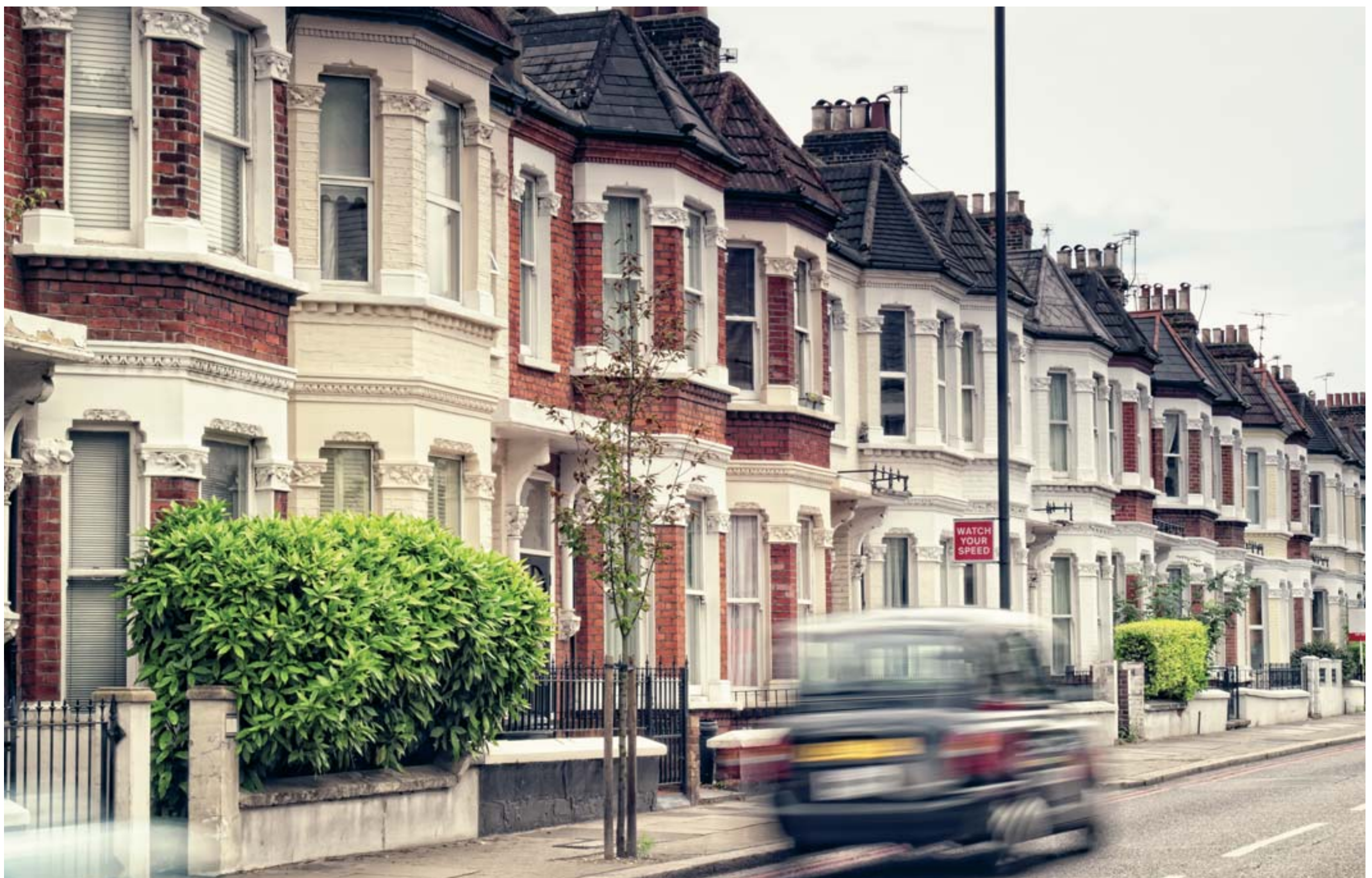
Bank as adviser

The Claimant claimed damages against the bank for mis-selling two derivative products, involving currency swaps. The bank's terms of business provided that it did not act as the Claimant's adviser and provided an execution-only service. The Claimant claimed the bank had negligently advised it to buy unsuitable products. On the hearing of certain preliminary issues it was held (a) the Claimant was not a "private person" so as to bring a claim for breach of duty under the Financial Services and Markets Act 2000 because it was a corporation carrying on a business, and because the purchase of foreign exchange products was a significant part of that business; (b) by the bank's contractual terms of business the bank had not undertaken to act as an adviser or to be responsible for any recommendations made; in any event on the facts the bank had not acted as an adviser and the Claimant had not relied on any such advice; (c) the bank's terms of business which merely defined the basis on which it was providing its services were not exclusion clauses subject to UCTA 1977 and in any event were reasonable. *Titan Steel Wheels Ltd v Royal Bank of Scotland plc* [2010] EWHC 211 (Comm), 17 February 2010.

Misrepresentation

Exclusion of liability

An employee of a bank which had issued loan notes linked to Russian bonds had not represented that the notes were conservative investments, liquid and without currency risk. In any event (a) the alleged representations would have been expressions of opinion carrying no implied representation that reasonable grounds existed to support them, (b) the purchaser was bound by the acknowledgments in the terms of dealing letters and in the notes that no representation or warranty had been made, and (c) clauses excluding liability



for misrepresentation were reasonable. *Springwell Navigation v J P Morgan Chase Bank* [2010] EWCA Civ 1221, 1 November 2010.

Sale and lease-back

Undervalue

Freehold land worth £275,000 was purchased for £210,000 on terms that the vendor would have a 21 year tenancy. Creditors of the vendor challenged the transaction under s 423 Insolvency Act 1986 on the basis that it was a transaction at an undervalue made with the intention of defrauding creditors of the vendor. Although the requisite intent was made out, the claim failed. Following *Redstone Mortgages v Welch* (2009), all the purchaser acquired was the freehold reversion. On the evidence, the price paid for the freehold reversion was fair. The Claimants could not show that the difference between the market value and sale price exceeded what the vendor would have had to pay as a premium for a lease in a comparable property. *Delaney v Can Chen* [2010] EWHC 6 (Ch), 8 January 2010.

Mortgages

Overriding interest

A fraudster took advantage of the Defendant, who suffered from mental illness, to persuade her to transfer her property to him. The Defendant was later committed to a psychiatric hospital, but continued to visit the property once a week and paid the household bills. The fraudster mortgaged to the property to the Claimant. When he defaulted, the Claimant brought possession proceedings which the Defendant resisted on grounds that she had an equity against the fraudster which was binding on the Claimant as an overriding interest on the basis of her actual occupation. It was held that the judge had been entitled to find that the Defendant had been in actual occupation, there being sufficient degree of continuity, a persistent intention to return home when possible, and a sufficient explanation of her residence elsewhere. *Link Lending Ltd v Bustard* [2010] EWCA Civ 424, 23 April 2010.

Forgery

A mother's signature on a loan agreement and legal charge, and on a subsequent agreement increasing the amount advanced, had all been forged. But the mother was found to have ratified the transactions and to be estopped from claiming that they bound her by reason of her conduct. In particular, she had attended at the offices of solicitors and had signed a form confirming that she had been advised about the consequences of entering into the transaction. She had later agreed to make payments, asked to change the payment date, and discussed with the lender the application of the proceeds of a claim under a PPI policy. She had also instructed her conveyancing solicitors about the existence of the loans secured on the Property, and caused them to pay the amount necessary to redeem the charge on sale without protest, at a time when she had full knowledge of the facts. *English v English* [2010] EWHC 2058 (Ch), 3 August 2010.

Subrogation

A bank made a mortgage advance to redeem a building society's existing first registered legal charge, but failed to register its own legal charge. Later a charging order was obtained and noted on the register. The bank was entitled to priority to a second chargee and to the holder of the charging order, by subrogation to the building society's charge, even if the bank might have been negligent in failing to register its own legal charge. *Anfield (UK) Ltd v Bank of Scotland* [2010] EWHC 2374 (Ch), 24 September 2010.

Debenture

Priorities

By the terms of a debenture granted to a lender over trust assets, the costs and expenses of the lender and receivers it had appointed took priority over the right of the trustees to be indemnified out of the trust assets. Nor could any term be implied giving the trustees priority because that would contradict the express terms of the debenture. *Dominion Corporate Trustees Ltd v Capmark Bank Europe Plc* [2010] EWHC 1605 (Ch), 29 June 2010 (David Richards J).

Floating charge

Security financial collateral arrangement

By a declaration of trust, customer payments to F2G were held by the respondent as trustee for F2G in a designated account. By clause 3, the respondent was entitled to withdraw sums due to it on the happening of specified events, including F2G's insolvency. Applying Spectrum Plus (2005), the court held that clause 3 gave rise to a floating charge on the funds because F2G could draw freely on the account until the specified events occurred. The arrangement was not a security financial collateral arrangement within the Financial Collateral Arrangements (No 2) Regs 2003 (which would not require registration under the Companies Act). For that purpose the collateral had to be within the control of the collateral-taker. The respondent's administrative control was not enough. The respondent had no other right to use the money until the specified events occurred. The charge was therefore void against F2G's liquidators for want of registration. *Re F2G Realisations Ltd* [2010] EWHC 1772 (Ch), 15 July 2010.

Proceeds of crime

Refusal to make payments

A bank delayed making transfers on behalf of its customer because it claimed it suspected the transactions involved money laundering. The customer claimed the bank had acted in breach of duty in failing to carry out his instructions. The customer's claims against the bank based on irrationality, mistake and breach of duty of care were dismissed summarily as having no real prospect of success. But the claim for breach of contract could not be summarily dismissed. The burden was on the bank to make good its defence by showing that it held a suspicion of money laundering. It was not sufficient to entitle the bank to summary judgment to rely on a witness statement from its solicitor asserting that various unidentified bank officials had entertained a suspicion. *Shah v HSBC Private Bank (UK) Ltd* [2010] EWCA Civ 31, 4 February 2010.

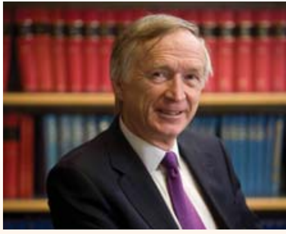
Financial Services contravention

Assessment of sums to be paid to the FSA

In an assessment of sums payable under s 382(2) FSMA by persons found to have accepted deposits without FSMA authorisation, the starting point was the full amount of the capital and contractual interest due under deposit contracts at the date of the FSA intervention, with interest at 6% thereafter. Deposits made by close relatives (as defined by the legislation) fell outside the scope of the Regulated Activities Order and were not therefore to be taken into account in the assessment. *FSA v Anderson* [2010] EWHC 1547 (Ch), 29 June 2010 (Vos J).

Neil Levy

Commercial Team



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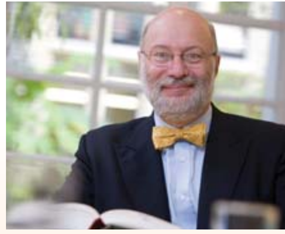

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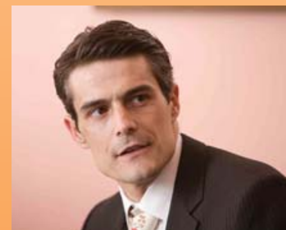

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