GUILDHALL
CHAMBERS

Commercial News

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Team News

The Guildhall Chambers Commercial Team is delighted to welcome two new members to the team, Daisy Brown and Henry Stevens. Daisy has joined chambers after the successful completion of her pupillage in October 2007. She will be undertaking litigation and advisory work in the areas of property, commercial and insolvency. She is already proving to be a valuable addition at the junior end of the team. Henry Stevens has been a successful member of the Guildhall Chambers Crime team since 2004. He has now made the decision to move across to the Commercial Team where he will be undertaking property and finance work, along with regulatory crime.

As well as welcoming two new members the Commercial team are also welcoming their new commercial clerk, Dan Cuthbertson. Dan joins Guildhall Chambers from the Bristol County Court where he was formerly the Chancery Listing Officer.

The Commercial Team offer a warm welcome to Daisy, Henry and Dan.

There is plenty of Team News for our Commercial Team as the panel of the left proves. I would also like to publicise two important management changes. Firstly, the appointment of Hugh Sims as Head of the Commercial Team, and secondly Chambers welcomes as its new Chief Executive, Hamish Munro, who has relocated to Bristol from accountants BDO Stoy Hayward having spent 15 years with "silver circle" law firm Simmons & Simmons, national law firm Eversheds, and litigation firm Davies Arnold Cooper (DAC). We hope that many of you will meet Hamish soon.

In this Newsletter we review some of the most significant decisions of 2007, which are likely to continue to provide much material for argument in 2008. I review the very significant restatement by the House of Lords of the law of interest in Sempra, which is potentially relevant in all commercial cases (page 2). Richard Ascroft reviews the House of Lords' reining in of compensation for commercial agents (page 4). Hugh Sims provides an update on some significant decisions in procedural law (page 6). Lastly, Neil Levy provides a review of recent banking and finance cases (page 8).

Gerard McMeel, Editor

Commercial law update

'Most interesting...': the new law of interest

Sempra Metals v Commissioners for Inland Revenue

[2007] UKHL 34, [2007] 3 WLR 534

A revolution in claims for interest

The modern commercial world understands and prices with precision the time value of money. In contrast, English law had a fragmented patchwork of claims for interest – mostly at statute – which almost invariably yielded interest on a simple, rather than a compound basis, whereas banks and other commercial actors worked on the latter basis. However everything you thought you knew about the law of interest was wrong, at least in the view of the House of Lords in *Sempra*, where their Lordships took the opportunity to issue a fundamental restatement of the law of interest in civil and commercial claims. In summary:

- interest can be claimed, not just pursuant to statute or the exceptional jurisdiction in equity, but potentially in every claim at common law;
- claims to interest at common law are claims for interest as damages, must be pleaded and proved, and are subject to the usual limitations of remoteness and mitigation;
- interest as damages is available whether the underlying claim is for late payment of a debt, in claims for breach of contract sounding in damages or debt generally, for tortious claims, including breach of statutory duty and in claims for restitution arising out of unjust enrichment;
- accordingly a claimant who can satisfy the Court that he has suffered loss either in the form of the cost of borrowing money or in a lost opportunity to invest in a property or project can in principal recover that loss in principle;
- however there is no presumption that delays in paying money will cause loss;
- most strikingly, the common law has caught up with the commercial community and can award both simple and *compound interest* in appropriate cases.

The context of the litigation

The factual matrix

The decision in *Sempra* may be one of the most significant in commercial law, at least adjectival or procedural commercial law for many years. However the matrix from which it sprung was only initially of interest to European lawyers, tax lawyers and self-confessed restitution 'anoraks' (amongst whom the author counts himself). *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* was a test case under a group litigation order arising out of the decision on 8 March 2001 of the European Court of Justice in *Metallgesellschaft Ltd v IRC, Hoechst v IRC* [2001] Ch 620, [2002] RLR §122. The ECJ had decided that provisions of the Income and Corporation Taxes Act 1988, in force until 1999, which permitted two companies resident in the UK to make a group income election so as to mitigate the impact of advanced corporation tax ("ACT") on distributions made within the group were discriminatory and contrary to article 52 (ex article 43) of the EC Treaty because the election only arose where both parent and subsidiary were resident in the UK. The ECJ further held that Community law conferred a right of compensation or restitution. By not being able to make a group income election subsidiaries of a parent company based in another member state, like the claimant, had suffered a timing disadvantage in having to pay sums in respect of ACT earlier than if it had been resident in the UK. However there was never any principal sum at the heart of the claim.

First instance and Court of Appeal

Park J held that in these special circumstances, claims arising out of the decision of the ECJ, the award should be quantified on the basis of compound, not simple, interest [2004] EWHC 2387 (Ch), [2004] STC 1178. The Court of Appeal dismissed the appeal. [2005] EWCA Civ 389 [2006] QB 37 (CA: Chadwick, Laws and Jonathan Parker LJJ). The appellate court held that whilst the rules of domestic law, enshrined in *President of India v La Pintada Compania Navigacion SA (La Pintada)* [1985] AC 104, that there was no right at common law to interest by way of damages for late payment of a debt or to compound interest, would have entailed there was no claim here at all because there was no principal sum outstanding when the action was commenced, the principle of effectiveness of Community law required a full remedy for the loss of the use of money over time, even in circumstances where domestic law would afford no remedy. According to Chadwick LJ: *"The English domestic rules as to interest fail to provide the remedy which Community law requires. Those rules must yield to the overriding requirement that the domestic court gives full compensation."* (at para [53]). Interest should accordingly be awarded on a compound basis using the same periodic rests by which the applicable rate was calculated.

The decision of the Court of Appeal highlighted the then unsatisfactory state of the domestic rules on pre-judgment interest. The implementation of the Law Commission report on *Pre-judgment Interest on Debts and Damages* (2004; Law Com No 287), which was referred to by Chadwick LJ at para [42], would have removed the anomaly created by this case between European and domestic law. His Lordship further observed that: *"It is, I think, generally accepted that, in commercial cases at least, an award based on compound, rather than simple, interest is more likely to reflect commercial reality and to provide full, rather than partial, recompense for the loss of use of money."* (at para [43]).

The House of Lords

The highest court went much further than the Courts below, and revamped the entire law. The claimant had claims both in tort for breach of statutory duty (on the basis of the breaches of the EC Treaty) and in restitution for unjust enrichment. The case is replete with different majority and minority opinions, but on the fundamental question of interest claims for breach of contract, and in particular late payment of debts, and in tort, the majority (comprising Lord Nicholls, Lord Hope and Lord Walker) swept away the old restrictive approach of the *London, Chatham and Dover Railway* case [1893] AC 429 and *La Pintada* [1985] AC 104, and held such claims were available in principle at common law, and could embrace compound interest. A similar majority also departed from the comparatively recent decision of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, where a majority had held that *equity* had no jurisdiction to award compound interest on restitutionary claims. Here Lord Nicholls and Lord Hope held that the *common law* (which was not even argued in *Westdeutsche*) could award compound interest in restitutionary claims, such as for a mistaken payment, and that the time value of money in such cases was presumptively the cost to the claimant of borrowing the money. Lord Walker would have preferred to reach the same conclusion based on the equitable jurisdiction.

Lord Nicholls's speech

Lord Nicholls's speech is the principal speech of the various majorities, and is likely to be cited routinely in contract cases in future. It is worth examining and citing the crucial paragraphs on contractual claims for late payment of a debt at [92-100] in some detail. Having held that the claimant was entitled to claim compound interest in respect of its claim for breach of statutory duty in tort, his Lordship continued:

> **92** ... I go further, in view of the wide-ranging arguments presented to your Lordships. The common law should sanction injustice no longer. The House should recognise the remnant of the restrictive common law exception for what it is: the unprincipled remnant of an unprincipled rule. The House should erase the remains of this blot on English common law jurisprudence....
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> **93** In *La Pintada* [1985] AC 104 the House made clear that, contrary to the general understanding of the effect of the *London, Chatham and Dover Railway* case [1893] AC 429, claims for damages for interest losses suffered as a result of the late payment of money are not taboo. That is plainly right. Those who default on a contractual obligation to pay money are not possessed of some special immunity in respect of losses caused thereby. To be recoverable the losses suffered by a claimant must satisfy the usual remoteness tests. The losses must have been reasonably foreseeable at the time of the contract as liable to result from the breach. But, subject to satisfying the usual damages criteria, in principle these losses are recoverable as damages for breach of contract. This is so even if the losses consist of a liability to pay borrowing costs incurred as a result of the late payment.... And this is so irrespective of whether the borrowing costs comprise simple interest or compound interest.
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> **94** To this end, if your Lordships agree, the House should now hold that, in principle, it is always open to a claimant to plead and prove his actual interest losses caused by late payment of a debt. These losses will be recoverable, subject to the principles governing all claims for damages for breach of contract, such as remoteness, failure to mitigate and so forth.
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> **95** In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will, here as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge. There are no special rules for the proof of facts in this area of the law.
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> **96** But an unparticularised and unproved claim simply for "damages" will not suffice. General damages are not recoverable. The common law does not *assume* that delay in payment of a debt will of itself cause damage. Loss must be proved....
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> **97** The common law's unwillingness to presume interest losses where payment is delayed is, I readily accept, unrealistic. This is especially so at times when inflation abounds and prevailing rates of interest are high. To require proof of loss in each case may seem unduly formalistic. The common law can bear this reproach. If a party chooses not to prove his interest losses the remedy provided by the law is to be found in the statutory provisions....
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> **100** For these reasons I consider the court has a common law jurisdiction to award interest, simple and compound, as damages on claims.

This conclusion goes much wider than the existing statutory measures: principally section 35A of the Supreme Court Act 1981 (re-named the Senior Court Act by the Constitutional Reform Act 2005); and section 69 of the County Courts Act 1984. The 1981 was not an exhaustive code, as was made clear by section 35A(4). Likewise the new common law jurisdiction must co-exist with the long-established equitable jurisdiction to award interest, including compound interest, such as against recalcitrant trustees and other fiduciaries. Furthermore, the Late Payment of Commercial Debts (Interest) Act 1998, as amended by the Late Payment of Commercial Debts Regulations 2002 (SI 2002/1674) remains in place as a stick, which does not require court proceedings to enforce its statutorily implied term, save as a last resort.

Conclusion

As with all such dramatic re-orientations, the devil will be in the detail, and we shall have to observe the reception of the new principles by courts of first instance. Nevertheless claimants are alive to the implications of *Sempra*. Defendants may have to recalibrate existing proposals for compromise and Part 36 offers on the basis of what is deemed always to have been the law of interest. It will be crucial to future cases how rigorous the Courts will be in requiring the detailed pleading and proof with regard to the claimant's alleged borrowing costs or missed investment opportunity. CPR 16.4(1)(b) and(2) will remain the basis of statements of case. Disclosure and witness evidence will be required in most cases in the absence of general presumption (save in restitution cases) that money has a time value. Issues of remoteness and failure to mitigate will be especially difficult in cases involving impecunious or 'sub-prime' claimants.

Gerard McMeel

Commercial law update

Commercial agents; adieu le grande payoff

Lonsdale (trading as Lonsdale Agencies) v Howard & Hallam Ltd

[2007] UKHL 32; [2007] 1 WLR 2055

The House of Lords in *Lonsdale (trading as Lonsdale Agencies) v Howard & Hallam Ltd (Winemakers' Federation of Australia Inc intervening)* has now provided much needed clarity on the proper approach to calculation of compensation payable under article 17(3) of the Commercial Agents (Council Directive) Regulations 1993 ("the Regulations") upon termination of a qualifying commercial agency contract.

In *Lonsdale* the relevant agency agreement was terminated by the principal, a shoe manufacturer, in consequence of cessation of trade in a declining market for its products. It was not disputed that the period of notice of termination given was reasonable; the sole issue was the agent's entitlement to compensation under reg 17(6) of the Regulations (implementing art 17(3) of the Directive).

At first instance Judge Harris QC, sitting in the Oxford County Court, awarded Mr Lonsdale £5,000 but, having regard to his expressed doubts that anyone would have been willing to purchase the agency given the deteriorating market conditions, recorded he was 'strongly tempted' to find that no damage had been established. The Court of Appeal upheld the decision. The decision of the Court of Appeal was affirmed by the House of Lords.

The Regulations represent the domestic implementation of Council Directive 86/653 EC of 18 December 1986 ("the Directive"), the purpose of which is said to be the co-ordination of the laws of member states relating to self employed commercial agents.

As in many attempts at EU harmonisation, the United Kingdom had imposed upon its domestic legal systems concepts with which they had been hitherto unfamiliar. The payment of compensation to agents upon termination of their agencies (in circumstances not amounting to a breach of contract) was another example.

Art 17(1) of the Directive provides:

Member states shall take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraph 2 or compensated for damage in accordance with paragraph 3.

A commercial agent for the purposes of the Regulations is defined in regulation 2(1) as a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the principal), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal.

The statutory definition expressly excludes officers of companies or associations, a partner lawfully authorised to enter into binding commitments on behalf of his partners and insolvency practitioners.

The origin of the right to an indemnity under art 17(2) is, it appears, German law while the right to compensation is derived from French law. The formula for calculating the amount of the indemnity payment is specifically set out in art 17(2)(b); no such guidance is given on the approach to determination of compensation.

Art 17(3) of the Directive provides:

The commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with the principal. Such damage shall be deemed to occur particularly when the termination takes places in circumstances:

- *depriving the commercial agent of the commission which proper performance of the agency contract would have procured him whilst providing the principal with substantial benefits linked to the commercial agent's activities,*
- *and/or which have not enabled the commercial agent to amortize the costs and expenses that he had incurred for the performance of the agency contract on the principal's advice.*

Before determining the amount of compensation, it is necessary to decide exactly for what the agent should be compensated. As to this, said Lord Hoffmann in *Lonsdale*, the Directive was explicit; the agent is entitled to be compensated for the damage he suffers as a result of the termination of his relations with the principal. Looking to French law for guidance was permissible and ordinarily the aim is to place a value upon the right to be an agent. That means, principally, the right to future commissions which, using the words in art 17(3) 'proper performance of the agency contract would have procured him.' That, in Lord Hoffmann's opinion, was the right for which Directive requires the agent to be compensated.

The value of the agency relationship lies, according to Lord Hoffmann (at para [11]), in the prospect of earning commission, the agent's expectation that 'proper performance of the agency contract' will provide him with a future income stream. It is that income stream which must be valued.

In performing that valuation exercise, the court must, as Lord Hoffmann makes clear:

1. Identify what could reasonably have been obtained, at the date of termination, for the rights which the agent had been enjoying;
2. Assume, for that purpose, that the agency would have continued and that the hypothetical purchaser would have been able properly to perform the agency contract;
3. On the other hand, avoid assumptions contrary to what was the position in the real world at the date of termination. That means, among other things:
   a. discounting the future earnings by an appropriate rate of interest to reflect present value;
   b. taking into account any restrictions on disposal (assignment) of the agency by the hypothetical purchaser;

c. having regard to the market conditions in which the agency operated; a rising or declining market for the relevant goods will affect what a hypothetical purchaser will be prepared to pay;

d. recognising the effect of expenses necessarily incurred by the agent in generating the relevant commission. Prima facie, the value of the relevant agency should be fixed by reference to its net earnings because, as a matter of common sense, that is what will matter to a hypothetical purchaser.

After a review of the authorities in this jurisdiction and in Scotland, Lord Hoffmann expressly rejected adoption of what is apparently the French practice of paying compensation based on the value of two years gross commission. As he explained, whatever the practice in France (and its origins appear to lie in a market for the transfer of commercial agencies which simply does not exist in England), the method of calculation of compensation is, as the Directive makes clear, a matter for each member state to decide and in respect of which each state enjoys a margin of discretion.

What was permissible, however, (at least as a useful cross-check to the level of compensation) was to consider what an agent could obtain under a system which provided him with an indemnity, since that too would satisfy the policy of the Directive. As a condition to eligibility for an indemnity the agent should have "brought the principal new customers or ... significantly increased the volume of business with existing customers" and that the principal "continues to derive substantial benefits from the business with such customers." Where, as in *Lonsdale*, the principal went out of business and therefore derived no benefit from customers introduced or maintained by the agent, no indemnity is payable. In those circumstances, it was impossible to argue that the policy of the Directive requires a payment of twice gross commission whether the principal derived any benefit from the termination or not.

In relation to the costs of running an agency, where an agent has more than one agency, the costs must be fairly attributed to each; it is not open to him to contend that the marginal cost of the terminated agency was little or nothing because he has to see the same customers and go to the same exhibitions etc for his other agency or agencies.

Given the likely modest value of many agencies on termination, the House of Lords was urged not to adopt a principle of valuation which required potentially expensive expert valuation evidence. The valuation figure must not, however, be plucked from the air or chosen at random. Lord Hoffmann doubted the need for a full-scale valuation in every case, but the court could expect some information about the standard methodology for the valuation of such businesses.

Also relevant in the valuation process is the risk that the agent would seek to divert his former customers to another principal; where that risk appeared likely at the date of termination, it may fairly be taken into account in fixing the value.

Following *Lonsdale*, it is now clear that windfall payments dressed up as "compensation" but bearing no resemblance to the commercial realities of the relevant business operated by the principal are a thing of the past. Even where the business is hugely successful and the principal terminates the agreement to avoid payment of expensive commission on high sales volumes, the level of compensation may be indirectly capped at the amount payable under the statutory indemnity, that amount being sufficient to meet the policy of the Directive.

Richard Ascroft

Commercial litigation update

Directors' liabilities - Costs orders against non-parties

Introduction

The court has full power to determine by whom and to what extent costs of proceedings are to be paid under section 51 of the Supreme (Senior) Court Act 1981 ("SCA 1981") and CPR 48.2. It has long been understood that an order for payment of costs by a non-party under section 51(3) requires exceptional circumstances (following *Symphony Group Plc v Hodgson* [1993] 4 All ER 143, CA). However, the courts are becoming more receptive to non-party costs order applications. What may previously have been characterized as insufficiently exceptional to justify an order could now be deemed to constitute a suitable case for a non-party costs order. This is especially so in the context of claims against directors of insolvent companies. Ultimately the court must consider whether it is just to exercise its jurisdiction, and this enables the court to "pierce" the corporate veil when it considers it just to do so. It is a useful weapon to have in the litigator's armoury where the spectre of a pyrrhic victory looms. But it is highly fact sensitive. It is appropriate therefore to consider the relevant principles in the context of two recent cases:

Chantrey Vellacott v The Convergence Group PLC and others

[2007] EWHC 1774 (Ch) (Rimer J)

In *Chantrey Vellacott v The Convergence Group PLC and others* Rimer J conducted a useful review of the authorities and principles concerned (see in particular para [230] and the reference to *Dymocks* (2004) UKPC 39 and *Petromec* (2006) EWCA Civ 1038), though the facts of the case were obviously exceptional. The case concerned an application for a non-party costs order in respect of £5.6m costs incurred by the claimant under s. 51 SCA 1981 against directors of company in administration. The writer was instructed to act on behalf of one of those directors (Mrs Robinson).

Chantrey Vellacott ("CV") sued The Convergence Group Plc and associated companies ("Convergence") for unpaid invoices totalling some £200,000 to £300,000 for accountancy services rendered. Convergence counterclaimed alleging professional negligence on the part of CV which Convergence alleged caused the failure of a Greek telecommunications project. That loss of chance was estimated to be in excess of 100 million euros. Costly litigation followed. Mr Robinson was the director who was principally in charge of the litigation. Another director of Convergence included his wife, Mrs Robinson. Nine days into a trial expected to take many months, and after Mr Robinson had given evidence, Convergence concluded that the case would not succeed and entered administration (Convergence had tendered witness statements from other persons, including Mrs Robinson, who were not called). The trial collapsed resulting in judgment being entered in favour of CV on its claim and a costs bill racked up by CV in the region of £5.6m. There was no indication that Convergence would have the means to pay that bill. CV turned its direction to the directors, and brought a non-party costs order application against Mr and Mrs Robinson under CPR 48.2 and s. 51 of the SCA 1981.

Rimer J concluded that Mr Robinson should be jointly liable with Convergence for the costs of CV, but declined to make any order against Mrs Robinson. He found that the counterclaim was a "try on" and that Mr Robinson gave false evidence to the effect that CV's negligence caused the losses complained of by Convergence. He also concluded that Mr Robinson controlled the litigation throughout. He also found that Mr Robinson could properly be viewed as the "real party" behind the counterclaim, since he was in control of the litigation, he would benefit from its success and he had assisted with its funding. By contrast, he concluded that Mrs Robinson was not a central player, that she was not the, or a, "real party" behind the counterclaim, and the circumstances did not justify making an order against her. The mere fact she had been willing to act as a witness was not deemed to be sufficient. To the extent that she might be said to have lent any improper assistance to the running of the litigation the judge was not satisfied this had resulted in CV incurring the costs it was claiming.

Whilst the jurisdiction is particularly fact sensitive, the decision by Rimer J emphasizes that there are certain underlying principles which the Court is likely to apply, particularly in the context of non-party cost order applications against directors of insolvent companies. They can be summarized as follows:

1. The court may order the non-party to be liable for the costs where that non-party is viewed as a or the "real party" behind the litigation, notwithstanding the fact that the cause of action was vested in the party;
2. In deciding whether a non-party should be viewed as a or the "real party" for these purposes it is unlikely that a pure funder (the first factor) will qualify. However if the person not only funds but also controls the litigation (the second factor) or stands to benefit from it (the third factor), it may well be just to make him or her liable. Equally, a person who controls litigation (the second factor) and seeks or expects to benefit from it (the third factor) may also be in the firing line. In short, a combination of any two of the three factors renders such a person susceptible to a finding that they should be viewed as a or the "real party" and liable as a non-party;
3. Irrespective of whether or not a director could be viewed as a or the "real party", He or she may also be found liable under section 51 of the SCA 1981 if it is found that they conducted or facilitated the pursuit of an improper case. This is particularly apparent where the company does not have an arguable case and therefore it could not be said to be in the interests of the company to advance such a case (whether it be a defence or a claim). It may also apply however where the company's claim is, on the face of it, one with a real prospect of

success, but the director concerned does not have a genuine belief in it, or can be found to have conducted the litigation in a speculative or reckless manner;

4 A director should not be viewed as a likely target of a non-party costs order simply because he or she has signed a witness statement and/or given evidence in support of a claim which might otherwise be viewed as a false or bogus one. To conclude otherwise could serve to undermine the rule that a witness enjoys immunity from suit;

5 The court will usually need to be satisfied that there is some causal nexus with the costs incurred and the conduct complained of. In an exceptional case, such as the case where assets are moved from a company in frustration of a judgment, the court may be satisfied that an order is appropriate, since in those circumstances the conduct complained of has caused the applicant to be unable to recover the costs incurred from the party to the proceedings. In some form or other, therefore, some causal nexus will need to be made out, or capable of inference.

Sims v Hawkins

[2007] EWCA Civ 1175 (Rix LJ, Keene LJ and Lloyd LJ)

The amounts involved in this case were more modest (of the order of tens of thousands), and as such it may provide a better illustration of how the non-party costs order regime could be applied in more routine small company cases.

At first instance Mr Sims (of no relation to the writer) succeeded in persuading His Honour Judge Havelock-Allan QC that a non-party costs order should be made against Mr and Mrs Hawkins from a date shortly before trial. The underlying litigation had been pursued by Mr Sims against a company of which Mr and Mrs Hawkins were the shareholders and the sole director and secretary respectively. The company ceased to trade during the litigation and in any event before the date from which the judge at first instance concluded a non-party costs order should run. The judge concluded that whilst the defence might have started as being genuinely pursued on behalf of the company it ended up being pursued to trial substantially for the interests of the directors such that the Court was entitled to treat the directors as being the "real party" at that time. The critical factor appeared to be the fact that Mr and Mrs Hawkins had funded the company's defence of the claim and a substantial motivation in causing the company to continue to defend the claim was so that these monies could be recovered by them. He concluded that Mr and Mrs Hawkins should have realized shortly before trial that there was the potential for it to be argued that this was their purpose and that they were exposed to a non-party costs order application.

Mr Sims appealed to the Court of Appeal, where he sought to obtain an order that Mr and Mrs Hawkins should be liable for the costs of the whole litigation (which was in excess of £100k). Mr Sims did not seek to suggest that the judge had erred in law, so his task was to persuade the Court of Appeal that the judge had erred in the exercise of his discretion. On the question of costs this is always a difficult task. The Court of Appeal dismissed the appeal and concluded that the judge's exercise of his discretion could not be faulted.

The Court of Appeal was also critical about the manner in which the parties had conducted the litigation, particularly having regard to the relatively modest sums involved. At end of the judgment of Rix LJ (who gave the leading judgment) there are some interesting observations to the effect that the parties should have pursued the litigation in order to obtain reasonable remedies, and that litigation should not be treated as an exercise in attrition. Useful dicta to have in mind when confronted with a particularly belligerent opponent (or perhaps client!).

Hugh Sims

Banking law update

'Possession' - book debts

RBS held a charge on O Ltd's book debts, which as created was a floating charge. HMRC was a preferential creditor of O Ltd for VAT. Before its liquidation, O Ltd's assets were hived down to subsidiaries, with part of the consideration payable by the subsidiaries being deferred. RBS released its charge on the assets transferred to the subsidiaries in exchange for undertakings by O Ltd's solicitors to pay RBS the consideration monies they received. The subsidiaries also later assigned the uncollected book debts to RBS. The consideration paid and payable by the subsidiaries was held to be a book debt of O Ltd within RBS's charge. The arrangement for payment to RBS amounted in substance to the realisation of its security, not merely payment of O Ltd's liabilities. RBS had therefore taken possession of the book debts before O Ltd's liquidation, so by s.96(2) of the Companies Act 1985 preferential debts were to be paid in priority to RBS. But the book debts assigned to RBS by the subsidiaries had been released from RBS's security and could not be regarded as property subject to RBS's charge on the company's book debts within s.196(2) when received by RBS. *HMRC v RBS* [2007] EWCA Civ 1262 (29.11.07).

Company director – personal liability

A director signing for a company may be (and on the facts of the case was) making an implied representation that the company had the capacity to meet the payment terms set out in the document. The director's signature of the document on behalf of the company is sufficient for the purpose of s.6 Statute of Frauds (Amendment) Act 1828 for the director to be personally liable to the creditor if, to the director's knowledge, that representation is untrue. *Contex Drouzhba Ltd v Wiseman* [2007] EWCA Civ 1201 (20.11.07).

Guarantee – primary or secondary liability

Outside the banking context there is a strong presumption against giving the words "on demand" in a guarantee, the effect of creating an independent primary liability. But on the facts of the case that presumption had been rebutted, particularly because the guarantee which required payment "immediately upon demand unconditionally" provided for a certificate in prescribed form to be conclusive and binding as to the sum payable under the guarantor, save for manifest error. The guarantee therefore imposed an unconditional primary liability, not a secondary liability to pay only if the principal debtor was liable to pay. So defences which might have been available to the principal debtor were not defences to the guarantor's liability. *ILG Capital LLC v Van Der Merwe* [2007] EWHC 2631 (Ch) (13.11.07).

Negligent advice – limitation

Mr S claimed damages for negligence and breach of statutory duty under section 62 of the FSA 1986 from SFS for negligently advising him in January 1997 to transfer his accrued benefits in an occupational pension scheme into a personal pension fund with Scottish Equitable in 1997. On the facts it was held that SFS (through its representative) had failed to meet the regulatory requirements relevant at the time in relation to pension transfers in a number of respects, including failing to undertake and discuss with Mr S an analysis comparing the company and personal pension scheme. This had caused Mr S loss. But his claims were time-barred. Time had not started running immediately when the transfer was effected because that depended on the performance of the Scottish Equitable fund. A contingent risk was not enough. But by 1999 Mr S was worse off due to falls in annuity rates, and by May 2000 at the latest he knew there was a real possibility his damage was caused by the failure to give him correct advice. *Shore v Sedgwick Financial Services* [2007] EWHC 2509 (QB) (8.11.07).

CCA – connected lender liability

In section 75(1) of the Consumer Credit Act 1974 (by which the creditor under a debtor-creditor-supplier agreement is jointly and severally liable for misrepresentation or breach of contract by a supplier in relation to a transaction financed by the credit agreement) the word "transaction" includes a transaction which takes place and is performed abroad and is governed by foreign law. A UK credit card issuer can therefore be liable under s 75 if its cardholder uses the card abroad to pay for goods or services where the supplier of the goods or services is liable for breach of contract or misrepresentation. *OFT v Lloyds TSB & others* [2007] UKHL 48 (31.10.07).

Mortgage - priority

The defendants resisted Natwest's mortgage possession claim on the grounds that a lease which passed to them on the death of their grandparents had priority to the bank's mortgage. The lease had been created at the same time as the property had been charged to the bank. The solicitor who had acted for the bank in taking the mortgage had known the grandparents were occupying the property and wished to remain living there. But the fact of the lease had not been drawn to the bank's attention at the time and the grandparents had later signed an acknowledgment that they had occupied the property without the bank's consent. The lease had not been impliedly surrendered by the grandparents moving out because on the facts there was no unequivocal act necessarily inconsistent with the continuance of the lease. But as the bank had not known of the proposal for the lease, its mortgage took priority (*Abbey National v Cann*, 1991). The solicitor's knowledge could not be imputed to the bank, because he had been instructed to act only in taking the mortgage and his knowledge of the lease had not come to him whilst acting in that capacity. *Hardy & Natwest Bank v Fowle* [2007] EWHC 2423 (Ch) (26.10.07).

Payment – breach of mandate

The company sued Natwest for making 16 transfers from its account to its sole director/shareholder, Mr M, without authority. Natwest made a CPR Part 20 against Mr M to recover any money held not to have been paid with authority, as money paid by mistake. The company's claim (for breach of contract - not negligence) failed. There was nothing in the bank mandate which prevented the bank from accepting oral instructions from Mr M and even if there had been, Mr M had sufficient authority to vary the mandate to authorise payment on his oral instructions. Although Mr M denied giving oral instructions and the bank had no records of receiving any, the evidence of the bank's staff as to their usual practice was preferred to that of Mr M who could not explain why he had felt able to dissipate the funds from his personal account if he had not authorised the transfers. Had it been necessary to consider it, the Part 20 claim would have succeeded. The money would have been recoverable from Mr M who had not changed his position by paying the money away, since by doing so he had merely altered the identity of those to whom he owed money. *Hill Street Services v Natwest Bank* [2007] EWHC 2379 (Ch) (19.10.07).

Insolvency – protective awards

Protective awards made in favour of former employees of a company in liquidation by an Employment Tribunal pursuant to section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") after the date on which the company went into liquidation, were not provable as debts of the company and were not payable as expenses of the liquidation because on the date on which the company went into liquidation there was no certainty that the employees had an enforceable claim against the company. *Day v Haine* [2007] EWHC 2691 (Ch) (16.10.07).

Guarantee - misrepresentation

In a brochure describing the finance it provided, the claimant stated that no personal guarantees were required from company directors and all that was required was a Warranty to cover fraud. But the "Warranty" which the claimant required the defendant to sign in fact indemnified the claimant against losses. It also contained a declaration that the signatory had not relied on any representations. The defendant admitted that he probably did not read the declaration. When sued on the warranty, he argued that he had been led to sign by the misrepresentation in the brochure. It was held that he had been lulled into a false sense of security by the brochure and as a result did not consider the effect of what he was signing. The "Warranty" was in substance a guarantee, so the representation in the brochure was false. The non-reliance clause did not help the claimant because the evidence did not go so far as to establish that it believed the declaration of non-reliance was true, so there was no estoppel to prevent the defendant relying on the misrepresentation in the brochure. *Quest 4 Finance v Maxfield* [2007] EWHC 2313 (QB) (12.10.07).

Guarantee - construction

In 2003 Mr H signed an all monies guarantee of the liabilities of four companies, including Value Rentals Group (VRG) and Homebuy Direct UK (HDUK). When the parent company went into administration, HDUK owed the claimant £338k for certain advances ("Coin TV Debt") and VRG owed the claimant £24k in relation to debts incurred to third parties but assigned to the claimant. Although Mr H had been assured in 2001 that he would not have personally to guarantee the Coin TV Debt, it was held that those discussions did not lead to any contractually binding agreement and were inadmissible in construing the scope of the 2003 guarantee which did cover the Coin TV Debt. However, on its true construction the guarantee did not apply to VRG's indebtedness to the claimant in respect of assigned debts, particularly because the guarantee gave Mr H the right to terminate the guarantee "in relation to agreements made between [VRG] and ING after the date notice is received" and it could not have been the intention of the parties that Mr H could terminate the guarantee in that respect but would remain liable in respect of assigned debts. *ING Lease v Harwood* [2007] EWHC 2292 (QB) (10.10.07).

Freezing order - breach

A freezing order was made on behalf of HMRC in respect of Mr AR's assets including £2m in a bank account with Lloyds TSB. Drawings for certain living expenses and costs were permitted by the order. The bank agreed with AR, without notifying HMRC, that the majority of the funds would be invested in certain interest bearing accounts. This actually increased the available funds. AR was convicted of money laundering offences. A confiscation order was made. HMRC applied to the court to find the bank in contempt for allowing the funds to be moved, although it did not ultimately seek any penalty. The bank argued that there had been no breach of the order, since it remained throughout AR's debtor. It was held that there had been a dealing with the asset contrary to the order because the bank had removed the "identifying characteristic" of the debt owed by the bank to AR by moving the funds between accounts. The bank's act was deliberate, though well-intended, and had therefore been a contempt. *R v Lloyds TSB Bank* [2007] EWHC 2393 (Admin) (2.10.07).

CCA – hire agreement

TRM supplied photocopiers to retailers under Location Agreements by which the retailers were to place the copiers on shop floors for use by customers who paid a copy charge for which the retailer accounted to TRM after deducting a commission. Lanwall, a competitor of TRM, removed TRM's copiers from some retailers' premises and replaced them with its own. TRM claimed Lanwall was inducing the retailers to breach their contracts with TRM. Lanwall argued there was no breach by the retailers because TRM's agreements were regulated hire agreements within the Consumer Credit Act, so the retailers had a statutory right under s101 CCA to terminate early. That submission was rejected. A hire agreement predicates payment by the hirer. TRM's agreements were not hire agreements since there was no obligation on the retailer to make any payment at all if no-one used their copiers. *TRM Copy Centres v Lanwall Services* [2007] EWHC 1738 (QB) (18.7.07).

Interest – implied term

Mr H had a current account to which HBOS debited various charges. Mr H claimed repayment of the charges, debit interest referable to them whilst his account was overdrawn, and interest on all sums awarded to him at 28.8%, compounded monthly, on the basis that was the bank's own unauthorised borrowing rate and there was an implied term that such interest would be paid by the bank on unauthorised debits. Without admitting liability, the bank refunded the charges and debit interest, but with only simple interest on those sums at 8%. Mr H's claim for compound interest at 28.8% was dismissed. It was not necessary to imply the alleged term since a bank customer is protected by the availability of statutory interest in legal proceedings. *Halliday v HBOS Plc* [2007] EWHC 1780 (QB) (8.6.07).

Neil Levy

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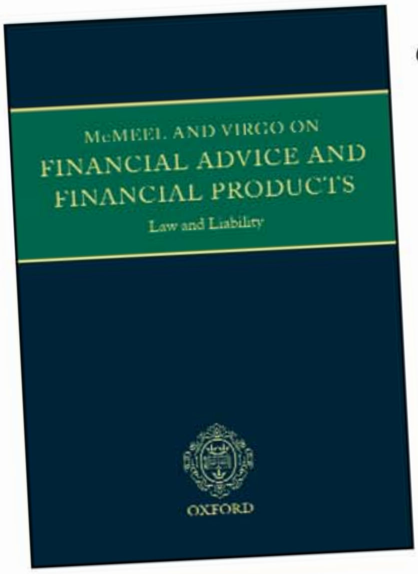

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The Commercial Team

Adrian Palmer QC
adrian.palmer@guildhallchambers.co.uk

Malcolm Warner
malcolm.warner@guildhallchambers.co.uk

Ralph Wynne-Griffiths
rwg@guildhallchambers.co.uk

John Virgo
john.virgo@guildhallchambers.co.uk

Neil Levy
neil.levy@guildhallchambers.co.uk

Martha Maher
martha.maher@guildhallchambers.co.uk

Jeremy Bamford
jeremy.bamford@guildhallchambers.co.uk

Richard Ascroft
richard.ascroft@guildhallchambers.co.uk

Matthew Wales
matthew.wales@guildhallchambers.co.uk

Gerard McMeel
gerard.mcmeel@guildhallchambers.co.uk

Hugh Sims
hugh.sims@guildhallchambers.co.uk

Katie Gibb
katie.gibb@guildhallchambers.co.uk

Henry Stevens
henry.stevens@guildhallchambers.co.uk

Stefan Ramel
stefan.ramel@guildhallchambers.co.uk

Daisy Brown
daisy.brown@guildhallchambers.co.uk

Hamish Munroe Chief Executive
hamish.munroe@guildhallchambers.co.uk

Dan Cuthbertson Principal Team Clerk
dan.cuthbertson@guildhallchambers.co.uk

Guildhall Chambers, 23 Broad Street, Bristol BS1 2HG

DX 7823 Bristol Tel. 0117 930 9000 Fax. 0117 930 3800

e-mail firstname.surname@guildhallchambers.co.uk

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