Some Contractual Considerations……

Our articles in this, our eighth, newsletter address some recurrent issues of contract law – recovering damages for ‘avoided’ losses; the incorporation of certain terms in a contract – and some considerations concerning the governing law of contracts and the law of duress in relation to contracts. I hope they are of interest.

Romie Tager Q.C.

RECOVERING DAMAGES FOR “AVOIDED” LOSS

It is commonly said that damages cannot be recovered for a loss which has been avoided. This view stems from the principle that in tort the object of an award of damages is to put the injured party, as nearly as possible, into the position in which he was if he had not suffered the wrong, and in contract to put him into the position in which he would have been had the contract not been breached.

There is a well-known exception to the principle that avoided loss cannot be recovered, namely, where a person has been compensated by insurance. A claim can still be maintained, and the wrongdoer is not entitled to a reduction in damages on the basis that the injured party has already been indemnified.

There are, however, less well known, but very important exceptions to the supposed rule against recovery of “avoided loss”. This article considers some of them, particularly in the light of the recent decision of the Court of Appeal in Thomson v. Christie Manson & Woods [2005] EWCA Civ 555, [2005] PNLR 713.

Collateral benefit

In some cases, the loss suffered by the Claimant will be remedied as a result of a cause completely independent of the defendant and his breach of duty. A good example of this is the case of Gardner v. Marsh & Parsons [1997] 1 WLR 489. In 1985 the plaintiffs bought a flat with a structural defect. They sued their surveyor on the basis that the defect had reduced the value of the flat. However, in 1990 the landlords of the building repaired the defect. The trial judge nonetheless awarded
the plaintiffs damages to reflect the diminution in value. The Court of Appeal upheld this award on the basis that the landlord’s action had not flowed inexorably from the negligence of the surveyor. The Court held that the benefit received by the plaintiffs was collateral, and should be ignored as being res inter alios acta.

The Court of Appeal’s decision was in line with earlier authority. In Hussey v. Eels [1990] 2 QB 227, the defendant vendors negligently misrepresented to the plaintiff purchasers that the bungalow they were selling was not affected by subsidence, which of course, it was. Following purchase the plaintiffs were unable to fund the remedial works and so demolished the bungalow and sold the plot with planning permission for a considerable profit. In their action for damages against the defendants for the diminution in value of the bungalow arising from the subsidence, the defendants maintained that the loss was negated by the profit on the sale. The Court of Appeal found for the plaintiffs. Lord Justice Mustill asked the pithy question whether the negligence which caused the loss also caused the profit. Since it did not, damages could be recovered.

A better deal obtained
Sometimes action taken by a claimant appears, at least superficially, to negate entirely the consequences of the defendant’s breach. For example, a defendant buyer may fail to purchase property in the form of goods or shares, on the stipulated date or for the agreed sum. The claimant seller is entitled to damages to reflect the difference between the agreed sum and the market price at the time when the obligation was to be fulfilled. It is entirely irrelevant that the market moves to the seller’s advantage thereafter, and he resells at a far higher price than he might have obtained from the original buyer. The reason, as explained by Lord Wrenbury when delivering the decision of the Privy Council in Jamal v. Moolla Dawood [1916] 1 AC 175, is that the retention of the property is the speculation of the seller. If the market rises, he reaps the reward; if the market falls, he stands the loss.

In such circumstances, in a sense, loss crystallises at the time of breach, and subsequent events are immaterial.

Missing a better deal
Frequently a party to a transaction who is unaware of some important point (for example a hidden liability of a company whose shares are being purchased) will maintain that if only he had known the true position he would not have proceeded with the transaction. Equally often, in truth that party would have proceeded despite the reservation, or a Court may find that to be the case. Can damages be recovered in such a case where it has to be assumed that the claimant would have gone ahead in full knowledge of the facts? The answer depends on the circumstances of the case, but provided that the claimant can establish a substantial chance that a better deal might have been had, damages should be awarded on a loss of chance basis. Thus in Cade Pty v. Thomas & Simmons (1998) 71 SASR 571 solicitors for the purchaser of shares in a company failed to advise about certain special rights in the company’s Articles; if the purchaser had known about those adverse rights, although he would still have
purchased he might have been able to negotiate a more favourable price. The Full Court of South Australia awarded damages on that basis.

A very extreme case of a claim for damages for loss of a potentially better deal is the recent decision of the Court of Appeal in *Thomson v. Christie Manson & Woods* [2005] EWCA Civ 555, [2005] PNLR 713. The claim was for damages against an auctioneer who was allegedly negligent in the description applied to various vases. They were described as “A pair of Louis XV porphyry and gilt-bronze two handled vases”. The Court of Appeal found that there was no negligence, but Lord Justice May considered what the position as to damages would have been had liability been established

“[130] I conclude that, on the assumptions which I am making, the measure of damage in this case would be the difference between what Ms Thomson paid for the vases and their value at auction in 1994 if Christie’s had described them as “probably Louis XV”. There is no evidence of what this second value would have been. So, if the assumptions represent the outcome of this appeal on matters of negligence, a further hearing to assess the damages would be needed.”

This reasoning contemplates a finding that although a claimant has probably obtained what he bargained for, where he has relied on a representation which is probably true but which ought to have been qualified by an expression of doubt, he may have a claim because a real, if unlikely adverse possibility relating to the subject matter could have been relevant to the price paid. In the event, in *Thomson*, this difficult exercise in quantification did not arise because there was no breach of duty by the auctioneer.

**Conclusions**

Whenever a loss is suffered, before dismissing the possibility of recovery of damage because that loss has apparently been extinguished, it is always worth considering the test posed by Viscount Haldane LC in *British Westinghouse Ltd v. Underground Railway Co Ltd* [1912] AC 673, namely, whether the benefit said to have accrued to the claimant, and to have extinguished the loss, has arisen independently of the relation between the parties, and independently of mitigation. If it has, then a claim may well survive the intervention of the supposed benefit.

**Jeremy Cousins QC**
CONTRACTS: THE INCORPORATION OF UNUSUAL TERMS

A stipulation that is particularly onerous will not be given effect as a term of an unsigned contract unless reasonable steps were taken to bring it to the notice of the party against whom it is asserted. Thus, in *Spurling Ltd v Bradshaw* [1956] 2 All ER 121, 125, Denning LJ commented that:

“the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient”

So, in *Thornton v Shoe Lane Parking Ltd* [1971] 1 All ER 686, the claimant went to park his car at a multi-storey car park owned and operated by the defendants. At the entry to the car park there was a sign stating the charges and that parking was ‘at owner’s risk’; he then drove in past a machine, which dispensed tickets. The ticket bore the time of entry and, in small print, the words:

‘This ticket is issued subject to the conditions of issue as displayed on the premises’.

Inside the premises were notices displaying the conditions, which purported to exclude liability to customers, not only for damage to cars but also for personal injuries. On his return to collect his car, the claimant was injured, due partly to his own negligence and partly to that of the defendants. The defendants argued that the conditions excluded their liability, but the Court of Appeal held that the ticket came too late, as by that stage the claimant had driven up the entrance ramp. A further ground for the decision was that that term was not fairly brought to the claimant’s attention.

In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348, the defendant advertising agency required photographs of the 1950s for a presentation for a client. On 5 March 1984 they telephoned the claimants, who ran a library of photographic transparencies and with whom they had not dealt before, inquiring whether the claimants had any photographs of that period which might be suitable for the presentation. On the same day the claimants sent to the defendants 47 transparencies packed in a bag with a delivery note which clearly specified that the transparencies were to be returned by 19 March and which under the heading ‘Conditions’ printed prominently in capitals, set out nine printed conditions in four columns. Condition 2 stated that all transparencies were to be returned within 14 days from the date of delivery and that ‘A holding fee of £5 plus VAT will be charged for each transparency which is retained by you longer than the said period of 14 days’. The defendants accepted delivery of the transparencies but it was unlikely that they read any of the conditions. The defendants did not use the transparencies for their presentation but instead put them to one side and forgot about them. The transparencies were not returned to the claimants until 2 April.
The claimants sent the defendants an invoice for £3,783.50 being the holding charge calculated at £5 per transparency per day from 19 March to 2 April. The defendants refused to pay and the claimants brought an action against them for the amount of the invoice. The Court of Appeal ruled that Condition 2 was an unreasonable and extortionate clause, which the claimants had not brought to the attention of the defendants, and therefore it did not become part of the contract and the defendants were not bound by it.

These principles have their limitations of course. In an important dissenting judgment in *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265, Hobhouse LJ said:

“it is necessary before excluding the incorporation of a clause in limine to consider the type of clause it is. Is it a clause of the type which you would expect to find in the printed conditions? If it is, then it is only in the most exceptional circumstances that a party will be able to say that it was not adequately brought to his notice by standard words of incorporation. If a party wishes to find out precisely how a clause of a normal sort has been worded, he should ask for the actual text of the clause.”

He added that, if every clause were to be given close scrutiny, to determine if it is “entirely reasonable, then one is distorting the ordinary mechanisms of making contracts and an element of uncertainty will be introduced”.

Can ‘onerous’ be equated with ‘unusual’? Are ‘unusual’ clauses within the dicta above? (By ‘unusual’ one means clauses not commonly encountered in the given commercial sphere.) In *HiIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, Rix LJ doubted if the Interfoto principle extended to clauses which were merely unusual.

In *Ocean Chemical Transport Inc v Exnor Craggs Ltd* (2000) 1 Lloyd’s Rep 446, the Court of Appeal held that a term in a contract for the sale of bunkers, which provided that all liability on the seller’s part would cease unless a suit was brought within six months after delivery of the goods, was neither extreme nor unexpected.

In *Jonathan Wren & Co Ltd v Microdec Plc* (1995) 65 Con LR 157, it was said, “it is unlikely that the approach adopted in the Interfoto case would be applied to a written contract actually signed by the parties.”

In *Bankway Properties v Dunsford* [2001] EWCA Civ 528 Arden LJ thought it not clear that the Interfoto principle applies to a signed contract and in *Ata v American Express Ltd* (unreported; October 7, 1996), Rix J (as he then was) was quite specific that it did not apply.

Accordingly, the position may be summarised as follows:

1. If the contract is signed, it is likely that the parties will be bound, notwithstanding the existence of unusual or onerous terms;
2. If the contract is not signed, and the relevant clause is of the type that you
would reasonably expect to find in the contract, it is probably binding.
As ever, it all depends on the facts.

STEPHEN BOYD

DURESS AND THE LAW APPLICABLE TO CONTRACTS

On 24 March 2006, Christopher Clarke J handed down an extensive judgment in the
Commercial Court on a claim for summary judgment/strike out under CPR Parts 24
and 3.4(2)(a), (b) respectively. The case itself, *Halpern v Halpern* [2006] EWCH 603
(Comm) (“*Halpern*”) is reported on Lawtel. Juliette Levy acted as Junior Counsel for
the Claimants and was led by Romie Tager QC.

This case is of note for several reasons. First, it is a prime example of how cases
which involve multiple disputes of fact and complex matters of law can still be
summarily dealt with by the Court under the CPR. A careful application under CPR
24 and/or 3.5, supported by strong evidence which deals with the relevant factual
issues in dispute can produce the desired result, despite strong resistance on the
grounds that the Court is being asked to conduct a mini-trial. In the instant case,
despite the reliance by the Defendants on a multitude of defences, including
fraudulent misrepresentation, mistake, frustration, a failure to comply with a condition
precedent and duress, only 1 defence survived the application, that of duress.

Secondly, the case deals with two important legal issues which are highlighted in this
article. It should be noted that both these legal issues are the subject of appeals to the
Court of Appeal.

Issues
1. Whether Jewish Law can be the governing law of a contract.
2. Whether a party can avoid a contract procured by duress in circumstances
where he cannot offer the other party substantial *restitutio in integrum*.

Background
The First Claimant and the Defendants were siblings who were unable to resolve their
inheritance disputes following the death of their parents. All the parties were devout
Orthodox Jews and accordingly agreed to submit their inheritance disputes to
arbitration by an *ad hoc* Beth Din (a Jewish Court of Law) made up of 3 Rabbis,
pursuant to two arbitration agreements. The arbitration proceedings were conducted
primarily in Zurich and were compromised following settlement discussions. The
compromise was set out in a written compromise agreement entered into by the
Second Claimant and the First Defendant on behalf of all the parties (“the compromise agreement”), which did not on its face specify which law applied to it. In
addition, the compromise agreement was also made an award of the arbitration proceedings.

Under the terms of the compromise agreement, the Defendants agreed *inter alia* to transfer assets to the value of £2.3 million to the Claimants. It was a condition precedent of the compromise agreement (under Clause 4, set out in the Judgment at paragraph 16) that the Claimants would either return to the Defendants or destroy any documentation, records, notes and tapes in their possession and that of third parties (including the Rabbis) which related to the inheritance disputes, the arbitration proceedings and the settlement discussions and, in addition, procure certification of compliance of this condition precedent by the Rabbis.

Despite fulfilment of the condition precedent by the Claimants (through destruction of all relevant documents and tapes) and certification thereof, the Defendants failed to comply with their principal obligation under the compromise agreement and transfer assets to the value of £2.3 million to the Claimants. Accordingly, the Claimants brought an action in this jurisdiction claiming damages for the Defendants’ repudiation of the compromise agreement.

The Defendants defended the action on inter alia, the following grounds:-

(i) That the compromise agreement was governed by Jewish law, under which a contact procured by duress is void and not voidable at it is under English law. The Claimants’ response to this defence was *inter alia*, that applying the Court of Appeal decision of *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals* [2004] 1WLR 1784, Jewish law is not the law of a country and therefore under the Rome Convention cannot be the law applicable to the compromise agreement.

(ii) That the compromise agreement had been procured by duress and could therefore be rescinded by them. The Claimants response to this defence was *inter alia*, even assuming the duress alleged was made out, having complied with the condition precedent under the compromise agreement and destroyed all their records and notes, the Defendants could not offer the Claimants substantial *restitutio in integrum* and therefore could not rescind the compromise agreement.

**Governing Law of the Compromise Agreement**

Under English law (pursuant to the Contracts (Applicable Law) Act 1990, s.2(1) and Sch 1), the Rome Convention on the Law Applicable to Contractual Obligations (“the Rome Convention”) determines the law governing most contracts. Article 1(1) of the Rome Convention provides that:

“*The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of differing countries*”
In *Shamil Bank* the Court of Appeal held that that wording, taken in conjunction with article 3(1) (“A contract shall be governed by the law chosen by the parties”) and the reference to choice of a “foreign law” in article 3(3), make it clear that the Rome Convention as a whole only contemplates and sanctions the choice of law of a country (see paragraph 48 of Potter LJ’s judgment and also paragraphs 27 to 29 and 37 to 39 of Morison J’s first instance Judgment [2003] EWCH 2118 (Comm); [2003] 2 All ER (Comm) 849), not any non-national system of law such as the *lex mercatoria* or Sharia Law.

*Shamil Bank* concerned financing agreements which contained a governing law clause which stated that:

“Subject to the principles of the Glorious Sharia’a, this agreement shall be governed by and construed in accordance with the laws of England”.

The Defendants in *Shamil Bank* relied upon this clause to found their defence to the application against them for summary judgment, following default by them of their payment, that on the true construction of these governing law clauses, the agreements were only enforceable to the extent that they were valid both in accordance with English law and the principles of Sharia. Therefore since the agreements did not comply with Sharia law, in that they were disguised loans at interest, they were void according to the rules and principles of Sharia.

The Court of Appeal, rejected this contention and upheld Morison J’s first instance judgment for the Claimants.

In *Halpern*, Clarke J applied *Shamil Bank* on the basis that there is no relevant distinction between Jewish law (known and referred to as *Halachah*) and Sharia law, and accordingly rejected the Defendants’ contention that the compromise agreement was governed by Jewish law (see paragraphs 48, 49, 50, 64 to 77).

In so doing, Clarke J also rejected the Defendants attempts to distinguish *Shamil Bank* on the basis that Jewish law is a settled and clearly defined set of rules, which the parties had impliedly incorporated into the compromise agreement and that incorporation was no different to the incorporation of a codified system of rules, such as the Hague Rules or the Warsaw Convention into a contract governed by English law. In *Shamil Bank* the Court of Appeal rejected this argument on the basis that the doctrine of incorporation can only sensibly operate when the parties have by the terms of their contract specifically identified the “black letter” provisions of an international code or foreign law or set of rules apt to be incorporated as terms of the contract. Indeed, even if the doctrine could be applied, the most that could achieved thereby is to enable the court to apply English law as the governing law of the contract into which foreign rules have been incorporated (see for example *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] QB 933, cited by Potter LJ at paragraph 51 in *Shamil Bank*).

Accordingly, when construing and applying those rules, where there is doubt or ambiguity, it would be appropriate for the court to consider evidence from foreign law experts on the manner in which the relevant provisions have been interpreted and
applied in their “home” jurisdiction. In other words, this is still only an end to interpretation by the English court when applying English law and rules of construction to the contract in issue. In Halpern, the application of the doctrine of incorporation could not in itself assist the Defendants, since it if was applied in the instant case, where no terms had been identified, the effect of the implication sought would be to “substitute halachah law for … English law” (per Clarke J at paragraph 77) which would in itself be inconsistent with English law (or Swiss law) being the applicable law of the compromise agreement under the Rome Convention.

It should be noted that Clarke J held that the decision of Rix J (as he then was) in Al Midani v Al Midani [1999] 1 Lloyd’s Rep 923, in which Rix J held that an arbitration agreement entered into by the heirs of a wealthy Saudi family was probably governed by either Sharia law or such law as modified by the law of Saudi Arabia, and that Islamic or Sharia law was to be regarded as a branch of foreign law, could not stand in the light of Shamil Bank.

The Court of Appeal will now consider Shamil Bank in the context of inter alia Jewish law and it appears, be invited by the Defendants to uphold Al Midani (supra). At a time when the Commission has published revised proposal for the regulation on choice of law for non-contractual obligations (COM(2006) 83 final) (“Rome II”) it is apt that the Court of Appeal will be considering issues relating to the Rome Convention and provide more guidance on it.

**Duress and Restitutio in Integrum**

In Halpern, Clarke J held that there was a distinction between equity, where as a condition of granting rescission where there had been undue influence, equity would require *restitutio in integrum*, at least in substance, and the common law remedy of rescinding a contract procured by duress, which would not necessarily follow the equitable requirement that the party seeking the remedy could restore the other party to substantially the same pre-contract position (see paragraph 110).

Accordingly, even though Clarke J had found that as a result of the Claimants’ compliance with the condition precedent under the compromise agreement, *restitutio in integrum* did not appear to be possible, the Claimants still failed in obtaining judgment against the Defendants on the basis of the distinction drawn between the equitable and common law positions and remedies available there under in relation to undue influence and duress respectively.

There does not, in fact, appear to be a reported case where the requirement for *restitution in integrum* was considered in the context of the avoidance or rescission at common law of a contract induced by duress: see *Duress and Undue Influence and Unconscionable Dealing* by Prof. Nelson Enonchong at paragraph 28-012. Yet the author goes on to state:

“The lack of discussion on this issue in cases of rescission for duress should not be taken to mean that *restitutio in integrum* is not a requirement for rescission on the ground of duress... In any event, *restitutio in integrum* is
clearly a requirement in the case of rescission for other common law vitiating factors such as fraudulent misrepresentation.”

The Defendants had not argued before Clarke J that under English law, if a victim of duress cannot restore the other party to substantially the same position he nonetheless does not lose his right of revocation. Indeed, it appeared that one of the reasons why the Defendants had argued that Jewish law applied to the compromise agreement, was because under Jewish law, an agreement entered into undue duress is void and not merely voidable. Therefore, if Jewish law applied, the issue of restitution in integrum would not be relevant and would not assist the Claimants.

Since Clarke J did not invite any submissions from the parties on this point of law and it is therefore (save as set out above) not dealt with in his judgment, the matters which will exercise the Court of Appeal to a much greater extent. It would however, be surprising if the Court of Appeal accepted that there was a distinction at common law between the illegitimate consequences of fraudulent misrepresentation on the one hand (under which a contract cannot be rescinded if restitutio in integrum could not be substantially achieved) and the illegitimate pressure that constitutes duress on the other hand (which did not justify the requirement for restitutio in integrum) – Watch this space!

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