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Summer 2015

Chancery – Commercial Newsletter

Summer 2015

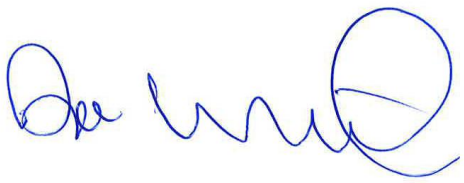
Welcome to this, our summer newsletter.

I am happy to report that Selborne's in-house seminar programme continues apace, not only serving up some intellectual stimulation but also some good wines. I look forward to seeing you over a glass in the near future.

In the meantime I commend to you our summer newsletter. It contains a number of lively articles, some of which have been written by those who featured in the cases examined, and all offer some unique insights.

In this newsletter Romie Tager QC and Alexander Goold ask and answer the question "what is a signature?", Stephen Boyd tells a cautionary tale of building works gone wrong, Neil Mendoza explores the recent decision on the duty of care to be exercised by Companies House, and Alice Hawker warns of the current state of the law on the defence of illegality.

As always, I welcome any comments that you may have.



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What is a signature?

ROMIE TAGER QC

ALEXANDER GOOLD

Introduction

In the recent case of *Ramsay v Love*[1], Morgan J decided that the celebrity chef and restaurateur, Gordon Ramsay, was bound by a personal guarantee for the rent of one of his businesses, the York & Albany, on the edge of Regent's Park, near Camden. This was even though, as was common ground by the time of the trial, Ramsay's signature had been made by a machine, a Ghostwriter, and put there by or on the instructions of his father-in-law, Chris Hutcheson.

Morgan J was able to reach his decision on the facts, based on the wide general authority that Ramsay had given his father-in-law at the outset of their relationship, one he had not countermanded since and that extended to entering into business (as opposed to domestic) transactions on his behalf personally.

In this first of two articles that consider some of the legal issues that arose in that case, we consider what, in law, amounts to a signature for the purposes of a number of well-known and frequently encountered statutory provisions: the requirement under Section 4 of the Statute of Frauds 1677 ("Section 4") for a guarantee to be in writing and signed by the guarantor or his agent; the execution of deeds and the disposition of an interest in land under Sections 1(3) and 2(3), respectively, of the Law of Property (Miscellaneous Provisions) Act 1989 ("LP(MP)A") and the execution of documents by a company under Section 44 of the Companies Act 2006 ("Section 44").

Definition

The dictionary definition of the word 'signature' includes a person's name written in a distinctive way as a form of identification in e.g. authorising a cheque or document or concluding a letter and derives from the medieval Latin, denoting a marking on sheep.

The very early cases

Although the precise origins of the principle of signatures are not clear, they appear to trace back at least as far as *Lord Lovelace's Case*[2]. This appears to have recognised that a person required to seal a document need not affix his seal to it personally if he agrees to be bound by the seal of another and, more generally, that the identity of the person who affirms a legal document need not correspond to the identity of the person who affixes a mark upon that document to signify that affirmation.

The principle in *Lord Lovelace's Case* was subsequently extended to situations where one person actually affixes another's signature to a document. In *Nisi prius coram Holt*[3], it was held that the law will not distinguish a document signed by a person's own hand from a document signed in one's name by the hand of another acting on one's behalf. The signature is equally valid if it is affixed in either manner. Thus by 1706, *Nisi*

[1] [2015] EWHC 65 (Ch)
[2] (1632) Jones, W 268, 82 Eng. Rep. 140
[3] (1706) Holt KB 461, 90 ER 1154

prius coram Holt and *Lord Lovelace's Case* had established the fundamental basis for the principle of signatures.

Some have traced this principle even earlier to *Combes's Case*[4]. As reported by Coke, this held that when one person has authority to act for another, he should do so in the name of the person on whose behalf he acts. This decision firmly established that an agent could, and often must, affix his principal's signature to legal documents to conduct business on the principal's behalf.

Section 4 of the Statute of Frauds 1677

Section 4 prevents a claim on a guarantee:

> "*…unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.*"

Ramsay was not a case that turned on Section 4, as the guarantee was also a contract of indemnity. However, in order to understand the Court's approach to the question of what is capable of amounting to a signature for the purposes of Section 4, it is necessary to understand the Court's view of the requirement for there to be a signature in order for there to be a valid contract of guarantee.

Section 4 was last considered at the highest level by the House of Lords in *Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering Spa*[5]. The contrasting speeches of e.g. Lord Bingham on the one hand and Lord Hoffman on the other, tend to show a degree of difference of judicial opinion, if not ambivalence or circumspection as to the continued utility of Section 4 and the potential for a substantively unmeritorious resort by a party to a lack of signature in order to avoid liability under a guarantee otherwise freely entered into.

More recently, in *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd & Another*[6], Tomlinson LJ emphasised that the Section 4 must, if possible, be construed in a manner that accommodated accepted contemporary business practice which, if adopted, could not be used as a vehicle for injustice by permitting parties to break promises supported by consideration and on which reliance had been placed. However, he did also emphasise that its purpose was to prevent the court having to resolve disputes as to oral utterances.

As Lord Birkenhead had observed in *United States v Motor Trucks Ltd*[7]:

> "*the Statute of Frauds is not allowed by any Court administering the doctrines of equity to become an instrument for enabling sharp practice to be committed*".

[4] (1613) 9 Coke Reports 75a, 77 E.R. 843
[5] [2003] 2 AC 541
[6] [2012] EWCA Civ 265 at paragraphs 22 and 29
[7] [1924] AC 196 at 200

In *Steadman v Steadman*[8] this observation was echoed by Lord Simon in the context of a discussion of the doctrine of part-performance, when he said that

> "*[e]quity would not, as it was put, allow the Statute of Frauds 'to be used as an engine of fraud'*".

Whilst recognizing that Section 4 remains the law for good reason, it is, perhaps, a combination of (i) the accretion of over 300 years of authority –particularly those from times when most of the population was unable to read or write; (ii) a reflection of long-standing judicial concern about its potential for injustice; and (iii) a wish to reflect the realities of current business practice; that has favoured a liberal approach to determining whether something is sufficient to amount to a signature for the purposes of Section 4.

What amounts to a signature for the purposes of Section 4?

Thus, for something to amount to a signature for the purposes of Section 4,

- It need not be a signature in the popular sense, i.e. written in manuscript by the hand of the person signing. It is sufficient if it has been printed, written, or typewritten by the guarantor or his agent; initials, a stamp or a person's mark are sufficient –see *Andrews & Millett The Law of Guarantees*[9] and *Phipson on Evidence*[10].

- By way of example, in *Goodman v J Eban Ltd*[11] (Denning LJ dissenting), a rubber stamp version of a solicitor's signature, placed on his bill of costs by him personally, was a signature for the purposes of the then Solicitors' Act –see Lord Evershed MR[12], whose analysis proceeded by analogy with Section 4[13].

- The guiding principle is whether the signature authenticates the whole or memorandum as evidencing a binding agreement –see *Caton v Caton*[14].

- The signature may be given by a lawfully authorised agent –see the wording of the section itself.

- The agent may be instructed orally and sign in the name of the principal –see Lord Mansfield CJ in *Emmerson v Heelis*[15].

[8] [1976] AC 536 at 558
[9] 6th Edition 3-024
[10] 18th Edition 40-08
[11] [1954] QB 550
[12] (1867) LR 2HL 127at 557
[13] It is to be noted that, in that case, Section 65(2) required either signature by the solicitor or one of the partners of the firm in his own name of that of the firm. Unlike Section 4, there was no ability for an agent to sign on behalf of his principal, whether in his own name and with or without making clear the capacity in which he did so, or in the name of his principal.
[14] Lord Chelmsford LC at 139, Lord Westbury at 143, Lord Colonsay at 146, and, Lord Cranworth at 148
[15] (1809) 2 Taunt 38 at 48

In *Ramsay*, Love's case was that providing it was done with his authority, the 'wet-ink' version of Ramsay's signature to the guarantee produced by Hutcheson using the Ghostwriter,

- *was* Ramsay's authentication of the whole as a binding agreement; and/or,
- *was* Ramsay's signature as if he had written it with his own hand; and
- satisfied the requirements of Section 4.

This was not challenged. Accordingly, *Ramsay* does not in fact determine whether a signature by a Ghostwriter amounts to a signature for the purposes of Section 4. On the facts, had it not amounted to a signature, providing it had been authorised, Ramsay personally would have been bound by the guarantee as it was also a contract of indemnity.

The position under the Law of Property (Miscellaneous Provisions) Act 1989

Section 1(3) LP(MP)A

For documents executed as a deed, Section 1(3) LP(MP)A provides, so far as is relevant, as follows:

> "…
>
> *(3) An instrument is validly executed as a deed by an individual if, and only if—*
>
> *(a) it is signed—*
>
> *(i) by him in the presence of a witness who attests the signature; or*
>
> *(ii) at his direction and in his presence and the presence of two witnesses who each attest the signature…*
>
> *(4) In subsections (2) and (3) above "sign", in relation to an instrument, includes*
>
> *(a) an individual signing the name of the person or party on whose behalf he executes the instrument; and*
>
> *(b) making one's mark on the instrument,*
>
> *and "signature" is to be construed accordingly*
>
> …"

Given the definition of 'sign' in subsection (4) it is, in our view, likely that a signature produced by a Ghostwriter, even if operated on a person's behalf by his agent, would satisfy the requirements of execution as a deed. Again, this was not challenged and, accordingly, *Ramsay* does not determine whether a signature by a Ghostwriter amounts to a signature for the purposes of Section 1(3) either. On the facts, had it not

amounted to a signature, providing it had been authorised, Ramsay personally would have been bound by the guarantee as it was also a contract.

Contrast Section 2 LP(MP)A

By way of contrast, for contracts for the disposition of an interest in land, Section 2 LP(MP)A provides, so far as is relevant, as follows:

> "*(1) A contract for the sale or other disposition of an interest in land can only be made in writing…*
>
> …
>
> *(3) The document incorporating the terms… must be signed by or on behalf of each party to the contract.*
>
> …"

In *Firstpost Homes Ltd v Johnson*[16], Peter Gibson LJ held that, for a document to be 'signed' for the purposes of Section 2 LP(MP)A, it required a person's manual signature. He said[17]:

> "*…it is an artificial use of language to describe the printing or the typing of the name of an addressee in the letter as the signature by the addressee when he has printed or typed that document. Ordinary language does not, it seems to me, extent so far.*"

He then quoted the dissenting judgment of Denning LJ in *Goodman v J Eban Ltd*, referred to above:

> "*In modern English usage, when a document is required to be 'signed by' someone, that means that he must write his name with his own hand upon it.*"

He went on to say that:

> "*..I do not accept that authorities on what was a sufficient signature for the purposes of the Statute of Frauds and [the predecessor of Section 2 LP(MP)A 1989] should continue to govern the interpretation of the word 'signed' in Section 2 of the Act of 1989.*"

Hutchison and Balcombe LJJ gave concurring judgments.

In *Mehta v J Pereira Fernandes SA*[18], Judge Pelling QC said of an email that was not signed separately but was described in the header as having come from an individual's email address[19]:

[16] [1995] 1WLR 1567
[17] at 1575G-H
[18] [2006] EWHC 813 (Ch)
[19] at 29

"I have no doubt that if a party creates and sends an electronically created document then he will be treated as having signed it to the same extent that he would in law be treated as having signed a hard copy of the same document. …if a party or a party's agent sending an e-mail types his or her or his or her principal's name to the extent required or permitted by existing case law in the body of an email, then, in my view that would be a sufficient signature."

On the facts he did not consider the individual's address in the email header to be sufficient signature. We do not see that decision, whether in the terms of the passage quoted (which was obiter) or because it was a first instance decision, as displacing the decision of the Court of Appeal in *Firstpost Homes Ltd*.

In *Ramsay* itself, Morgan J did comment that statements in *Firstpost Homes Ltd* and *Goodman v J Eban Ltd*:

"…were not designed to distinguish between signing by use of a pen held in the executing party's hand as distinct from the use of a signature writing machine…"

However, as the law stands, we think that a signature produced by a Ghostwriter would be unlikely to satisfy the requirements of Section 2(3) LP(MP)A, although Morgan J's comments would give some support to an argument that it might.

The position under Section 44 Companies Act 2006

By way of further contrast, Section 44 provides, so far as is relevant, as follows:

"(2) A document is validly executed by a company if it is signed on behalf of the company–

(a) by two authorised signatories, or

(b) by a director of the company in the presence of a witness who attests the signature.

(3) The following are "authorised signatories" for the purposes of subsection (2)–

(a) every director of the company, and

(b) in the case of a private company with a secretary or a public company, the secretary (or any joint secretary) of the company.

…

(5) In favour of a purchaser a document is deemed to have been duly executed by a company if it purports to be signed in accordance with subsection (2).

A "purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.

…"

Unless the deeming provisions of subsection (5) apply to protect a purchaser in good faith for valuable consideration, (including a lessee or mortgagee), in our view, a signature produced by a Ghostwriter would be insufficient to satisfy subsection (2)(a) – as one of those signing was not an authorised signatory but a machine, or subsection (2)(b) –as there was no company director in the witness' presence, only a machine, assuming it was even used in front of the witness.

In *Ramsay*, his signatures on behalf of his companies, which were also made using a Ghostwriter, did not satisfy Section 44(2), (although on the face of it, the lease was signed by two authorised signatories of those companies, Ramsay and Hutcheson), as they did not satisfy the requirements of subsection (2)(a) –Ramsay's signature had been made by the Ghostwriter, indeed so had Hutcheson's, who also had a signature card for the machine.

Further, pursuant to Section 44(5), Love's predecessor in title was not "*a purchaser*" in whose favour the Lease was deemed to have been duly executed by the companies merely by purporting to be signed in accordance with subsection (2); Love's predecessor in title was not acquiring an interest in property but granting one.

Nonetheless, by the time of the trial, the companies had confirmed that they would treat the lease as binding on them, no doubt on the basis that they had concluded they would have difficulty in challenging them, anticipating strong argument on ratification had they done so.

Conclusion

It is unhelpful to have to give the lawyer's answer 'it depends' to the question 'what is a signature?' but we think that it is the proper reflection of the current state of the law, depending on whether one is concerned with the signature of a guarantee, execution of a deed, disposition of an interest in land or execution of a document by a company.

We think it is undesirable that, seemingly in an attempt to take a common sense approach to the question of signature, the decision of the Court of Appeal in *Firstpost Homes Ltd* has produced a result that we see as being out of sync with modern life and modern ways of doing business, particularly as it concerns such a commonplace event as the disposition of an interest in land.

We also think that, regardless of the statutory provision for which signature is being sought, as a matter of good practice it behoves non-contentious practitioners to take care and be punctilious to ensure, so far as possible, that both the client's and counter-party's signatures are made and witnessed in accordance with the relevant statutory provision, preferably in front of the solicitor, with an attendance note being made to that effect.

ROMIE TAGER QC

ALEXANDER GOOLD

Dawoodi v John Zafrani and Kashif Zafrani (a cautionary tale from the TCC list at Central London, HHJ Bailey, 22 January 2015)

STEPHEN BOYD

Mr Dawoodi, who I represented, owns a house (Blackacre) in Wood Green. It is his main residence in the UK, but he travels abroad extensively and has homes in other countries. He resides at the Property at least once a month usually for about a week.

Blackacre encompasses at its southern extremity part of a narrow path (the Path), some 37 inches wide, which extends east from the road.

Such paths are a fairly typical feature in North and South London developments built in the late 19th and early 20th centuries. Their purpose was to permit deliveries to the rear of the adjacent residential properties, primarily of coal.

By the time Mr Dawoodi acquired Blackacre, the Path was no longer in use and had been blocked off at the road end by the previous owner, who explained that it had been used as an access route by burglars.

Mr Dawoodi therefore took the opportunity to build a substantial shed which not only went up to the brick wall at the end of his garden, which was on the northern side of the Path, but extended over it up to the flank wall of Whiteacre.

John Zafrani ("JZ"), who resides in the USA, purchased Whiteacre at auction as an investment, intending to demolish it and build a new house.

He entrusted the development project to his nephew, Kashif ("KZ").

KZ was given erroneous advice by an architect that the boundary with Blackacre was along that property's garden wall so that the Path was within Whiteacre.

The works, which included the excavation of a basement, started without planning permission, service of a party wall notice or the consent of the local authority's Building Control.

The Defendants erected scaffolding on the Path without obtaining or even seeking Mr Dawoodi's consent.

The contractors carried out the works in a very slipshod way and without any regard to the rights of the adjoining occupiers.

In his judgment, HHJ Bailey said that KZ had been wholly ill-suited and ill-equipped to supervise or control the project.

The works resulted in serious subsidence to and in part collapse of the Path and a significant area of ground to the rear of Blackacre, including the shed.

Mr Dawoodi claimed damages for various heads, which the Judge dealt with as follows:

The scaffolding

This head was dealt with on the negotiated damages basis, leaving the judge to ascertain such a sum of money as might reasonably have been demanded by Mr Dawoodi from JZ as a quid pro quo for permitting the encroachment: see per Neuberger LJ in *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2007] L&TR 6 [25] citing Mr Anthony Mann QC in *AMEC Development v Jury's Hotel (UK) Ltd* (2001) 82 P&CR 22

The judge referred to a number of authorities, including *AG v Blake* [2001] 1 AC 268, *Wynn-Jones v Bickley* [2006] EWHC 1991, *Sinclair v Gavaghan* [2007] EWHC 2256 and *Stadium Capital Holdings (No 2) Ltd v St Marylebone Property* [2012] 1 P&CR 7. He took from the latter the principles distilled from the authorities by Vos J [69] that the court must assume a reasonable grantor and grantee, the appropriate measure to be the price a reasonable grantee would pay for user and the fact that the grantor holds a trump card is a relevant factor which should be taken into account. Further, the fact that one party might have refused to agree is irrelevant.

There were two periods over which the scaffolding was in place, separated by some 14 months. In the judge's view, it was appropriate to consider the appropriate figure for negotiating damages at the start of each of the two periods as different factors applied.

As at August 2009, a negotiation for a fee for the erection of scaffolding would have involved Mr Dawoodi giving up part of his land and involve the presence of workmen on the scaffolding which would provide easy access to his back garden. He would not have had a trump card as it would have been possible for JZ to demolish the old house without scaffolding, but it would have been less convenient.

JZ should have obtained a party wall agreement, which would have resulted in the grant of a license at a fee. There was no evidence of what such a fee might have been.

The only evidence of license fees came from MR Dawoodi's surveyor who referred to the Church of England rate of £200 per linear metre per week, which the judge thought was very high and out of proportion in the context of a house in North London.

For the first period of four months, the judge held the appropriate fee was £750 per month, totalling £3,000.

By the start of the second period, the position had changed. Firstly, the incompetent way in which the contractors had proceeded without regard to the neighbours' rights was only too apparent; in particular, there had been the subsidence causing the collapse of the shed. Secondly, it would have been impracticable to construct the new house without erecting scaffolding.

For the second period of five months, the judge awarded damages at the rate of £1,500 per month, totalling £7,500.

Debris and building materials

The contractors made free with Mr Dawoodi's land and, notwithstanding Mr Dawoodi's complaints, treated the Path as if it was part of Whiteacre. They placed debris and building materials on the Path for some two years. They should have sought a license, but failed to do so.

The judge awarded £200 per month, totalling £4,800.

'Project manager'

Given his peripatetic lifestyle and his justifiable concern about that the contractors might do next, the judge accepted that Mr Dawoodi was entitled to £2,000, which he had paid his project manager to keep an eye on the site and report developments to him.

Costs of reinstatement

The judge accepted that significant work was necessary to reinstate the garden and erect a new shed. He allowed £31,000 + VAT for this, having regard to the three quotations provided by Mr Dawoodi.

Temporary sheds

The judge accepted that Mr Dawoodi needed a shed and that a new permanent structure could not be erected until the back of the garden had been reinstated. Mr Dawoodi had put up a temporary shed nearer his house using shuttering ply at a cost of £1,850, anticipating that the dispute with JZ would soon be resolved. However, the litigation continued and the first temporary shed grew damp. Accordingly, he took it down and replaced it with a second temporary shed made of marine ply at a cost of £2,622. The judge took the view that account should be taken of the fact that the marine ply would still be usable when the time came to build a permanent shed at the end of the garden. He considered that £2,000 was an appropriate award for both temporary sheds.

Aggravation and inconvenience

The judge made an award of £500 which reflected the fact that Mr Dawoodi did not live at Blackacre all the time and had been awarded the £2,000 he had paid to his project manager.

Aggravated damages

The judge referred to *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2014] 1 P&CR 5 at [26] where Patten LJ said, "Aggravated damages may be awarded in cases of trespass where the defendant's conduct has been high-handed, insulting or oppressive", citing *Horsford v Bird* [2006] UKPC 3 and made an award of £1,000, which reflected the appalling manner in which the work had been carried out, but taking account of the fact that Mr Dawoodi did not live at Blackacre all the time and the award to the project manager.

Exemplary damages

Three years into the litigation, and only a few months before the trial, KZ installed a drain on the Path and a few weeks later a downpipe leading down to it. These were flagrant trespasses committed when there was no doubt about the ownership of the Path and the Judge accepted that they fell within the second limb referred to in *Rookes v Barnard* [1964] AC 1129 as being calculated by KZ to make a profit in excess of any compensation that might be payable.

Total damages amounted to £59,000.

The moral of the story is that anyone purchasing land, particularly developers, should always obtain legal advice as to the position of boundaries, and ensure compliance with planning law, Building Regulations and the Party Wall Act before embarking on any demolition or construction work.....and employ competent contractors!

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All because of a simple little letter "s"

NEIL MENDOZA

"*It was bluebell time in Kent*". Thus began one of the most famous judgments of the late and great Lord Denning, as a tale of rural tranquillity unfolded into the cataclysmic events causing the mayhem and nervous shock about which so many lawyers and law students have read and become painfully familiar. Lord Denning's views featured again more recently in another tale of cataclysmic events causing mayhem, albeit of a wholly different kind. South Wales was the setting for this disaster and the judgment of Edis J. in *Sebry –v- Companies House and The Registrar of Companies* [2015] EWHC 115 (QB) dealt with the financial havoc the flowed from a very simple and innocent bit of carelessness on the part of a civil servant performing a fairly mundane task in the depths of Companies House in Cardiff.

Taylor & Sons Ltd was a very old established engineering company with a business stretching back into the late 18th century. Having survived world wars, various recessions (both global and local) the company had pulled though, restructured, refinanced and faced an optimistic future with full order books. All looked fine and the managing director was off in the Maldives enjoying a well-deserved rest and celebrating his wife's 50th birthday. Meanwhile, a wholly unconnected company called Taylor & Son Ltd became the subject of a winding up order. The Insolvency Service sent the Order to Companies House but (not then unusually) omitted the number of the defunct company. Companies House had a clear written policy for its staff that in the event of such an irregularity the order should be rejected and returned to the Insolvency Service. However, following the practice that had developed amongst the staff at Companies House, and in flagrant disregard of the policy, an employee decided to look on the computer systems to identify and fill in the missing company number. Of course, the inevitable happened – the employee alighted on the wrong company, Taylor & Sons Limited, wrote down its number and then proceeded to enter its details on the computer system as having been wound up. A very simple mistake indeed, all over a simple letter "s".

The holiday in the Maldives was dramatically cut short as a result of phone calls concerning the wholly false news that the Company had been wound up. Although the mistake was corrected on the Register in a matter of days it was too late, the bad news was out there. In the modern world of information technology and the Internet, the registered liquidation was picked up by credit reference agencies almost instantaneously and then by their customers in turn; it spread through the world of engineering commerce like an electronic black death. Suppliers refused to continue to trade on credit, existing creditors required immediate repayment. Efforts by the Company to explain what had occurred fell on deaf ears; there was simply a blanket refusal to accept that Companies House would make "that sort of mistake". Struggling to meet financial demands from every angle, the agreed bank facilities were drawn down and then limits exceeded. It all became a self-fulfilling prophecy and in a matter of very few weeks, the true demise of the Company became inevitable.

Having taken an assignment of the cause of action of the Company against Companies House and the Registrar, the former Managing Director, Mr. Sebry, launched proceedings claiming damages. The Defendants refused to accept liability

contending that their functions arose out of the discharge of a statutory obligation and, in the circumstances, that they owed no common law duty of care. The trial concerned preliminary issues as to the existence of that duty and whether any breach had actually caused the Company to go under.

The trial was fought tooth and nail over 10 days, with the Defendants standing firm that they simply owed no duty to the Company arising out of a plain breach of even their own internal policies.

However, the case is particularly interesting in its analysis of the law of negligence and its development since *Hedley Byrne v Heller* [1963]. In his judgment, Mr. Justice Edis observed that he had been provided with over 1000 pages of authority. He considered in detail the three approaches to the determination of whether or not a duty of care exists, namely "incrementalism" (essentially based on developing precedent), assumption of responsibility and the "three stage Caparo test" – requiring a consideration of foreseeability, proximity and whether it was fair, just and reasonable for a duty of care to exist.

The Judge tackled the issue by considering each of the three tests – an approach mandated by Lord Bingham in the House of Lords in *Commissioners for Customs and Excise v Barclays Bank plc.* [2007]. The Judge was of the view that where the Registrar undertakes to alter the status of a company on the Register, which it is his duty to keep, in particular by recording a winding-up order against it, he does assume a responsibility to that company to take reasonable care to ensure that the winding up order is not registered against the wrong company. It is not to be thought that this involves a duty to check and verify the information that is provided to Companies House for registration, but only to carry out the registration process accurately.

The Defendants were particularly concerned that if a duty was owed it would be owed in respect of too broad a class of entities, namely every company on the Register and that this might open the "floodgates" to claims. However, the Judge observed that here the duty was owed to one individual company whose identity was readily discoverable; the observations concerning other companies was no different from a hospital owing a duty to each patient that it treats, even though such a duty would be owed to many thousands of individual patients over the course of any year. That fact would not be a reason for denying that the hospital ever owes any duty – a very large number of duties can be owed to a very large number of people but the class is limited and its members ascertainable at the particular stage when treatment is given.

The imposition of a duty was foreshadowed by *Ministry of Housing and Local Government v Sharp* [1970] where a search of the local land register had produced an inaccurate certificate as a result of a clerk's negligence. With there being liability in negligence in that case, and the decision being regarded with approval in various other authorities (both here and abroad) the imposition of duty owed by the Registrar of Companies could accurately, and properly, be described as "incremental".

For the late Taylor and Sons Limited, each of the three posited tests for the existence of a duty of care in a novel situation provided the same answer. Over the weeks following the decision on liability, the press has had a field day, articles appearing across the national broadsheets and in the red tops. On the one hand, it makes good copy with

an easy to follow dramatic tale; on the other, it fuels the fire of those complaining about incompetence in government departments. Most lay readers view the outcome as being plainly correct and something that should have been a foregone conclusion; they are surprised that Companies House resisted liability, either so forcefully or at all. However, such a superficial approach masks the complexity of this area of the law of tort and the usefulness of the judgment in dissecting the development of the authorities and the relevant legal principles to be applied in ascertaining the existence of a common law duty of care.

In closing submissions on behalf of the Claimant, the final words went to Lord Denning in the Sharpe case. There, Lord Denning considered the Defendant's position that there was no common law duty of care saying that in those circumstances "unless there was an action for breach of statutory duty, the incumbrancer would be left without a remedy - which is unthinkable." Fortunately for Mr. Sebry, the Judge's analysis resulted in the same conclusion.

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THE DEFENCE OF ILLEGALITY: *ex turpi causa non oritur actio*

ALICE HAWKER

If two highwaymen cannot agree about the division of their spoils, will the Court determine the legal consequences of their illegal act? In the case of *Everet v Williams* (1893) 9 LQ Rev 197, two highwaymen entered into a partnership agreement to split the proceeds of robberies. When Everet became suspicious that his partner in crime was in fact stealing from his share of the profits, he took him to court for an account of profits. The Court of Exchequer considered the claim '*both scandalous and impertinent*', dismissed the case and eventually both claimant and defendant were hanged.

Almost 300 years on from the Highwaymen's Case, *ex turpi causa non oritur actio* (the defence of illegality) has been described by Lord Neuberger as a '*difficult and important topic… involving something of a spectrum of views.*' Despite the Supreme Court considering this topic on three occasions in the past year, yet still it remains unsettled, confused and confusing.

Holman v Johnson

At first blush it may seem surprising that the Courts would ever adjudicate where the claim concerns matters that are illegal. The answer is set out in the case of judgment of Lord Mansfield CJ in *Holman v Johnson* (1775) 1 Cowp 341 at [343]:

> "*No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendentis.*"

The reliance test: Tinsley v Milligan

In contractual or tortious claims, there is a real tension in the recent case law as to the correct test applied to determine whether the Courts will intervene at all. On one hand, there is the "reliance test" established in *Tinsley v Milligan* [1994] 1 AC 340. The House of Lords unanimously disapproved the "public conscience" test – i.e. whether it would be against the public conscience to decide the issue between the parties – and asked whether the claimant *relied upon* (i.e. asserted by way of pleading or evidence) facts that disclosed illegality in order to establish the claim. In other words, if the illegal aspect of the claim could be extricated without the cause of action toppling, the defence of illegality was not made out.

In the case of *Madoff International Securities Limited v Raven* [2013] EWHC 3147 at [309], in which Ian Clarke, leading Lara Kuhl, acted for Mr Flax, a company director, Popplewell J applied the reliance test and held that the defendant must establish "sufficient connection" between the illegality and the claimant's claim. Although

Popplewell J acknowledged that some decisions of the Court of Appeal have hinted at a more flexible approach, he applied the reliance test having regard to *Tinsley v Milligan* as well as *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 (although *Stone & Rolls* is itself a difficult case that has fallen prey to many interpretations).

Public policy considerations

On the other hand, Lord Hoffmann created mischief by his observation in *Gray v Thames Trains Ltd* [2009] 1 AC 1339 that '*the maxim ex turpi causa expresses not so much a principle as a policy. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situations.*' Furthermore, Sir Anthony Clarke MR, in *Gray v Thames Trains*, noted that the *Tinsley v Milligan* principle is less readily appropriate in the context of tort cases than contractual or property cases, and thus posed the question as to whether there ought to be a different test in the context of property rights. In light of such examples of fresh judicial thinking since *Tinsley v Milligan* the Law Commission declined to recommend statutory reform and encouraged further judicial reform instead.

The idea that the Courts should balance policy rather than apply the reliance test gained further traction in *Hounga v Allen* [2014] UKSC 47. The Supreme Court unanimously allowed an appeal against the Court of Appeal's judgment that an illegality defence defeated a claim for damages arising from a complaint of unlawful discrimination, where the claimant had been privy to her own trafficking. Although the reliance test had been applied to a claim in tort (*Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391) Lord Wilson took up the opportunity to set out why, in the majority's view, the reliance test was not definitive in claims in tort. Instead, Lord Wilson asked (1) what is the aspect of public policy which founds the defence of illegality and (2) is there any *other* aspect of public policy to which the application of the defence of illegality would run counter? Thus, Lord Wilson undertook a balancing exercise of competing public policies and held that the public policy in support of the application of the defence should give way to the public policy to which its application was an affront.

A rule of law or a discretionary power?

Lord Sumption took the chance to steer the test back towards the reliance test in *Les Laboratoires Servier and anor v Apotex Inc and ors* [2014] UKSC 55. In a claim for damages under an undertaking given in English proceedings, the defendant argued that it was against public policy to award to Apotex damages for being prevented from selling a product whose manufacture in Canada was illegal there. Lord Sumption stated at [22]:

> "*The application of the ex turpi causa principle commonly raises three questions: (i) what acts constitute turpitude for the purpose of the defence? (ii) what relationship must the turpitude have to the claim? (iii) on what principles should the turpitude of an agent be attribute to his principal, especially when the principal is a corporation?*"

The first and second questions are relevant to this discussion. Regarding the first question, Lord Sumption was satisfied that acts must be criminal or 'quasi-criminal'. In

Les Laboratoires, the particular acts did not constitute turpitude that engaged the defence.

As to the second question, Lord Sumption made the following points, albeit *obiter dicta*. The reliance test does not make the application of the illegality defence dependent on a value judgment about the significance of the illegality or the consequences for the parties of barring the claim. This follows from Lord Sumption's observation that the defence of illegality is a rule of law and not a discretionary power. It is based on public policy and not the perceived merits between the parties as to the particular dispute, or achieving proportionality between the claimant's conduct and their loss. Thus it is bound to confer capricious benefits on defendants, some of whom have little to be said for them in the way of merits.

Lord Toulson dissented. He made no criticism of the Court of Appeal in *Les Laboratoires* for considering whether public policy considerations merited applying the doctrine of illegality, and stated that in doing so it had taken a similar approach to the Court in Hounga v Allen.

The Court of Appeal's best efforts to reconcile *Tinsley*, *Hounga v Allen* and *Les Laboratoires* in *R (on the application of Best) v The Chief Land Registrar* [2015] EWCA Civ 17 at [51 – 61] are unconvincing. Sales LJ held that the culmination of case law demonstrated that there is not a broad discretion in deciding whether illegality has an impact on the relief sought: the Court must identify, in the specific context, a particular rule which reflects the law in an appropriate way. This explanation ignores the underlying tensions as to which analysis should be applied, and the Supreme Court has since recognised that those cases and their interrelationship merit further examination.

To be continued: Jetivia SA and anor v Bilta

In the very recent decision of *Jetivia SA and anor v Bilta (UK) Limited (in liquidation) and ors* [2015] UKSC 23, the Supreme Court drew out the tensions between the approach in *Les Laboratoires* and *Hounga v Allen*. Lord Sumption distinguished the latter judgment in *Jetivia* as a 'competing public policy'.

Lord Neuberger stated that *Jetivia* was not the case to decide the approach to the defence of illegality: it was not determinative of the outcome because the illegal acts of the directors and shareholder could not be attributed to Bilta, and there had been little argument on the subject. Lord Neuberger held that *Les Laboratoires* provided a basis for saying the Supreme Court had recently affirmed the reliance test, whereas *Hounga v Allen* provided scope to argue that it had been rejected. Indeed, Lord Neuberger stated that the Supreme Court should address this '*difficult and controversial issue*' as soon as appropriately possible. Unsurprisingly, Lord Sumption stood by his judgment in *Les Laboratoires* in *Jetivia*, and rehearsed the reasons for this judgment. Lord Toulson and Lord Hodge treated the defence of illegality as a primary question, and stated that public policy applied, to the extent that statutory policy relating to directors' interests conflicted with the illegality defence.

The reliance principle in equity

The principle behind the application of the defence of illegality in contract and tort claims is not only important in its immediate context, but may also affect its application in equity. The general maxims of *ex turpi causa non oritur actio* and *in pari delicto potior est conditio defendentis* (where both parties are equally wrongful the position of the defendant is stronger) apply in equity: the defence of illegality may operate equally in relation to unjust enrichment.

However, the defence of illegality is subject to three exceptions in equity: (i) the parties are not equally culpable; (ii) withdrawal during the *locus poenitentiae*; and (iii) the claimant can establish a proprietary claim without relying on the illegality. The third exception may look familiar; it applies the reliance principle established in *Tinsley v Milligan*. This has been criticised by Burrows as '*complex, technical, capable of producing injustice, and, in some respects, uncertain.*'

The Law Commission has recommended statutory reform to the defence of illegality as it applies to trusts, in order to override *Tinsley v Milligan*. However, as I said above, the application of the defence in other contexts – whether contract, tort, or unjust enrichment – has been left to judicial reform. Thus, any consideration by the Supreme Court would have wide-ranging effects in equity also, particularly if *Tinsley v Milligan* is overruled and replaced with a balancing exercise of competing public policy.

Conclusion

Until much-needed clarity is brought to bear, the law remains in a state of topsy-*turpi*…

If you are met with a defence of illegality then consider whether you can establish the claim independently of any illegality involved in the relevant transaction. Conversely, if you are considering pleading a defence of illegality, do not overlook whether the claimant has to rely on their own illegality in order to establish the claim or whether, instead, the illegality is part of the factual matrix, which can be removed from the claim without it toppling. As the law stands, it reflects the celebrated statement of principle in *Holman v Johnson*, which was premised on the fact that the Court will not lend its aid to a man *who founds his cause of action* on an immoral or illegal act.

However, be warned! The Courts have shown an eagerness to balance policy considerations – consider whether these can be used to assist your position.

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