



Geoffrey Vos QC

## When the cat's away

Having spent nearly 28 years in Chambers at 3 Stone Buildings, the clerks are enjoying a well-earned respite from organising my life. I was elected Chairman of the Bar Council with effect from 1st January 2007, and thereby took on my first full time job in all those years. But it will not be long before my term of office will come to an end, and I shall be back at my desk in Chambers – and the clerks will be back on duty! The 31st December 2007 is not that far away...

## And aboriginal remains

Meanwhile, those left behind in Chambers have been very busy. Norman Palmer and Oliver Hilton acted for the Tasmanian Aboriginal Centre in its application for the return of aboriginal remains forming part of the Natural History Museum's collection. Gilead Cooper QC was also instructed on behalf of the TAC when the Museum commenced its own action in the Chancery Division. The dispute was eventually resolved in a mediation undertaken by Lord Woolf – and the remains were duly returned to Tasmania...

## The Golden Strait: Or Crystal Balls and the Calculation of Damages

The recent case of *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha* [2007] UKHL 12 required the House of Lords to consider the difficult question of how far, in assessing damages for breach of contract, the calculation should take account of events which occurred after the innocent party has accepted the repudiation. The issue split the Court, provoking powerful dissents from Lords Bingham and Walker.

The facts of *The Golden Strait* were as follows. By a charterparty entered into in July 1998, the appellant shipowners chartered their vessel, *The Golden Strait*, to the respondent charterers for a period

of seven years. Clause 33 of the agreement gave both parties a right to terminate if war or hostilities broke out between two or more of a number of named countries, including the US, the UK and Iraq. On 14 December 2001 the charterers repudiated the contract by re-delivering the ship to the owners, who accepted the repudiation (thus putting the contract to an end) on 17 December 2001.

The matter was referred to arbitration. The shipowners claimed damages for the whole of the amount that would have become due to them under the remaining four years of the charter (giving credit for the amount they could have earned

by chartering the ship elsewhere). In response, the charterers argued that, on the outbreak of the second Gulf war on 20 March 2003, they would have exercised their contractual right to cancel the agreement and, accordingly, the shipowners should only be entitled to damages for the period from their acceptance of the repudiation to the time when the charterers would have terminated the charterparty.

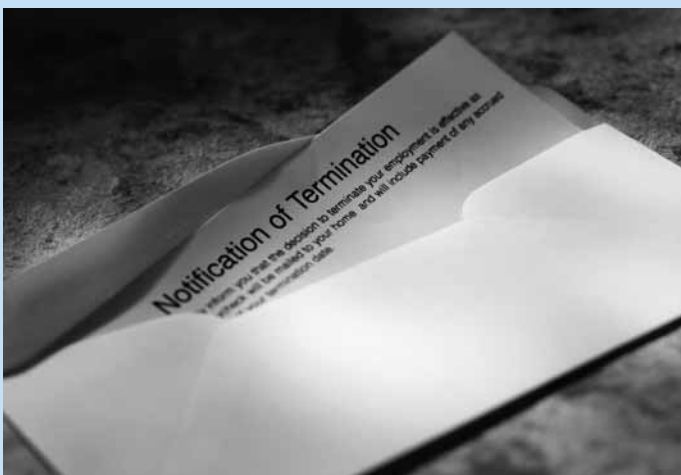
The case illustrated a tension between two competing principles. The first is the principle of certainty, finality and ease of settlement, which suggested that the charterers should not be entitled to point to the later occurrence of the war. As the shipowners' right to damages had crystallised on their acceptance of the charterers' repudiation, the value of that right should not be affected by later events.

Set against this was the principle of compensation, which underpins the whole of the law of damages. This requires that the innocent party to a breach of contract should only receive damages equivalent to his actual loss. As the charterers had established that, as a matter of historical fact, the agreement would only have

run up to the war, this indicated that the shipowners should not have been compensated on the basis that the agreement would have run its full course.

At first instance, the arbitrator felt himself bound by authority to accept the charterers' argument, although he did so reluctantly. His decision was upheld on appeal by Langley J and, again, by the Court of Appeal, consisting of Auld and Tuckey LJ and Lord Mance. By a majority, the House of Lords agreed with the Court of Appeal.

For the majority (Lords Scott, Carswell and Brown), the principle that damages should be assessed as at the date of breach was not inflexible and the desirability of achieving certainty in commercial contracts was subject to the overriding compensatory principle that the damages awarded should represent no more than the value of the contractual benefits of which the claimant had been deprived. The majority thought that if, at the date of breach there had been a real possibility that an event would happen terminating the contract (or otherwise reducing those contractual benefits) the quantum of damages might need to be ►►



## The Golden Strait: Or Crystal Balls and the Calculation of Damages *continued*

reduced proportionately to reflect the estimated likelihood of that possibility materialising. However, where such an event had already happened by the time damages were assessed, the court should have regard to what had actually occurred so that estimation was no longer necessary.

As noted above, this approach attracted powerful dissents from Lords Bingham and Walker. In a nutshell, they both regarded the majority's approach as fundamentally destructive of the principle of certainty and predictability in commercial transactions, a principle which (in the words of Lord Bingham) "has been a constant theme of English

*commercial law... and has been strongly asserted in recent years...*" In Lord Bingham's view the decision of the Court of Appeal (and therefore of the majority of the Lords) was likely to "impair this quality of certainty".

Specifically in response to the charge that the minority approach would over-compensate the shipowners, Lord Bingham had three answers. First, contracts are made to be performed not broken, and the breach may sometimes prove disadvantageous to the contract breaker. Second, if the charterers had honoured their obligation to pay damages upon acceptance of their repudiation the matter would have been over well before

the war anyway. Finally, "the owners were, as the arbitrator held... entitled to be compensated for the value of what they lost on the date it was lost, and it could not be doubted that what the owners lost at that date was a charterparty with slightly less than four years to run.."

There is no doubt that the problem addressed in *The Golden Strait* is conceptually difficult and does not admit of a clear cut answer. It is also true that the majority's reasoning has an undeniable logic to it. However, a dissent by either Lord Bingham or Lord Walker (and certainly by both of them together) is ominous. Ultimately, it is hard to see how the decision cannot avoid introducing

uncertainty into the assessment of damages by making their calculation dependent on a contingency, namely the time when that assessment happens to be made. Whatever the conceptual niceties, this result looks arbitrary and hard to justify in commercial terms. ▲



Luke Harris

## A Trap for Landlords

At common law an original lessee remains liable for the rent throughout the term of the lease. Section 17(2) of the Landlord and Tenant (Covenants) Act 1995 now restricts the landlord's right of recovery, whether the lease was granted after or before its commencement date (1 January 1996). It provides that no liability attaches to the original lessee for rent (and certain other 'charges' as defined) unless the landlord has served upon the original lessee a notice in or substantially in the prescribed form within six months of the rent becoming due. Thus, if an occupying tenant fails to pay rent falling due on 25 March the original lessee will never come under any liability to pay it to the landlord unless a section 17(2) notice is served upon him by 24 September following.

Section 17(4) of the 1995 Act deals with the position where, at the time the rent falls due, its quantum cannot be finally ascertained – because, for example,

a rent review is outstanding. In such a case, the landlord must warn the original lessee in his section 17(2) notice that the rent may be subsequently determined for a higher amount and must serve a further notice on the original lessee within three months of the date when the liability is finally determined, telling the original lessee that he intends to recover the difference.

Where the occupying tenant is in default throughout the rent review process, the scheme of the 1995 Act presents no serious difficulty. What, though, if the occupying tenant *pays* the basic rent during the bulk of the time taken by the rent review, but becomes insolvent before the reviewed rent is determined and the accrued uplift becomes payable? That was the position in *Scottish & Newcastle v Raguz* [2007] EWCA Civ 150. While the occupying tenant was paying the basic rent, the landlord had served no section 17(2) notices on the

original lessee within six months of the basic rent falling due, nor did it serve any notices under section 17(4) within three months of determination of the review.

The Court of Appeal held that, *even though the occupying tenant was not in default until towards the end of the review process and even though the landlord never had any intention of pursuing the original lessee for the basic rent while that state of affairs continued*, the landlord could not recover the 'uplift' from the original lessee on the occupying tenant's insolvency, because the wording of section 17 required that during the time the review was in progress the landlord must have served section 17(2) notices on the original lessee within six months of the relevant rent day, stating (in effect) that no demand was then being made for the basic rent (which the occupying tenant was paying) but warning that a subsequent liability might arise when the reviewed rent was determined. In addition, the landlord would have to have

complied with section 17(4) within three months of determination of the review.

This represents a serious trap for landlords – especially where the review process is allowed to drag on. Whether the legislation will be amended remains to be seen, but for the moment landlords need to protect themselves during, as well as at the determination, of any rent review which is not completed comfortably within six months of the last relevant rent day. ▲



Edward Bannister QC

## Foster Bryant Surveying Ltd v Bryant

In *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200, the Court of Appeal examined the circumstances in which a retiring director who then participates in a competing business may be in breach of his or her fiduciary duties.

The facts of the case were unusual in that the defendant's conduct was clearly at the innocent end of the spectrum of conduct found in such cases. Mr Foster and Mr Bryant were chartered surveyors with shareholdings in a joint-venture company which provided their services to a single client. Mr Foster had a 60% shareholding and Mr Bryant 40%. They had a falling out. Mr Foster excluded Mr Bryant from the running of the company. Mr Bryant gave notice of his intention to leave the company and started to seek employment with other firms of chartered surveyors during his notice period.

The substance of the complaint against Mr Bryant was that during his notice period and prior to his formal resignation as a director he had accepted a proposal from the company's client to continue working for that client. The initial proposal had been that he would in fact be directly employed by the client. However because the client was unable to obtain professional indemnity insurance for Mr Bryant on that basis, a corporate structure intended to replicate as closely as possible the position which

would have obtained if Mr Bryant had been an employee was proposed and accepted.

That structure was neutral as to any particular projects on which Mr Bryant might work, so that he would receive the same income whatever work he was given (or even if he was given no work at all). Mr Bryant accepted the proposal six weeks before he was due to leave and a new company was incorporated in order to implement the proposal 10 days prior to Mr Bryant's resignation taking effect. It was found however that in the meantime Mr Bryant continued to work conscientiously for the company.

It was clear on the evidence that it was the client who sought out Mr Bryant and not Mr Bryant who sought out the client. The client was quite clear at the time that it wished to retain the personal services of both Mr Foster and Mr Bryant. What the client would not countenance was leaving the work with Mr Foster alone and have him subcontract out the work he could not personally do.

Accordingly, the only act which could have been said to have constituted a breach of fiduciary duty was the acceptance of the client's proposal. In substance the complaint made against Mr Bryant was that he should have refused the offer of future employment and that he should have said

that he could not discuss the matter until his notice period had expired and he had resigned as a director.

The Court disagreed. Rix LJ, who gave the judgment of the Court, conceded that in one sense it might be said that the agreement to work for the client put Mr Bryant in a position where there was a conflict of interest or of duty and interest. However an examination of the facts made it clear that all that Mr Bryant did was anticipate that after his resignation he would be working for the client in a way. This was in essence indistinguishable from a retiring director legitimately preparing to compete in the future.

Accordingly, this case was an example of the application of the fifth and sixth principles approved by the Court of Appeal in *In Plus Group Limited v Pyke* [2002] 2 BCLC 201 that "acts done by the directors while the contract of employment subsists but which are preparatory to competition after it terminates are not necessarily in themselves a breach of the implied term as to duty and fidelity" and "directors, no less than employees, acquire a general fund of skill, knowledge and expertise in the course of their work, which is plainly in the public interest that they should be free to exploit in a new position."

Rix LJ furthermore observed that a review of the relevant cases demonstrated "that in the present context of retiring directors, where the critical line between a defendant being or not being a director becomes hard to police, the courts have adopted pragmatic solutions based on a common sense and merits based approach".

The case is therefore to be contrasted with cases where directors have planned their resignation having in mind the destruction of the company based upon

the exploitation of its property in the form of business opportunities.

The relevant principle in such cases is a modification of the statement of Laskin J. in *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (2d) 371 so that the final "or" in the following passage reads as "and":

*"... this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with two more with which he is associated maturing business opportunity which the company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which the later acquired."*

The practical application of this principle will remain one of ongoing difficulty as the forensic examination of whether the resignation "may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity" will often yield different results to different minds. In this case, however, it was clear that the business opportunity had not prompted or influenced the resignation. ▲



Joseph Carney

## Service of proceedings in foreign jurisdictions by a non-prescribed method of service

Service of proceedings in a foreign state can be a costly and time consuming process, particularly in the absence of a bi-lateral service treaty and/or if the prescribed methods of service in that state makes service impractical or results in extensive delay. It is sometimes asked whether, in these circumstances, it is possible to achieve timely service in a foreign state by adopting an alternative method of service to the methods expressly prescribed in that state. The recent decision of *Habib Bank Ltd v Central Bank of Sudan* [2006] EWHC 1767 found that this is possible, provided the alternative method is not expressly prohibited by the law of that state.

This has not always been so certain, however. CPR 6.24(1)(a) provides that proceedings may be served out of the jurisdiction by any method permitted by the law of the country in which it is to be served. CPR 6.24(2) provides that nothing in this rule or in any court order shall authorise or require any person to do anything in the country where the claim form is to be served which is against the

law of that country. The notes to CPR 6.24 in the White Book at paragraph 6.24.2 state that “*the function of CPR 6.24 was to prevent service by a method which the domestic law of the place of service did not permit in the relevant circumstances*”, indicating perhaps that the method of service adopted has to be permitted by the law of the country where service is to be effected. In support of this proposition it cites *Shiblaq v Sadikoglu* [2004] EWHC 1890, a case where Colman J set aside default judgment on the ground that service of the claim in Turkey was effected by a method not prescribed by Turkish law, finding that the court would only exercise its extra-territorial jurisdiction in circumstances where the formalities of service prescribed by local law or international convention had been complied with.

However, in that case, the method of service adopted was expressly prohibited by the law of Turkey. It was on this basis that Field J held in *Habib Bank Ltd* that *Shiblaq* was “*not authority for the proposition that service abroad must be expressly permitted*

*by the foreign jurisdiction in order for it to be good service within CPR 6.24.*” (para 30)

In *Habib Bank Ltd* permission was given to serve a claim on defendants in Sudan. The problem was that Sudanese law required service through the courts, but the courts did not recognise a request for service issued out of an English Court. Cooke J therefore ordered that the claim form could be served by leaving a copy at the defendant’s offices in Khartoum, which, it was found, was not contrary to the law of Sudan. In upholding the order of Cooke J, Field J found that “*[the note at 6.24.2 of the White Book] is somewhat misleading. CPR 6.24 does not require service abroad “by any method . . . permitted by the law of the country in which it is to be served.” On the contrary, it is implicit in 6.24(2) that the Court may permit any alternative method of service abroad under CPR 6.8 so long as it does not contravene the law of the country where service is to be effected.*” (para 30)

It is not entirely clear whether Field J was of the view that alternative service this

way would, without more, be good service under CPR 6.24. However, in my view it is probably better practice to apply to the Court for permission to adopt an alternative method of service abroad under CPR 6.8, where the Court has a broad discretion to allow service by an alternative method where service would otherwise be impractical or would involve very extensive delay: *Marconi Communications Ltd v PT Pan Indonesia Bank Ltd* [2004] EWHC 129. ▲



Oliver Hilton