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Commercial contracts newsletter

Contracts: recent developments in brief

Formation of contract: beware the "gentleman's agreement"

Summary: Investing in a new business adventure can be hugely profitable or hugely risky and *Kowalishin -v- (1) Jason Roberts (2) Tech 21 UK Limited* [2015] EWHC 1333 (Ch) is a sharp reminder of the need for caution. Here, an investor who provided funds to a company before agreement was reached, was held not have the equity in it which he believed he had. Although his restitutionary claim to the money, plus interest, was upheld, the case shows the danger of commitment before a binding contract (or at least heads of terms) is in place.

Background: This case concerns an investment by Mr Kowalishin in Tech 21 UK Limited (the Company), a manufacturer of impact protection cases for phones and laptops, at a time when it was in severe financial need. It was common ground that his intention was to invest in return for shares. However, Mr Roberts argued that the agreed investment was £250,000 and if there was a binding contract, which he disputed, Mr Kowalishin was in breach. Mr Kowalishin paid £50,000 on 29 August 2007, and urged that once Mr Roberts returned from a business trip they would "*hook up to tie up the rest of the deal*". A draft contract was mentioned but nothing was drawn up, and after a while communications between the parties petered out. Meanwhile, Mr Roberts obtained funding from elsewhere and the company flourished. At the end of 2012, Mr Kowalishin remembered his £50,000 investment when he bought a new iPhone and looked at its case. He contacted Mr Roberts and sought an account.

The parties had a "gentleman's agreement" and nothing more. The parties did not seriously dispute the relevant principles of law, which can be summarised as follows:

- In order to determine whether a contract has been concluded, it is necessary to look at the course of correspondence between the parties as a whole.
- Even if they have reached agreement on all the terms, they may intend that the contract will not become binding until a further condition has been fulfilled (the ordinary "subject to contract" case).
- They may intend that the contract shall not become binding until some further term(s) has been agreed.
- Alternatively, they may intend to be bound immediately even though some further terms are still to be agreed. If they fail to reach agreement, the existing contract may stand unless the outstanding term makes the contract as a whole unworkable or void for uncertainty.
- The effect of an expression such as "*to be agreed*" in relation to an essential term of the contract depends very much on whether a contract exists. If a contract already is in place, the words are not necessarily fatal, especially in long-term arrangements, and the courts will strive to uphold the bargain.
- Where an alleged agreement is partly oral and partly written, the court may have regard to the parties' words and conduct after it was made, not for construction purposes but to test the parties' recollections.

On the evidence, the judge concluded that the parties did not intend to be contractually bound at least until heads of terms had been agreed, which never happened. If they had, they would at least have discussed the date for payment of the extra £200,000 and the number of shares to which Mr Kowalishin was entitled for his £50,000, and the judge commented: "*I would also expect discussion and agreement as to whether Mr Kowalishin was entitled to bring in other investors and, if so, on what terms*". In the judge's view, Mr Kowalishin paid the £50,000 before an agreement was reached and in anticipation of doing so. The claim in contract was dismissed.

However, Mr Kowalishin succeeded in his restitutionary claim against the company for the return of the money and for the "time value" of that sum. On 29 August 2007, the company was in such dire financial straits

that it would not have been able to borrow more cheaply than at its bank's unauthorised borrowing rate of 29.5 per cent. Interest was therefore ordered to be paid at that rate from 29 August 2007 to the date of judgment.

Misrepresentation: its impact on compromise agreements

Summary: The Court of Appeal has confirmed in *Hayward -v- Zurich Insurance Company plc* [2015] EWCH Civ 327 that the law of misrepresentation has a limited role to play in the context of compromise and settlement agreements. Usually, the parties to this type of agreement are just concerned with avoiding litigation. They are not concerned with the truth (or otherwise) of statements made by each other, given the nature of their relationship, and the question of reliance does not usually arise. The Court of Appeal also made a number of interesting comments about the public interest in upholding such agreements save where the traditional requirements of rescission for fraud have been "well and truly satisfied".

Background: The appellant, Mr Howard, suffered a back injury in respect of which he received £134,973 in full and final settlement from his employer's insurers. Two years later, the insurers (Zurich) received an allegation from a third party that it was a dishonest claim. Zurich claimed damages or rescission of the settlement for fraudulent misrepresentation. The County Court agreed, holding that Mr Howard had been dishonest and the settlement should be set aside on the basis that it was sufficient that Zurich had been influenced by his dishonest misrepresentation; there was no requirement for it actually to have believed it.

Was belief necessary? Briggs LJ was clear that the authorities on misrepresentation definitely require the representee to have given at least some credit to the truth of the misstatement. The representee need not have "*blind faith*" in its truth; its belief may be a contributory, rather than the sole, cause of entry into the contract. The difficulty here was that Zurich did not merely disbelieve Mr Howard's assertions – it had from the outset pleaded that they were fraudulent. Although it was possible that the subsequent discovery by a representee that a statement was fraudulent might allow rescission, on the basis that, in principle, "fraud unravelled all" this was not the case here. "*All that happened… was that better evidence of the fraud came to light… than when the settlement contract was made*."

"There is an important public interest in the finality of settlements." The classic proposition in *Callisher -v- Bischoffsheim* (1870) LR 5 QB 449 is that settlement of an ill-founded claim is nevertheless binding, save in cases of fraud: although it may be fair to treat a representee as having taken the risk of statements by the representor being wrong, it will not – absent any indication to the contrary – be fair to treat him as having accepted the risk of them being dishonest. However, as Lord Justice Underhill pointed out, the qualification "*absent any indication to the contrary*" is important. Although the risk of fraud is often treated differently, the extent of the risk which is deemed to have been accepted must depend on the circumstances of the particular case. If a party clearly intended to settle despite the possibility that the claim had elements of fraud, there can be no reason why he should not be held to his agreement. In other words, he should not be allowed to revive the allegation of fraud as a basis for setting aside a settlement. "*It may stick in the throat that the claimant can retain the reward for his dishonesty, but the defendant will have made the deal with his eyes open…*". Briggs LJ commented that allowing rescission in cases such as this would make it "*… almost impossible to compromise a whole swathe of litigation if settlements were vulnerable to being set aside in this manner*". This would severely undermine the public policy of encouraging the settlement of litigation. He accepted that fraud puts a different light on things but only if subsequently discovered; in this case, the settlement "*compromised an allegation of fraud already on the pleadings*".

Misrepresentation: the effect of contributory negligence

Summary: The case of *Taberna Europe CDO II PLD -v- Selskabet AF 1*, *September 2008 in bankruptcy (formerly known as Roskilde Bank A/S)* 2015 EWHC 871 (Comm) examines the extent to which contributory negligence can reduce the damages payable in a misrepresentation claim and confirms that this possibility arises only in very limited circumstances. As a general rule, it is still true to say that a party cannot easily invite another to rely on statements which it makes, then allege that the other failed to carry out its own investigations.

Background: This case involved a claim by Taberna for substantial damages in respect of alleged misrepresentations made by or on behalf of the defendant (Roskilde) which Taberna said induced it to enter into a secondary market purchase of certain subordinated notes. Following the purchase, Roskilde encountered severe financial difficulties and eventually went into bankruptcy in early 2009. Taberna abandoned its common law misrepresentation claims in deceit and negligence during the course of the proceedings and its sole claim was brought under

section 2(1) of the Misrepresentation Act 1967. As a result, the burden of proof (which is slightly different in claims under the 1967 Act) lay on Taberna to show:

- Taberna entered a contract;
- the contract was entered into after a misrepresentation had been made to Taberna by another party to that contract;
- as a result of that misrepresentation, Taberna suffered loss; and
- Roskilde would be liable in damages in respect of such loss had the misrepresentation been made fraudulently.

It was also common ground that Roskilde would be liable in damages unless it proved that it had reasonable ground to believe, and did believe, up to the time the contract was made that the facts it represented were true.

Contributory negligence relevant in very rare circumstances. The court held that a number of misrepresentations had been made. However, Roskilde argued that it was entitled to rely on a defence of contributory negligence under the Law Reform (Contributory Negligence) Act 1945. This topic has a long judicial history (*Redgrave -v- Hurd* (1881) 20 Ch D 1, *Reynall -v- Sprye* (1852) 1 De G.M. & G. 660) but the best recent authority is *Gran Gelato Limited -v- Richcliff (Group) Limited* [1992] Ch 560.

Here, Sir Donald Nicholls VC took the view that, although the 1945 Act applies, the court must still consider what, if any, apportionment to make and that any reduction in damages must be "*just and equitable*". Although, in principle, failure to conduct an independent investigation might affect a claim, it would need to be a "*very special case*" before carelessness would make it just and equitable to reduce the damages otherwise payable. Such special cases are difficult to imagine and, in fact, the court was unaware of any reported case in which damages for misrepresentation under the 1967 Act were reduced by reason of contributory negligence.

It was common ground that Taberna did not take any specialist advice regarding the notes despite its unfamiliarity with the Danish market. According to Roskilde, its failure to carry out proper due diligence was so substantial that it broke the chain of causation. However, Eder J did not accept these submissions. For an event to break the chain of causation, it must be of such impact that it "*obliterates*" the wrongdoing of the defendant and the matters Roskilde alleged did not meet this test. This was not the "*very special case*" which would justify a reduction in the damages payable.

Construction: when can a court depart from the "natural meaning" of words?

Summary: The Supreme Court has emphasised that interpreting a contract does not mean correcting or rewriting it where, for example, one party made an unwise decision or subsequent events produce an unexpected result. Where the wording is clear, the court must give effect to it, even if they are uncomfortable with the commercial impact. In such cases, it is up to the parties, possibly through rectification or with the help of a mediator, to amend the document to achieve a fair result. The approach suggests that in many long-term contracts it might be sensible to include hardship clauses to deal with situations such as this. (*Arnold -v- Britton* [2015] UKSC 36)

Background: This case concerned the service charge provisions in the leases of various chalets in a South Wales caravan park. The provisions were not identical. In most, the service charge increased by ten per cent every three years. However, in some, the ten per cent rise occurred every year, resulting in some lessees paying much higher fees for the same services. The lessees and the lessors disagreed about the correct interpretation of the provisions.

The recent House of Lords and Supreme Court authorities on construction and interpretation were discussed and seven factors identified:

- The effect of commercial common sense and context (for example, in *Chartbook Limited -v- Persimmon Homes Limited* [2009] UKHL 38) "*should not be invoked to undervalue the importance of the language*" in the relevant clause.
- The less clear the words are, and the worse the drafting is, the more ready the court can be to depart from the natural meaning.
- The commercial common sense approach must not be invoked retrospectively, i.e. the mere fact that a contract turns out badly for one of the parties is not, by itself, a reason for departure from the natural language of the words.
- The court should be very reluctant to reject the natural meaning of the words simply because the term in question appears to be imprudent or ill-advised.
- Only facts or circumstances which existed at the time the contract was made and which were known, or reasonably available, to both parties should be considered. The bilateral nature of a contract means it is wrong to take into account something known only to one.

- If an unexpected event occurs, the court should look at the wording and apply it, if it is clear what the parties would have intended.
- Service charge clauses are not subject to any special rule of interpretation.

A bad bargain does not, itself, justify the court's interference. The mechanism of all the provisions was clear. The first half obliged the lessee to pay an annual charge to cover the costs of providing the services, and the second half identified how that charge was to be calculated. It had the benefit of certainty. Although the clauses were not perfectly drafted, and some of the lessees would be liable to pay a much higher service charge, this could not justify the court "*inventing a lack of clarity in the clause as an excuse for departing from its natural meaning*". The parties had taken a gamble on inflation but the natural meaning of the words meant they shared the risk. Lord Hodge agreed with Lord Neuberger, dismissing the appeal, while acknowledging the outcome as highly unsatisfactory for some lessees. He emphasised that construing a contract is a unitary task in which the court must consider the language used and ascertain what a reasonable person, with the background knowledge available to the parties at the time, would have understood them to have meant. As no stage should the court consider the wisdom (or otherwise) of the deal. Moreover, for construction to be available as a tool to remedy a mistake, the mistake must be clear and the correction must be too. Neither of these was satisfied.

Lord Carnwath, dissenting, pointed out that in his view the clauses posed "*unusual interpretative challenges which may call for unusual solutions*". A table was produced showing the differences in the service charges in 1974, 1980, 1985, 1988, 2000, 2012 and 2072. He described the differences as "*dramatically increasing, and ultimately grotesque…*", particularly in the light of the political and economic circumstances at the time the leases were entered into and the nature and circumstances of the holiday park itself. The clauses in some of the leases included two different descriptions of the amount payable which was an inherent ambiguity which needed to be resolved. As time went on and inflation fell, it was impossible to think that incoming lessees would have accepted such a high increase. Moreover, the service contributions from other lessees would have fallen far short of the lessors' expenditure. The lessors' interpretation was "*so commercially improbable that only the clearest words would justify the court in adopting it*".

Exclusion clauses – crossing the line into unreasonableness

Summary: The court's approach to the exclusion and limitation clause in *Saint Gobain Building Distribution Limited (t/a International Decorative Surfaces) -v- Hillmead Joinery (Swindon) Ltd* [2015] All ER (D) 226 is a valuable reminder of how the reasonableness test under UCTA will be applied to standard terms and conditions. Although the defendant ultimately failed to prove breach of the relevant terms, the court's analysis of the clause reinforces the view that suppliers should not exploit a stronger bargaining position to impose clauses which effectively deprive their customers of a meaningful remedy if something goes wrong.

Background: This case concerned the supply by the claimant (IDS) to the defendant (Hillmead) of laminate sheets which were ultimately destined for use in fitting out various Primark stores. IDS claimed the price of the goods sold and delivered, but Hillmead alleged that they were defective and counter-claimed over £367,000 (to include claims for diversion of staff time and loss of business over a period of six years). The court considered a number of issues, including whether IDS's terms were included in the contract; if so, whether the exclusion/limitation clauses were reasonable and enforceable under the Unfair Contract Terms Act 1977 (UCTA), and whether the statutorily implied terms concerning the quality of goods and their fitness for purpose applied to the sales.

IDS's terms were effectively incorporated. Hillmead had applied for credit facilities from IDS, using an application form which contained IDS's standard terms and conditions (Ts & Cs). The application form itself included a declaration that the applicant had read the Ts & Cs and, should credit be granted, agree to trade solely under those terms. Unsurprisingly, the judge felt that this wording was clear; IDS was prepared to provide credit facilities but only on the terms that its Ts & Cs would apply to subsequent sales. IDS had drawn its Ts & Cs sufficiently to Hillmead's notice and they were therefore incorporated into the various contracts which followed.

Were those Ts & Cs "reasonable"? According to the exclusion and limitation clause:

- The customer was obliged to inspect the goods on delivery and notify the supplier in writing within three working days of any alleged damage, shortage or defect.
- The supplier would not be liable for any alleged problem with the goods unless it had been given

the right to inspect them before the customer used them.
- The supplier's only liability would be to make good any shortages in quantity or replace damaged or defective goods.
- All other terms (whether conditions, warranties or innominate terms, express or implied) were excluded.
- The supplier excluded all liability for "*loss of profit, loss of business, loss of goodwill, loss of savings, increased costs, claims by third parties, punitive damages, indirect loss or consequential loss whatsoever and howsoever caused…*".
- Save for death or personal injury directly attributable to negligence, financial liability was limited to the invoice price.

Both parties acknowledged that the clause was subject to UCTA and the court should therefore have regard to the factors set out in Schedule 2 when assessing its reasonableness and therefore its enforceability. Relevant factors were:

- IDS was in a substantially stronger bargaining position than Hillmead;
- The provision of credit facilities was not an inducement to agree to those Ts & Cs, as the same Ts & Cs applied irrespective of whether credit was provided;
- Hillmead was fully aware of the terms;
- Hillmead had an opportunity in practice to inspect the goods as required; and
- There was no evidence that the goods had been manufactured to a special order.

Applying these, the provisions regarding inspection and notification of defects were "*too draconian*". It was unreasonable to exclude **all** liability if these requirements were not met, particularly since the seller should have inspected the goods before they were delivered. Excluding the statutorily implied terms was unreasonable as they were not replaced by anything else which might have given comfort to the customer. When the contracts were entered into, both parties knew that the sheets were going to be fabricated into bonded panels. Therefore, if they proved defective, the buyer's loss would be more than simply the replacement costs of the sheets themselves. As a result, it was unreasonable to limit liability to replacing goods or reimbursing the invoice price. It was relevant, too, that the exclusion of consequential loss was a blanket exclusion rather than a cap.

As a result, the statutorily implied terms about quality applied, although ultimately Hillmead failed to prove on the evidence that those terms had been breached.

Court of Appeal holds parking charges enforceable

Summary: There has been a lot of rumour and uncertainty about the enforceability of charges imposed for overstaying in car parks. The Court of Appeal has clarified the issue and has held that although an £85 fee for overstaying a permitted period of free parking was imposed primarily to deter, it was not "*manifestly excessive*" and other commercial considerations existed to justify it: *ParkingEye Limited -v- Barry Beavis* [2015] EWCH Civ 402.

Background: Mr Beavis overstayed the two hours' free parking at a Chelmsford car park by nearly an hour. ParkingEye, who operate the car park on behalf of the landowner, sought to recover their standard charge of £85 (reduced to £50 for prompt payment) in such circumstances. Mr Beavis argued that the charge was unenforceable at common law as it was a penalty and that it was unfair and therefore unenforceable by virtue of the Unfair Terms in Consumer Contracts Regulations 1999 (the Regulations).

Penalties: the importance of commercial justification. Counsel for Mr Beavis pointed out that the only purpose of the parking charge was to deter motorists from staying longer than two hours. He also highlighted the fact that, under ParkingEye's contract with the landowner, its profitability depended on collecting such charges – "*making money out of the weaknesses and negligence of motorists*". Although the Court of Appeal accepted the point about purpose, recent case law indicates that the distinction between enforceable liquidated damages and an unenforceable penalty is not always clear-cut. As *Makdessi -v- Cavendish Square Holdings BV* [2013] EWCA Civ 1540 highlighted, the commercial justification of the clause is key. "*The modern cases thus appear to accept that a clause providing for the payment on breach of sum of money that exceeds the amount that a court would award as compensation… may not be regarded as penal if it can be justified commercially and if its predominant purpose is not to deter breach. However, they also demonstrate a greater measure of flexibility and a willingness to recognise the underlying principles on which the doctrine of penalties as a whole rests in order to determine the outcome in any particular case*."

The charge in context. The only loss which ParkingEye might suffer if a motorist overstayed the two hours was indirect, based on the fact that it would not be operating the car park in accordance with its contract with the landowner. In addition, lower charges would be uneconomic for ParkingEye to enforce. The judge had been correct to look at the

purpose of the charge from a number of perspectives, including proportionality to loss, purpose and commercial justification, and in his ultimate conclusion that it was neither "*improper in its purpose nor manifestly excessive in amount*" compared with similar charges imposed by local authorities and others. Although these charges directly affected ParkingEye's profits, viewed objectively, the provision of free or cheap car parking benefitted both consumers and local businesses, a benefit which depended on ensuring that the facilities were not abused by overstaying.

"There was no want of good faith in the present case." The judge at first instance had held that the term was not unfair within the meaning of the Regulations because the charge was similar to those imposed by local authorities and because very clear warnings were displayed around the car park. The key questions under the Regulations were:

- whether ParkingEye acted contrary to the requirements of good faith in imposing an £85 fee; and
- if so, whether the term caused "significant imbalance" in the parties' rights and obligations to the detriment of motorists.

The Court of Appeal agreed that there was no lack of good faith. Clear, prominent notices were displayed around the car park. Two hours' free parking is a valuable right and charges of this kind are a common way by which local councils and similar bodies can manage the use of what is generally a scarce resource. Provided the charge is not excessively high, it would not create a significant imbalance in the parties' rights and obligations. It was probably worth noting, too, that neither side argued the point under the Regulations particularly strongly.

Assessing loss and the impact of mitigation

Summary: Mitigation must always be considered whenever a contract is breached and loss results. In *Thai Airways International Public Company Limited -v- KI Holdings Co Limited* [2015] EWHC 1250 (Comm) the High Court confirmed that, strictly speaking, a claimant is free to react to a breach however it chooses, but the award of damages will reflect an assumption that it has taken reasonable steps in mitigation whether it has done so or not. This case also shows the court's application of the principles to a fairly complex set of facts and confirms that benefits obtained by the claimant from its attempts to mitigate will be taken into account. It is useful guidance to a customer who faces being let down by a supplier.

Background: The claimant (Thai) entered into three contracts with the defendant (Koito) under which Koito agreed to supply economy class seats for three groups of aircraft. Some were delivered late and others were not delivered at all. As a result, Thai was unable to use five new aircraft for around 18 months until seats were obtained from another supplier. In order to maintain its services, it brought three old aircraft back into service and leased three more from a third party. It subsequently obtained seats from two alternative suppliers.

Express warranties did not exclude implied terms. Essentially, Koito failed to meet its contractual obligations as a result of regulatory intervention (it had falsified the results of safety tests and other data so it appeared that its seats complied with regulatory requirements). It was common ground that each of the contracts included a term that Koito would ensure that its processes complied with applicable regulatory requirements and that it would maintain a quality assurance system in compliance with the appropriate regulations. Some of the seats delivered also breached the implied terms under section 14 of the Sale of Goods Act 1979. It was held that the express warranties in the contracts did not, on their own, have the effect of excluding such terms.

Mitigation: the key principles. In identifying the claimant's losses, its actions in response to the breach of contract will be taken into account. A distinction will be made between effects of the defendant's breach and effects of the claimant's own action or failure to act, and this is the function of mitigation. The doctrine is frequently expressed as three rules:

- The claimant must take all reasonable steps to mitigate the loss to him which results from the defendant's wrong and he cannot recover for avoidable loss.
- Where he does take reasonable steps to mitigate, he can recover for the loss he incurs in so doing.
- If mitigation pays off, the defendant is liable only for the loss as lessened.

The claimant must act reasonably, which often means choosing the option which is the least expensive. However, assessing "reasonableness" involves a recognition that it is not the claimant at fault and he will not therefore be expected to incur unreasonable expense, risk or inconvenience.

Thai's mitigation efforts paid off, and the leased aircraft ultimately made a contribution to its profits. Should these be taken into account in assessing damages? The leading case (*British Westinghouse Electric & Manufacturing Co Limited -v- Underground*

Electric Railway Co of London Limited [1912] AC 673) indicates that they should. Provided the claimant's response to the breach is reasonable, the measure of damages is the loss which he has actually suffered, taking account of both cost and benefit resulting from the breach.

Here, the burden was on Koito to prove that Thai had derived a benefit from the arrangements. It was relevant that Thai had leased the aircraft for three years, rather than two, although it could, and did, source replacement seats well within two years. The court held that that third year of the leasing arrangement was an independent business decision driven by other commercial considerations and not the result of Koito's breach. A distinction had to be drawn between the costs and benefits accruing in the first two years and those accruing in the third year.

Overall, Koito failed to show that the profits Thai made were sufficient to be offset against its mitigation costs. Thai could therefore recover its lease costs, the costs of preserving and storing aircraft awaiting seats, and its technician expenses. The parties were invited to agree the net sums payable by Koito.

Execution of documents by overseas companies

Summary: Formalities for an overseas company executing an English law document often cause last-minute headaches when trying to close a deal. English law does provide some guidance but the Court of Appeal in *Integral Petroleum SA -v- SCU-Finanz AG* [2015] EWCA Civ 144 has confirmed that the question of whether a company has validly executed an agreement is governed by the law of the country of incorporation and not solely by the law of the contract. Here, a Swiss company was held to have executed incorrectly because the document was signed by only one authorised individual rather than two as required by Swiss law.

Background: The contract in question (for the supply of oil) was governed by English law with English courts having exclusive jurisdiction. It was made between two Swiss companies, the appellant (Integral) and the respondent (SCU). Essentially, Swiss law provides that company contracts are created by signature by one or more "prokurists" who have broad authority to bind the company, although this rule is subject to a number of potential restrictions, one of which is a requirement for a joint signature. SCU's constitution provided that it was subject to this restriction and therefore could enter into binding contracts only by two signatures. However, the supply contract was signed on behalf of SCU by one individual prokurist.

Key question: was the document executed correctly under local law? The issue was whether this was enough to bind SCU, the answer to which raised a conflicts of law point. According to a leading authority,[1] the capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and the laws of the country which governs the transaction in question. English law allows company contracts to be made by one signature: section 43 of the Companies Act 2006, which provides that a contract may be made on behalf of a company by a person (i.e. one individual) acting with express or implied authority. However, the Court of Appeal focused on the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 which modify the effect of section 43 and 44 of the Companies Act to apply them to foreign companies. Essentially, the Regulations provide that a contract may be made under the law of England and Wales "*…on behalf of an overseas company, by any person who, **in accordance with the laws of the territory in which the company is incorporated**, is acting under the authority (express or implied) of that company*" (emphasis added). This brought SCU's constitutional rules under Swiss law firmly into the spotlight. It was clear that local law required two signatures on SCU's behalf in order to bind the company, and this meant the signatures of two individual prokurists rather than, say, the signature of one plus attestation by a witness. In Floyd LJ's words: "*I cannot see how on the present evidence it can be suggested that the contract here purported to be signed by a person who, in accordance with Swiss law, was acting under the authority (express or implied) of SCU… Swiss law requires the signatures of the two prokurists, and the document did not purport to be so signed*".

Note

1 Dicey, Morris & Collins, *The Conflict of Laws*, 15th Edition, Rule 175.

Contacts

If you would like further information on any of the matters discussed in this newsletter, please contact:

Mark Lubbock
Partner
T: +44 (0)20 7859 1762
E: mark.lubbock@ashurst.com

Christopher Bates
Partner
T: +44 (0)20 7859 2388
E: christopher.bates@ashurst.com

Patricia Wade
Head of Knowledge & Learning
T: +44 (0)20 7859 1031
E: patricia.wade@ashurst.com