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Compromise of claim—court's power to grant declarations

CPR r.40.20. For purposes of commercial development, creator (D) of cartoon character entering into agreements with other parties (C) and, in so doing, assigning intellectual property and other rights in the character. Relationship between parties breaking down and D asserting that assignment ineffective. For the purpose of establishing their entitlement to the rights assigned by the deed of assignment, C commencing proceedings against D claiming declarations and an injunction. D defending and making counterclaim. In September 2005, shortly before trial, parties entering into compromise agreement (1) in which C's particulars of claim were recited, and (2) under which it was agreed (a) that C would accept and D would pay £325,000 in full settlement, (b) that the proceedings be stayed for six months to enable D to raise finance for the payment, (c) that, if D was unsuccessful in that endeavour, the proceedings should be stayed for a further period during which rights in the character would be placed for sale on an open market. On the basis that no sufficient offer for purchase of the rights had been received during the extended period, C invoking a term in the compromise agreement under which they were at liberty in those circumstances to enter judgment for the recited declarations and injunction and, in March 2007, applying to the court for an order to enforce the agreement. D submitting that the court could not properly grant declaratory relief on the summary basis sought without first hearing evidence on the underlying issues to which the declarations were directed (in particular the issue of the validity of the assignment). Judge rejecting this submission and making order including the declarations and injunction sought by C ([2008] EWHC 438 (Ch)). **Held**, dismissing D's appeal, (1) it is the established practice of the court that declarations will not be granted simply because the parties have agreed to them, (2) but it is open to the court to grant a declaration by consent where that was necessary to do justice between the parties, (3) in this case, the compromise agreement was a commercial bargain and under is terms it was not open to D to

contend that C must still establish that they were the rightful owners of the relevant rights, (3) in effect, the position was the same as if D had agreed to transfer his rights (if any) in the character and the parties had agreed that in default C could seek an order for specific performance and a declaration that upon the transfer taking effect they were the owner of rights. ***Wallersteiner v Moir*** [1974] 1 W.L.R. 991, CA; ***Patten v Burke Publishing Ltd*** [1991] 1 W.L.R. 541; ***Lever Fabergé Ltd v Colgate-Palmolive Co*** [2005] EWHC 2655 (Pat); [2006] F.S.R. 19, ref'd to. (See ***Civil Procedure 2008*** Vol.1 para.40.20.3.)

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CPR r.52.17, Practice Direction (Appeals) Section IV, Supreme Court Act 1981 ss.18(1)(c) and 28A. Environmental Protection Act 1990 s.160. Local authority (D) serving noise abatement notice on occupier (C) of property. On ground that it was out of time, magistrates' court dismissing C's appeal. On C's appeal by way of case stated to High Court, judge finding that the notice had not been properly served as required by s.160 and remitting the case to the justices for them to determine C's appeal ([2007] EWHC 734 (Admin)). Court of Appeal allowing D's appeal and making order accordingly. However, upon discovering subsequently that, because the judge's decision was "final" within meaning of s.28A(4), and therefore, by virtue of s.18(1)(c), no appeal lay to the Court of Appeal (a point apparently overlooked by all concerned), on its own motion Court setting aside the order allowing D's appeal. D applying to High Court under r.52.17 for permission to re-open C's appeal to the judge. **Held**, refusing permission, (1) the circumstances were exceptional, and there was no alternative effective remedy available to D (r.52.17(1)(b) and (c)), however (2) the Court of Appeal's judgment had no binding validity as a legal precedent, and did not give rise to any res judicata, issue estoppel or any other kind of estoppel binding on C and D, accordingly (3) it could not be contended (a) that D had been left in the position that they were bound by a decision of the High Court which was erroneous in point of law, and (b) that, on this basis, D had suffered "a real injustice" (r.52.17(1)(a)), (4) in the circumstances, D had not clearly established that a significant injustice had probably occurred. Observations on precedential value of judgments given in decisions of appellate courts declared invalid for jurisdictional reasons. ***Taylor v Lawrence*** [2002] EWCA Civ 90; [2003] Q.B. 528, CA; ***Seray-Wurie v Hackney London Borough Council*** [2002] EWCA Civ 909; [2003] 1 W.L.R. 257, CA; ***Westminster City Council v O'Reilly*** [2003] EWCA Civ 1007; [2004] 1 W.L.R. 195, CA; ***Farley v Secretary of State for Work and Pensions (No.2)*** [2005] EWCA Civ 869; [2005] 2 F.L.R. 1075, CA, ref'd to. (See ***Civil Procedure 2008*** Vol.1 paras 40.2.1.1, 52.17.2 and 52PD.136, and Vol.2 para.9A–95.)

■ **CHEVAL BRIDGING FINANCE LTD v BHASIN** [2008] EWCA Civ 1613, December 12, 2008, CA, unrep. (Longmore, Wilson and Lawrence Collins L.JJ.)

Stay of possession proceedings refused—action against mortgagor pending

CPR r.3.1(2)(f), Administration of Justice Act 1970 ss.36 and 39. Owner of property (D) encountering difficulty in servicing mortgage. D selling property to another (X) on understanding that X would (1) pay off the mortgage, (2) hold the legal title on trust for D's benefit, (3) allow D to live in the property rent free, and (4) grant D an option to re-purchase. X re-mortgaging the property with commercial lender (C). With £529,000 owing by X on an advance of £285,000, C commencing proceedings against X to enforce the mortgage (in which D was joined as co-defendant, but which X did not defend) and possession proceedings against D. D bringing action against X for damages for breach of trust and fiduciary duty (to which C were not joined as a party). In a judgment handed down on December 17, 2007, following a trial of preliminary issues in the possession proceedings, judge (1) ordering D to give possession of the property, and (2) on ground that there was no prospect that the mortgage debt would be discharged within a reasonable period, refusing D's request for an adjournment and a stay to enable her to assemble evidence to support an application for relief under s.36. On April 11, 2008, Court of Appeal granting D permission to appeal on two issues. On August 8, 2008, judge giving judgment for D in her action against X. **Held**, dismissing appeal, (1) the question whether the judge had power under s.36, r.3.1 or the inherent jurisdiction, to order a stay to await the outcome of D's action against X had become academic, (2) the factor which the court would take into account in exercising any such power would be precisely the same, namely whether there was any real prospect that the mortgage debt could discharged from the proceeds of the action, (3) it was clear that that was a very remote prospect, (4) there was no need for the court to decide whether the judge had erred in proceeding on the assumption that D fell within the definition of "mortgagor" as defined in s.39 and in dealing with D's application under s.36, or whether he should have held that s.36 did not apply, because (5) throughout C had been prepared to concede that it was arguable that D was a mortgagor and (although permission had been given) it was not a point on which D relied or could rely. (See ***Civil Procedure 2008*** Vol.1 para.3.1.7, and Vol.2 paras 3A–39, 3A–47, 9A–77 and 9A–177.)

■ **GREENE WOOD & MCLEAN LLP v TEMPLETON INSURANCE LTD** [2009] EWCA Civ 65, February 12, 2009, CA, unrep. (Sir Anthony Clarke MR, Longmore and Hooper L.JJ.)

Service out of jurisdiction of contribution claim—claimant not party to contract

CPR rr.6.36 and 6.37(3), Practice Direction (Service Out of the Jurisdiction) para.3.1(6)(c) [r.6.20(5)(c)], Civil Liability (Contribution) Act 1978 ss.1 and 6. On CFA basis, solicitors (C) representing numerous mineworkers (M) bringing claims against solicitors (S) who had formerly acted for them in personal injury claims and against their unions (U). C arranging ATE insurance with insurers (D), a company incorporated in the Isle of Man. ATE insurance covering, not merely S and U's costs if M lost, but also M's "own disbursements". C's application on behalf of M for a GLO rejected by judge, partly on basis that it was unclear whether the costs of the proposed respondents (S and U) would, if they were successful, be met by the ATE insurance. Because C had undertaken that M would not themselves be liable for such costs, C paying S and U's costs of opposing the failed GLO application and making individual payments to M for stress and inconvenience caused. C then commencing proceedings against D on the basis (1) that D directly promised C that they would meet valid claims under the policy, or (2) that C themselves were liable to M as nominal claimants to pay S and U's costs as well as relevant disbursements, but D were also liable to pay those costs as ATE insurers. C claiming that both D and they (C) were thus "liable for the same damage" and C were entitled to seek a contribution (which they said should be a 100 per cent contribution) from D pursuant to s.1. Judge refusing D's application to set aside the initial order giving C permission to serve D out of the jurisdiction in respect of the contribution claim ([2008] EWHC 1593 (Comm)). **Held**, dismissing D's appeal, (1) under para.3.1(6)(c), permission to serve out of the jurisdiction may be granted where a claim is made "in respect of a contract" where the contract is governed by English law, (2) the paradigm case of a contract pursuant to which permission is given on this basis is a contract between the intended claimant and the intended defendant, (3) but that was not this case as here C's contribution claim was made only because, as it happened, D had a contract with M whereby D agreed to indemnify M in respect of costs which might be ordered against them in the GLO application and in respect of own disbursements, (4) nevertheless C's contribution claim clearly had a connection with a contract governed by English law and that made it a claim "in respect of" that contract, even though it was not a claim brought under the contract. Court noting that in this case the connection between the claim and the contract was "very close" and observing that a respondent's objection that a claim was remote from a contract was a matter that could be dealt with when the court turned to the question whether England was the proper place in which to bring the claim (r.6.37(3)). Court further holding that the damage for which C were liable under their undertaking to M, and the damage for which D were liable under the policy, was "the same damage" within s.1. (See ***Civil Procedure 2008*** Vol.1 para.6.21.34, and Vol.2 para.9B–1090.)

■ **MAHER v GROUPAMA GRAND EST** [2009] EWHC 38 (QB); 159 New L.J. 158 (2009) (Blair J.)

Foreign tort—interest on pre-judgment damages

CPR r.16.4(2), Supreme Court Act 1981 s.35A, Private International Law (Miscellaneous Provisions) Act 1995 s.11. Following a collision (on July 29, 2005) on a road in France between two vehicles, one driven by an individual (C) domiciled in the UK and the other by an individual (X) domiciled in France, in which X was killed, C commencing proceedings in High Court bringing a direct action against X's French insurers (D) for damages for personal injuries suffered in the accident. As neither the jurisdiction of the English court nor the liability of D was in issue, judgment entered on liability with damages to be assessed. Master ordering trial of two preliminary issues, viz., (1) whether damages were to be assessed by reference to English law or French law?, and (2) whether the award of pre-judgment interest on the damages should be determined in accordance with English law or French law? At trial of these issues, **held** (1) D had to meet directly X's liability and that liability was a tortious one, (2) for the purpose of the assessment of damages, D's liability should equally be seen as a liability arising in tort, (3) accordingly, the proper characterisation of C's claim against D was that it was not (as D submitted) a contractual claim but a claim in tort, (4) the proper law of the tort was French law (the lex causae), (4) under English conflict of laws rules and s.11, (a) the assessment of damages in tort is a procedural matter and, therefore, is governed by the law of the forum, but (b) the right to claim interest by way of damages in a claim in tort depends on the proper law and is not in any sense a procedural question for the law of the forum, (5) where, according to the proper law, a right to claim interest is established, the rate of interest is to be determined by the lex fori. Judge noting effects, as from January 11, 2009, of Council Regulation (EC) No.864/2007 ("Rome II") on ascertainment of applicable law as to assessment of damages in non-contractual claims arising out of events occurring after August 20, 2007. ***Harding v Wealands*** [2006] UKHL 32; [2007] 2 A.C. 1, HL; ***Through Transport Mutual Insurance Association (Euroasia) Ltd v New India Assurance Co Ltd*** [2004] EWCA Civ 1598; [2005] 1 Lloyd's Rep. 67, CA; ***Midland International Trade Services Ltd v Al Sudairy***, April 11, 1990, unrep.; ***Kuwait Oil Tanker Co SAK v Al Bader*** December 17, 1998, unrep., ref'd to. (See ***Civil Procedure 2008*** Vol.1 paras 7.0.3, 7.0.17, 7.0.22 and 74.11.1, and Vol.2 para.9A–124.)

■ **R. (TARANISSI) v HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY** [2009] EWHC 130 (Admin), January 14, 2009, unrep. (Saunders J.)

Application for copies of documents filed in judicial review claim—non-party applicant defendant in libel claim

CPR r.5.4C(2). Individual (T) commencing judicial review claim against HFEA and, at a contested hearing in open court, obtaining permission to proceed. Claim subsequently compromised. In libel claim brought against them by T, BBC defending and pleading justification. Disclosure applications by BBC pending in the libel claim. On the basis that the court records of the judicial review proceedings contained documents relevant to their justification defence, BBC applying under r.5.4C.2 for copies of a general class of documents contained in the record. Upon BBC giving certain undertakings, HFEA not opposing the application, and T not appearing at the hearing. **Held**, granting the application, (1) the copies sought were of documents before the judge at the permission hearing , (2) as it seemed likely that the court record would contain documents relevant to the justification defence, it was in the interest of justice that both BBC (as well as T) should have access to them, (3) the court may give permission under r.5.4C in circumstances where disclosure applications have been made in collateral proceedings. (See ***Civil Procedure 2008*** Vol.1 para.5.4C.7.)

■ **TARN INSURANCE SERVICES LIMITED v KIRBY** [2009] EWCA Civ 19, January 27, 2009, CA, unrep. (Waller and Thomas L.JJ. and Sir John Chadwick)

Unless order barring defence—relief from sanction

CPR r.3.9. Company (C) in administration bringing proceedings against de facto director (D) and other individuals and companies. Claims against D including allegations that particular payments to D were in the nature of a secret commission or bribe, and that payments from C's funds had been made without proper regard to the interests of C. C obtaining freezing order and proprietary injunction against D. At return date hearing (April 16, 2008), judge (1) dismissing D's application (a) to extend time for compliance with the orders for the provision of asset and tracing information and (b) to discharge the orders for provision of documents, and (2) granting C's application for an order debarring D from defending unless he provided certain information documents and affidavits by a particular date (April 22, 2008). In affidavit by D served on that date, which C regarded as insufficient, D acknowledging that he had still not fully complied with the orders and by notice applying for relief against the sanction debarring him from defending. By counter-notice, C applying for judgment by default against D on the grounds that he was debarred from defending. On July 28, 2008, different judge (1) finding (a) that C's complaints about the inadequacy of D's affidavit were made out, (b) that the effect on C of D's non-compliance was "relatively slight", and (c) that D had established that there was a real prospect of a successful defence, (2) varying the unless order (in effect giving D the relief from sanction which he sought), (3) dismissing C's application for judgment by default against D, and (4) granting C permission to appeal. **Held**, allowing C's appeal and setting aside the variation of the unless order, (1) an unless order debarring a defendant from defending is only appropriate if made on the basis that there is no reason to think that (in the absence of the order) the defendant would not be able to advance a defence with a real prospect of success, (2) that D had such a real prospect was an implicit assumption underlying the unless order, and the judge erred in treating it as a decisive factor in granting relief, (3) further, the judge erred in failing (a) to give proper weight to the serious nature of what was a deliberate breach of an unless order made to enforce compliance with the provisions of freezing and proprietary injunctions, and (b) to appreciate that the effect on C of D's non-compliance was very serious, (4) the true test under r.3.9 is whether, notwithstanding that an unless order was a proper order for the court to make in the circumstances known at that time, it remained appropriate, in the circumstances known at the time of the application for relief, to allow the sanction to take effect, (5) in a case of deliberate and persistent non-compliance with orders to provide information and deliver documents made in order to safeguard proprietary claims, a proper administration of justice requires that, save in very exceptional circumstances, sanctions imposed should take effect, (6) in this case, D's persistent non-compliance was deliberate and there were no exceptional circumstances. ***R.C. Residuals Ltd v Linton Fuel Oils Ltd*** [2002] EWCA Civ 275; [2002] 1 W.L.R. 2782, CA; ***CIBC Mellon Trust Company v Stolzenberg*** [2004] EWCA Civ 827, June 30, 2004, CA, unrep., ref'd to. (See ***Civil Procedure 2008*** Vol.1 paras 3.4.4.1 and 3.9.1.)

In Detail

ANTI-SUIT INJUNCTION IN SUPPORT OF ARBITRAL PROCEEDINGS

In the case of *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* [2005] EWHC 454; [2005] Lloyd's Rep. 257, the facts were that a ship ("The Front Comor") owned by a Liberian company (C) collided with a jetty owned by the charterers (D) and situated in an Italian port. C denied liability for the substantial damage caused. The charterparty was governed by English law and contained a clause providing for arbitration in London. D claimed compensation from its insurers (X), an Italian company, up to the limit of its insurance and commenced arbitration proceedings in London against C for the excess.

Having paid D compensation, and having a statutory right to subrogation according to Italian law, on July 30, 2003, X commenced proceedings against C in an Italian court to recover the amounts which it had paid D. In those proceedings, C contended that, because of the arbitration agreement, the court lacked jurisdiction. On October 5, 2004, C entered their appearance and rejoinder by which they disputed the court's jurisdiction and applied for a stay on the grounds of the arbitration agreement.

On September 10, 2004, C commenced proceedings in the High Court (1) for a declaration that the dispute between them and D should be settled by arbitration, and (2) for an injunction (a) restraining X from pursuing any proceedings other than arbitration, and (b) requiring X to discontinue the Italian proceedings. It was apparent that the issues of liability which arose between X and C in the Italian court proceedings were substantially the same as those which arose in the arbitration. The main issue in both proceedings was whether C were protected by the errors of navigation exclusion in clause 19 of the charterparty or by art.IV r.2(a) of the Hague Rules. On September 20, 2004, at a hearing at which X were not present, a judge granted an interim anti-suit injunction.

Subsequently the matter came before Colman J. His lordship decided that both in English law and in Italian law the right to the delictual claim which had been transferred to the insurers by subrogation was subject to the arbitration clause in the charterparty. He therefore made the declarations claimed by C. On the basis of the decision of the Court of Appeal (which was binding upon him) in *Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67, CA, he rejected X's submission that it would not be consistent with the Judgments Regulation for an English court to grant an anti-suit injunction. He therefore granted the injunction. X's submission in that respect was based principally on the decision of the ECJ in *Turner v Grovit (Case C-159/02)* [2005] 1 A.C. 101, ECJ, where it was decided that a court of a Member State may not issue an anti-suit injunction to restrain a party from commencing or prosecuting proceedings in another Member State which has jurisdiction under the Judgments Regulation, on the ground that those proceedings have been commenced in bad faith.

On D's appeal to the House of Lords (following the judge's granting of a certificate under the Administration of Justice Act 1969 s.12), the House referred the following question to the ECJ for preliminary ruling ([2007] UKHL 4; [2007] 1 Lloyd's Rep. 391, HL): is it consistent with the Judgments Regulation for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement? In their opinions in the reference Lord Hoffmann and Lord Mance made it clear, for reasons shortly given, that their answer to the question would be "yes". Lord Mance said (at paras 29 and 30):

"29. The purpose of arbitration (enshrined in most modern arbitration legislation) is that disputes should be resolved by a consensual mechanism outside any court structure, subject to no more than limited supervision by the courts of the place of arbitration. Experience as a commercial judge shows that, once a dispute has arisen within the scope of an arbitration clause, it is not uncommon for persons bound by the clause to seek to avoid its application. Anti-suit injunctions issued by the courts of the place of arbitration represent a carefully developed—and, I would emphasise, carefully applied—tool which has proved a highly efficient means to give speedy effect to clearly applicable arbitration agreements.

30. It is in practice no or little comfort or use for a person entitled to the benefit of a London arbitration clause to be told that (where a binding arbitration clause is being—however clearly—disregarded) the only remedy is to become engaged in the foreign litigation pursued in disregard of the clause. Engagement in the foreign litigation is precisely what the person pursuing such litigation wishes to draw the other party into, but is precisely what the latter party aimed and bargained to avoid."

The jurisdictions of the courts of Member States are governed by the Judgments Regulation, but art.1(2)(d) of the Regulation provides that it is not to apply to arbitration. A neophyte might conclude that that exclusion provides a complete answer to the question and that there is no reason why an English court should not, in circumstances such as these, exercise the power that it undoubtedly has according to English law to grant injunctions to restrain parties

to an arbitration agreement from instituting or continuing proceedings in the courts of other countries (see *Aggeliki Charis Compania Maritme SA v Pagnan SpA ("The Angelic Grace")* [1995] 1 Lloyd's Rep 87,CA, and the Arbitration Act 1996 ss.44(1) and (2)(e)). But the matter is more complicated than that.

On February 10, 2009, the ECJ ruled that the answer to the question referred by the House of Lords is "no"; see *Allianz SpA v West Tankers Inc (Case C-185/07)*, *The Times* February 13, 2009, ECJ. Put briefly, the court ruled that the anti-suit injunction was incompatible with the Judgments Regulation because (1) although the English proceedings did not come within the scope of the Regulation, the Italian proceedings brought by X against C did, (2) it was exclusively for the Italian court to rule, pursuant to arts 1(2)(d) and 5(3), on the question whether it lacked jurisdiction.

In dealing with, and rejecting, C's submission based on the exclusion in art.1(2)(d), the ECJ stated (para.22 et seq) that, in determining whether a dispute falls within the scope of the Judgments Regulation, reference must be made to the nature of the rights which the proceedings in question serve to protect. Even though proceedings do not come within the scope of the Regulation, they may nevertheless have consequences which undermine the effectiveness with which the Regulation attains its objectives of unifying rules of conflict of jurisdiction in civil and commercial matters and of enabling the free movement of decisions in those matters. This is so where (as here) proceedings in one Member State that do not come within the scope of the Regulation prevent a court of another Member State from exercising jurisdiction conferred on it by the Regulation. It followed from this that it was appropriate to consider, first, whether the proceedings brought by X against C in Italy themselves came within the scope of the Regulation, and then, secondly, to ascertain the effects of the anti-suit injunction on those proceedings. As the subject-matter of the dispute in the Italian proceedings came within the Regulation, the preliminary issues as to the validity and applicability of the arbitration agreement, also came within its scope. The use of an anti-suit injunction to prevent a court of a Member State, being a court having jurisdiction to resolve a dispute under art.5(3), from ruling, in accordance with art.1(2)(d), on the very applicability of the Regulation to the dispute brought before it necessarily amounted to stripping that court of the power to rule on its own jurisdiction under the Regulation and was therefore incompatible with the Regulation.

DETERMINING WHETHER UNDERTAKING GIVEN

In *Zipher Ltd v Markem Systems Ltd* [2009] EWCA Civ 44, February 10, 2009, CA, unrep., the basic issue in the appeal was whether a binding undertaking had been given or offered to the High Court in patent entitlement proceedings (in circumstances where it was never committed to writing) and, if so, whether it bound the party who gave it (given that an appeal was taken to the Court of Appeal in those proceedings) in subsequent invalidity proceedings involving the same parties. In giving the principal judgment, Lord Neuberger (with whom Jacob L.J. and Sir Peter Gibson agreed) said that this issue was "fairly simple and, in terms of practice, not unimportant".

The facts were that a company (C) applied for UK and PCT patents in respect of an alleged invention. The patents contained five claims, numbers one to four of which were significantly wider than number five (which incorporated by reference features of the previous four). Another company (D) brought entitlement proceedings contending that they, rather than C, were entitled to the proprietorship of the patents. During trial, C (1) indicated to judge that claim five was the crucial part of their pending patent applications, and (2) stated that they would not pursue claims one to four in those applications. In giving judgment, the judge (1) held that D were entitled to claims one to four and C to claim five, and (2) noted that C's offer to abandon claims one to four was "a realistic response to the evidence". The Court of Appeal allowed C's appeal, with the result that C regained the applications for the two patents in full ([2005] EWCA Civ 267; [2005] R.P.C. 761, CA). After the patents had been granted, C commenced infringement proceedings against D. In their defence, D contended (1) that C were bound by their undertaking to the judge in the entitlement proceedings, and therefore (2) that C were not entitled to rely on, or to allege infringement of any claim wider than claim five. In two judgments, the judge held (1) that the patents were invalid and fell to be revoked, (2) that C were bound by the undertaking given to the judge, and (3) that the undertaking extended to the PCT, as well as to the UK, patents ([2008] EWHC 1379 (Pat); [2008] EWHC 2078 (Pat)). On C's appeal against the second and third of these holdings the Court of Appeal (Jacob L.J., Lord Neuberger and Sir Peter Gibson), held, allowing the appeal (1) at the trial of the entitlement proceedings there was no more than an offer by C of an undertaking, (2) the judge did not take up that offer when he decided that D were entitled to claims one to four, (3) the offer therefore lapsed and did not revive when the Court of Appeal decided that it was C who were entitled to claims one to four.

In his judgment, Lord Neuberger made some general remarks of general application about undertakings given to the court and the principles to be borne in mind when recourse is had to transcripts of proceedings for purpose of determining whether an undertaken was given and what its terms were (see paras 19 to 25). Those remarks are important and, as they cannot be summarised without risk of distortion, they are set out verbatim immediately below.

"19. An undertaking is a very serious matter with potentially very serious consequences. It is a solemn promise to the court, breach of which can lead to imprisonment or a heavy fine. Accordingly, there should never be room for

argument as to whether or not an undertaking has been given. Further, while there is inevitably sometimes room for argument as to the interpretation of an undertaking, the circumstances in which such arguments can be raised should be kept to a minimum. Accordingly, any undertaking should be expressed in full and clear terms and should also be recorded in writing.

20. None of this is either controversial or original. Unsurprisingly, it is well established. In *Hussain v Hussain* [1986] Fam. 134, CA, Sir John Donaldson M.R. said (at p.139H) that 'an undertaking to the court is as solemn, binding and effective as an order of the court in like terms'. He went on to observe (at p.140E) that 'it is in all cases highly desirable that any undertaking to the court shall be recorded and served on the giver personally'. As he immediately went on to say, the 'most obvious and convenient way … is to record the undertaking in an order of the court'. Neill L.J. took the same view, stating (at p.142A-B) that 'the general practice to be adopted' was that the 'undertaking should be included in a recital or preamble in the order of the court', which should be issued and served on the person who gave the undertaking with a penal notice. He went on to emphasise the importance of clarity and certainty in relation to what was required by any undertaking, and the consequences of it being breached. Ralph Gibson L.J. agreed with both judgments.

21. It seems to me that it must follow from this that, in a case where there is a *bona fide* dispute as to whether an undertaking has been given, the fact that neither the existence nor the terms of the undertaking has been recorded in writing militates against an undertaking having been given. All the more so where the court has made an order in which the undertaking, if given, could and should have been recorded. As Neill L.J. said in *Hussain* (op cit at p.142B), in a case where an undertaking has been given, even where the court makes no order, that ought itself be recorded in a formal order which should recite in full any undertaking that has been given.

22. I consider that it must also follow from the above analysis that, where the terms of an undertaking could equally well be interpreted as having a narrow scope or a wide scope, it is the narrower scope which must prevail. An accusation that there has been a breach of an undertaking has similarities with an allegation of criminal behaviour, and it therefore must be right that, where two interpretations of an undertaking are equally convincing, the less stringent one should prevail. (Of course, in some circumstances, the terms of an undertaking may be ambiguous in such a way as to render the undertaking simply unenforceable.)

23. In this case, the undertaking is said to have been given orally, and was never committed to writing (save that the variation to the patent which would have resulted from the alleged undertaking was written down and handed to the court). The argument as to whether an undertaking was given, and what its terms were, has therefore centred on the transcript of what was said at the hearing. Quite apart from the self-evident undesirability of courts having to trawl through transcripts of earlier hearings to consider whether any binding commitments were made on behalf of any party, and, if so, the meaning and extent of any commitment, there are, I think, four points of principle to bear in mind when considering transcripts in such circumstances.

24. First, all the relevant passages must be read together and, of course, in their overall context. Secondly, one should be wary of indulging in what Lord Diplock characterised as 'detailed semantic analysis' of the words revealed by the transcript: if such analysis can be inappropriate in relation to formal written contracts, it must be *a fortiori* when it comes to oral exchanges in court. Thirdly, if there is real doubt as to the meaning or effect of what was said, it should, as mentioned, be resolved in favour of the person who would be bound. Fourthly, it is permissible to have regard to what was said and done after the undertaking is said to have been given, in order to assist in resolving whether it was, and, if so, what its terms were—see per Lord Hoffmann in *Carmichael v National Power Plc* [1999] 1 W.L.R. 2042, HL, at pp.2048E–2051C.

25. Before turning to the specific points in this case, I add this. The fact that undertakings should be recorded formally in writing in clear terms does not mean that the court is bound to conclude that, where that has not happened, no undertaking has been given. There is no rule that an undertaking given to the court must be recorded in writing before it can be effective. In other words, whether an undertaking has been given is ultimately a question of fact in each case. Equally, the fact that, in cases of doubt, an undertaking should be construed beneficially to the person who gave it, does not mean that the court should search for uncertainties or ambiguities in undertakings. Ultimately, an undertaking is to be interpreted in the same way as any other document (assuming that it is in documentary form, as it ought to be)."

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