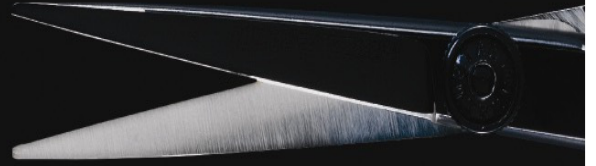


Payer beware!

Case note



The recent judgment in *Marine Trade v Pioneer* provides a stark warning to parties who dispute that payment is due to a contractual counterparty but who, for good reason, make the disputed payment under protest, with a view to reclaiming the amounts so paid in subsequent litigation. The case confirms that, absent a change or extension of the current law, parties may not be able to reclaim payments made under protest to a contractual counterparty.

*Marine Trade S.A. v Pioneer
Freight Futures Co. Ltd & Anr
[2009] EWHC 2656 (Comm)*

In practice, the question of whether to pay under protest may be particularly acute where, as was the case in *Marine Trade*, parties have entered into a number of transactions under an umbrella agreement, such as an ISDA Master Agreement, where default under one transaction can result in termination of all the transactions under the umbrella agreement. As the case demonstrates, whilst the impetus to pay in those circumstances may be very compelling, the ability to recover the sums paid is very far from certain. This note sets out the key issues raised by the case, with suggestions for how these may be addressed in practice.

The facts

Marine Trade (C) and Pioneer (D) had entered into a number of Forward Freight Agreements which were governed by the terms of a 1992 ISDA Master Agreement. The dramatic decline in the freight market in Q4 2008 meant that whoever was the Seller (which in some transactions was C and in others was D) was substantially in the money. The settlement sums for January 2009 totalled approximately \$7 million where C was the Seller and approximately \$12 million where D was the Seller. D invoiced C for the net amount of approximately \$5 million. However C considered that D was affected by an Event of Default which, pursuant to section 2(a)(iii) of the ISDA Master, relieved C of its obligation to pay D.

When C did not pay, D served a Notice of failure to pay under section 5(a)(i) of the ISDA Master which provides that any failure to make payment on or before the third Local Business Day after giving such a Notice is an Event of Default. Thus, if C was wrong about its liability to pay and did not pay within the stipulated period, that would constitute an Event of Default which would in turn have entitled D to serve an Early Termination Notice. The effect of termination would have been to crystallise the liabilities under all the transactions and, as matters then stood, would have required C to pay \$116 million to D. C attempted to obtain an injunction to prevent D from serving an Early Termination Notice but the court declined to grant it on the basis that it would have had a potentially disastrous effect on D's cash flow. C therefore paid the \$5 million claimed by D under protest and commenced proceedings against D.

The issue

One of the issues which arose for determination was whether C was entitled to recover the \$5 million paid under protest if D was in fact affected by an Event of Default.

The decision

The judge held that C was not entitled to recover. He cited Lord Hoffman's speech in

"...whilst the impetus to pay ... may be very compelling, the ability to recover the sums paid is very far from certain."

Deutsche Morgan Grenfell Group plc v IRC [2007] 1 AC 558 ("DMG"): "... English law has no general principle that to retain money paid without any legal basis (such as debt, gift, compromise, etc) is unjust enrichment. ... In England, the claimant has to prove that the circumstances in which the payment was made came within one of the categories which the law recognises as sufficient to make retention by the recipient unjust". The categories thus far recognised as giving rise to a right of recovery in restitution are, broadly*: payments made under a mistake of fact or law, as a result of compulsion (such as duress or undue influence), pursuant to an express or implied agreement to repay or where there is total failure of consideration.

In the present case, the only category relied upon was mistake. However, in order to succeed in a claim for restitution based on mistake, it is necessary to show (1) that the party was mistaken at the time of paying and (2) that the mistake caused the payment to be made. In the present case, the mistake was said to have been the erroneous impression that there was a real and substantial chance that D was not affected by an Event of Default and therefore that C was liable to make payment. It was submitted for C the case raised the issue of what degree of doubt on the part of the party paying will negative mistake. C accepted that the highest it could put its case was that it paid thinking that it was probably not liable to pay. Previous cases have considered whether a state of doubt is consistent with being mistaken but it was submitted for C that there was no maximum amount of permissible doubt beyond which a party could not be mistaken. Referring to Lord Hope's judgment in *Kleinwort Benson v Lincoln CC* [1999] 2 AC 349, and to the judgments of Lords Hope, Hoffman and Brown in *DMG*, which all considered the extent to which a state of doubt was inconsistent with being mistaken, the judge said that: "[i]n my judgment, the furthest that a court of first instance could or should go as to the current state of the law is that there may be cases in which a payer can still be said to be under a mistake, even if he has doubts, provided that he paid concluding that it was more likely than not that he was liable to pay". The judge went on to say: "I consider that a case where the payer makes the payment thinking that it is more likely than not that he is not liable to pay, such as the present case, cannot properly be described as a case of mistake at all".

Although not strictly necessary given his finding that there had been no mistake, the judge also dealt with causation and concluded: "...Marine Trade's principal concern was to avoid Pioneer designating early termination, because the payment calculation which would then ensue would result in a very substantial sum in favour of Pioneer, which Marine Trade simply could not afford to pay. That was why Marine Trade was anxious to try to restrain Pioneer from serving any Section 6 Notice by injunction and when that failed, the only way in which Marine Trade could be sure of avoiding the risk of early termination being designated by Pioneer was to make payment of the balance of US\$5,030,242.50. The correct analysis is that the payment was made to avoid that risk, irrespective of whether Pioneer was in fact entitled to demand payment because it was affected by an Event of Default, with [Marine Trade] in fact thinking that Pioneer was so affected and thus not entitled to demand payment. That was not a payment by mistake or caused by mistake. In my judgment the claim in restitution fails".

At the time of writing, no request for permission to appeal has been lodged with the Court of Appeal.

Discussion

This is a result which clients might rightly consider to be counter-intuitive and unfair. Nevertheless, until the Supreme Court decides otherwise, it represents the state of the current law and puts those in a similar position to Marine Trade in an invidious position. The options for mitigating the position are limited and each case will inevitably turn on its own facts and circumstances, in particular the reasons for payment. Where a party is certain that it is not liable to pay, but has compelling reasons to do so, possible steps which could be taken include:

- seeking the express agreement of the counter-party to repay any sums paid if it is subsequently established that there was no liability to do so; or
- seeking an injunction from the Court.

In any event, it is clear that legal advice should be taken as a matter of urgency and before any payment is made. Parties who are not able to obtain an injunction or an express agreement to repay but nevertheless proceed to make payment will have to argue for some other basis for recovery. This is a complex area of law and, again, the arguments available will be wholly fact-dependent. However, they could include, for example, an argument that they did in fact pay on the basis of a mistake, or that the court should imply an agreement on the part of the payee to repay (mere payment under protest will not of itself give rise to an implied agreement but may form part of the evidence from which an implied agreement may be found). Arguments based on failure/absence of consideration may also be considered but are likely to be very difficult to establish in a commercial context on the current state of the law.

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* Note: additional grounds are available against public bodies.

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