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Supreme Court grapples with the economic tort of 'causing loss by unlawful means'; Court of Appeal confirms that conflicts of interest do not overrule an assignment of privilege; and High Court sets out the constituent elements of the novel 'Marex' tort

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PH*lit* is our London litigation know-how blog, where you will find the latest developments on commercial litigation topics delivered in a monthly round-up of the most important topics addressed by the Courts of England and Wales, as well as key regulatory and legislative updates. You can subscribe to this site if you would like our updates sent to you by email as soon as they are posted.

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In this edition…

- We consider a Court of Appeal decision in which the Court confirmed that legal professional privilege passes to a successor in title following a valid assignment of that privilege and that such assignment cannot be overruled by a conflict of interest.
- We review a Supreme Court ruling which grapples with the scope of the economic tort of 'causing loss by unlawful means'. In this case, the Supreme Court confirmed that the so-called 'dealing requirement' is an essential element of the tort.
- We reflect on a High Court decision which gives guidance on 'expert shopping' and the circumstances in which conditions may be imposed for granting a party permission to replace its expert.
- We note a Court of Appeal ruling which rejects the notion that there is a general 'public interest' exception to litigation privilege and confirms that a party's claim to privilege is not lost where that party obtains the privileged information by deception.
- We consider a High Court decision, in which the Court set aside a default judgment despite an *"unjustified delay"* in the making of the set aside application and where the defendant only marginally satisfied the relevant merits test threshold.
- We discuss a landmark ruling of the High Court in which it set out for the first time the parameters of the tort of *"interference in a judgment debt"* or *"violation of rights in a judgment debt"* —sometimes referred to as the *"Marex"* tort.

- We note an interesting High Court ruling which concluded that the new practice direction on trial witness statements (PD 57AC) does not impact existing rules on admissibility of evidence.

- We review a Court of Appeal decision that confirmed that a non-party costs order should only be made against a director of a company involved in litigation in circumstances where the director is seeking to benefit personally from the litigation or has acted with some form of impropriety or bad faith.

- We discuss a Supreme Court ruling that considered the correct approach to interpreting liquidated damages clauses and, in particular, whether a reference to "negligence" in a cap on contractual liability included breaches of a contractual duty to exercise reasonable care and skill.

- We consider a High Court decision in which the Court confirmed that, in cases of professional negligence, time will not start to run under section 14A of the Limitation Act 1980 until the claimant has reason to consider that the advice which they received may have been wrong, or that advice which should have been given was omitted.

- Finally, we reflect on an important High Court decision for the growing field of data breach litigation, in which claims for misuse of private information and breach of confidence arising out of a cyber-attack were struck out for being "ill founded".

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Court of Appeal confirms that an assignment of privilege cannot be overruled by conflicts of interest

Travelers Insurance Company Ltd v Armstrong and Another **[2021] EWCA Civ 978 (judgment available here)**

1 July 2021

- The Court of Appeal has confirmed that legal professional privileges passes to a successor in title following a valid assignment of it.

- The facts of this case are complex. Transform, one of the UK's leading cosmetic surgeries, was the defendant in group litigation concerning its use of inferior silicone breast implants when performing cosmetic surgery on hundreds of women. Transform and its insurers, Travelers, instructed solicitors, BLM, to defend the group litigation. Accordingly, there was joint interest privilege as between Transform and Travelers. Of 623 individual claims brought against Transform, only some were covered by its insurance policy with Travelers. This led to Transform ultimately going into administration when it did not have sufficient funds to pay the claims that were not covered by its insurance.

- Prior to its administration, Transform had brought professional negligence claims against BLM in respect of advice given in relation to the group litigation. When Transform went into administration, the administrators assigned Transform's claim against BLM to Hugh James Involegal ("**HJI**"), a company associated with Hugh James, the solicitors who had acted for the claimants in the group litigation. Travelers objected to the disclosure of the case files to HJI on the basis that HJI had a conflict of interest because Hugh James was seeking to recover its costs of the group litigation from Travelers, as Transform was unable to pay them.

- At first instance the Court held that there had been an effective assignment of the professional negligence claims from Transform (acting through its administrators) to HJI, which included the right for HJI to access privileged documents because it, as assignee, stood in the same position that Transform, the assignor, had done. The Court therefore found that Travelers could not object to disclosure of the privileged documentation to HJI. Travelers subsequently appealed.

- At appeal, the Court carefully considered the applicable legal principles which it summarised as follows:

  - in respect of privileged documents, a successor in title stands in the shoes of their predecessor;

  - the right of a successor in title to disclosure of documents and to assert privilege in documents is a right that passes as a matter of law;

  - the scope of the rights of a successor in title will depend on the assignment; and

  - legal professional privilege is a fundamental right of each party to joint interest privilege and the parties to such joint interest privilege: (i) cannot assert privilege against each other; (ii) can only waive privilege jointly; and (iii) can assert privilege against third parties.

- Ultimately, despite the perhaps unusual facts, the Court of Appeal noted that *"no principle, no authority, and no part of the background material was identified which [would] even begin to persuade me that the ordinary principles relating to successors in title, and joint retainer privilege, did not apply".*

PH*lit* comment:

At its core, this case is a reminder of the fundamental right of privilege by re-stating that: (i) neither party's interest in joint interest privilege trumps the other; and (ii) once one party's privilege has been validly assigned, the assignee has the same rights to the joint interest privilege as the other party.

Supreme Court grapples again with the economic torts: 'causing loss by unlawful means'

Secretary of State for Health and another v Servier Laboratories Ltd and others [2021] UKSC 24 (judgment available here)

2 July 2021

- In considering the scope of the economic tort of 'causing loss by unlawful means' (the "**unlawful means tort**"), the Supreme Court ruled in favour of the defendants, confirming that the so-called 'dealing requirement' is an essential element of the tort. For a fuller commentary on this judgment, please see our Stay Current piece here.

- Before we examine the present case, it is helpful to first consider the unlawful means tort itself. In the seminal case of *OBG v Allan* [2008] 1 AC 1, the House of Lords confirmed that, in order to make out a claim in the unlawful means tort, the following three elements must be satisfied:

  - **Unlawful means**: first, the claimant must show that the defendant employed unlawful means against a third party, which act would be independently actionable by that third party as against the defendant.

- **Intention to cause loss**: second, the claimant must show that, by its unlawful means, the defendant unlawfully acted upon the third party with the intention that such interference would cause loss, irrespective of who would suffer that loss (this is also referred to as the 'instrumentality requirement').

- **Dealing**: the claimant must show that the defendant's interference affected the third party's freedom to deal with the claimant (referred to as the 'dealing requirement').

Background to the present case

- The original claimant group in this action comprised various NHS bodies that have since been abolished. The claim was therefore assumed by the Secretary of State for Health as successor in title to it (for convenience, we refer to the claimant as the "**NHS**"). The defendants in the proceedings, Servier Laboratories Ltd and others ("**Servier**"), develop and manufacture pharmaceutical drugs, including perindopril erbumine, a medicinal product used in the treatment of cardiovascular diseases (the "**Product**").

- In 2001, Servier applied to the EPO in order to patent the Product, which was granted in 2004 with, among others, a UK designation (the "**Patent**"). In 2006, the Patent survived opposition proceedings commenced by 10 companies. Thereafter, Servier sought to enforce the UK designation of the Patent, including by obtaining injunctions in the English Courts prohibiting rival pharmaceutical companies from manufacturing and selling the Product. One such rival company applied for summary judgment against Servier on the grounds that the Product lacked any novelty, such that the Patent should be invalidated. In 2005, the High Court held that the Patent was invalid as it lacked novelty or alternatively was obvious over another existing patent. This decision was upheld by the Court of Appeal and, in 2009, the Patent was revoked by the EPO.

- The NHS brought proceedings against Servier on the basis of the unlawful means tort. It alleged that Servier had deceived the EPO and the English Courts in obtaining, defending and enforcing the Patent, which, in turn, had discouraged and/or prevented effective competition for the Product in the UK market, as a result of which the NHS had suffered economic loss in having to pay higher prices to purchase the Product from Servier than it might otherwise have done in a competitive market.

- However, it was accepted that there were never any dealings between the NHS and either the EPO or the English Courts in respect of the Product, meaning that the third limb of the *OBG* test (the 'dealing requirement') could not be satisfied. As a result, the NHS's unlawful means tort claim was struck out by the High Court, with the Court of Appeal rejecting the NHS's appeal.

- The NHS appealed to the Supreme Court in respect of the following two issues: (i) first, was the 'dealing requirement' actually part of the binding ratio in *OBG*? (the "**First Issue**"); and (ii) second, if it was, should the Supreme Court nevertheless depart from *OBG* and dispense with the 'dealing requirement'? (the "**Second Issue**").

The First Issue

- The Supreme Court was definitively of the view that the dealing requirement was part of the ratio in *OBG*, in particular because: (i) when giving the leading judgment, Lord Hoffman had expressly stated that the essence of the unlawful means tort included the dealing requirement, and the test established in *OBG* was "*plainly definitional*" in nature; and (ii) the dealing requirement addressed the concern expressed by the House of Lords that the tort should be controlled and kept within "*reasonable bounds*", and therefore narrowed

to the extent possible and desirable (i.e. the dealing requirement performed a required "*controlling mechanism*", as discussed further below).

The Second Issue

- The NHS argued that it would result in an injustice if it was precluded from bringing a claim based on the unlawful means tort simply because it had not dealt with the third party that had been used by the defendant as a vehicle to damage the NHS's economic interests. On the NHS's case, the other elements of the tort, in particular the second element (instrumentality), were sufficient 'control mechanisms'.

- The Supreme Court rejected the NHS's position on the following principal grounds:

  - At a basic level, the Supreme Court noted that while the NHS had pointed to some academic criticism of the decision in *OBG*, it had not provided any real life examples of that decision causing difficulties, creating uncertainty or impeding the development of the law (which would be necessary in order to depart from the *OBG* precedent).

  - The second limb of the unlawful means test (i.e. the instrumentality requirement) was deemed by the Supreme Court to be itself *"too weak a factor"* to perform the vital *"controlling mechanism"* that limits the scope of the tort. If the dealing requirement were removed, there could be issues of remoteness where the damage suffered is very far removed from the unlawful act. As the Supreme Court put it: *"the dealing requirement performs the valuable function of delineating the degree of connection which is required between the unlawful means used and the damage suffered".*

  - The House of Lords in *OBG* specifically rejected a narrow test of intention: rather than requiring intention to harm the specific claimant, the defendant need only have intended harm as a means to an end, irrespective of who the harm was suffered by. The 'dealing requirement' performs a vital counterbalance, without which the wide test of intention could give rise to indeterminate liability to a wide range of claimants, which in this case could include: other health authorities, generic competitors, insurers, foreign health authorities and individuals who had simply bought the Product.

- Accordingly, the Supreme Court remained of the view that the dealing requirement was part of the *OBG* ratio, there was no basis upon which to depart from the *OBG* precedent, and therefore the appeal was dismissed.

PH*lit* comment:

Following on from the clarification provided by the Court of Appeal in Kawasaki Kisen Kaisha Ltd v James Kemball Limited [2021] EWCA Civ. 33 concerning the tort of procuring a breach of contract (see our article on this here), the Servier case provides helpful confirmation of the criteria that a claimant must satisfy in order to make out a claim for causing loss by unlawful means. However, this case does not necessarily spell the end of the judicial debate, as two key points remain unsettled.

First, the present case involved the tort of deceit, being a civil cause of action that would have been independently actionable by the EPO and/or the English High Court against Servier. However, a point that remains open for debate is whether 'unlawful means' should be extended beyond the arena of civil liability, so as to include criminal and other wrongs that cannot be actioned independently.

A second point of possible future judicial wrangling, is the correct test for 'intention'. In the present case, the NHS was only able to plead the wider test of intention (i.e. an intention to cause loss as a means to an end, and not to specifically injure the claimant) meaning that the Supreme Court was not required to consider whether a departure from this settled approach was necessary. Whether the appropriate test for intention will itself need further consideration by the Supreme Court in future cases remains to be seen.

"*Expert shopping is undesirable and to be discouraged*"—High Court gives guidance on changing expert engaged prior to issuance of proceedings

***Rogerson (trading as Cottesmore Hotel, Golf and Country Club) v Eco Top Heat & Power Ltd* [2021] EWHC 1807 (TCC) (judgment available here)**

2 July 2021

- The High Court has given guidance on 'expert shopping' and the circumstances in which a court may impose conditions for granting a party permission to replace its expert.

- The underlying case relates to a fire at the claimant's hotel in 2018. At the time of the fire, the defendant, a firm of building contractors, was undertaking work at the hotel. The claimant's case is that the fire was most probably caused by a cigarette discarded by one of the defendant's employees. Prior to the commencement of proceedings, both parties instructed experts to establish the cause of the fire. They attended the site in 2018, including two joint visits, and the defendant's expert ("**Expert A**") was in email correspondence with the claimant's expert thereafter. Expert A also attended a conference with the defendant's solicitors in October 2018, of which a privileged attendance note (the **"Attendance Note"**) was taken.

- The claimant then issued proceedings in August 2020, and when draft directions were exchanged prior to the Costs and Case Management Conference, it transpired that the defendant was seeking to call another expert ("**Expert B**") to replace Expert A. The claimant did not oppose the calling of Expert B, but applied for a condition that certain documents in relation to Expert A be disclosed.

- In its judgment, the High Court carefully analysed the applicable case law and helpfully set out the general principles as follows:

  - The Court has a wide and general discretion as to whether to impose terms or conditions when granting permission to adduce expert evidence under CPR 35.4, and will have regard to all the circumstances of the particular case.

  - In exercising such power or discretion, the Court may give permission for a party to rely on a replacement expert, but such discretion is usually exercised on a condition that the report of the first expert is disclosed (*Vasiliou v Hajigeorgiou* [2005] 1 WLR 2195, CA).

  - Once the parties have engaged in the pre-action protocol process, the expert owes a duty to the Court so if the expert has prepared a report, there is no justification for not disclosing it (*Edwards Tubb v JD Weatherspoon plc* [2011] 1 WLR 1373, CA).

  - The Court discourages 'expert shopping', but the fact that an expert has produced a report already and the party subsequently wishes to adduce another expert is only one factor when considering whether there has been 'expert shopping'.

  - The Court will usually require strong evidence of 'expert shopping' before imposing a condition that would require the party to disclose materials other than the final report (such as attendance notes and correspondence), but it is not an essential requirement that 'expert shopping' is shown before conditions are imposed (*Coyne v Morgan* [2016] BLR 491, TCC).

- The Court then identified the two main issues that fell to be determined: (i) first, whether, taking into account the nature and timing of Expert A's early instruction, the defendant

was actually seeking to change experts at all; and (ii) second, if the defendant was to be regarded as having changed experts, whether the Court should exercise its discretion to impose the condition sought by the claimant.

- In respect of the first issue, the Court found that Expert A had been instructed as an expert for the purposes of the litigation and that its decision to appoint Expert B therefore amounted to a change of expert. In this regard, the Court noted that, although Expert A had been instructed at an early stage: (i) prospective litigation was already on foot, as demonstrated by the litigious pre-action correspondence that had been exchanged between the parties; (ii) Expert A had not undertaken a one-off inspection of the site, but had attended two joint site visits with the claimant's expert; (iii) Expert A, along with the claimant's expert, had met with witnesses and had engaged with the claimant's expert on possible causes of the fire; and (iv) Expert A then continued to exchange correspondence with the claimant's expert after these meetings. The Court noted that the fact that Expert A had not yet produced a written report was not "*fatal*" and it was relevant that he had expressed his opinion on the fire, as recorded in the Attendance Note.

- As to whether it should exercise its discretion to impose a condition for granting the defendant permission to change its expert, the Court noted that there was a sliding scale of circumstances where, at one end, sits flagrant cases of expert shopping where a party simply does not like the damaging view expressed by its expert and, at the other end, cases where an expert is replaced for an objectively justifiable reason, such as illness or retirement. The closer the circumstances to the former, the more likely it is that the Court will impose a condition on the grant of its permission. In the present case, the Court drew the inference that expert shopping had occurred for various reasons, including: (i)"*unwarranted*" attempts by the defendant to distance itself from Expert A, including by alleging that Expert A had attended site on the instructions of another party and had only limited instructions to arrive at some basic understanding of the matter; (ii) the defendant's initial denial that Expert A had expressed an opinion on causation and then subsequent admission that he had in fact done so at the meeting with its solicitors in October 2018; and (iii) the Court's view that Expert A was a suitable expert for the role and of comparable experience to Expert B.

- The Court therefore granted the defendant permission to adduce evidence from Expert B, but only on the condition that relevant materials concerning Expert A, including passages of the Attendance Note concerning Expert A's views on causation, were disclosed.

PH*lit* comment:

This judgment provides helpful guidance regarding 'expert shopping' and, in particular: (i) the circumstances in which a court may find that a party has appointed an expert for the purposes of litigation, who they are then seeking to replace; and (ii) the kind of factors which a court will consider when exercising its discretion to impose conditions in return for granting a party permission to replace its expert.

Experts are often instructed at an early stage of a dispute to help evaluate a party's case and the prospects of potential litigation. This case serves as a useful reminder that, even where the expert is instructed very early on, a court may determine that they have been appointed as a party's expert for the purposes of the litigation and, accordingly, may order the disclosure of privileged documents (even those created prior to the formal commencement of proceedings) in the event that a party later wishes to replace them. In this regard, it is important to note that by imposing a condition to disclose privileged material, the court is not overriding a party's claim to privilege—instead it is imposing a "price" for switching experts.

Court of Appeal holds privilege is not lost where party threatens litigation in order to obtain information

Victorygame Ltd and another v Ahuja Investments Ltd **[2021] EWCA Civ 993 (judgment available here)**

5 July 2021

- In last month's edition of PH*lit*, we considered a High Court ruling that a party's deception as to the true purpose of correspondence does not necessarily prevent that party from claiming litigation privilege over that correspondence where the dominant purpose test has otherwise been met (available here). The defendant in that case, Victorygame, was granted permission to appeal this decision to the Court of Appeal on an expedited basis. On 5 July, a unanimous Court of Appeal upheld the decision of the High Court, rejecting the general public interest exception to litigation privilege contended for by Victorygame and reiterating that once privilege is established, waiver and estoppel are the only methods by which it may be lost.

- The issue arises out of proceedings brought by the claimant, Ahuja, in which it claims that it was induced to enter into the purchase of a commercial property as a result of misrepresentations made by Victorygame. Victorygame defended the claim on the basis that Ahuja's former solicitors, Stradbrooks, were aware of the true position as they had been provided with supporting documents. Accordingly, the question of what Stradbrooks knew at the time of the transaction is vital to determining the dispute. However, Stradbrooks was uncooperative and did not provide the information Ahuja requested.

- Ahuja sought to obtain the information by threatening to bring proceedings for professional negligence against Stradbrooks, and sent a letter before action to Stradbrooks in that regard. Stradbrooks responded, by way of its insurer, providing the information sought. Victorygame sought disclosure of these two letters, but Ahuja claimed that the letters were subject to litigation privilege as it had no intention of commencing proceedings against Stradbrooks, and the real (and dominant) purpose of the letter was to obtain information for use in the proceedings against Victorygame.

- This argument was rejected by a Master, who determined that the dominant purpose test was not met. Ahuja appealed, and the High Court overturned the Master's decision, holding that, when assessed objectively, the dominant purpose of bringing the correspondence into existence was to obtain information for use in the present proceedings, as opposed to threatening and/or commencing proceedings against Stradbrooks. The High Court considered that, once it had been established that the dominant purpose test had been met, there was no reason to reject the claim for privilege on the basis of Ahuja's deception in terms of the manner in which it obtained the information.

- Victorygame was granted permission to appeal the High Court's decision on a limited basis. The question for the Court of Appeal was whether there is a legal principle to the effect that if one party obtains information from another party, by misleading that other party as to the purpose for which the information is required, the requesting party cannot maintain privilege over the information even if their dominant purpose in requesting it was for use in litigation.

- In answering this question, the Court took the starting point that, on their face, the two letters were subject to litigation privilege and there was no error of law in the High Court's approach to that issue. In addition, it was noted that this was not a situation where the letters had been produced in furtherance of a criminal purpose, such that the so-called "iniquity exception" to privilege might apply. For more information on the scope of the

iniquity exception, please see our blog commentary on the High Court's decision in *Various Claimants v News Group Newspapers Ltd* [2021] EWHC 680 (Ch).

- The Court stated that, under English law, once privilege attaches it can be: (i) waived by the party to whom the privilege belongs; or (ii) the party to whom the privilege belongs can be estopped from asserting the privilege because it would be unfair or unconscionable for him to do so by reason of his conduct. However, once privilege has been established for a particular communication or attaches to a particular document, that privilege cannot be set aside on the ground that some other higher public interest requires it. There is no wider public interest exception to the circumstances in which a party may claim privilege.

- The Court accepted (without deciding the point) that an estoppel might be found to arise where a deliberate lie is told by a party to prospective litigation in order to get the prospective defendant to divulge information to their opponent that they would not otherwise have been obliged to disclose (i.e. in circumstances where the prospective defendant is not aware that it is a party to an information-gathering exercise at all). However, for the purposes of establishing an estoppel, if the person making the request is entitled to the information, it is unlikely to matter how the information is obtained. In any event, there was no suggestion that Ahuja would be estopped from claiming privilege in the present case.

- Overall, the Court found that there was no wider public interest principle that a party should lose their entitlement to privilege simply because it obtained information by threatening a litigation it did not intend to bring. The Court noted that: (i) Ahuja's behaviour was not particularly reprehensible; (ii) it was probably entitled to the information anyway; and (iii) Stradbrooks was unlikely to have been deceived given its existing knowledge of the underlying dispute with Victorygame. Accordingly, the appeal was dismissed.

PH*lit* comment:

As with the High Court decision, this case does not expand upon the basic principles of litigation privilege, and the High Court's finding that the 'dominant purpose' test was satisfied was not in issue in this appeal.

However, this decision has clarified that where a party to litigation (or prospective litigation) seeks information from a third party, but does not disclose to that third party the reason why it requires the information, this is immaterial to the question of whether litigation privilege attaches. Privilege can be lost in specific circumstances, by statute, waiver or estoppel, but there is no principle in English law that a competing public interest (such as non-disclosure of purpose) can outweigh the privilege.

High Court sets aside default judgment "*after some hesitation and with some reluctance*"

***Mountain Ash Portfolio Limited v Boris Tsibenovich Vasilyev* [2021] EWHC 1853 (Comm) (judgment available here)**

7 July 2021

- The High Court has set aside a default judgment in the sum of £101,404,140 despite an "*unjustified delay*" in the making of the set aside application and in circumstances where the defendant only marginally satisfied the relevant merits threshold.

- Pursuant to a shareholders' guarantee purportedly entered into as a deed on 1 November 2007 (the "**Guarantee**"), the defendant (together with his former co-shareholder Mr Georgy Trefilov), guaranteed the obligations and liabilities of MARTA Unternehmensberatungs GmbH ("**MUG**") under a loan agreement that it entered into with

CF Structured Products BV as lender ("**CFSPBV**") in the sum of US$100m (the "**Loan Agreement**"). CFSPBV was the beneficiary under the Guarantee. MUG defaulted on the Loan Agreement in 2008 and was subsequently placed into insolvency proceedings. As a result of those proceedings, a demand for payment was made to Mr Vasilyev under the Guarantee on 27 April 2009 (the "**Demand**").

- The claimant in the present proceedings, Mountain Ash Portfolio Limited ("**MAP**") became the beneficiary under the Guarantee in 2018, by way of assignment, and on 29 April 2020 it issued proceedings against Mr Vasilyev for recovery of £101,394,000.00. Mr Vasilyev failed to file an Acknowledgment of Service or Defence, with the result that MAP applied for, and obtained, a default judgment on 23 September 2020. On 5 February 2021, Mr Vasilyev filed an application to set aside the default judgment (the "**Application**") pursuant to the Court's discretionary jurisdiction under CPR 13.3.

- In order to obtain relief under CPR 13.3, pursuant to CPR 13.3(1) an applicant must convince the court that either: (i) it has a real prospect of successfully defending the claim (the "**Threshold Test**"); or (ii) there is some other good reason why: (a) the judgment should be set aside; or (b) it should be allowed to defend the claim (the "**Good Reason Test**"). In addition: (i) under CPR 13.3(2), the court must consider whether the application was made "*promptly*"; and (ii) the court will have regard to all the circumstances of the case, in the same way it would do when hearing an application for relief from sanctions under CPR 3.9 (the "**Wider Discretion**").

The Threshold Test

- Mr Vasilyev alleged that the litigation had been orchestrated by his former co-shareholder and joint guarantor (Mr Trefilov), who had previously been made bankrupt and through that process had compromised his joint and several liability under the Guarantee for just £76,262.62. In that context, there were two key factual issues for the court to consider:

  - First, Mr Vasilyev's claim that he had no recollection of attending the meeting at which the Guarantee was purportedly signed, and therefore that his signature on the Guarantee was a forgery (the "**Forgery Issue**").

  - Second (and in line with the Forgery Issue), Mr Vasilyev claimed that the Guarantee was not, in any event, properly witnessed and therefore validly executed as a deed. As a result, Mr Vasilyev alleged that the Guarantee could only have taken effect as a simple contract and MAP's claim would therefore be time-barred (noting the six-year limitation period to claims based on simple contracts as opposed to the 12-year limitation period in respect of deeds under English law (the "**Witness/Deed Issue**")).

- As to the Witness/Deed Issue, the key piece of evidence was a statement from the witness (Ms Lerner) confirming that she did not witness Mr Vasilyev's signature in his presence. MAP disputed the legitimacy of the statement on the inferred grounds that she was intimidated into making the statement by various individuals including Mr Vasilyev and members of the Federal Security Service of the Russian Federation. Notwithstanding the "*troubling*" circumstances surrounding Ms Lerner's statement, the Court concluded that the statement created enough doubt as to the validity of the Guarantee, and therefore (but with "*instinctive hesitation*"), Mr Vasilyev had *just* satisfied the Threshold Test on the Witness/Deed Issue.

- Accordingly, the Forgery Issue did not need to be determined for the purpose of the Application. The Court nonetheless expressed a number of reservations about Mr Vasilyev's allegations, particularly given that he had only raised the Forgery Issue on 30 December

2020 and after his lawyers had already made various arguments (including as to misrepresentation) which presupposed that Mr Vasilyev had in fact signed the Guarantee.

The Good Reason Test

- Given the Court found that Mr Vasilyev had satisfied the Threshold Test, he did not need to satisfy the Good Reason Test. However, the Court nevertheless considered it briefly.

- Vasilyev had relied on MAP's claim not being brought to his attention before the default judgment had been entered, as well as the financial magnitude of the claim, as reasons why the default judgment should be set aside. The Court made clear that neither ground (individually or cumulatively) would have satisfied the Good Reason Test under CPR 13.3(1)(b), but it was still necessary to draw a conclusion on the evidence available in respect of both arguments as they were relevant to the Wider Discretion, as we discuss below.

The Court's Wider Discretion

- In this regard, the Court concluded (again "*with some hesitation in light of the incomplete or ambiguous evidential position*") that the proceedings had not come to Mr Vasilyev's attention until 19 October 2020, and therefore after default judgment had been entered. However, the Application was made 72 business days later (allowing for the intervening Christmas and New Year holidays), which the Court observed was "*a startling amount of time*", particularly in view of the amount at stake.

- Whilst the Court accepted that an applicant should not be punished for acting responsibly and diligently, the Application was "*not a complex or substantial offering*". The Court was particularly unimpressed with: (i) the unexplained reliance on the Christmas and Russian Orthodox holidays as causative of any delay; (ii) the lack of detail as to an incapacitating illness which was allegedly suffered by Mr Vasilyev and which was said to be a reason for delay; (iii) more generally the lack of detail in the investigative process, and, specifically, why that had caused such significant delay; and (iv) the high level of involvement from Mr Vasilyev's lawyers, which suggested that matters should have been dealt with quickly.

- Against those issues, the Court considered that the following matters weighed in favour of granting the Application: (i) the 11-year delay in proceedings being brought under the Demand; (ii) that allegations of forgery and fraud should not be made without due consideration; (iii) the financial magnitude of the default judgment (although the Court accepted that this was also reason to act more promptly); and (iv) there being no suggestion that any prejudice was caused to MAP by the delayed Application.

- The Court concluded that the matter was "*right on the line*", but it was "*marginally satisfied*" that it was just and appropriate to set aside the default judgment.

PH*lit* comment:

Whilst the Application was successful, the Court appeared to be at pains when arriving at its decision. The defendant was able to cast sufficient doubt in the Court's mind so as to pass the Threshold Test, whilst just managing to satisfy the Court that to set aside the default judgment was just and appropriate in all the circumstances (albeit Mr Vasilyev was penalised by an indemnity-based costs sanction).

Above all, practitioners are reminded of the requirement that any application to set aside a default judgment must be made promptly. Any unexplained or unjustifiable delay may result in the application being rejected. Moreover, the case demonstrates that generic references to intervening, or so-called "delaying", events (such as holidays, COVID-19 or other illness), will not generally in themselves constitute compelling reasons for delay, unless the applicant is able to explain how such events actually contributed to the delay.

High Court delivers a landmark ruling confirming the tort of *"violation of rights in a judgment debt"*—otherwise known as the *"Marex"* tort

***Lakatamia Shipping Co Ltd v Nobu Su and others* [2021] EWHC 1907 (Comm) (judgment available here)**

8 July 2021

- In a recent decision, the High Court has set out for the first time the parameters of the tort of "*interference in a judgment debt*" or "*violation of rights in a judgment debt*"—sometimes referred to as the "*Marex*" tort.

- The "*Marex*" tort derives its name from the judgment of Robin Knowles J in *Marex Financial Services Ltd v Sevilleja* [2017] EWHC 918 (Comm) in which he held that there was (at least) a good arguable case that English law recognised a tort of inducing or procuring a violation of rights under a judgment. His reasoning was that, given that inducing a breach of contractual rights is actionable, it would be counterintuitive if it were not also tortious to procure a violation of rights in a judgment debt that was founded upon a contract.

- In the present proceedings, the claimant (Lakatamia) alleged that the defendants had intentionally violated its rights in respect of a judgment debt of more than USD 60 million. A judgment had been entered in Lakatamia's favour against the first defendant, Mr Su, in November 2014. Throughout the underlying proceedings, Mr Su had been subject to a Worldwide Freezing Order over his assets, and this remained in place when he failed to voluntarily satisfy the judgment debt. Lakatamia alleged that the second to sixth defendants (his mother and a number of corporate defendants beneficially owned or controlled by Mr Su and/or his mother) had assisted Mr Su in evading the Freezing Order by dissipating the sale proceeds of Mr Su's private aeroplane and two villas that he owned in Monaco, in order to avoid paying the judgment debt.

- In determining whether Lakatamia had a cause of action for loss occasioned by *"interference with rights in a judgment debt"* the High Court recognised that the English courts continue to acknowledge and develop new forms of tortious wrongdoing. In particular, although a novel tort, "*interference with a judgment debt*" was conceived of as a development of the existing economic tort of "*inducing a breach of contract*" and so its elements could stand to be identified by analogy to that already existing tort. On this basis, the High Court concluded that the constituent elements of the tort should be:

  - the entry of a judgment in the claimant's favour;
  - a breach of the rights existing under that judgment;
  - the procurement or inducement of that breach by the defendant;
  - knowledge of the judgment on the part of the defendant; and
  - realisation on the part of the defendant that the conduct being induced or procured would breach the rights owed to the claimant under the judgment.

- The High Court also considered that the following additional principles should apply:

  - It suffices that the defendant intended to violate the claimant's rights under the judgment—the defendant does not need to also intend to cause damage to the claimant.

- It is not essential that the defendant had actual knowledge of the contents of the judgment; instead, it is sufficient for the defendant to know that the judgment existed.
- In this regard, "blind-eye" knowledge is sufficient i.e. it is enough for the claimant to show that the defendant acted knowingly or recklessly *"indifferent [as to] whether it is a breach or not"*.
- As with inducing a breach of contract, there must be procurement or inducement by the defendant of the breach of rights existing under the judgment, by persuading, encouraging or assisting the judgment debtor in the breach. Such encouragement, assistance, or persuasion etc. must influence the choice or *"operate on the mind and will"* of the judgment debtor in order to have a sufficient causal connection with the breach to render the defendant as an accessory to the breach.
- There is no need to establish *"spite, desire to injure, or ill will"* on the part of the defendant.
- Justification, which is recognised as a defence to inducing a breach of contract (although of narrow scope and restricted ambit), has no equivalent in the "*Marex*" tort as there cannot ever be sufficient justification for interfering with rights enshrined in a court judgment.

- Finally, the Court concluded that the principles governing the award of damages for the "*Marex*" tort would be the same as for the tort of inducing breach of contract, i.e. establishing what loss has been suffered by the violation of the interest in the judgment debt.
- Having determined the parameters of the tort, the High Court went on to find that the second to sixth defendants were liable for interference in a judgment debt (or the "*Marex*" tort) and that Lakatamia had suffered loss as a result of non-payment of the judgment debt. Such loss was the sale proceeds of the private aeroplane and Monaco villas, which had been dissipated in contravention of the freezing order over Mr Su's assets, and Lakatamia was therefore entitled to compensatory damages in the amount of the relevant sale proceeds.

PH*lit* comment:

The "Marex" tort provides a welcome addition to the armoury of the judgment creditor and may provide numerous advantages to the judgment creditor when faced with difficulties enforcing a judgment debt. In particular, where the involvement of parties other than the judgment debtor is suspected, the "Marex" tort may be easier to establish than other causes of action, such as unlawful means conspiracy, as the third party who interfered in the judgment debt can be pursued separately to the judgment debtor, with no need to show a conspiracy between the two parties.

Only time will tell whether the "Marex" tort will be taken up enthusiastically by judgment creditors and their advisers. However, at the very least, this decision has provided clarity on what exactly the judgment creditor will need to demonstrate in order to pursue such a claim.

For more information on this case and the development of the "Marex" tort please refer to our Stay Current article.

High Court rules that new practice direction on trial witness statements does not impact existing rules on admissibility of evidence

Mad Atelier International BV v Manes **[2021] EWHC 1899 (Comm) (judgment available here)**

8 July 2021

- In what is believed to be the first judicial analysis of the new practice direction on trial witness statements ("**PD 57AC**"), the High Court has ruled that PD 57AC does not create a new template for analysing the admissibility of witness evidence.

- This decision arises out of an application brought by the defendant, Mr Manes, for the strike-out of certain passages in four witness statements served by the claimant. In addition, the defendant also sought to have certain paragraphs of the claimant's expert report (which relied upon the offending passages) struck out. All of the challenged passages dealt with issues of quantum.

- In the underlying proceedings the claimant, Mad Atelier, claims that the defendant fraudulently induced it to enter into transactions which led to the termination of a joint venture agreement between them. In respect of the damages recoverable for that fraud, the claimant alleges that: (i) the transfer of its interest in the company Mad Atelier SA had been made at a substantial undervalue; and (ii) it suffered a loss of profits that would have been earned from the joint venture. Both of these quantum issues required an assessment of the hypothetical profits that would likely have been made, and the witness evidence under scrutiny was given in support of the claimant's position on its projected profits from the restaurants which were going to be set up in Covent Garden, Mayfair and Dubai under the joint venture terms. The witnesses providing this evidence were all (at the relevant time) working for the claimant, and had some involvement in the joint venture. Some of their evidence was also based on their relevant experience in the sector.

- The defendant sought to have this evidence struck out on the basis that, contrary to the requirements of PD 57AC: (i) it was not evidence of fact, but was instead commentary or opinion on other evidence; or (ii) it was otherwise seeking to argue a particular point in the case. It was the position of the defendant that all authorities which preceded PD 57AC must be read in light of the new rules, though the defendant did not go so far as to say that PD 57AC overruled these authorities.

- In determining the application, the High Court stated that PD 57AC does not change the law as to the admissibility of evidence or overrule the directions given by the previous authorities as to what may be given in evidence. In particular:

  - there is support in the authorities for hypothetical evidence (as to what would or could have happened) itself being evidence of a matter of fact—this would bring such statements within paragraph 3.1(1) of PD 57AC which refers to *"evidence as to matters of fact that need to be proved at trial"*; (emphasis added);

  - PD 57AC states at paragraph 3.1(2) that a witness statement may include evidence which a witness *"would be allowed to give in evidence in chief if they were called to give evidence at trial"* and therefore the test is one of admissibility at trial;

  - references to documents in witness statements does not necessarily amount to *"commentary"* on those documents; and

- The sanctions provided for in paragraph 5.2 of PD 57AC (e.g. striking out all or part of the statement or refusing permission to rely on the evidence) are discretionary in any event.

- The High Court then referred to a number of authorities which demonstrated that witnesses of fact may be able to give opinion evidence which relates to the factual evidence which they have given, particularly if they have relevant experience or knowledge. This is particularly so where the evidence is given as to a hypothetical situation as to what would, or could, have happened. The Court considered that hypothetical evidence is evidence of fact, provided that the witness can give evidence, by reference to personal knowledge and involvement, as to what would have happened in the counterfactual scenario.

- Accordingly, the Court held that the claimant in this case was entitled to put before the trial judge its evidence as to what would or could have happened as such evidence is not inadmissible and is either: (i) itself factual evidence; or (ii) evidence of opinion given by those with knowledge of the facts and by reference to the factual evidence which they would give. The defendant's application for strike-out was therefore dismissed.

PH*lit* comment:

Whilst practitioners look to assimilate the new PD 57AC into their everyday practice, it is comforting to note that PD 57AC does not overrule the existing authorities on admissibility of evidence. The High Court stated that while PD 57AC is "obviously valuable in addressing the wastage of costs incurred by the provision of absurdly lengthy witness statements merely reciting the contents of the documentary disclosure and commenting on it… [PD57 AC] was not in [its] judgment intended to affect the issue of admissibility".

Accordingly, and in line with the existing position on admissibility of evidence, this decision confirms that a witness of fact can give opinion evidence where it is related to their factual evidence (especially where they have relevant expertise) and that this is particularly so in circumstances where the opinion evidence is about a hypothetical scenario. The Court noted the benefits of such evidence in assessing quantum, where it is often trying to "do its best on the material before it".

"Most civil litigation … end[s] up being about the costs that were incurred in pursuing that same litigation"—Court of Appeal gives guidance on third party cost orders

***Goknur Gida Maddeleri Enerji Imalat Ithalat Ihracat Ticaret Ve Sanati AS v Aytacli* [2021] EWCA Civ 1037 (judgment available here)**

13 July 2021

- The Court of Appeal has confirmed that a non-party costs order under section 51(1) of the Senior Courts Act 1981 ("**SCA 1981**") should usually only be made against a director of a company involved in litigation in circumstances where: (i) the director is seeking to benefit personally from the company's pursuit of, or stance in, the litigation; or (ii) the director has acted with some form of impropriety or bad faith.

- The underlying dispute relates to a contract concerning the supply of fruit juice by the appellant, Goknur, to Organic Village, a small family-run business of which the respondent, Mr Aytacli, is its sole director. The contract stipulated that the fruit juice should not be made from concentrate. In 2011, Organic Village rejected stock received from Goknur, believing it to have been made from concentrate, and refused to pay for said stock. In 2012, Gorkan issued a claim against Organic Village for non-payment. Organic Village defended the claim and issued a counterclaim for losses it allegedly suffered as a result of Goknur's breach of contract; in particular, loss of future profits.

- Due to non-compliance with various orders, Goknur's claim was ultimately struck out and it was ordered to pay Organic Village's costs. Organic Village's counterclaim was upheld in relation to its claims for breach of contract and misrepresentation, but given it could have obtained alternative supplies, its claim for loss of future profits did not succeed and it was awarded a nominal £2 in damages. Crucially, Organic Village was ordered to pay 25% of Goknur's costs associated with the counterclaim. However, as Organic Village was balance sheet insolvent, and Mr Aytacli had provided personal guarantees in respect of its costs, Goknur made an application for a non-party costs order against him.

- At first instance, the High Court held that while Mr Aytacli controlled and funded Organic Village and the conduct of the litigation, it could not be said that the counterclaim was pursued solely or substantially for his own benefit. In addition, in the absence of some other compelling factor, such as bad faith or impropriety, it would be an unjust outcome for him to be liable for Organic Village's costs. Goknur then appealed.

- The Court of Appeal, upholding the High Court's judgment, noted that section 51(1) of the SCA 1981 provides the courts with a general discretion in relation to cost orders, including the discretion to make a costs order against a non-party. However, following the decision of the Privy Council in *Dymocks Franchis Systems (NSW) Pty Limited v Todd and another* [2004] UKPC 39, cost orders against non-parties are to be regarded as "exceptional" and it is for the court to consider whether it is just to make the order in all the circumstances. This principle was restated by the Court of Appeal in *SystemCare (UK) Limited v Service Design Technology Limited* [2011] EWCA Civ 546, which also clarified that for a cost order to be made against a controlling or funding director of a party to litigation, it is usually a requirement that the director has either acted for their own benefit, or with bad faith/impropriety.

- In the present case, the Court of Appeal found that while Mr Aytacli clearly did fund and control the litigation, he did not stand to benefit personally but rather acted as a "funder", trying to get his money back. Organic Village could not have paid the sum claimed by Goknur and so had to defend the claim. In addition, the Court also noted that it was right for Organic Village to defend the claim on the merits.

- Finding that Mr Aytacli had not acted for his own benefit, the Court then turned to assess whether he had acted in bad faith or otherwise improperly. Goknur alleged that Organic Village had failed to disclose certain emails demonstrating Mr Aytacli's attempts to mitigate certain of Organic Village's losses, which it was later claimed had been accidentally deleted. However, the High Court had not found this to have amounted to bad faith/impropriety and the Court of Appeal upheld this, noting that any impropriety must be serious before a non-party costs order can be made.

PH*lit* comment:

This judgment usefully restates the applicable principles when considering a non-party or third party costs order against a director of a party to litigation. Whilst the courts have a wide discretion under section 51(1) of the SCA 1981, the test ultimately is a factual one concerned with what is just in the circumstances. In this regard, if it is established that the director either funded or controlled the litigation, then in order for a costs order to be made against them, it is then required that either: (i) the director acted with impropriety or in bad faith; or (ii) the director acted for their own benefit.

Supreme Court confirms correct approach to liquidated damages and interpretation of "negligence"

***Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29 (judgment available here)**

16 July 2021

- In this case, the Supreme Court considered the correct approach to interpreting liquidated damages clauses. In an appeal on three issues, the Supreme Court determined that: (i) liquidated damages are payable up to the termination of a contract, even where the relevant works have not been completed; (ii) a reference to "negligence" in a cap on contractual liability included breaches of a contractual duty to exercise reasonable care and skill (as well as the concurrent tortious duty); and (iii) liquidated damages were subject to a contractual cap on liability.

- On 8 February 2013, the claimant/appellant in these proceedings, PTT Public Company Ltd ("**PTT**") entered into a contract with Triple Point Technology, Inc. ("**Triple Point**"), pursuant to which Triple Point (as contractor) agreed to design, install, maintain, and license a software system through which PTT could carry out its commodity trading business (the "**Contract**"). The Contract contained a liquidated damages clause under which Triple Point was liable in the amount of 0.1% of undelivered work "*per day of delay from the due date for delivery up to the date PTT accepts such work*". Triple Point's total liability under the Contract was limited to the contract price received by Triple Point; however, this limitation did not include "*liability resulting from fraud, negligence, gross negligence or wilful misconduct*" (emphasis added).

- The Contract deliverables were split into 9 phases, of which Triple Point completed stages 1 and 2 of the first phase, 149 days late. PTT paid Triple Point for that work, but refused to make payment of certain other invoices, causing Triple Point to suspend its performance of the Contract, following which PTT gave notice to terminate the Contract on 23 March 2015. As at the date of termination, Triple Point had neither completed the remaining stages of phase 1 nor any of the other 8 project phases.

- Triple Point subsequently brought proceedings for non-payment of its outstanding invoices, to which PTT counterclaimed for liquidated delay damages, wasted costs and costs resulting from termination of the Contract (in particular those relating to procuring a replacement software system). At first instance, Jefford J dismissed Triple Point's claim, determining that the delay in performance was a result of its failure to comply with its contractual obligation to exercise reasonable skill, care and diligence. Jefford J held that PTT was entitled to liquidated damages for Triple Point's delay (which was not subject to the contractual cap on liability), as well as: (i) termination loss arising from Triple Point's negligent breach of contract, in the form of the costs of procuring an alternative software system; and (ii) wasted costs, both of which were subject to the contractual cap on liability. Triple Point subsequently appealed and PTT cross-appealed against the finding that any of the damages were subject to the contractual cap.

- The Court of Appeal set aside the High Court's award of liquidated damages and held that: (i) PTT was only entitled to liquidated damages in respect of works that had been completed before the Contract was terminated (i.e. not those that had not been completed or had been abandoned, which work would be subject to a claim in general damages) (the "**First Issue**"); (ii) the carve out for "negligence" in the contractual cap on liability did not apply to a contractual obligation to exercise reasonable care and skill and therefore the claim for termination loss due to Triple Point's negligent breach of contract fell within the contractual

cap on liability (the "**Second Issue**"); and, (iii) any award of liquidated damages was subject to the contractual cap on liability (the "**Third Issue**"). PTT appealed to the Supreme Court on the First, Second, and Third Issues.

- On the First Issue, the Supreme Court noted that the interpretation of a liquidated damages clause is subject to the ordinary methods of contractual interpretation and held that clear words would be required to overturn the orthodox position that liquidated damages would be payable for all delays up to termination of the relevant contract, following which the contractor would be liable for general damages. While the liquidated damages clause in the present case referred to the acceptance and completion of work, there was no clear wording to overturn that orthodox position. Accordingly, the Supreme Court reversed the Court of Appeal's decision, principally on the basis that such decision was "*inconsistent with commercial reality and the accepted function of liquidated damages*", which function is to provide a "*predictable and certain*" remedy for a specific event (in this case, delay). To treat the clause in this way ensured "*commercial common sense*" and would prevent "*the unlikely elimination of accrued rights*".

- As to the Second Issue, the majority of the Supreme Court departed from the High Court and the Court of Appeal. It was held that the reference to "*negligence*" in the carve out from the contractual cap on liability should be construed as including a contractual duty to exercise care and skill (in addition to the tortious duty), on the basis that the word's "*accepted meaning in English law*" covers both the separate tort of failing to use due care and a breach of a contractual provision to exercise care. As a result, the termination loss arising from Triple Point's breach of its contractual obligation to exercise care and skill was not subject to the contractual cap on liability. Lord Sales and Lord Hodge, dissenting from the majority, were of the view that the parties had clearly intended to refer to the tort of negligence and not any contractual duty.

- Turning to the Third Issue, the Supreme Court agreed with the Court of Appeal that liquidated damages did fall within the contractual liability cap. Whilst there was wording in the limitation clause that left room for interpretation, the Supreme Court held that on a proper construction of the Contract, the total liability cap encompassed liquidated damages.

PH*lit* comment:

Of particular note and welcome clarity for practitioners (especially those within construction, technology and other project-based sectors) is the clarification that when a contractor is in delay, liquidated damages will continue to accrue until the point of termination of the underlying contract, even where the relevant work has not been completed (with general damages potentially available thereafter). This decision makes clear that, should contracting parties wish to depart from this default position, they will have to include specific drafting to the contrary.

This case offers a further reminder as to the care that must be applied in drafting generally, but above all when drafting limitation of liability and liquidated damages clauses. Where the parties wish to include certain carve-outs, any ambiguity must be avoided at all costs. In this case, it is worth noting that the Court of Appeal ruled unanimously that "negligence" should be construed as the tort of negligence alone, but that unanimity was overruled (albeit with dissent) by the Supreme Court, thereby resulting in a significantly greater damages award for PTT.

High Court considers latent damage for the purposes of limitation in the context of a professional negligence claim

Witcomb v J. Keith Park Solicitors (a firm) **[2021] EWHC 2038 (QB) (judgment available here)**

20 July 2021

- Section 14A(4) of the Limitation Act 1980 (the "**Limitation Act**") operates so as to provide two alternative time limits for bringing a negligence claim: (i) six years from the date on which the cause of action accrues i.e. when the damage is first sustained (under section 14A(4)(a)); or (ii) three years from the *"earliest date on which the claimant had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action"* (under section 14A(4)(b)).

- In a preliminary issue trial regarding the application of section 14A, the High Court has confirmed that in cases of professional negligence, time will not start to run under the second limb of section 14A(4) until the claimant has reason to consider that the advice which he received may have been wrong, or that advice which should have been given was omitted. In reaching this conclusion, the Court highlighted the distinction drawn by section 14A(5) between, on the one hand, knowledge of the damage itself and, on the other hand, knowledge that the damage is attributable to the act or omission of the defendant. A prospective claimant must have both types of knowledge before time will begin to run under section 14A(4)(b).

- The claimant in this case, Mr Witcomb, was seriously injured in a traffic accident in 2002 and brought a claim against a third party who admitted liability. Mr Witcomb received £150,000 in full and final settlement of the claim in December 2009. The defendants are Mr Witcomb's former solicitors and counsel, who represented him at the time of the settlement.

- Mr Witcomb's symptoms worsened over time, and, in January 2017, he was advised that the best treatment was amputation of his right leg below the knee. Mr Witcomb alleged that the defendants negligently caused him to enter a settlement which did not make sufficient provision for the risk of future deterioration in his condition, in that: (i) the defendants did not cause a medico-legal report to be obtained (which would have identified the risk of future amputation) despite recognition it was needed; and (ii) the defendants failed to advise Mr Witcomb to seek provisional damages at all.

- The defendants raised the preliminary issue of whether Mr Witcomb's claim was barred by the expiry of the limitation period. It was common ground that the primary limitation period, whether in tort or in contract, was a period of six years running from the date of the settlement meeting in December 2009, which expired well in advance of the initiation of the present claim in December 2019. However, Mr Witcomb relied on section 14A(4)(b) of the Limitation Act to argue that he did not have all of the knowledge required to bring a claim until January 2017 at the earliest, when he first learned he was facing amputation. According to Mr Witcomb, it was only at this stage that he knew he was likely to have suffered damage in the form of under-settlement of his personal injury claim that was attributable to the defendants' negligence.

- The defendants denied that section 14A(4)(b) of the Limitation Act applied to Mr Witcomb's claim at all, contending that he had all the relevant knowledge at the date of the settlement meeting. In the alternative, the defendants suggested that Mr Witcomb had the necessary knowledge about the deterioration in his medical condition as early as mid-2016, and

accordingly the three year time limit under section 14A(4)(b) of the Limitation Act would have expired in mid-2019, meaning that Mr Witcomb was out of time in any event.

- Under section 14A(5) of the Limitation Act, the extended time limit does not start to run until a claimant has knowledge of both: (a) the material facts about the damage; and (b) the fact that the damage was attributable to the defendant's act or omission which is alleged to constitute negligence. Accordingly, the Court needed to consider when Mr Witcomb would have acquired the knowledge that the under-settlement was due to the defendants' negligent act or omission. Referring to the leading House of Lords authority on section 14A, *Haward v Fawcetts* [2006] UKHL 9, the High Court concluded that where the "*essence of the allegation of negligence is the giving of wrong advice, time will not start to run under section 14A until the claimant has some reason to consider that the omitted advice should have been given*".

- The Court also recognised that knowledge of the damage itself is distinct from the knowledge that the damage is attributable to the act or omission of the defendant. The two often become merged, but they are separate: in some cases a person will acquire both types of knowledge simultaneously, but not always. In the present case, the Court considered that the defendants had erroneously equated knowledge of the 'damage' (the under-settlement) with knowledge that the damage was attributable to an allegedly negligent act or omission by the defendants (the failure to obtain medical evidence and/or to advise on a claim for provisional damages).

- Accordingly, although Mr Witcomb knew about the risk of under-settlement, there was no reason for him to suspect that the advice he had received was flawed. When Mr Witcomb's condition worsened in mid-2016, he still had no reason to suspect that the advice he had received was wrong. It was only in January 2017, when he was advised that amputation might be required, that Mr Witcomb sought further legal advice and discovered he could have attempted to claim provisional damages in 2009. As such, Mr Witcomb's claim was not time-barred by virtue of the application of section 14A(4)(b) of the Limitation Act, and could proceed to trial.

PH*lit* comment:

Although this case does not create new law, it usefully restates the principles regarding the application of section 14A of the Limitation Act and provides helpful guidance on what will constitute the requisite "knowledge" in circumstances where a claimant has received negligent advice, but is unaware that the negligent advice has caused them loss until additional legal advice is sought. There was no suggestion in this case that Mr Witcomb should have sought fresh legal advice sooner; nor was it the case that Mr Witcomb needed to understand in detail the legal principles which meant that the defendants' acts and omissions were negligent as a matter of law. Instead, the test is whether the claimant had some reason to consider that the omitted advice should have been given.

Important decision for data breach litigation as claims for misuse of private information and breach of confidence struck out for being "ill founded"

***Darren Lee Warren v DSG Retail Limited* [2021] EWHC 2168 (QB) (judgment available here)**

30 July 2021

- In an action for damages arising out of a cyber-attack suffered by the defendant, DSG Retail Limited ("**DSG**"), the High Court has ordered that the claimant's claims for misuse of private information ("**MOPI**"), breach of confidence ("**BOC**") and common law negligence be summarily dismissed and/or struck out. Accordingly, the only cause of action

that can still proceed is one for breach by DSG of statutory duty arising out of an alleged breach of the seventh data protection principle ("**DPP7**") contained in the Data Protection Act 1998 (the "**DPA 1998**"), which requires data controllers to implement "*appropriate technical and organisational measures*", so as to guard against "*unauthorised or unlawful processing* of *personal data*". Please see our extended commentary on this short but significant case here.

- Between 24 July 2017 and 25 April 2018, DSG (which operates 'Currys PC World' and 'Dixons Travel') was the victim of a "*complex cyber-attack*" carried out by "*sophisticated and methodical criminals*" who managed to infiltrate DSG's systems and install malware which ran on 5,930 point of sale terminals in DSG stores (the "**Cyber-Attack**").

- The claimant in the present proceedings, Mr Warren, claims that his personal information or data was compromised in the Cyber-Attack. As a result, he issued proceedings against DSG, as the relevant data controller, for damages in the amount of £5,000 for distress caused by the loss of control of his personal data. No claim was made for any personal injury or financial loss.

- In bringing his claim, Mr Warren relied upon four separate causes of action: (i) BOC; (ii) MOPI; (iii) common law negligence; and (iv) breach of the DPA 1998 (based on alleged breaches of various data protection principles, all of which were ultimately discontinued, other than the alleged breach of DPP7). On 17 June 2021, DSG made an application for summary judgment and/or strike out of each of the causes of action advanced by Mr Warren, save for the alleged breach of DPP7.

BOC and MOPI

- In respect of Mr Warren's claims for BOC and MOPI, the breach alleged was a failure by DSG to keep his data secure from unauthorised third-party access. DSG submitted that such allegations could not form the basis of claims for BOC and/or MOPI because these causes of action require the defendant to have taken some positive wrongful action in relation to the data in question (such as disclosing it to a third party or making some other unauthorised use of it). It was argued that DSG had not done that; instead, DSG was simply the victim of a sophisticated criminal cyber-attack and therefore made no unlawful use of the data.

- Whilst Mr Warren had conceded the BOC claim as being untenable, he maintained his claim for MOPI and argued that he had a reasonable expectation that his private information would be kept private, which extended to an expectation that his information would be properly protected by DSG, which DSG had failed to do. The Court was referred to persistent failures by DSG to remedy data security deficiencies identified as far back as 2014, and it was submitted by Mr Warren that this failure by DSG to implement basic security measures to protect its customers' data meant that were was, in effect, publication by DSG of his private information to the criminal hackers.

- The Court observed that Mr Warren's overarching claim was that DSG had failed in its alleged duties to implement sufficient security measures, which allowed the cyber-criminals to carry out the Cyber-Attack and access its customers' personal data. Mr Warren had not alleged any positive conduct by DSG that could be said to comprise a breach or misuse of the data (which was not surprising given that DSG was itself the victim of the Cyber-Attack) and there was no suggestion that DSG had purposefully facilitated the Cyber-Attack.

- Accordingly, the Court found that the articulation of Mr Warren's claims for BOC and MOPI amounted to the imposition of some form of "*data security duty*". However, it held that

claims for BOC or MOPI are not established through the imposition of a broad duty on the holder of private or confidential information to ensure the security of it; rather, they prohibit a defendant from engaging in any positive conduct that is "*inconsistent with the obligation of confidence/privacy*" that is owed.

- Accordingly, the Court agreed with DSG's position that a claim for BOC/MOPI requires some positive conduct on the part of the defendant. The Court accepted that this could include unintentional use, but it must be "use" in some form by the defendant, which was not present in this case. As a result, the claims in MOPI and BOC were dismissed and/or struck out for having no reasonable prospect of success and not disclosing any reasonable grounds of claim.

Negligence

- The Court held that there is "*neither need nor warrant*" to impose a duty of care where the DPA 1998 already imposes a relevant statutory duty; to determine otherwise would be "*otiose*" and potentially give rise to "*indeterminate liability*". Whilst Mr Warren was able to draw the court's attention to instances of potential breaches of a duty of care, such instances did not establish that a duty of care itself existed (with the result that there could be no breach).

- Further, even if a duty of care had been established, Mr Warren had not pleaded any recoverable loss. He had only pleaded "distress", which, whilst recoverable as damage under the DPA 1998, is not a recoverable loss in negligence (unless it amounts to a "*clinically recognised psychiatric illness*").

- Accordingly, Mr Warren's pleaded cause of action in negligence was not complete and failed both for lack of a defined duty of care and loss.

PH*lit* comment:

The fundamental takeaway from this case is that the law has not recognised culpability in MOPI or BOC where the defendant itself has made no unlawful use of the information in question. Accordingly, whilst unintentional use might suffice, a mere failure by the defendant to have adequate security measures in place to protect information or data against unauthorised access or use by a third party, will not be sufficient to plead claims for BOC or MOPI. However, perhaps of even greater significance is the effect this judgment could have on the viability of existing and future data breach claims.

Individual and group claims arising out of data breaches are commonly funded by, amongst other things, after the event ("ATE") insurance, the premiums of which are not cheap. Whilst successful litigants cannot typically recover such premiums from the other side in civil litigation, this general rule does not apply to "publication and privacy proceedings", which include claims for BOC and MOPI, but not claims under data protection law. Based on this recent decision of the High Court, it is doubtful that claimants will now be able to recover the ATE premiums from defendants in data breach cases involving attacks by third-party criminal actors, which could have a significant impact on the economic value of such claims. This might not only deter potential claimants who have been affected by such data breaches, but could also have a profound impact on the business models of those firms who seek to represent them.

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Paul Hastings' London litigators form an integral part of our global litigation practice and provide services across a wide range of contentious areas including company and commercial disputes, banking, insolvency, intellectual property, employment law, data privacy, reputation management, civil and criminal fraud, internal investigations, bribery and corruption, money laundering, and international arbitration.

Our London litigators understand the business implications of litigation and are trusted by clients to counsel them through their most complex and significant disputes. Please do not hesitate to contact any of the following Paul Hastings' London litigators:

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