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PH Insight for News and Analysis of the Latest Developments from the Courts of England and Wales

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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 an interesting Court of Appeal decision in which litigation privilege was found to apply to text messages in respect of some, but not all, of the defendants, which may prove to be a challenging judgment for practitioners to apply in practice;
- We highlight the High Court's latest affirmation that privilege does apply to the advice of foreign lawyers practising in-house;
- We analyse the interesting procedural aspects arising from the FCA's first use of the Financial Market Test Case Scheme set out in Practice Direction 51M of the Civil Procedure Rules in the highly anticipated COVID-19 business interruption insurance decision;
- We review a recent decision of the High Court in which the "reflective loss" principle set out earlier this year by the Supreme Court in *Sevilleja v Marex Financial Ltd* has been applied for the first time. The Supreme Court had ruled in that decision that reflective loss is a bright line legal rule preventing shareholders from bringing a claim where they have suffered loss (in the form of diminution of share value) as a result of loss sustained by the company and in respect of which the company has a cause of action against the same wrongdoer;
- We note a Court of Appeal decision on the construction of a technical term in an exclusion clause and the reminder this provides for those drafting contracts that, if it is desirable to refer to sector or industry specific jargon in your agreements, be sure that the word is clearly defined to avoid it being prescribed its ordinary meaning; and
- Finally, we consider a decision of the High Court, which reminds us that the courts may imply a sanction for breach of a CPR rule for policy reasons, even where such sanction is not expressly set out in the CPR itself.

Privilege for some, but not for others

TBD (Holland) v Simons & Others [2020] EWCA Civ 1182 (judgment available here)

8 September 2020

- The Court of Appeal has held that a defendant was not entitled to claim litigation privilege over a series of text messages, despite accepting that his co-defendants in the litigation (including a company of which he was a director) could claim privilege in respect of the same messages.
- The decision demonstrates that litigation privilege can only belong to a person who is, or is reasonably contemplated will be, a party in the litigation.
- It is also notable that the Court of Appeal rejected the claimant's submissions that litigation privilege was restricted to evidence (as opposed to communications about obtaining evidence) and communications which revealed what advice had been requested or given. The Court of Appeal did not accept that litigation privilege should be so narrowly construed.
- The Court of Appeal also rejected the defendant's alternative case for common interest privilege in the text messages, given that he did not have his own interest in obtaining legal advice about the claims at the relevant time. The fact he was majority shareholder in the defendant company did not affect the analysis, given that there was no evidence to suggest that he was acting in his capacity as the majority shareholder, as opposed to as a director, at the applicable point.

PH*lit* comment:

The consequence of the decision appears to be that the claimant would only be able to rely on the privileged material for the purposes of advancing its case against one of the defendants, who was unable to assert a claim for privilege. However, the claimant would not be able to use the material for the purposes of furthering its case against the other defendants, on the basis that those defendants had a valid claim for privilege over it. It is unclear how this would work or be managed in practice, and it could potentially be a difficult point for practitioners to navigate.

High Court confirms the application of privilege to foreign lawyers

PJSC Tatneft v Bogolyubov & others [2020] EWHC 2437 (Comm) (judgment available here)

11 September 2020

- A judgment handed down by the High Court has confirmed the well-established principle that legal advice privilege ("**LAP**") applies to foreign lawyers.
- Reviewing the authorities, the Court noted that the starting point for considering whether or not LAP applies is to look at the rationale for it; this being, that it is considered to be in the public interest that clients can obtain legal advice in confidence. Whilst the courts in England and Wales have declined to extend LAP to professionals other than members of: (i) the Bar; (ii) the Law Society; and (iii) the Chartered Institute of Legal Executives, in-house lawyers are required to be regulated and to hold a valid practicing certificate. Accordingly, they can render legal advice to their employer, which is capable of being covered by LAP.

- The argument that the requirement for regulation should extend to foreign lawyers was rejected by the Court on the basis that foreign lawyers comprise a distinct category. The key requirement is merely that the foreign lawyer should be *"acting in the capacity or function of a lawyer"*. In addition, due to principles of comity, and as a result of the functional approach of the English law to privilege, it was noted that the English courts have consistently held that the standards of training, qualification or regulation of foreign lawyers are beyond the supervision of English judges.

PH*lit* comment:

This decision will give comfort to companies, with contracts and arrangements that are subject to English law, that the legal advice given by their non-English qualified in-house counsel will attract LAP, even where those advisers are not members of the bar or otherwise subject to professional regulation in the country of their qualification. Instead, the key requirement is merely that the foreign lawyer should be "acting in the capacity or function of a lawyer"*.*

For more information on this case and its implications see our detailed case update here.

Judgment in FCA's COVID-19 Business Interruption Test Case

The Financial Conduct Authority v Arch & Others **[2020] EWHC 2448 (Comm) (judgment available here)**

15 September 2020

- The High Court has recently handed down judgment in the highly anticipated COVID-19 Business Interruption Test Case. The test case is significant for a number of reasons, not least because of the potential impact for the insurance coverage available to SME businesses across the U.K. for losses arising from the COVID-19 pandemic. For litigators, the case holds particular interest, as it is the first time that a case has been brought on an expedited basis by the FCA under the Financial Market Test Case Scheme set out in Practice Direction 51M of the Civil Procedure Rules (the "**Scheme**").

- Many policyholders with business interruption coverage who had expected their losses arising out of the COVID-19 pandemic to be covered by insurers have faced obstacles when asserting a claim. As a result, the FCA decided to use its authority to seek the Court's determination of a test case relating to a sample of 21 pre-selected clauses used by eight insurers.

- The Court found for the FCA on the majority of the issues of interpretation and the FCA has estimated that some 700 policies across 60 insurers and 370,000 policyholders could potentially be affected by the decision. Although the judgment will be welcome news for many policyholders, it does not conclude that insurers would be liable across all of the 21 representative wordings that were considered. Each policy will still need to be reviewed carefully alongside the detailed judgment in order to determine liability.

- This is the first case brought under the Scheme and it has given rise to a number of interesting procedural points that are outside the norm for High Court litigation:

  - The number and range of pre-action steps was unusual. In conjunction with the participating insurers, the FCA developed a framework agreement to govern the scope of the proceedings, which stated that the FCA and defendant insurers had a *"mutual objective of achieving the maximum clarity possible for the maximum number of policyholders and their insurers"*.

- The case was heard by two judges: Flaux, LJ (a Lord Justice of Appeal) and Butcher, J (a Financial List judge), because this was a case of particular urgency and importance.

- The FCA sought for the trial to be expedited. As a result, the claim form was issued on 9 June 2020 and trial was scheduled for eight days from 20 July 2020, a mere 6 weeks later, which is an incredibly short time for such a case to be brought to trial.

PH*lit* comment:

Given the success of this first test case under the Scheme, it is possible that the FCA may seek to use it more frequently for issues of general public importance which impact significant numbers of businesses or individuals. If so, we may expect that a similarly open and transparent approach will be taken to future cases.

The decision was subject to a leap-frog appeal to the Supreme Court, which was heard over four days between 16 – 19 November. This also represents an incredibly short time frame between trial and the hearing of an appeal and the outcome is awaited with interest.

For more information on this case and its implications see our detailed case update here.

High Court considers the "reflective loss" rule

***Broadcasting Investment Group & others v Smith & others* [2020] EWHC 2501 (Ch) (judgment available here)**

21 September 2020

- Earlier this year, the Supreme Court considered the "reflective loss" principle, where the Court held (by a 4-3 majority) that the principle is a bright line legal rule which prevents shareholders from bringing a claim where they have suffered loss in the form of a diminution of share value or in distributions as a result of loss sustained by the company and in respect of which the company has a cause of action against the same wrongdoer (see *Sevilleja v Marex Financial Ltd* [2020] UKSC 31).

- In the present case, the High Court had to consider that principle for the first time since the *Marex* decision and emphasised the narrow scope of the re-stated rule. The Court held that the case was a paradigm example of the application of the reflective loss principle, with the first claimant being a direct shareholder in the company that had suffered the relevant loss. The first claimant's claim was therefore struck out accordingly.

- Interestingly, the Court held that the reflective loss principle did not defeat the claim of the third claimant who was a *"shareholder in a shareholder"* in the first claimant, rejecting the defendant's argument that it was a *"quasi-shareholder"* in the company. The Court relied on statements in *Marex* that the reflective loss rule is a *"highly specific exception of no wider ambit"* and bars only shareholders in the company that has suffered the loss.

PH*lit* comment:

The reflective loss rule has significant implications for financial service providers, playing an important role in defending shareholder actions (aside from those brought under the Financial Services and Markets Act 2000 where there is statutory exemption). As such, the clarification of the rule in Marex *was welcome, even though it did confirm the rule's narrow ambit. At first glance, the present decision may raise the spectre of "shareholder in a shareholder" claims against financial institutions. However, the "shareholder in a shareholder" must have an independent cause of action and in many cases this will not exist. As such, this latest decision may have fairly limited scope.*

Court of Appeal considers the preferred contractual construction of a term in an exclusion clause

Primus International v Triumph Controls [2020] EWCA Civ 1228 (judgment available here)

22 September 2020

- The Court of Appeal has upheld a decision of the High Court regarding the meaning of the term "goodwill" used in an exclusion clause.
- The case concerned a share purchase agreement that contained an exclusion clause which provided that the sellers would not be liable for any claims relating to "lost goodwill". The defendants argued that the term "goodwill" denoted a specific, technical accounting definition and should be construed accordingly. The claimants argued that the term should be given its ordinary legal meaning.
- The Court of Appeal found that the ordinary legal meaning of "goodwill" in a commercial context means the good name and business reputation of an entity. The Court was unable to find any indication in the contract that anything other than the ordinary legal meaning was intended or that the technical accounting definition was to be preferred. Accordingly, unless a contract uses clear words to the contrary, the ordinary legal meaning of a particular term will be preferred to an unusual, technical or non-legal meaning.

PH*lit* comment:

This decision will be of particular note to contract draftsmen across all sectors where an unusual or technical meaning of a common term is ubiquitous in that sector. If it is desirable to refer to sector or industry jargon in your agreements, be sure that the word is clearly defined to avoid it being prescribed its ordinary meaning.

High Court applies principles for relief from sanctions to application to admit late witness evidence

Wolf Rock (Cornwall) Ltd v Langhelle [2020] EWHC 2500 (Ch) (judgment available here)

23 September 2020

- The High Court has held that an application to admit late witness evidence should be treated like an application for relief from sanctions under CPR 3.9. The Court considered that the obvious inference from an order that evidence should be served by a certain time was that if a deadline is missed that evidence will not be admitted without the Court's permission. As such, there were good policy reasons for treating an application to admit late evidence in the same way as any other application for relief from sanctions.
- In the present case, the judge had given directions as to the service of evidence, directing Wolf Rock to file and serve witness evidence by 24 July 2019 (later extended to 16 August 2019). Wolf Rock filed and served three additional witness statements on 22 November 2019 and applied for permission to rely on those statements.
- As no specific sanction was prescribed for breach of the order to submit evidence by a certain date, the Court held that there was an *"implied sanction"* to which the principles in *Denton/Mitchell* would be applicable.

- This is not to say that a sanction should be implied in all cases where the relevant rule or order states the party *"must"* comply. However, where it is: (i) the unexpressed intention of the rule-maker or judge that there should be a sanction attaching to the rule or order; or (ii) there are policy reasons for treating the case as an application for relief from sanctions, the principles in *Denton/Mitchell* should apply.

PH*lit* comment:

Of particular note is the fact that the courts may imply a sanction for policy reasons even where it cannot be said that there is an unexpressed intention to apply a sanction. However, what may constitute sufficient policy reasons to imply a sanction remains unclear.

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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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