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The High Court considers two contrasting cases arising from the COVID-19 pandemic: a material adverse change clause in a contract for Premier League Football broadcasting rights and a force majeure clause in a media rights contract relating to European Club Rugby

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- We consider a claim in which the High Court ordered security for costs against the purported creator of Bitcoin on the basis that the claimant is a company and there was reason to believe that it would be unable to pay the defendants' costs if ordered to do so.
- We review a Court of Appeal ruling in which the court struck out a defence of 'mitigation by off-setting' in the context of a follow-on damages claim arising from the so-called 'ball-bearings' cartel, holding that the defendant had no right to 'go fishing' with a speculative, theoretical defence which lacked an evidential under-pinning.
- We reflect on a High Court ruling that the COVID-19 pandemic did not trigger a material adverse change clause in a contract for Premier League broadcasting rights because changes to match-days and match-times, as well as the absence of fans, did not represent a *"fundamental change"* to the *"format of the competition"* as required by the clause.
- We note a Court of Appeal ruling which confirmed that an unsealed claim form cannot be effectively served as it is not truly a claim form at all.
- We consider a High Court decision which notes that parties should not be *"play[ing] fast and loose"* with the requirements for trial witness statements under Practice Direction 57AC.

- We discuss a ruling of the High Court which confirms that a counterclaiming defendant can make a valid "claimant's" Part 36 offer.

- We note an interesting ruling of the Court of Appeal which gives guidance on amending a claim once the limitation period has expired—providing that a party may amend its statement of case where the limitation period has expired *"if the new claim arises out of the same facts or substantially the same facts as the claim in respect of which the party applying for permission has already claimed a remedy in the proceedings".*

- Finally, we review a High Court decision in which the licensee of media rights relating to European Club Rugby was entitled to rely on the "*Force Majeure machinery*" in its contract with the licensor and terminate a media rights agreement as a result of the COVID-19 pandemic.

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High Court orders security for costs against the purported creator of Bitcoin

***Tulip Trading Ltd (a Seychelles company) v Bitcoin Association for BSV (a Swiss verein) and others* [2022] EWHC 2 (Ch) (judgment available here)**

5 January 2022

- In a claim relating to US$4.5 billion worth of cryptocurrency, the High Court has awarded 15 of the 16 defendants security for costs in respect of their jurisdictional challenge. The award was made on the basis that the claimant is a company and there is reason to believe that it will be unable to pay the defendants' costs if ordered to do so.

- The ultimate beneficial owners of the claimant, Tulip Trading Ltd ("TTL"), are Dr David Wright and his family. Dr Wright claims to have created the Bitcoin cryptocurrency system under the pseudonym "Satoshi Nakamoto". The 16 defendants are open-source software developers who developed or improved the Bitcoin software on a non-commercial basis.

- TTL claims to have owned US$4.5 billion worth of Bitcoin (the "Assets"), which were accessed by Dr Wright from his computer in England using secure private keys. Following a hack into his computer in February 2020 the private keys were deleted, with the result that the Assets are no longer accessible by Dr Wright. TTL alleges that the defendants owe fiduciary and/or tortious duties to it to rewrite or amend the underlying software such that the Assets can be recovered. Whether TTL in fact owns the Assets is itself an issue in dispute.

- The first defendant acknowledged service of the claim noting its intention to defend it, and therefore did not challenge jurisdiction. The remaining 15 defendants (the "Relevant Defendants") contested jurisdiction, and there will be a 3-day hearing before a High Court judge on 28 February 2022 (the "Jurisdiction Hearing"). The Relevant Defendants applied for security for their costs in respect of the Jurisdiction Hearing (the "Application").

- For security to be granted, CPR 25.13 requires that: (i) to do so would be just in all the circumstances of the case (the "First Limb"); and (ii) one or more of the conditions set out in CPR 25.13(2) apply (the "Second Limb"). We address these limbs in reverse order, as done in the judgment.

The Second Limb

- The Defendants applied under conditions (a), (c), (f), and (g) of CPR 25.13(2), which conditions we expand on below. The Court ultimately granted security on the basis of condition (c) (the "Impecuniosity Condition") alone.

- The Impecuniosity Condition requires that "*there is reason to believe that the claimant will be unable to pay the applicant's costs if ordered to do so*", with regard to which the Court noted as follows:

  - an inability to pay means an inability to pay when the costs fall due for payment. Therefore, it was relevant what assets TTL is reasonably likely to have when the date for payment arises;

  - the burden on the applicant to show a "reason to believe" is lower than the balance of probabilities, and the related approach to that threshold should be simple and not overburdened by technical arguments; and

  - where a foreign company is reticent in revealing or declines to reveal its financial position, security should typically be granted, notwithstanding that such reticence is not in itself a breach of CPR 1.3, which requires parties to litigation to assist the court in furthering the overriding objective of dealing with cases justly and at proportionate cost.

- TTL had demonstrated deliberate reticence to provide financial information, with the result that the Court determined that the 'reason to believe' threshold had been met.

- TTL sought to argue that it had good prospects of being able to access in the near future some of the Assets subject of the underlying claim, through the use of software presently under development, and therefore it would be able to make payment as and when an order was made. The Court was not convinced that this would be possible.

- Accordingly, the Court was satisfied that the second limb of 25.13(1) had been satisfied on the basis of the Impecuniosity Condition. Whilst this was enough, the Court nevertheless addressed the other conditions relied upon by the Relevant Defendants.

- As to CPR 25.13(2)(f), which applies where the claimant is acting as a "nominal claimant", the Court did not agree that TTL had been incorporated or acquired for the purpose of bringing the underlying claim. TTL has a legal and beneficial interest in the Assets dating back to 2011, and therefore a legitimate interest in the claim. It did not matter that it could be said that TTL was holding the Assets, in some sense, as a trustee. Accordingly, an argument under CPR 25.13(2)(f) was not a viable one.

- As to CPR 25.13(2)(a), which applies where a claimant is: (i) resident out of the jurisdiction; but (ii) not resident in a State bound by the 2005 Hague Convention on Choice of Court Agreements, Rule 173(2) of Dicey confirms that a company is resident in the country where its central management and control ("CMC") is exercised, and that exercise can be split across more than one country. Whilst TTL is domiciled in the Seychelles, the Court was persuaded that its CMC was in England. Even if that were wrong, there was sufficient evidence to show that the CMC was exercised in both the Seychelles and England. On a proper construction of CPR 25.13(2)(a), TTL's residence in England precluded the Defendants from relying on this ground.

- CPR 25.13(2)(g) requires a claimant to have "*taken steps in relation to his assets that would make it difficult to enforce an order for costs against him*", but the Court was not at all persuaded that TTL had taken such steps, and therefore the Court noted that this ground was also not a viable one.

The First Limb

- The First Limb confers discretion upon the court not to award security where to do so would stifle the claim.
- The Court declined to exercise this discretion for the following reasons:
  - the Relevant Defendants were individuals resident outside of the jurisdiction;
  - without examining the merits of the case in any detail, the Court still accepted that the merits of TTL's case were not "*on their face strong*";
  - it was not relevant that TTL's case was grounded in the Defendants' conduct in refusing to help TTL regain access to the Assets, as this was itself based on the assumptions that TTL owned the Assets and that the Defendants owed any duty to TTL; and
  - TTL's offer to transfer some of the Assets to a trusted third party source to be frozen as security could not be credibly considered given: (i) the complexity and issues involved in the transfer itself, which involved writing new software; and (ii) that in the event TTL loses the litigation, it would have no right to transfer the Assets, thereby rendering the hypothetical security meaningless.

PHlit comment:

At a general level, this case offers useful reminders to practitioners as to the relevant criteria and thresholds in applications for security for costs, and the key case law concerning CPR 25.13.

For practitioners interested in cryptocurrency, this is certainly a case to keep on your radar. Whilst it seems, on the face of this judgment, that TTL is fighting an uphill battle, it will be very interesting to see whether there are any legal developments in what is a nascent area of law.

Subsequent to the judgment on whether security should be ordered at all, the Court issued a further judgment ([2022] EWHC 141 (Ch)) concerning the quantum and form of security that should be posted by TTL, who sought to provide security by way of Bitcoin. This was the first time that the Court has had to determine whether Bitcoin could be provided as security, and, in its judgment, the Court decided that the volatility of Bitcoin meant that it could not "result in protection for the defendants equal to a payment into court, or first class guarantee". Accordingly, it would not appear that cryptocurrency is, for the time being at least, considered by the courts to be an adequate form of security.

Court of Appeal strikes out insufficiently detailed 'mitigation by off-setting' defence

NTN Corp and other companies v Stellantis NV and other companies [2022] EWCA Civ 16 (judgment available here)

7 January 2022

- The Court of Appeal has struck out a defence of 'mitigation by off-setting' in the context of a follow-on damages claim arising from the so-called 'ball-bearings' cartel. The question for the Court was whether it was permissible to plead a defence that the customer had mitigated its loss by off-setting any anti-competitive overcharge imposed by its supplier

against securing discounts elsewhere, without any actual evidence that the customer *did in fact* mitigate its loss in this manner. The Court of Appeal concluded that if a defendant has no realistic evidence of a possible defence then it has no right to 'go fishing' with a speculative, theoretical defence, without an evidential under-pinning.

- The present proceedings arise out of a finding of the European Commission dated 19 March 2014 (the "EC Decision"), which found that the defendant and five others had engaged in a collusive tendering cartel over a seven-year period in breach of Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). The agreement involved the exchange between suppliers of commercially secret information about customers' procurement processes and agreement as to how to collude to defeat attempts by customers to impose competitive tendering upon suppliers by means of Requests for Quotations ("RFQs"). The EC Decision made no findings about the actual effects of the cartel on the market in question. Each cartelist admitted participation, and fines were imposed.

- In light of the EC Decision, the claimants, Stellantis NV and others, brought proceedings in the High Court (subsequently transferred to the Competition Appeal Tribunal ("CAT")) claiming damages for breach of statutory duty arising from the breach of Article 101 TFEU in the approximate sum of €100 million. The defendant admitted liability, and so the proceedings were limited to questions of quantum. The primary defence of the defendant was that no loss at all was caused by the cartel because the claimants were successful in using the RFQ system to prevent price increases for inputs. The defence was based on the conditional hypothesis that if there was an overcharge, the claimants would have mitigated the overcharge by off-setting. However, the defendant had no actual knowledge or evidence that the claimant had mitigated its loss by off-setting; the defence was based on the *inference* that the claimant would have done so.

- The claimants applied to the CAT to have the off-setting defence struck out, on the basis that it was theoretical, lacked realism, was implausible, and to allow such a speculative defence to proceed would add disproportionality to the burden of the claimants at trial. The CAT agreed and struck out the defence.

- The defendant appealed to the Court of Appeal arguing that, in cases characterised by evidential and informational asymmetry, if further particularisation of its defence was required this would be an unfair "Catch-22", because the law requires the defendant to plead relevant evidence of causality at the outset but then condemns the pleading because of the omission of evidence that can only be obtained if the pleading is allowed to run to trial and the claimant gives disclosure on the issues raised.

- The Court of Appeal disagreed with this line of reasoning and upheld the decision of the CAT. In reaching its decision, the Court of Appeal first noted that there is a duty imposed on a claimant to take all reasonable steps to mitigate the loss arising from the defendant's breach of duty, and there must be a sufficient causal nexus between the steps taken by way of mitigation and the breach. Therefore, in order for a defence of mitigation by off-setting to run, there has to be a legal and proximate connection between the breach (the overcharge) and the act of mitigation (the off-setting).

- The Court then considered the evidential standard that the defendant had to meet, in order for the defence to be permitted to proceed to trial. In this regard, the Court referred to the recent case of *Royal Mail Group Limited v DAF Trucks Limited* [2021] CAT 10, in which the CAT, applying the Supreme Court decision in *Sainsbury's Supermarkets Limited v Visa Europe Services LLC* [2020] UKSC 24, framed the evidential standard as a "*realistic prospect of the plea succeeding at trial*", with 'realistic' meaning that it carries "*some*

degree of conviction and is more than merely arguable". However, the CAT also noted in the *Royal Mail* case that the court must take into account the fact that evidence may be available at trial that is not available at an early stage in proceedings.

- Pulling these strands together, and applying them to the defendant's defence, the Court of Appeal held that:
  - It does not suffice to merely plead the bare assertion that there has been mitigation by off-setting and there is a burden on the defendant to support an allegation of this kind with sufficient particularisation and evidence such that it surpasses a minimum threshold of realism and conviction.
  - The defendant's defence was theoretical and based upon successive inferences which could not properly be drawn from the primary facts. The mere existence of a cost control system which the claimants used to keep down costs from their suppliers was insufficient to support an inference that the cost control system would have been effective in off-setting the overcharges by reducing the costs from other suppliers, in circumstances where the claimants were not aware (by the very nature of a secret cartel) that they had been overcharged in the first place. The cost control mechanism would also have been in operation regardless of the cartel, and so the reduction in costs achieved by the procurement staff would have been achieved anyway, independently of the overcharge.
  - Raising a viable defence of this nature may be difficult, but it is not impossible and mitigation by off-setting remains capable of being advanced in a pleading. However, what is necessary to support it is some plausible factual foundation for the application of the broad economic theory, and for there to be a causative connection between the overcharge and the cost-cutting.
- As such, in circumstances where the defendant had no realistic evidence of off-setting in support of its defence, it had no right to 'go fishing' in disclosure to see if there is anything that might support its position. Accordingly, the Court of Appeal upheld the CAT's decision to strike-out the defence.

PHlit comment:

Although this decision is particularly relevant to the 'off-setting' defence, which arises so often in follow-on competition law claims, the principles are of wider application. In particular, the evidential standard which must be met by a defendant when raising a potential defence at the pleadings stage will be equally applicable to other contractual and tortious claims.

In this regard, the case serves as a useful reminder that there has to be a properly pleadable starting point before a claimant will be put to the heavy burden of disclosure in relation to an issue raised by the defendant, although the extent to which a case can be described as "properly pleadable" will often be at the discretion of the relevant judge, with scope for the line to be drawn in different places. In the present case, the Court recognised that raising a viable defence of this type would be difficult, but it nevertheless remains the case that the defence must have some plausible factual foundation before it will be allowed to proceed.

High Court holds that the COVID-19 pandemic did not trigger a material adverse change clause in a contract for Premier League broadcasting rights

The Football Association Premier League Ltd v PPLive Sports International Ltd [2022] EWHC 38 (Comm) (judgment available here)

11 January 2022

- In a recent application for summary judgment, the High Court has considered whether the defendant, PPLive Sports International, had a real prospect of defending the claim against it on the basis that, amongst other things, a material adverse change (or "MAC") clause, contained in an agreement for broadcasting rights of Premier League games in mainland China, had been triggered by the suspension and re-organisation of the remaining games in the 2019/2020 Premier League season in the wake of the COVID-19 pandemic. In construing the relevant clause, the Court held that the changes to match-days and match-times, as well as the absence of fans, did not represent a "*fundamental change*" to the "*format of the competition*" as required by the clause. Accordingly, the defence had no real prospect of success.

- The claimant, the Football Association Premier League, is the entity that organises and markets the Premier League football competition on behalf of its member clubs. The defendant has been involved in broadcasting Premier League football matches in mainland China. In 2017, the claimant and defendant entered into a Live Package Agreement ("LPA") and Clips Package Agreement ("CPA") (together the "Agreements") pursuant to which the defendant obtained the rights to show both live and delayed Premier League matches, as well as "clips" or highlights, on television within mainland China for the 2019-2020, 2020-2021 and 2021-2022 seasons. The sums to be paid to the claimant under these Agreements were considerable: US$ 701 million under the LPA and US$ 8.02 million under the CPA.

- The first of the three seasons under the Agreements was the 2019-2020 season which, in March 2020, was temporarily suspended as the COVID-19 pandemic began to impact U.K. society. The season was formally suspended on 3 April 2020, and resumed on 17 June 2020 under very different conditions. No fans were allowed to attend the matches and the 92 remaining matches, which had originally been scheduled to be played over nine weeks, were condensed into a five week schedule with a consequent impact on the proportion of games played on weeknights (as opposed to weekend fixtures) and at later time slots in the day. Once the season re-started, the claimant continued to provide the defendant with feeds of the relevant matches until the end of the season.

- The defendant was due to pay an instalment of US$ 210 million under the LPA on 1 March 2020 and an instalment of US$ 2.673 million under the CPA on 1 June 2020. It failed to pay these two instalments. Accordingly, the claimant terminated the Agreements on 3 September 2020 under their terms and issued proceedings against the defendant for payment of the outstanding sums.

- The claimant applied for summary judgment under CPR 24.2 on the basis that the defendant had no real prospect of defending the claim and there was no other compelling reason that the matter should be disposed of at trial. The claimant's primary submission was that this was a simple debt claim: two instalments had fallen due under the respective Agreements and those payments had not been made by the defendant. The defendant raised a number of defences, the principal of which was that the MAC clause contained in the LPA was engaged. The MAC clause provided that:

> *The Premier League hereby warrants and undertakes that, during the Term the format of the Competition will not undergo any fundamental change which would have a material adverse effect on the exercise of the Rights by the Licensee. . . . If any such fundamental change to the format of the Competition occurs during the term then . . . the Licensee shall be entitled to enter into a period of good faith negotiations with the Premier League in order to discuss a possible reduction of the Fees payable by the Licensee . . . in order to reflect the effect of that fundamental change on the exercise of the Rights granted to the Licensee. . . .*

- The defendant argued that the format of the competition had been fundamentally changed as a result of the way the remaining matches were played and this had had an adverse impact on the exercise of the rights under the LPA. In particular, more matches were played on weekday evenings after 8pm BST, meaning that the matches were played at c. 2-3am CST in mainland China with a consequent impact on viewing figures and the manner in which the defendant could maximise revenues from advertisers and promoters. The claimant submitted that, although the conditions were not as imagined when the LPA was agreed in February 2017, this could not be characterised as a "fundamental" change to the "format of the competition". Changes to the "format of the competition" were limited to changes to the number of clubs in the competition, the points system, the structure of the league table or similar—not matters such as match-days and kick-off times, which were clearly at the discretion of the claimant under the terms of the LPA.

- In reaching its decision, the High Court first considered the well-established principles to be applied on applications for summary judgment, namely:

  - the court must consider whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success;

  - a "realistic" defence is one that carries some degree of conviction—this means a defence that is more than merely arguable;

  - in reaching its conclusion, the court must not conduct a "mini-trial"; and

  - the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

- The Court then moved to construe the terms of the MAC clause itself, applying the principles of contractual construction discussed in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 and *Arnold v Britton* [2015] UKSC 36, which are now trite law. The Court ruled that, on the true construction of the clause, when considered alongside the rest of the provisions of the LPA, the "format" of the competition did not include kick-off times, match days, or whether fans would be in attendance, with these matters being decided at the discretion of the claimant under the LPA's terms. Instead, references to the "format" of the competition were limited to the way that the competition was undertaken between the member clubs, namely: how many times they played each other; the points system; and how the league table was organised. None of these things changed on the resumption of the season in June 2020.

- Accordingly, the MAC clause was not engaged on the facts and this defence therefore had no real prospect of success. The defendant also raised a number of other potential defences, which the Court dealt with shortly:

- **Advance Payments:** the defendant argued that the sums payable under the Agreements were advance payments made in consideration of the matches being shown live across all three seasons governed by the Agreements and, accordingly, as the Agreements were terminated after one season, the claimant would be unjustly enriched if the payments were made. The Court considered that this defence had no real prospect of success, as to interpret the payment provisions in this way would run counter to the plain terms of the contracts and therefore there could be no unjust enrichment as the claimant was entitled to the money under the contractual terms.

- **Penalties and relief from forfeiture:** the defendant argued that the claimant's right to the sums in spite of termination of the Agreements was an unenforceable penalty clause and therefore the defendant should be entitled to relief. The Court held that this defence had no real prospect of success as a penalty is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to the legitimate interest of the other party, and the payment terms of the LPA and CPA did not meet this definition.

- **Set-off:** the defendant argued that it would be entitled to set-off against the damages it claimed arising from the alleged breach of the warranty contained in the MAC clause. In dismissing this argument, the Court pointed to a number of provisions in the Agreements which provided that payments must be made *"in full and without set-off or counterclaim"*. These contractual provisions were crystal clear, and therefore this defence could also have no real prospect of success.

- The Court therefore concluded that none of the defences advanced by the defendant had anything other than fanciful prospects of success and, in some cases, were unarguable. Accordingly, the claimant's application for summary judgment was granted.

PHlit comment:

This case reinforces how the interpretation of a MAC clause will hinge on the factual matrix in play. Like all matters of contractual construction, the exact wording of the agreement and the relevant contractual context will be critical. It is therefore of vital importance that the contractual drafting reflects the parties' intentions in terms of risk allocation for certain events, though of course the difficulty with all such clauses is that the relevant events, such as COVID-19, are likely to have been unforeseen by the parties.

"*The self-induced problem of late filing*": Court of Appeal confirms that an unsealed claim form is no claim form at all

Ideal Shopping Direct Limited v Mastercard Incorporated and Visa Europe Limited [2022] EWCA Civ 14 (judgment available here)

13 January 2022

- The Court of Appeal has upheld the High Court's judgment that serving an unsealed claim form cannot constitute valid service as an unsealed claim form does not constitute a "claim form" for the purposes of the Civil Procedure Rules ("CPR"). The Court of Appeal also confirmed that the Court's general power to rectify matters of procedure under CPR 3.10 cannot be used to override specific provisions.

- The underlying dispute relates to a number of claims, issued between February 2017 and January 2020, by the appellants against Visa and Mastercard for breaches of competition law. As the claims are broadly similar to those in three pieces of litigation concerning the lawfulness of multi-lateral interchange fees, which were the subject to a combined appeal

to the Supreme Court in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24, the parties recognised that it was in everyone's interest to await the outcome of that appeal before taking further steps. Accordingly, the appellants' solicitors sent the issued claim forms to Visa and Mastercard for information only, and agreed extensions of time for service, which ultimately ran until 17 July 2020 (a month after the Supreme Court's judgment in Sainsbury's was handed down on 17 June 2020). The extensions were agreed on the basis of an undertaking from the appellants' solicitors in these terms:

> *Our client hereby undertakes to each of the defendants and to the Court not, at any point in the future, to discontinue, withdraw or otherwise bring to an end the Proceedings and issue a further claim (or claims) in substantially the same or equivalent form…*

(the "Undertaking").

- Following the outcome of *Sainsbury's*, the appellants changed their claims and on 17 July 2020 (i.e. the last possible day under the agreed extension for service), the appellants' solicitors filed 16 amended claim forms electronically on CE file between 09.58 and 16.38. Some of these amended claim forms were accepted by the Court on that day, but the majority were accepted on the following working day, Monday, 20 July 2020, with one only being accepted on 22 July 2020 as the Court had raised a query. However, all were ultimately accepted, and in accordance with paragraph 5.4 of Practice Direction 51O ("PD 51O") all of the claim forms were treated as having been issued on 17 July 2020.

- On the same day, the appellants' solicitors served the unsealed amended claim forms on the respondents, apparently being of the view that a claim form needed to have been filed electronically before it was served, but without considering whether sealed amended claim forms were necessary to effect service. Visa and Mastercard then applied for orders that the appellants had not served the claim forms by 17 July 2020 and were now out of time to do so and prevented from bringing fresh proceedings by the Undertaking, and accordingly the court had no jurisdiction to hear those claims. The appellants applied for declarations that they had validly effected service of the amended claim forms, and alternatively for relief under CPR 6.15, 6.16 or 3.10.

- At first instance, the Court, relying on *Hills Contractors and Constructions Ltd v Struth* [2014] 1 WLR 1 and *Cranefield v Bridgegrove Ltd* [2003] 1 WLR 2441, held that a document which is in the form of a claim form is only a claim form for the purposes of the CPR if it bears an original court seal. The Court then considered whether the appellants could be granted relief under CPR 6.15 pursuant to which the Court can make an alternative order for service or CPR 6.16 whereby the Court may dispense with service altogether. However, the Court found that what the appellants were actually seeking was not alternative service, but rather a change in what had to be served, and the Court held that it was not able to permit service of something which was not actually a claim form for the purposes of the CPR. Finally, the Court also dismissed the appellants' application for relief under CPR 3.10, pursuant to which the Court may remedy a party's procedural error, because there are authorities to the effect that CPR 3.10 is to be regarded as a general provision which cannot prevail over specific rules regarding the time and manner of service. As granting relief under CPR 3.10 would bypass the specific rules in CPR 6.15 and 6.16, the Court declined to permit the appellants the relief sought and held that the amended claim forms had not been served. However, the Court construed the Undertaking as not preventing the appellants from issuing fresh proceedings as they had not brought the previous ones to an end.

- The appellants appealed on two grounds: (i) first, that the judge erred in finding that a claim form is not issued, and does not become a claim form, until it is sealed; and (ii) second, that the judge erred in his approach to CPR 3.10. Visa cross-appealed on the grounds that: (i) the judge had erred in holding that the appellants did not bring proceedings to an end by failing to serve the amended claim forms by mistake; and (ii) that the Undertaking only applied where proceedings are brought to an end.

- The Court of Appeal upheld the High Court's ruling on both grounds of the appeal and cross-appeal, dismissing the overarching contention of the appellants that the time lag between the filing of a claim form and its acceptance on CE file (and therefore the return of the issued claim form) leads to injustice and uncertainty. The Court accepted that there was such a time gap, but that this was well-known to solicitors and that the appellants' solicitors could have avoided their self-induced problem of late filing by: (i) filing earlier; (ii) seeking a further extension of time if they were not able to file earlier; (iii) serving the original claim forms, and then serving the sealed claim forms when they had been sealed, if an extension of time could not be agreed; (iv) asking the court staff to expedite matters; and (v) if all else failed, making an application to court for an extension of time. The Court concluded that the problem the appellants faced was not caused by a lacuna in PD 51O, but by their solicitors' failure to take any of the courses detailed in (i) – (v) above and their mistaken belief that service of an unsealed claim form would be good service.

PHlit comment:

This case serves as a useful reminder of the importance of filing documents with the Court on time, including allowing sufficient time for the documents to be accepted onto CE File. The practice of filing documents last minute, in order to give the other side as little notice as possible, or to extend time-frames where possible, is relatively wide-spread. However, the damning comments of the Court of Appeal that late filing is an entirely self-induced problem of the solicitors, rather than caused by any lacuna in the electronic filing system (with which solicitors should be familiar by now), are particularly noteworthy in this regard.

High Court notes that parties should not be "play[ing] fast and loose" with the requirements for trial witness statements under Practice Direction 57 AC

Prime London Holdings 11 Ltd v Thurloe Lodge Ltd [2022] EWHC 79 (Ch) (judgment available here)

18 January 2022

- The High Court has given further guidance on trial witness statements under Practice Directions 57 AC ("PD 57AC"). In two applications concerning a trial witness statement submitted on behalf of the defendant, the Court found "faults on both sides", taking up "considerable court time" (including the judge's weekend), and urged the parties not to "play fast and loose" with PD 57AC, nor to "leave it to the court to produce a compliant witness statement".

- The underlying dispute relates to a disagreement between the parties relating to whether or not the claimant can access the defendant's land to carry out some repairs on its property. The dispute between the parties relevant to the present judgment related to the defendant's witness statement and whether or not it complied with PD 57AC.

- There was a consent order which mandated the filing of witness statements by 17 December 2021, and the defendant served a witness statement on this date (the "Original Witness Statement"). The timeline then developed as follows:

- On 4 January 2022, the claimant's solicitors wrote to the defendant's solicitors noting that the Original Witness Statement was incompatible with PD57AC, without giving detail as to why they considered it to be non-compliant.

- The defendant's solicitors responded on 7 January 2022 to complain that this procedural point had been raised only shortly before trial (which was listed for 11 January 2022, albeit that it ultimately commenced on 14 January 2022).

- The claimant then issued an application on 10 January 2022 asking for the Original Witness Statement to be struck out as inadmissible. On the same day, the defendant's solicitors acknowledged receipt and noted that the application did not detail specific areas of concern and asked the claimant to detail the same.

- On 11 January 2022, the claimant's solicitors responded to recommend that the defendant review PD 57AC, noting that the statement of truth did not follow PD 57AC and that the certificate of compliance under paragraph 4.3 of PD 57AC was missing. It did not detail any further concerns or point the defendant to specific paragraphs of the Original Witness Statement, which were said to be non-compliant.

- On 13 January 2022, the defendant's solicitors invited the claimant's solicitors to consent to a substitution of the Original Witness Statement with a revised witness statement (the "Revised Witness Statement"). The claimant's solicitors responded the same day to consent to certain paragraphs of the Revised Witness Statement, but not all. The defendant therefore issued an application to have the Revised Witness Statement admitted into evidence.

- The Court briefly dealt with whether the Original Witness Statement complied with PD 57AC and found that it did not (which was accepted by the parties) because:

  - it did not include the confirmation required by paragraph 4.1 of PD 57AC requiring the witness to confirm: (i) their understanding of the purpose of the witness statement; (ii) that the statement only contains matters within their personal knowledge and recollection; (iii) that the statement has been written in the witness's own words; and (iv) that the witness has not been encouraged by anyone to include anything that is not their own account or recollection;

  - it did not include the certificate of compliance from the defendant's solicitors required under paragraph 4.3 of PD 57AC; and

  - it did not comply with the content requirements set out in paragraph 3 of PD 57AC.

- The Court then turned to whether it should allow the defendant to replace the Original Witness Statement with the Revised Witness Statement, and whether the latter was compliant with PD 57AC. The Court noted its very wide case management powers under paragraph 5 of PD 57AC where a party fails to comply, including the ability to: (i) strike out all or part of the witness statement; (ii) order the party to redraft the witness statement; (iii) impose cost sanctions against the non-compliant party; and/or (iv) order that the witness give evidence in chief orally.

- Relying on two recent cases on the requirements of PD 57AC, *Mansion Place Limited v Box Industrial Services Ltd* [2021] EWHC 2747 (TCC) and *Blue Manchester Ltd v Bug-Alu Technic GmbH, Simpsonhaugh Architects Limited* [2021] EWHC 3095 (TCC)), the Court found that the striking out of a witness statement was reserved only for the most serious cases of non-compliance. The Court therefore ordered that the Revised Witness Statement

replace the Original Witness Statement, but deleted certain non-compliant paragraphs in the Revised Witness Statement. Importantly, the Court expressed its discontent at both parties' behaviour in the present case, noting that the claimant had failed to properly engage in a timely or detailed manner, or constructively, with the defendant on the issue of non-compliance under PD 57AC. However, the Court also noted the defendant's role in bringing this matter to the Court, and therefore imposed a costs order against the defendant.

PHlit comment:

This case usefully highlights the Courts' distaste for unnecessary satellite litigation. Whilst PD 57AC is still relatively new, there have now been a number of cases concerning its requirements, so that parties can no longer feign ignorance. In addition, it is important that the parties constructively engage with each other in the process of litigation as a whole, but compliance with procedural rules in particular, to avoid wasting Court time. The judge's comments in this regard, including his finding that there were failings on both sides which took up valuable Court time, are scathing.

High Court finds a counterclaiming defendant can make a valid "claimant's" Part 36 offer

The Huntsworth Wine Company Ltd v London City Bond Ltd [2022] EWHC 97 (Comm) (judgment available here)

19 January 2022

- The High Court has confirmed that a party to proceedings can obtain the costs benefits of a "claimant's" Part 36 offer in relation to its counterclaim, even though it was not named as the claimant in the litigation. This decision is significant because, under CPR 36.17, a "claimant's" Part 36 offer has more attractive consequences than a "defendant's" Part 36 offer, including an award of costs on the indemnity basis.

- In the main action, the claimant, Huntsworth Wine Company ("Huntsworth"), brought a claim for losses sustained from the theft of wine that it was storing at a bonded warehouse owned and operated by London City Bond ("LCB"). Although the value of the stolen wine was estimated to be in the region of £125,000, LCB's liability was limited to £1,000 under the terms of the contract between them. Huntsworth argued, amongst other things, that this limitation on liability did not apply. LCB then counterclaimed for the excise duty it had paid on the goods on Huntsworth's behalf. At trial, the Court found that the limitation on liability did apply and Huntsworth was therefore awarded just £1,000 in damages, plus interest. However, LCB was awarded £3,662.34 (plus interest) in respect of its counterclaim and thus, the net sum due from Huntsworth to LCB was £2,837.53, making LCB the successful party in the litigation.

- In taking the case to judgment, Huntsworth had incurred £179,988.22 in legal costs, and LCB had incurred £215,185.00. Accordingly, the recovery of costs was a crucial issue for both parties. The case had been tried using the Shorter Trials Scheme (under PD 57AB) which anticipates a summary assessment of costs by the court, and both parties were invited to make written submissions accordingly. In this regard, LCB relied on the fact that it had made an offer to settle under the terms of Part 36 (the "Offer"), and had since obtained a better result than the one contained in the Offer. In its Offer, LCB had offered to accept payment of £2,000 to settle: (i) its claim for outstanding excise duty for £3,664.34; and (ii) all aspects of Huntsworth's claim arising from the theft of the wine (noting that its liability in that respect was limited by contract to £1,000).

- Huntsworth argued that LCB's Offer was invalid, as it was framed as a "claimant's" Part 36 offer when, in fact, LCB was the defendant in the proceedings. This was significant because a "claimant's" Part 36 offer has different consequences to a "defendant's" Part 36 offer, with a "claimant's" Part 36 offer providing for the following additional benefits: (i) costs on the indemnity basis (rather than on the standard basis); (ii) additional sums by way of interest on both the damages award and costs; and (iii) an uplift on the judgment sum itself. Instead, Huntsworth suggested that costs should be awarded on an 'issues-won' basis—Huntsworth having succeeded in its claim (albeit only recovering limited damages) and LCB having succeeded on its counterclaim. Huntsworth calculated that the costs referable to the issues on which it had won represented approximately 55% of the total costs of the claim, and therefore it should recover 55% of its costs.

- In considering whether a counterclaiming defendant can make a valid "claimant's" Part 36 offer, the Court was persuaded that in circumstances where two parties have valid claims *vis-à-vis* each other, the answer should not simply depend on who is named as claimant in the proceedings or who is the party to shoot first (i.e. making a Part 36 offer first solely to deprive the other party of the potential benefits of making a claimant's offer). In the Court's view *"this would be a most unfortunate interpretation of the rules, if the question as to who could make a claimant's Part 36 offer was determined simply by who made the first such offer, or who issued proceedings where a counterclaim was probable"*.

- In reaching its decision, the Court referred to the judgment in *AF v BG* [2009] EWCA Civ 75, in which the Court of Appeal held that a defendant who had made a "claimant's" Part 36 offer to settle both the existing claim against him and a pending counterclaim, before he had actually amended his defence to include the counterclaim, had nevertheless made a "claimant's" Part 36 offer. The Court considered that this case demonstrated that the emphasis is not to be laid on a particular party's title within the litigation, but rather on their role in making the offer.

- The Court also made reference to the following list of features set out in Friston on Costs that may be relevant to determining whether an offer constituted a "claimant's" Part 36 offer:

  - the relevant facts of the litigation and, in particular, the perceived status of the offeror given how the competing claims were presented at the time the offer was made;

  - the label attached to the offer and whether any clarification was made about its effect;

  - whether the offer was to pay a net amount or to receive a net amount of damages;

  - whether the offer made reference to paying or receiving costs in the event it was accepted;

  - whether the offer referred to the costs consequences of non-acceptance in terms that have the hallmarks of being a "defendant's" offer or a "claimant's" offer and, in particular, whether it mentioned any of the claimant-only benefits of making a Part 36 offer; and

  - whether the offer's terms were incompatible with it being either a "claimant's" offer or a "defendant's" offer.

- On the facts of the present case, the Court considered that these factors pointed towards LCB's Offer being treated as a "claimant's" Part 36 offer and, accordingly, the starting point was that LCB had obtained a judgment that was more favourable than the Offer it had

made. Accordingly, the costs consequences of Part 36 in respect of a claimant's offer to settle should apply. Finally, the Court considered whether there was any reason why it would be unjust to make such an order under CPR 36.17(4). Huntsworth had submitted that the fact that LCB had failed to engage in mediation at an early stage and was not successful on all the issues at trial would be two such reasons, but the Court disagreed.

- Accordingly, the Court awarded LCB its costs on the indemnity basis, with interest on both damages and costs at 4.5% from the end of the relevant offer period, and an additional 10% uplift on the award of damages.

PHlit comment

As this case aptly demonstrates, the key to making a Part 36 offer is clarity as to what the effect of the offer actually is—so long as there is sufficient clarity, a defendant bringing a counterclaim can make a claimant's offer in respect of the counterclaim. As such, in a matter where there are claims in both directions, both parties may be able to benefit from making a "claimant's" Part 36 offer, regardless of their title in the proceedings, and their legal advisers should therefore carefully consider how to structure any Part 36 offer so that it brings the most advantageous costs benefits to their client.

Court of Appeal gives guidance on amending a claim once the limitation period has expired

***Mulalley & Co. Ltd v Martlet Homes Ltd* [2022] EWCA Civ 32 (judgment available here)**

24 January 2022

- The Court of Appeal has clarified section 35 of the Limitation Act 1980, which is given effect by Civil Procedure Rule ("CPR") 17.4 and provides that a party may amend their statement of case where the limitation period has expired "*if the new claim arises out of the same facts or substantially the same facts as the claim in respect of which the party applying for permission has already claimed a remedy in the proceedings*". The Court held that any proposed amendment has to be considered by reference to the same or substantially the same facts as are already in issue, including those set out in the Defence, but that beyond that, it is a question of fact and degree.

- The underlying dispute arose between the owner of five high-rise towers and the design and build contractor. Following the Grenfell Tower fire disaster, the claimant carried out checks on the towers and discovered major safety defects at the very end of the relevant contractual limitation period. The claimant commenced proceedings in respect of four of the towers (as the limitation period for the fifth had already expired), alleging inadequate design and workmanship in relation to the external wall insulation (the "Insulation"), which contained expanded polystyrene ("EPS"), installed in the towers. In its Defence, the design and build contractor denied those allegations by relying on a certificate demonstrating that the Insulation complied with the Building Regulations at the time of construction. The defendant alleged that the cause of the claimant's loss was not any breach of contract on its part, but the need to comply with a change in Government advice in respect of new Building Regulations which prohibit EPS.

- The claimant subsequently sought permission to amend its claim to include an express claim that using EPS in the Insulation did not comply with the Building Regulations at the time of the contract and that the selection of the Insulation was a breach of contract. The defendant objected to those amendments on the basis that they constituted a new cause of action, which did not arise out of the same or substantially the same facts, and was now statute-barred as the limitation period had lapsed. At first instance, the High Court held

that it was a new claim, but that it arose out of the same or substantially the same facts and therefore allowed the amendment. The defendant appealed on two grounds: (i) first, that the amendments did not arise from the same or substantially the same facts; and (ii) second, that the amendments went beyond what was pleaded in the Defence, contrary to the principle in *Goode v Martin* [2001] EWCA Civ 1899. The claimant cross-appealed on the ground that the amendments did not constitute a new cause of action.

- The Court of Appeal first considered the cross-appeal and the question of whether the amendments constituted a new cause of action. Relying on *Co-Operative Group Limited v Birse Developments Limited & Anr* [2013] EWCA Civ 472, the Court noted that it had to compare the essential facts and claims of the original pleadings with those of the amended pleadings. The Court noted that, where the claimant alleged a different breach of some previously pleaded duty, it would be a question of fact and degree whether that constitutes a new claim. Comparing the nature, scope and extent of the original claim with the proposed amendments, the Court found that, despite both relating to the EPS in the Insulation, the original claim focused on the workmanship or the implementation of design choices, whereas the proposed amendments were principally concerned with the design choices (of EPS) themselves. The Court therefore held that the amendments constituted a new cause of action and dismissed the cross-appeal.

- The Court of Appeal then considered whether the proposed amendments were contrary to the principle in *Goode v Martin*, which the defendant relied on to argue that post-limitation amendments were only allowed if the new claim relied on no new facts or matters at all beyond those pleaded in the Defence. The Court clarified the decision and noted that there does not have to be a 100% overlap between the new claim and the Defence. Rather, the principle in *Goode* is that any proposed amendments have to be considered by reference to the same or substantially the same facts as are already in issue, including those set out in the Defence. Beyond that, it is a question of fact and degree and the Court therefore dismissed this ground of the appeal.

- Finally, the Court of Appeal considered whether the amendments arose out of the same or substantially the same facts in respect of which the claimant had already claimed a remedy. The Court noted that this question essentially involved a value judgment, and that "the same or substantially the same" is not synonymous with "similar". The question for the Court to consider was whether the selection of EPS in the Insulation arose out of the same or substantially the same issues. The Court noted that the original pleaded case raised both workmanship and design issues (albeit emphasising workmanship), whilst the amended claim emphasised design issues. In addition, the Court summarised the claimant's position as being: "we dispute this aspect of your defence: we say that your original design and the use of EPS did not comply with the contract and the Building Regulations". In doing so, the Court found that it would be an extraordinary position if the claimant was not allowed to amend its claim in response to issues raised by the Defence and therefore it also dismissed this ground of appeal.

PHlit comment

Whilst cases involving CPR 17.4 are generally fact and context specific, given that they will involve a factual analysis of whether the claim arises out of the same facts or substantially the same facts in respect of which a remedy has already been sought, this judgment is perhaps most noteworthy for its clarification of Goode. It is important to note that whether or not an amendment arises out of the same or substantially the same facts is to be determined not only by reference to the particulars of claim, but also the issues raised in the Defence. Defendants seeking to rely on a limitation defence therefore will need to carefully consider how to defend themselves so as not to inadvertently raise further issues which the claimant could use to amend their claim beyond any relevant limitation period.

Licensee mauls its way out of rugby media rights agreement on basis of pandemic

***European Professional Club Rugby v RDA Television LLP* [2022] EWHC 50 (Comm) (judgment available here)**

26 January 2022

- In a case concerning contractual construction, the High Court has determined that the licensee-defendant, RDA Television LLP ("RDA"), was entitled to rely on the "Force Majeure machinery" in its contract with the licensor-claimant, European Professional Club Rugby ("EPCR"), and terminate a media rights agreement as a result of the COVID-19 pandemic.

- EPCR organises and owns the rights to the two premier European club rugby union competitions: the Champions Cup and the Challenge Cup (the "Competitions"). EPCR agreed to license the media rights in the Competitions (the "Rights") to RDA for four seasons between 2018 and 2022, under a media rights agreement (the "MRA"). The MRA contained a force majeure clause, which operated to relieve a party of performance under the MRA in the event of a "Force Majeure Event" (as defined in the MRA). The party that was not affected by the relevant Force Majeure Event was given the right to terminate if the affected party's performance had been prevented for more than 60 days.

- The COVID-19 pandemic resulted in various matches in the Competitions being postponed in 2020. Following a postponement of 60 days, RDA served notice to terminate, citing a Force Majeure Event. EPCR considered such termination to be wrongful and therefore amounted to repudiatory breach of contract, for which it brought a claim for damages against RDA. RDA counterclaimed for: (i) prepayments it had made to EPCR for the 2020/21 and 2021/22 seasons, during which RDA would no longer enjoy the Rights due to its termination of the MRA; and (ii) an adjustment to the fees paid for the 2019/20 season to take account of the reduced matches enjoyed in that season.

- The definition of "*Force Majeure Event*" included an "*epidemic*", and it was not in dispute between the parties that it covered the COVID-19 pandemic. RDA simply contended that if a Force Majeure Event continually hindered performance of EPCR's contractual obligations for 60 days, RDA was entitled to terminate. On the other hand, EPCR argued that RDA was not so entitled to terminate principally on the following grounds:

  - the Competitions were capable of completion at any time during the term of the four year MRA and not just in their allocated "Season" (as defined in the MRA), and therefore the 60-day period under the force majeure provision had not been triggered because time remained in the currency of the MRA for the Competitions to be staged (the "First EPCR Argument");

  - RDA was also affected by the pandemic as it had been impacted financially through its sub-licensees; the MRA only entitled termination for a Force Majeure Event where only one of the parties' performance had been affected by the relevant event (the "Second EPCR Argument"); and

  - the true motivation for RDA to serve a notice to terminate under the force majeure clause was to renegotiate on improved terms (the "Third EPCR Argument").

- In assessing the parties' respective positions, the Court summarised the key principles for contractual construction: where the words are unambiguous they should be construed literally; but where there is ambiguity or inconsistency, the context of the relevant contract should be considered; and where there remains doubt between the words used and their factual context, business common sense should prevail. At all times it should be borne in

mind that the Court will not interfere simply where there has been a bad bargain. The key principles are helpfully summarised at paragraph 32 of the judgment.

- As to the First EPCR Argument, the Court determined that the MRA clearly allocated a total of eight separate Competitions to each defined "Season" (i.e. two Competitions to each of the four years of the MRA term), and EPCR committed to those Competitions being staged in their applicable Season. It was not correct that any one Competition could be completed at any point during the contract term. Once performance had been hindered for 60 days, RDA could terminate for force majeure.

- The Court considered the Second EPCR Argument to be a mistaken construction of the MRA. The relevant wording from the force majeure provision was as follows: "*If the Force Majeure Event prevents, hinders or delays a party's performance of its obligations for a continuous period of more than 60 days, the party not affected by the Force Majeure Event may terminate this Agreement [. . .]*". Simply because RDA might have been affected "*in a general sense*" by the pandemic (i.e. the same Force Majeure Event), that did not deprive RDA of the right to terminate where EPCR's performance had been hindered for a continuous 60-day period. To construe the MRA otherwise would be "*commercially absurd*".

- As to the Third EPCR Argument, provided that RDA had a legitimate right to terminate under the force majeure clause (which, as above, it did) its true motives were inconsequential.

- Accordingly, EPCR's claim for wrongful termination failed. RDA nevertheless remained liable for a pre-payment amount that had fallen due prior to the termination date, which was set-off against RDA's successful counterclaims.

PHlit comment:

As noted above, the Court's recitation of the fundamental principles to be applied in construing contracts is something that practitioners would be well served to take note of. As ever, we are reminded that each contract will turn on its own facts and specific drafting.

This case can be contrasted with the Football Association Premier League v PPL Sports International [2022] EWHC 38 (Comm) *referred to earlier in this edition of PHlit, where the court did not agree that the postponement of matches that were subsequently held without spectators constituted a material adverse change in the relevant contract (force majeure was not relied on in that case). Despite both cases being grounded in the effects of the pandemic, the respective licensees experienced opposite outcomes, which demonstrates how fact-sensitive these types of cases are, and how different drafting can lead to very different outcomes.*

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