PAUL HASTINGS

PH*lit*

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The Court of Appeal holds that pleading a claim on an extrapolated basis from the outset is not an abuse of process and confirms that each unfair prejudice petition must be determined by reference to the individual company; and High Court the declines to grant a "best endeavours" order to procure third party disclosure

By Alex Leitch, Jack Thorne, Harry Denlegh-Maxwell, Alison Morris, Jonathan Robb, & Gesa Bukowski

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 claim in which the High Court declined an application for disclosure of data from two personal mobile devices on the basis that the defendant did not 'control' the relevant data and the Court lacked jurisdiction to make an order compelling the defendant to use "best endeavours" to obtain the data.
- We review a High Court ruling in which rescission of an escrow agreement was granted because the agreement was concluded due to the parties' mutual reliance on incorrect advice which created a significant tax liability.
- We reflect on a High Court ruling which granted a mandatory anti-suit injunction to restrain the continuance of proceedings brought in Armenia in breach of an agreement to arbitrate, in circumstances where existing prohibitory injunction was insufficient to be effective.
- We note a High Court ruling which considers whether a claim alleging a minor data protection infringement should be struck out as an abuse of process under the *de minimis* principle.
- We consider a High Court decision which provides further guidance on the requirements for trial witness statements prepared under Practice Direction 57AC.

- We discuss a ruling of the Court of Appeal that confirms that each unfair prejudice petition must be determined by reference to the individual company, even in circumstances where petitions are brought against several entities of a group that acts as one business.

- We note an interesting ruling of the Court of Appeal in which the Court noted that a claim to set aside a judgment on the basis of fraud will be an abuse of process only if the claimant had deliberately decided not to investigate a suspected fraud, or had determined not to rely on a known fraud, in the original proceedings.

- Finally, we review a Court of Appeal decision that confirms that, in an appropriate case, a claim may be pleaded from the outset on an extrapolated basis, and so long as the defendant understands the case it has to meet, it is not only permissible but desirable to plead a claim in this way in order to keep the litigation within proportionate bounds.

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High Court declines to grant a "best endeavours" order to procure third party disclosure

Various Airfinance Leasing Companies v Saudi Arabian Airlines Corporation [2021] EWHC 2904 (judgment available here)

1 November 2021

- The High Court has declined an application for disclosure of data from two personal mobile devices on the basis that the defendant did not control the relevant data, and the Court lacked jurisdiction to make an order compelling the defendant to use "best endeavours" to procure what was, in effect, third party disclosure through the back door.

- The 'Third Party' to proceedings, International Air Finance Corporation ("**IAFC**"), was the original lessor of 50 Airbus aircraft to the defendant, Saudi Arabian Airlines Corporation ("**Saudi Airlines**"). IAFC novated the aircraft to various entities, together comprising the first claimant (the "**Lessors**"). The second claimant is the parent portfolio company of the Lessors, which together with IAFC and the Lessors are referred to herein as the "IAFC Parties", as they were in the judgment.

- The underlying dispute centres on the amount of rent payable under the relevant aircraft lease agreements, which dispute extends to questions of contractual interpretation and alleged estoppels based on statements or assumptions communicated between the parties.

- The IAFC Parties applied for disclosure of data held on the personal devices (in particular mobile phones), owned or used by: (i) Mr Saleh Al Jasser, formerly employed as Director General of Saudi Airlines, and presently the non-executive Chairman of Saudi Airlines; and (ii) Mr Abdulrahmen Altayeb, a former employee of Saudi Airlines, including as a senior aide to Mr Al Jasser (together with Mr Al Jasser, the "**Relevant Individuals**").

- The IAFC Parties sought alternative orders, as follows: (i) that Saudi Airlines use "best endeavours" to secure the production of documents stored on the Relevant Individuals' mobile telephones; and/or (ii) that the Relevant Individuals produce their devices to independent IT consultants. As this was not an application for third party disclosure, the court considered that the application was restricted to the making of a best endeavours order upon Saudi Airlines, and in assessing that application, the following three questions arose:

    - Were the documents held on the mobile telephones within the control of Saudi Airlines?

- If the documents held on the mobile telephones were not within the control of Saudi Airlines, did the Court have the jurisdiction to make a "best endeavours" order?
- If so, should the Court make an order for disclosure or a "best endeavours" order?

- As to the first question, this turned principally on matters of Saudi law, which governed the relevant employment relationships, and in respect of which expert evidence was adduced by both sides. The Court determined that there was nothing under Saudi law or pursuant to the express terms of the relevant employment contracts that conferred on Saudi Airlines an entitlement to access or take possession of the Relevant Individuals' mobile phone data. Similarly, there was no presumption that a right of access to the data arose because the Relevant Individuals had held senior positions with Saudi Airlines, notwithstanding that this argument might have held more weight if considered as a matter of English law. Nothing turned on the fact that Saudi Airlines had referred to the Relevant Individuals in its Disclosure Review Document ("**DRD**") because a qualification had been included to the effect that the Relevant Individuals were no longer employed, and therefore their data may be difficult to obtain.

- As to the second question, the Court made clear that its powers to order disclosure are statutory, and *"it is appropriate that the Court's jurisdiction is defined by the Civil Procedure Rules, rather than being developed as a matter of general law"*. There was nothing in the CPR or otherwise that bestowed upon the court the power to make a "best endeavours" order. Whilst CPR 58.14 does set out such a possibility, this is specifically in the context of marine insurance, and the Court did not think it appropriate to extend that very limited jurisdiction. Had 'control' been established (i.e. the first question), then such an order might have been possible.

- As to the third and final question, the Court remarked that even if it were wrong on the scope of its jurisdiction to make the orders sought, it would have exercised its discretion not to grant the orders. The bases of this remark were twofold. Firstly, the mobile phones contained different categories of data, some of which related to Saudi Airlines (and therefore potentially relevant) as well as personal information (which would not have been susceptible to disclosure). Those categories would have been practically difficult and costly to separate. Secondly, the only source of new data would have been instant messages, including WhatsApp, and the Court was not convinced as to how much substantially relevant material the exercise would reveal.

PH*lit* comment:

The IAFC Parties adopted a novel means to procuring third party disclosure; however, the Court, being generally reluctant to order disclosure against third parties, was alive to this, and would only have been able to make the order sought if Saudi Airlines had in fact been able to legally exercise control over the documents in question. This was not proved to be the case as a matter of Saudi law. This judgment presents three particularly notable practical takeaways:

1. Qualifications and caveats in DRDs should be well thought through, including to avoid inadvertently asserting that a party controls documents. Fortunately for Saudi Airlines, the DRD had been ably drafted by qualifying the availability of certain data sources.

2. The Court may require convincing that the document sought can be obtained in a technically straightforward and relatively inexpensive manner. Muddying the waters in that regard will serve a respondent party well.

3. Finally, where disclosure of general data on a given device is sought, the applicant should be as precise as possible as to the types of documents that it expects the device to reveal. If that is not shown, the court might not be persuaded that a disclosure order is proportionate.

High Court rescinds escrow agreement because of mistake

***JTC Employer SER Trustees Ltd v Khadem* [2021] EWHC 2929 (Ch) (judgment available here)**

4 November 2021

- In an unopposed Part 8 claim seeking rescission of an escrow agreement, the High Court has determined that the parties' mutual reliance on incorrect advice gave rise to that agreement, which in turn created a significant tax liability. This was a mistake of fact common to the parties, sufficient for the Court to award the relief sought.

- The claimant, JTC Employer SER Trustees Ltd ("**JTC**"), was the trustee of the defendant's - Mr Ramin Khadem ("**Mr Khadem**") - pension plan. Following Mr Khadem's retirement, he decided to move to the UAE in March 2018, in connection with which, the parties jointly sought tax advice from RSM UK ("**RSM**"). In order to avoid UK income tax, Mr Khadem required a tax domicile certificate from the UAE (a "**Certificate**"). In December 2018, RSM informed the parties that the UAE would only provide a Certificate in arrears up to the date of application. Accordingly, and so as to avoid UK income tax, RSM advised JTC and Mr Khadem to place the entirety of the pension pot into an escrow account controlled by JTC and held to the order of Mr Khadem, pursuant to an escrow agreement (the "**Agreement**"). Under the Agreement, JTC would distribute to Mr Khadem the £6 million pension pot (the "**Escrow Amount**") prior to Mr Khadem turning 75 in January 2019.

- JTC and Mr Khadem entered into the Agreement on 24 December 2018, and applied for the Certificate the same day. The UAE Finance Ministry granted the certificate for the period April 2018 to April 2019, meaning that RSM had been incorrect in advising that the Certificate would only be granted in arrears. This would not have been a problem if Mr Khadem remained domiciled in the UAE. However, during Mr Khadem's visit to see his wife who had remained in the UK for work, the UAE closed its borders on 15 March 2020 as a result of the pandemic. For health reasons, Mr Khadem has not returned to the UAE since. Consequently, the lump sum Escrow Amount became liable to a 45% UK income tax charge when it fell due for transfer under the terms of the Agreement.

- JTC claimed that, but for the erroneous tax advice, the parties would have entered into a more tax efficient arrangement that did not involve the Agreement, and therefore the Agreement was entered into by virtue of mistake common to both parties. Mr Khadem, unsurprisingly, did not dispute the claim. HMRC entered submissions by way of a letter to the Court dated 8 July 2021 disputing the claim, but without applying to become a party to the proceedings.

- The Court remarked that the approach taken by HMRC is common, and the courts will typically (if not always) have regard to submissions put forward by HMRC. If an application proceeds on an unopposed basis, the court must still be satisfied that the application proves the facts necessary to establish that the court has jurisdiction to grant the relief sought. In this case, HMRC submitted that the mistake relied on by the claimants lacked the following necessary elements to engage the equitable doctrine of mistake, these being: seriousness, causative effect and unconscionability.

Was there a sufficiently serious and causative mistake?

- It is trite law that *"mere ignorance, mere inadvertence or mis-prediction"* do not comprise mistake; however, ignorance or inadvertence can create a false conscious belief that might constitute mistake. JTC had directly followed RSM's advice, which incorrectly stated that

the Certificate issued by the UAE Finance Ministry would only be issued in arrears. This was a mistake of fact.

- The Court disagreed with HMRC's position that the mistake had no negative impact on JTC. As trustee of the pension plan, JTC would potentially be in breach of trust having entered into an agreement that gave rise to an avoidable tax liability, which was a very serious matter (both from a legal and reputational perspective) for a trustee. The Court remarked that there need not be any financial impact on the claimant in order for the doctrine of mistake to be engaged.

- The Court dealt with the seriousness and causative effect broadly together. HMRC argued that Mr Khadem's change of residency in March 2020 back to the UK was the cause of the tax liability. On JTC's case, the cause of the tax liability was RSM's incorrect advice as to the timing of the Certificate. Without that advice, JTC would not have entered into expensive escrow arrangements, and the payment of the Escrow Amount would have been structured more efficiently (including by way of staggered annuity payments, as opposed to a lump sum payment). This reliance upon RSM's incorrect advice caused and was central to the Agreement. Had the Escrow Amount not fallen due under the Agreement, there would have been no tax liability.

- The Court was therefore satisfied that there was a mistake of fact that was sufficiently serious and causative of the Agreement

Would it otherwise be unconscionable not to award rescission?

- The Court was persuaded that the following factors would have rendered it unconscionable not to rescind the Agreement: (i) first, the size of the tax liability; (ii) second, that JTC could no longer pay Mr Khadem in a more tax efficient manner; and (iii) third, the potential for there to be a claim against JTC for breach of trust. The Court also remarked that the potential cause of action against RSM for its incorrect advice further justified rescission of the Agreement.

- Accordingly, the Court concluded that the Agreement had been entered into because of mistake, and therefore should be rescinded.

PH*lit* comment:

Above all, this case offers practitioners a useful recitation of the court's equitable jurisdiction to rescind a contract on the grounds of mistake. Where an agreement has been entered into in ignorance of a set of facts or matters of law, it is unlikely that this will be sufficient to constitute mistake unless such ignorance gives rise to "a false conscious belief or tacit assumption".

The case was perhaps most notable by the fact that it was unopposed by the defendant. We are reminded that in tax-related matters, HMRC need not be a party to proceedings in order to have its position properly and fully conveyed to and considered by the court. Tax practitioners would do well to remember that the doctrine of mistake is not a "collusive remedy" to risky and unsuccessful tax schemes.

High Court grants a mandatory anti-suit injunction to prevent continuation of Armenian court proceedings in breach of an arbitration agreement

***VTB Bank (PJSC) v Mejlumyan* [2021] EWHC 3053 (Comm) (unreported)**

5 November 2021

- The High Court has granted a mandatory anti-suit injunction to restrain the continuance of proceedings brought in Armenia in breach of an agreement to arbitrate. The Court held that the existing prohibitory injunction was insufficient to be effective in the circumstances,

and therefore it was appropriate to require the defendant to the High Court proceedings to take an active step to prevent the foreign proceedings from continuing.

- The underlying claim arises out of non-payment under a finance agreement. In 2004, an Armenian company, Armenian Copper Programme CJSC ("**ACP**"), which was within the defendant's (Mr Mejlumyan) group of companies (the "**Vallex Group**"), was granted a licence to develop and exploit a copper molybdenum mine in the Lori region of Armenia. The license was subsequently assigned to a wholly-owned subsidiary, Teghout CJSC ("**Teghout**"). In 2011, the claimant, VTB Bank, provided Teghout with a facility of USD 283.3 million to finance the construction of the mine (the "**Financing Agreement**"). This debt was restructured in 2016 with four companies in the Vallex Group providing a guarantee in respect of the financing. The Financing Agreement is governed by English law and provides that all disputes arising out of it should be resolved in London under the LCIA Rules. Security for the guarantees took the form of two pledge agreements, the second of which was a pledge granted by Mr Mejlumyan over his 100% shareholding in ACP (the "**Pledge**"). The Pledge is subject to Armenian law and LCIA Arbitration in London.

- In July 2019, VTB Bank sent a confiscation notice to Mr Mejlumyan, notifying him that Teghout had failed to make payment under the Financing Agreement and therefore it intended to exercise its rights under the Pledge. Mr Mejlumyan commenced proceedings in Armenia seeking a declaration that the Pledge had terminated on the grounds that the debt due under the Financing Agreement had been extinguished following VTB Bank's enforcement of other security (the "**Armenian Proceedings**"). VTB Bank challenged the jurisdiction of the Armenian Court, and that challenge remains extant.

- In February 2021, VTB Bank commenced proceedings in England and Wales, seeking interim relief to prevent Mr Mejlumyan from taking any other steps in the Armenian Proceedings. The original hearing was adjourned on Mr Mejlumyan's application, but the Court nevertheless ordered that *"until the further hearing or further order, [Mr Mejlumyan] shall not pursue or take any further steps in, or procure or assist in the pursuit of the [Armenian Proceedings] as against [VTB Bank] whether by himself, his employees, his counsel, servants or agents…"* (the "**First Order**").

- The application was eventually heard in May 2021 and the High Court determined that:

  - The Armenian Proceedings were at an early stage and that the delay by VTB Bank in commencing the claim did not justify the refusal of an injunction;

  - VTB Bank had not submitted to the jurisdiction of the Armenian Court; and

  - There was nothing in the way that VTB Bank had presented its case that was unfair or inconsistent with the grant of relief.

- Accordingly, the Court found in favour of VTB Bank and granted a final prohibitory injunction, that ordered Mr Mejlumyan not to "pursue or take any further steps in or procure or assist in the pursuit of" the Armenian Proceedings (the "**Second Order**").

- The judgment which gave rise to the Second Order was shared with the parties in draft before it was formally handed down. Very shortly before the judgment was handed down (but after the draft had been circulated to the parties) Mr Mejlumyan's lawyers appeared before the Armenian Court and notified it of the impending injunction. Mr Mejlumyan's lawyers submitted that the Armenian Court should continue to consider the case in Mr Mejlumyan's absence, on the basis of the positions and justifications presented by Mr Mejlumyan to the Armenian Court to date, as is permissible under the Armenian Civil

Procedure Code (the "**ACPC**"). On the same day, Mr Mejlumyan's wife applied to join the Armenian Proceedings as an independent claimant on the basis that, under Armenian law, the pledged shares were jointly owned by her as Mr Mejlumyan's wife and accordingly could not be pledged without her consent. VTB Bank submit that this action was taken in concert with Mr Mejlumyan in order to further slow the proceedings and prevent enforcement of the Pledge.

- VTB Bank then applied to the High Court for a final mandatory injunction on the basis that Mr Mejlumyan was openly seeking to circumvent the First Order and Second Order by requesting that the Armenian Court proceed, without himself needing to take any further steps. VTB Bank submitted that a mandatory injunction was appropriate and necessary as the prohibitory injunction had been deprived of its effect and had not resulted in the cessation of the Armenian Proceedings. Instead, a mandatory injunction should be granted which required Mr Mejlumyan to discontinue the Armenian Proceedings.

- In reaching its decision, the High Court first noted its power under the Senior Courts Act 1981 to grant an anti-suit injunction restraining foreign proceedings where they are issued in breach of an exclusive jurisdiction agreement and/or an arbitration agreement. The relevant principles to be determined when exercising that power are threefold:

  - The applicant must satisfy the court that there is a high degree of probability that there is a binding and applicable arbitration agreement;

  - If it is satisfied that there is a binding and applicable arbitration agreement, the court should ordinarily restrain foreign proceedings brought in breach of the agreement, unless the defendant can show strong reasons not to do so; and

  - Anti-suit relief is a discretionary remedy and there are no absolute or inflexible rules governing its exercise – there are, however, well-established objections to its exercise such as where the claimant has delayed in applying for relief and where the claimant has submitted to the jurisdiction of the foreign court.

- The Court noted that these principles had been thoroughly rehearsed and applied in the judgment which led to the granting of the Second Order. Therefore, the question was whether anything additional was required for the grant of a mandatory injunction. Mr Mejlumyan submitted that there was: mandatory injunctions should be granted with more caution. The Court agreed that this might be the case where the mandatory injunction sought was interlocutory, but was unnecessary for the grant of a final injunction where a prohibitory injunction was already in place. The question was simply whether the mandatory relief was necessary in order to give effect to the injunction and prevent the foreign proceedings from progressing any further.

- In the present case, the Court considered that mandatory relief was both necessary and appropriate because:

  - The Armenian Proceedings were commenced in breach of a binding and applicable arbitration agreement and although Mr Mejlumyan was prohibited from continuing the Armenian Proceedings, a mandatory injunction was now necessary to ensure that that prohibition was not circumvented;

  - The risk of injustice to VTB Bank could not be adequately protected by the existing prohibitory injunction as Mr Mejlumyan expressly asked the Armenian Court to determine his claim in his absence and therefore, without a mandatory injunction, the prohibitory injunction would be circumvented by Mr Mejlumyan's own actions;

- There was a real and tangible risk that the prohibitory injunction already in place would be rendered ineffective for the purpose for which it was imposed;
- Mr Mejlumyan's actions were wrongful, and he was clearly using the Armenian Court procedure to bypass the prohibitory injunction, contrary to the spirit and the letter of the First Order and Second Order; and
- It was clear that Mr Mejlumyan was acting deliberately and consciously in contriving a means to continue the Armenian Proceedings.

- The Court dealt with Mr Mejlumyan's objections sharply, preferring VTB Bank's expert evidence as to the application of the ACPC in these circumstances. In overview, the Court disagreed with Mr Mejlumyan's submissions that: (i) under the ACPC, discontinuing the Armenian Proceedings would prevent him from advancing the same claim in arbitration or enforcing the same; and (ii) the Armenian Court would not accept the discontinuance as this was a "corporate dispute" (as defined in the ACPC) and therefore it was open to the Armenian Court to continue the proceedings of its own motion, rendering the mandatory injunction ineffective.
- Accordingly, the High Court granted VTB Bank's application for a mandatory injunction.

PH*lit* comment:

This judgment demonstrates how vociferously the English Courts will seek to uphold the parties' contractual election to settle disputes through arbitration, and that the court will not shy away from granting mandatory anti-suit injunctions in order to uphold those agreements.

On the facts of the present case, the mandatory injunction did nothing more than express in words what should have occurred upon the grant of the prohibitory injunction i.e. the discontinuance of the Armenian Proceedings. However, this will nevertheless provide reassurance to litigants in circumstances where the prohibitory injunctive relief that they have obtained has failed to prevent the continuance of foreign proceedings brought in breach of an arbitration agreement.

High Court considers whether a minor data protection infringement should be struck out as an abuse of process under the *de minimis* principle

***Johnson v Eastlight Community Homes Ltd* [2021] EWHC 3069 (QB) (judgment available here)**

16 November 2021

- The Media and Communications List of the High Court has recently considered whether a claim for damages of £3,000 for misuse of private information, breach of confidence, negligence, breach of Article 8 of the European Convention of Human Rights ("**ECHR**") and breach of data protection law (the GDPR and Data Protection Act 2018) was sufficiently de minimis, such that the claim had no real prospect of success and/or fell afoul of the principle in *Jameel v Down Jones & Co Inc* [2005] QB 246 (i.e. that litigation must have a legitimate benefit to the claimant that is proportionate to the court resources in trying the case in order to proceed), and so should be struck out under CPR 3.4(2) as an abuse of process.
- The factual background to the claim is straightforward: the defendant is a provider of low-cost social housing and the claimant is one of its tenants. In September 2020, one of the defendant's other customers (the "**Third Party**") requested a rent statement. By return, the defendant sent the Third Party an email which attached a compilation of rent statements of other customers of the defendant, including the claimant. The claimant's information, (her name, address, account reference number, account balance and details

of recent rent transactions) appeared at pages 880-882 of a 6,941 page document. The Third Party was the sole recipient of the email, and immediately notified the defendant of its error. The defendant requested that the Third Party delete the email and the Third Party confirmed it had done so. The inadvertent disclosure, caused by human error, lasted less than three hours.

- The defendant emailed the claimant to inform her of the error, to apologise and to state that the matter had been reported to the Information Commissioner's Office ("**ICO**"). The ICO confirmed a few weeks later that it would be taking no further action.

- The claimant brought proceedings against the defendant in the High Court, claiming damages of £3,000. In a witness statement, the claimant alleged that she had moved to her current home to escape an abusive relationship, and so the release of her personal details to an unauthorised third party had caused her particular distress and anxiety due to a fear that her ex-partner would discover her location. However, the claimant had not pleaded personal injury (in the form of mental distress) as part of her claim. The Court also noted that the claimant had not elected for her details to be "ex-directory" and so her whereabouts were easily established in any event. Accordingly, the claimant's distress was in the realms of the hypothetical rather than reality, and was historic rather than current.

- The defendant sought to have the claim struck out on the basis that it did not meet the threshold of seriousness below which any claim cannot be expected to succeed. In addition, the defendant disputed the claimant's proposition that there is a common law duty of care in relation to personal data, noting that it was contrary to recent authority, including in *Warren v DSG Retail Limited* [2021] EWHC 2168 (QB) (for more detail on this case, please refer to the July edition of our blog). The claimant conceded this point during the hearing and the Court noted that dropping that aspect of the claim at such a late stage seemed to have been either *"the unreasonable maintenance of opportunism or simply the unreasonable maintenance of a claim without further consideration or reflection"*.

- The Court, therefore, was free to focus on the defendant's main argument: that the claim was insufficiently serious to proceed. In this regard, the Court set out the Jameel principle, as summarised in *Higinbotham v Teekhungan* [2018] EWHC 1880 (QB), which recognises that:

  - The Court has jurisdiction to stay or strike out a claim where no real or substantial wrong has been committed and litigating the claim would yield no tangible or legitimate benefit to the claimant proportionate to the likely costs and use of court procedures - in other words *"the game is not worth the candle"*.

  - Nevertheless, striking out is a draconian power which should be used only in exceptional cases and unless it is obvious that the claim has very little prospect of success, it should be taken at face value.

  - Accordingly, the Court should only conclude that continued litigation of the claim would be disproportionate to what could legitimately be achieved where it is impossible to fashion any procedure by which that claim could be adjudicated in a proportionate way.

- In applying these principles to the facts, the Court considered that this claim seemed to be precisely the type of trivial data protection breach referred to by the Court of Appeal in *Lloyd v Google* [2019] EWCA Civ 1599: *"…the threshold of seriousness… would undoubtedly exclude, for example, a claim for damages for an accidental one-off data breach that was quickly remedied."* In addition, the Court considered that both the Jameel principle and the

de minimis threshold were not displaced by the primacy of EU law over the common law, and each jurisdiction is entitled to apply the regulations in accordance with its own legal principles and procedures.

- In this regard, the Court referred to the Precedent H Form (the costs budget) filed by the claimant's solicitors which confirmed that £15,000 in costs had already been incurred, and a total figure for costs in excess of £50,000 had been estimated. The Court noted that no serious privately paying litigant would contemplate spending £50,000 in costs (which may not prove recoverable) for a damages claim of £3,000 or less. Accordingly, the presentation of the claim to-date in the forum of the High Court constituted a form of abuse.

- However, it remained possible for the Court to deal with the claim in a proportionate way, and accordingly the Court directed that the claim be transferred to the Small Claims Track of the County Court (where it should have been issued in the first place) and noted that the suggestion that this case was suited for the High Court because this is a developing area of law which requires elaborate and complex legal argument is unrealistic, if not opportunistic.

PH*lit* comment:

This decision forms part of the emerging picture of the parameters of data breach litigation, and helps to establish the thresholds which litigants will need to meet in order to bring a successful claim in circumstances where their data has been lost or compromised. Like many minor data breaches, there was no tangible "loss" to the claimant from the temporary unauthorised dissemination of her data and her claim for damages was therefore small (and disproportionate to the costs of bringing a claim). Large corporates will be reassured that this sort of (relatively) insignificant breach is unlikely to result in a multitude of small claims, unless there is some evidence of specific loss (including mental distress) suffered by the claimant, over and above the loss of data itself. However, notably, the claim was not struck out, but transferred to the County Court, so the threat of small claims against corporates for minor breaches has not entirely disappeared, albeit the limited costs recovery in the County Court may well act as a deterrent for pursuing claims of such low value.

High Court gives further guidance on witness statements under PD57AC

***Blue Manchester Limited v (1) Bug-Alu Technic GmBH, (2) Simpsonhaugh Architects Limited* [2021] EWHC 3095 (TCC) (judgment available here)**

19 November 2021

- The High Court has given further guidance on the requirements for trial witness statements prepared under Practice Direction 57AC ("**PD 57AC**"). Of particular interest, the Court's judgment includes a helpful appendix setting out whether paragraphs contained in five separate witness statements were compliant with PD 57AC or required re-drafting, and in the case of the latter, why.

- The underlying dispute relates to the construction of the building, in which the claimant seeks damages from the defendants in relation to cladding failures. The parties disagreed as to the proper approach to PD57 AC and so the Court, whilst noting that litigants should avoid becoming embroiled in "unnecessary trench warfare" about the proper interpretation of PD 57AC, allowed a day of arguments given: (i) the disparity between the parties and their respective positions; and (ii) the relative novelty of PD 57AC and the need for Court guidance.

- Whilst the parties largely agreed that there are the following six overriding principles with which trial witness statements have to comply, they differed on their interpretation of them:

- They must be in the witness' own words (if practicable);
- They cannot include opinion about the meaning of a document, unless the witness's contemporaneous belief about a document is a relevant issue;
- They cannot include argument;
- They cannot quote documents at length;
- They must state which statements are made from the witness' own knowledge and which are matters of information and belief; and
- On important disputed matters of fact, they must state how well the witness recalls them (if practicable) and if their recollection has been refreshed by documents (and, if so, identify those documents).

- The claimant's case was that the defendants' witness statements were largely not written in the first person, and some contained precisely the same words on similar issues. They also did not clearly specify which statements arose out of the witness's own knowledge and belief and which did not. Lastly, the defendant's solicitors had served a composite list of documents which did not separate out the documents to which each individual witness had been referred. The defendant's case was that these witness statements nevertheless were compliant with PD 57AC as there was a sufficient core of compliant material in each witness statement.

- The Court, noting that PD 57AC was likely not yet in force at the time that the witness statements were prepared, agreed that there were substantial failings in the defendants' witness statements. However, the Court did not agree that they should be struck out in their entirety, but rather ordered that the witness statements ought to be redrafted to ensure compliance with PD 57AC. To underline the severity of the order, the Court ordered that an unless sanction would apply in relation to any individual sections of any witness statements which remained non-compliant after the re-draft.

- In giving its judgment, the Court carefully analysed each section complained of and noted whether such section was in compliance with PD 57AC and if not, why. Whilst the individual sections are necessarily context-dependant, the Court gave the following comments which will be generally applicable to any witness statement drafter under PD 57AC:
  - Witness statements should be written in the first person to confirm personal knowledge;
  - Source of knowledge or belief should be stated;
  - Reference to documents should be limited to what is necessary and relevant;
  - Lengthy recitals from documents are unlikely to be necessary, but depending on the context, short extracts may be reasonably necessary;
  - Phrasing should make it clear where the witness is making after-the-event comments or referring to their beliefs when seeing a certain document at the time; and
  - A list of document should be attached to each witness statement.

PH*lit* comment:

This judgment is the latest guidance from the High Court on PD 57AC and underlines the importance of strict compliance with PD 57AC. Whilst the Court permitted the re-drafting of the witness statements, the Court's comments that this was partly due to the relative novelty of PD 57AC may mean that that future litigants will be met with less generosity and may face strike-out of their witness statements for significant non-compliance. Practitioners are therefore well advised to take note of the appendix to this judgment as the Court's guidance on whether or not a paragraph complies with PD 57AC is made clearer by reference to specific sections of the witness statements.

Court of Appeal gives guidance on unfair prejudice petitions and the costs of withdrawn contempt applications

***Loveridge v Loveridge* [2021] EWCA Civ 1697 (judgment available here)**

19 November 2021

- The Court of Appeal has confirmed that each unfair prejudice petition must be determined by reference to the individual company, even in circumstances where petitions are brought against several entities of a group that acts as one business. The Court of Appeal also confirmed that contempt applications are subject to the usual cost rules in Part 44, so that the starting point for a withdrawn application is that the party withdrawing the application will be liable for costs.

- The case relates to a long-standing dispute involving the family business of multiple successful Caravan parks in the UK and the fall-out between certain family members. Such fallout had led to the son of the family, a minority shareholder in various companies used to run the business: (i) seeking to wind up certain of the companies; (ii) issuing a petition for unfair prejudice in respect of certain of the companies; (iii) making an application for an injunction restraining his parents from demanding the repayment by him of certain loans (the "**Injunction Application**"); and (iv) making a contempt application against his sister (the "**Contempt Application**").

- In the present appeal, the Court of Appeal was asked to determine the High Court's decision to refuse: (i) permission to strike out the unfair prejudice petition, and instead grant permission for the amendment of the same, and the Injunction Application (the "**Company Appeal**"); and (ii) the sister's application for costs following the withdrawal of the Contempt Application (the "**Costs Appeal**").

- In relation to the Company Appeal, the Court had to consider whether one unfair prejudice petition could be made in respect of five different companies, thereby essentially treating the separate companies as one business. The Court stressed that *"questions of unfair prejudicial conduct and whether it is just and equitable to wind a company up must be determined by reference to each individual company and Michael's [the son] interest as a member of it"*. The Court also noted that the fact that the affairs of one company may have been conducted in an unfairly prejudicial manner, does not in itself justify a similar conclusion in respect of another company, even if they are *"in some senses regarded as part of the same overall business"*. The son had failed to distinguish between the separate entities and had therefore failed to properly set out his case of unfair prejudice as a member of each separate entity and his complaints were therefore held to be unarguable and his petition was struck out.

- In its judgment, the Court of Appeal also considered an offer that had been made in respect of one of the companies to buy the son out at a fair market value, without a minority discount (i.e. an *O'Neill v Philipps'* offer). The Court rejected the argument that the fact

that one offer was made in respect of one company was supportive of the need to consider the companies together and as one business. On the facts, it found that the offer would have cured the alleged unfair prejudice in respect of that company only.

- In relation to the Costs Appeal, the Court noted that the wide discretion a judge has in relation to costs was well established. It was also well established that the normal cost principles applied in respect of a contempt application, i.e. that the starting position is that the withdrawing party should pay the other party's costs, which, despite its quasi-criminal nature, remains a civil remedy. However, interestingly, the Court further noted that the merits of a contempt application may be taken into account when determining costs as the Court is required to have regard to all of the circumstances, which in an appropriate case will include the merits. Ultimately, the Court ordered the son to pay his sister her costs associated with the withdrawn Contempt Application on the basis that the contempt allegations had not been proven.

PH*lit* comment:

This judgment is a useful reminder of the applicable principles to unfair prejudice petitions. As such petitions are brought by a shareholder vis-à-vis their right as member of a company, it is key that a petition is tailored to a specific company, and does not seek to lump together various companies within a group. In addition, the Court of Appeal's remarks in relation to the costs of withdrawn contempt applications and its guidance that the merits of a case may be taken into account are interesting. In particular, while the Court ultimately ordered the son to pay the costs of the withdrawn Contempt Application in this case, it does not necessarily follow that the respondent to a withdrawn contempt application will automatically be entitled to their costs.

Court of Appeal considers when a claim to set aside a judgment on the grounds of fraud constitutes an abuse of process

Park v CNH Industrial Capital Europe Ltd (trading as CNH Capital) **[2021] EWCA Civ 1766 (judgment available here)**

24 November 2021

- In a recent decision, the Court of Appeal ruled that a claim alleging that a prior judgment in default had been obtained by fraud, should be allowed to proceed. The defendant to the action had alleged that the claim was an abuse of process, because the claimant was aware of the circumstances giving rise to the fraud at the time of the original proceedings. However, the Court dismissed this argument, noting that a claim to set aside a judgment on the basis of fraud will be an abuse of process only if the claimant had deliberately decided not to investigate a suspected fraud, or had determined not to rely on a known fraud, in the original proceedings.

- The claimant, Mr Park, is a farmer in Lancashire and runs his farming business through Park Organic Farms Limited ("**POFL**"). In 2013 and 2014, Mr Park signed four unregulated hire-purchase agreement with the defendant, CNH Industrial (a finance company), relating to farm equipment for use in the business. The agreements, which were completed by CNH, mistakenly identified Park Hall Farms Limited as the hirer; there is and was no company with that name. The company registration number on the agreements was associated with Park Hall Farms Enterprises Limited, an entirely different farm in Shropshire with no association to the claimant.

- Mr Park requested the hired equipment be kept in storage whilst he raised the finance for the deposit. When POFL was in a position to pay the deposits, Mr Park went to inspect the equipment in storage and found that it was badly damaged. Mr Park ceased to make payments on the rentals, and CNH terminated the first two-agreements. A representative

of CNH, Mr Smith, then visited Mr Park at his farm late in the evening in December 2014. Mr Smith procured Mr Park's signature on an agreement, a Deed of Rectification, which purported to rectify the hire-purchase agreements on the ground of a mutual mistake. The Deed stated that it was always the intention that the agreements be concluded by Mr Park personally as a sole trader. Mr Park's evidence was that it was always intended that POFL would be the hiring entity, and the mistake as to the contractual counterparty was simply CNH's mistake.

- CNH brought proceedings against Mr Park personally for £138,483.48 due under the hire purchase agreements, plus interest (the "**Original Proceedings**"). In overview, in the Original Proceedings:
  - CNH's Particulars of Claim stated that Mr Park had "signed the hire purchase agreement purportedly as director of Park Hall Farms Limited, a company which did not exist… the mistake was rectified by a Deed of Rectification… it was agreed that all references to Park Hall Farms Limited in the agreements meant the defendant trading as Park Hall Farms…". The Particulars of Claim were verified by a Statement of Truth.
  - Mr Park, acting in person, served a handwritten defence which stated that the debt was owed by Park Hall Farms Limited and not him personally. Mr Park then failed to comply with directions set at the case management conference and to file his witness statements, with the result that his defence was automatically stuck out.
  - Mr Park's application for relief from sanctions was denied, and CNH applied for judgment in default. In its request for judgment in default, CNH implicitly represented that it was entitled to judgment on the basis set out in the Particulars of Claim.
- Mr Park commenced a fresh action against CNH in November 2018, alleging that the default judgment had been obtained by fraud and should be set aside. In response, CNH countered that the fresh proceedings were an abuse of process, because the stance taken by Mr Park in the present proceedings - that CNH had deceived the Court in its Particulars of Claim by stating that it was always the intention of both CNH and Mr Park that Mr Park should be personally liable as hirer in the hire-purchase agreements, when the true position was that POFL was the intended hirer – was inconsistent with his defence in the Original Proceedings (namely that Park Hall Farms Limited was the intended hirer).
- The High Court held that causation was not established because CNH's alleged fraud was not the "operative cause" of the entry of the default judgment; the operative cause was Mr Park's procedural defaults which led to the automatic strike out of his defence. The Court struck out Mr Park's claim, accepting that it was an abuse of process because:
  - Mr Park's claim for fraud was based on facts which were known to him at the time of the original action and therefore failed to satisfy the requirement for "fresh evidence";
  - There was no deception of the Court when the default judgment was entered;
  - The claim was fundamentally inconsistent with Mr Park's defence in the original action; and
  - The alleged fraud was not the operative cause of the default judgment, which was due to Mr Park's own procedural failings.

- Mr Park appealed to the Court of Appeal which held that his claim was not an abuse of process and should not have been struck out, thereby allowing his appeal and restoring the directions given previously:

  - On the first issue, the Court held that the meaning of "fresh evidence" in this context does not mean evidence that has only come to light since the imputed judgment; it simply denotes evidence that was not deployed in the original action. The fact that the fraud argument could have been raised in the first action was not enough to make the second action an abuse of process. The claim to set aside the judgment will only be an abuse of process if, in conducting the original proceedings, the claimant alleging fraud in the claim to set aside had deliberately decided not to investigate a suspected fraud or had determined not to rely on a known fraud. In the present case, there was no evidence that Mr Park knew he could rely upon the circumstances in which the Deed of Rectification was signed as a defence to the claim brought by CNH until his application for relief from sanctions was heard.

  - On the second issue, the Court of Appeal found that the Court was deceived at the time the judgment in default was entered: CNH had deceived the Court by making deliberately false statements in its Particulars of Claim. The Court noted that the process of judgment in default involves the court trusting in the truth of representations made in the Particulars of Claim, which are fortified by a Statement of Truth, because the veracity of those claims will not have been tested at trial.

  - On the third issue, the Court of Appeal had little time for the argument that there was any inconsistency between Mr Park's pleaded defence in the Original Proceedings and his claim in the present proceedings. In both proceedings, Mr Park was denying that he had any personal liability for the debt arising under the hire-purchase agreements and there was no inconsistency between stating that the person identified in the agreements as hirer was Park Hall Farms Limited and subsequently asserting that the named hirer should have been POFL.

  - Finally, the Court held that the judge had applied the wrong test in determining whether the alleged fraud was the operative cause of the judgment; the correct test is not whether the fraud is the operative cause, but whether it is an operative cause. In the present case, Mr Park's default gave CNH the opportunity to enter judgment on its claim against him, but the judgment was entered on the basis that Mr Park was liable for the reasons set out in the Particulars of Claim, which was untrue.

PH*lit* comment:

This case demonstrates that the onus is on the claimant to act honestly in the conduct of proceedings and, if the Particulars of Claim contains misleading or untrue statements, there is a risk that any judgment obtained based on that pleading could be set aside for fraud.

In addition, this case clarifies that a party seeking to set aside a judgment on the ground of fraud need only establish that the fraud was an operative cause of judgment being entered, not that it was the operative cause. Once a judgment is tainted by deceit it is fatally flawed and "fraud unravels all".

Court of Appeal holds that pleading a claim on an extrapolated basis from the outset is not an abuse of process

Building Design Partnership Ltd v Standard Life Assurance Ltd **[2021] EWCA Civ 1793 (judgment available here)**

29 November 2021

- The Court of Appeal has held that, in principle, a claim may be pleaded from the outset on an extrapolated basis. The Court was asked to strike-out a claim as an abuse of process on the basis that part of the claim was not properly pleaded, in that it extrapolated the defendant's liability in respect of 3,437 issues based on an investigation the claimant had undertaken of 167 similar issues. In reaching its decision not to strike-out the claim, the Court considered that, in an appropriate case, and so long as the defendant understands the case it has to meet, it is not only permissible but desirable to plead a claim on an extrapolated basis in order to keep the litigation within proportionate bounds.

- The underlying claims concerned a mixed retail and residential development in Berkshire (the "**Project**"). The claimant, Standard Life, was the developer and the defendant, Building Design Partnership ("**BDP**") was the contract administrator and leader of the design team. The Project was completed at a considerable overspend, which Standard Life alleged was both unjustified and avoidable, arising as a result of BDP's negligence by way of their late, inadequate, inaccurate, incomplete and uncoordinated provision of design information. In order to demonstrate this negligence, Standard Life investigated 167 variations to the building contract, of which 122 were particularised and pleaded as giving rise to a claim in professional negligence (the "**Specific Claims**"). Standard Life then went on to allege that, in respect of a further 3,437 contract variations, it could be inferred that, on an extrapolated basis from the Specific Claims, BDP and the design team were culpably responsible for 83.1% of them (the "**Extrapolated Claim**"). Standard Life stated that it should be permitted to extrapolate its analysis, in circumstances where:

  - BDP's personnel worked on all significant aspects of the project, performing the same basic functions;

  - The underlying cause of the additional costs which had been investigated as part of the Specific Claims were revealed to be, time and again, a result of late, inadequate, inaccurate, incomplete or uncoordinated information provided by BDP;

  - BDP had not provided any positive case to suggest any other cause of the cost overrun; and

  - It would be disproportionate to analyse each of the remaining 3,437 variations in the same way as the 167 which were the subject of the Specific Claims.

- BDP sought to strike out the Extrapolated Claim and/or obtain reverse summary judgment against Standard Life on the basis that an extrapolated pleading was an abuse or process and/or disclosed no reasonable grounds for bringing such a claim.

- At first instance, the High Court refused to grant BDP's application and exercise its discretion to strike out the claim. In the High Court's view it would have been disproportionate to require Standard Life to investigate every variation which formed part of its Extrapolated Claim and although there was likely to be "wheat" as well as "chaff" within the Extrapolated Claim, BDP had not demonstrated that every part of the Extrapolated Claim was necessarily bad and unfit for trial. Instead the Court exercised its discretion to require Standard Life to conduct limited further investigations on variations

of BDP's choice (to sure-up the sampling) and to otherwise re-plead the case to remove any unsupportable allegations.

- BDP appealed to the Court of Appeal, arguing that the High Court had applied the wrong test in determining the strike out application, in that proportionality was not a relevant consideration in the first limb of the correct test, and that the High Court had wrongly exercised its discretion.

- In reaching its decision, the Court of Appeal began by noting that the use of sampling and extrapolation is not uncommon in the Business and Property Courts as a way of corralling evidence and keeping trials within proportionate limits. The issue here was whether, as a matter of principle, a claimant can go one step further and plead its case on an extrapolated basis from the outset. The Court noted the relevant provisions of the CPR, namely that:

  - Any application of this type must be determined by reference to the overriding objective (CPR 1.1) which provides that "the court must deal with cases justly and at proportionate cost";

  - Under CPR 3.4(2) the court may strike out a statement of case if it appears to the court that the statement of case discloses no reasonable grounds for bringing the claim or is an abuse of the court's process; or if there has been a failure to comply with a rule, practice direction or court order; and

  - By virtue of CPR 16.4, particulars of claim must include a concise statement of the facts on which the claimant relies. Subsequent case law has interpreted this to mean that the pleadings should not be vague and unparticularised, and must be pleaded in such a way as to allow the defendant to know the case that that it has to meet.

- In applying these provisions, the Court was directed to two previous High Court decisions where a claim was allowed to proceed from the outset on an extrapolated basis (*Amey LG Ltd v Cumbria County Council* [2016] EWHC 2856 (TCC) *and Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* (No. 2) [2017] EWHC 1763 (TCC)). The Court of Appeal agreed that these cases showed that, as a matter of pleading and in an appropriate case, a claimant can plead an extrapolated claim from the outset.

- Therefore, the question was whether it was an abuse of process to do so in the present case. The Court noted that under CPR 3.4(2) the correct test for strike-out has two limbs: (a) was there an abuse of process; and (b) if so, how should the Court exercise its discretion to remedy that abuse? The Court disagreed with BDP that the High Court had applied the incorrect test - although the High Court had not expressly referred to the test in its judgment, it was clear from the judgment that the High Court had borne the correct test in mind. In addition, the Court of Appeal held that, in a case such as this, proportionality was a real concern and it could be properly considered as part of the first limb of the test:

  "It would be artificial for the court to ignore questions of proportionality in an already heavily pleaded case like this… so it is necessary to ask: is it proportionate and in accordance with the overriding objective for Standard Life to plead its Extrapolated Claim in this way? If it is, then provided BDP can understand the case that they have to meet, and that case has a real as opposed to fanciful prospect of success, it cannot be said that the Extrapolated Claim falls foul of CPR 3.4(2)…"

- The Court concluded that BDP could readily understand the case it had to meet, as the allegations contained in the Extrapolated Claim were based on the same grounds as those

in the Specific Claims, namely the late, inadequate, incomplete or uncoordinated provision of design information. The underlying themes of the claims plainly cut across all aspects of the Project, and it was a reasonable inference to draw that the issues investigated as part of the Specific Claims were also present in the Extrapolated Claim. No argument had been put forward that the Extrapolated Claim should be distinguished in some way from the Specific Claims. For the same reasons, the Court could not conclude that the Extrapolated Claim was bound to fail.

- Finally, the Court of Appeal noted that the High Court had properly exercised its discretion in the circumstances. The Court noted that striking out a claim, or the giving of reverse summary judgment, is a matter of last resort and if the claim can be saved in some way then the Court should seek to achieve that end (provided it is in accordance with the overriding objective). Accordingly, the directions given by the High Court to require Standard Life to improve its pleadings were a perfectly sensible and appropriate exercise of the Court's discretion under CPR 3.4(2).

PH*lit* comment:

This decision affirms that an appropriate case may be pleaded from the outset on an extrapolated basis, confirming two High Court cases which had been previously allowed to proceed on that basis. Helpfully, in a short supporting judgment, Lord Justice Birss noted that pleading a case based upon extrapolation does not require that extrapolation to be supported by statistical confidence or random sampling. This will come as a relief to practitioners operating in this area, and particularly in the construction and technology sectors, where large projects may give rise to hundreds or thousands of similar breaches of contract or instances of professional negligence. Both the overriding objective and the concept of proportionality were successfully deployed in support of this approach, which will also be encouraging for practitioners seeking to bring complex, lengthy or unwieldy claims.

It is also noteworthy that the Court emphasised that striking-out a claim was a matter of last resort, and the court's discretion should be utilised to save the claim where possible.

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Alex Leitch

Partner
Litigation and Investigations
T: +44 (0)20 3023 5188
alexleitch@paulhastings.com

Jack Thorne

Senior Associate
Litigation and Investigations
T: +44 (0)20 3023 5155
M: +44 (0)7841 584814
jackthorne@paulhastings.com

Harry Denlegh-Maxwell

Associate
Litigation and Investigations
T: +44 (0)20 3021 1008
M: + 44 (0)7500 848498
harrydenlegh-maxwell@paulhastings.com

Alison Morris

Associate
Litigation and Investigations
T: +44 (0)20 3023 5143
M: +44 (0)7523 131903
alisonmorris@paulhastings.com

Jonathan Robb

Associate
Litigation and Investigations
T: +44 (0)20 3023 5110
M: +44 (0)7498 930035
jonathanrobb@paulhastings.com

Gesa Bukowski

Associate
Litigation and Investigations
T: +44 (0)20 3023 5169
gesabukowski@paulhastings.com