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# *Supreme Court clarifies the parameters of the tort of lawful act economic duress; the Competition Appeal Tribunal grants the first ever Collective Proceedings Order; and the Privy Council holds that the Prudential 'reflective loss' rule is a substantive rule of law*

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

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- We consider a High Court decision in which the Court held that a settlement agreement superseded the offer and acceptance of a pre-action Part 36 offer, as opposed to simply memorialising that original agreement.

- We review a Court of Appeal ruling regarding the doctrine of res judicata in circumstances where the claimant filed two actions arising out of the same dispute.

- We reflect on a High Court decision to set aside an extension of time to serve a Claim Form outside the jurisdiction where the Court was not satisfied that the claimant had taken reasonable steps to effect service, and the COVID-19 pandemic was not deemed to be a sufficient reason to justify the delay.

- We note a Privy Council ruling which confirms that the 'reflective loss' rule (also known as the rule in *Prudential*) is a rule of substantive law, not merely a rule of procedure designed to avoid double recovery, and is associated with the rule that the person who can seek relief for an injury done to a company is the company itself.

- We consider a Supreme Court decision, in which the Court considered the tort of lawful act economic duress and confirmed that its three central elements are: (i) an illegitimate threat by the defendant; (ii) sufficient causation; and (iii) no reasonable alternative for the claimant but to give in to the defendant's threat.

- We discuss a landmark ruling of the Competition Appeal Tribunal in which the Tribunal granted the first ever Collective Proceedings Order in the UK.

- We note an interesting High Court ruling in which the Court was asked to consider a defence that the claimants were estopped from asserting their contractual rights by *"a combination or amalgam of all or some of…"* estoppel by representation, estoppel by convention, promissory estoppel or proprietary estoppel.

- We review a High Court ruling in which the Court rejected applications from both parties to extend the scope of a disclosure exercise, governed by the Disclosure Pilot Scheme under CPR PD 51U, in circumstances where granting the applications for further disclosure would have put the disclosure timetable in jeopardy.

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## High Court holds that Settlement Agreement supersedes pre-action Part 36 offer

***Falcon Trident Shipping Ltd v Levant Shipping Ltd* [2021] EWHC 2204 (Comm) (judgment available here)**

*4 August 2021*

- In a Part 8 claim relating to the recoverability of litigation costs, the High Court has held that a settlement agreement superseded the offer and acceptance of a pre-action Part 36 offer, as opposed to simply memorialising that original agreement. Accordingly, the usual cost consequences flowing from the acceptance of a Part 36 offer did not apply.

- On 21 April 2019, the parties' vessels collided in Indian waters. Levant Shipping Limited ("**Levant**") accepted 100% liability for the collision, with only quantum to be determined. On 12 May 2020 (after various rounds of inter-solicitor correspondence), the solicitors acting for Falcon Trident Shipping Ltd ("**Falcon**") wrote to Levant, confirming that its client was ready to issue proceedings should quantum not be agreed. The 12 May letter attached a "Scott Schedule" setting out Falcon's claim in the total amount of US$876,682.79, but specifically noted that the Scott Schedule did "*not include [Falcon's] legal costs incurred to date*".

- Shortly after the 12 May letter, Falcon sent a Part 36 settlement offer in the amount of US$775,000 (the "**Part 36 Offer**"), which Levant accepted on 22 May 2020. On 26 May 2020, the parties signed a settlement agreement, which annexed and referred to the Part 36 Offer (the "**Settlement Agreement**") and was expressed to be "*in full and final settlement and discharge of the Claim and all losses, damages, expenses and costs whatsoever and howsoever arising between the Parties out of the Collision*", but with "*recoverable pre-action legal costs to be assessed if not agreed*". The definition of "*Claim*" under the Settlement Agreement referred to, and was stated to be in the same amount as, the Scott Schedule. On 2 June 2020, Levant paid the damages-related settlement amount of US$775,000.

- Falcon subsequently claimed costs totalling US$85,538.06, comprised of six separate categories. One of the categories was subsequently withdrawn by Falcon, and another (solicitors' and counsel's fees) was not disputed by Levant. However, the parties disagreed over the following categories which amounted to approximately US$60,000: (i) agency fees incurred in arresting Falcon's ship in Indian waters; (ii) fees for Indian counsel in respect of the arrest of the ship; (iii) correspondent fees relating to the arrest; and (iv) fees for an Italian lawyer appointed by the Hull insurers (together, the "**Disputed Items**").

On 20 January 2021, Falcon issued Part 8 proceedings for a declaration that it was entitled to the Disputed Items.

- Falcon contended that the Settlement Agreement simply memorialised the Part 36 Offer, and the consequences of Part 36 should still follow. Accordingly, on Falcon's position, Levant was liable for all "*costs of and incidental to the proceedings*" up to the date of acceptance of the Part 36 Offer, which included the Disputed Items.

- On the other hand, Levant's position was that the Settlement Agreement superseded the Part 36 Offer, and the definition of "*Claim*" in the recitals thereto made it clear what the parties had agreed to settle. This definition specifically incorporated the items set out in the Scott Schedule attached to the 12 May letter, which Schedule included the Disputed Items. On that basis, the parties had agreed under contract to settle the Disputed Items, with the result that they were not recoverable from Levant as "*pre-action legal costs*".

- The Court agreed with Levant. The Settlement Agreement demonstrated the parties' objective intention to provide a fuller settlement agreement, which went further than merely memorialising the Part 36 Offer. The Court was particularly persuaded of this position given that a Part 36 offer that is made and accepted in the pre-action phase of proceedings does not engage the normal Part 36 cost consequences, which require extant proceedings. As the Settlement Agreement defined "*Claim*" by reference to the Scott Schedule, this meant that the Settlement Agreement, properly construed, settled the Disputed Items, with only solicitor and counsel fees to be agreed or determined separately.

- Given the Court's conclusion that the Settlement Agreement superseded the Part 36 Offer, it did not have to draw conclusions as to whether the Disputed Items would have, in any event, been recoverable under CPR 36.13. The Court nevertheless dealt with this issue briefly. Whether a cost should be considered within a head of damage or as a loss in the litigation will depend on whether the relevant cost is factually more closely linked to the events giving rise to the cause of action, or the proceedings subsequently pursued in respect of that cause of action. The Court was of the view that the Indian and Italian lawyers' fees in connection with obtaining security and/or commencing litigation would be recoverable as legal costs, whereas agency fees, the correspondent fee and the costs of contemporaneous surveys are more likely to be claimed as damages or expenses.

**PH*lit* comment:**

*Perhaps above all, practitioners are reminded about the use of Part 36 settlement offers in the pre-action phase of proceedings, and specifically that the desired cost consequences will not take effect if the offer is both made and accepted without proceedings being issued. Given this lack of certainty, the Court found it "unsurprising" that the parties chose to agree a fuller settlement agreement. This is to be contrasted with a situation where a Part 36 offer is accepted after proceedings have been issued, where a settlement agreement would not typically be required, or indeed advisable given that it might serve to disrupt the desired Part 36 cost consequences.*

*When making any offer of settlement, and in particular offers in accordance with Part 36, parties must be careful not to inadvertently miss out on sums that have not been included in the wider damages claim, on the basis that they were (incorrectly) thought to fall within the category of litigation costs. The issues that arose in this case could have been avoided had the parties clearly distinguished between what sums were included in the settlement, and what sums remained to be agreed; various costs can fall into a grey area, and care should be taken when detailing what is included in a settlement and what is not.*

**Court of Appeal considers the doctrine of res judicata in circumstances where the claimant filed two actions arising out of the same dispute**

***Zavarco plc v Tan Sri Syed Mohd Yusof Bin Tun Syed Nasir* [2021] EWCA Civ 1217 (judgment available here)**

*5 August 2021*

- In considering a second appeal relating to the defendant's failure to 'pay up' certain shares, the Court of Appeal has determined that a previous award of declaratory relief confirming the defendant's 'pay up' obligation did not engage the doctrine of merger, which would otherwise have served to extinguish the claimant's ability to subsequently seek damages in respect of the same cause of action.

- Zavarco plc ("**Zavarco**") was incorporated in England on 29 June 2011, at which time Mr Nasir was allotted 360 million shares with a par value of €0.10 each. On 5 June 2015, Zavarco served a call notice on Mr Nasir, requiring him to pay up in cash the 360 million shares (at par), in the total amount of €36 million. Mr Nasir contested any liability to make such a payment, causing Zavarco to serve on Mr Nasir a notice of intended forfeiture of the shares pursuant to its articles of association. Both parties issued separate proceedings for declaratory relief in respect of Mr Nasir's liability and the right of forfeiture. Those claims were heard together in October 2017, with the High Court ruling in favour of Zavarco and determining that the shares had not been paid up and therefore Zavarco was entitled to forfeit them (the "**2017 Declarations**").

- On 11 October 2018, having forfeited the shares, Zavarco issued separate proceedings for damages in the amount of €36 million and interest arising from Mr Nasir's failure to pay up, which claim was served out of the jurisdiction in Malaysia. Mr Nasir challenged jurisdiction, and applied to have service of the claim form set aside, on the following bases: (i) the claim for damages was barred by the doctrine of merger in view of the 2017 Declarations; and/or (ii) alternatively, the claim for damages ought to have been brought together with the first action seeking declaratory relief, with the result that the second action was an abuse of the court's process.

- As noted by Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, the doctrine of merger is one of several legal principles that together constitute *res judicata*. Per Lord Sumption, the doctrine of merger "*treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment*". The principal question in these proceedings was whether a judgment awarding declaratory relief precluded a subsequent claim for damages reliant on the same cause of action.

- At first instance, Chief Master Marsh determined that the "*essence of the doctrine of merger is that the cause of action merges in the judgment*", and whilst a declaration might not have any "*executory or coercive effect*", it is nevertheless a judgment that extinguishes the cause of action. Therefore, Zavarco was estopped from bringing the second set of proceedings, meaning that the Court did not have jurisdiction to hear the claims and service of the claim form should be set aside.

- On the first appeal, Birss J reversed that decision, noting that whether a declaration is capable of engaging the doctrine of merger will depend on an examination of "*both the judgment and the legal right said to have merged into it*". In this case, Birss J considered that by the first action, Zavarco sought declarations as to the right to forfeit the shares, which was a different legal right to Zavarco being entitled to payment in respect of those shares. In addition, Birss J determined that the second action had not been an abuse of the Court's process. Mr Nasir appealed the decision.

- On the second appeal, the Court accepted that the underlying cause of action in both proceedings was the same (i.e. Mr Nasir failing to pay up the shares), but agreed with Birss J in holding that the 2017 Declarations did not preclude Zavarco from bringing the second action. The Court referred to the leading textbook on *res judicata* (Spencer, Bower & Handley), which states that where a person has the benefit of a final judgment, that person is "*precluded from afterwards recovering before any English tribunal a second judgment for* ***the same civil relief*** *in the same cause of action*" (emphasis added). Whilst a party would be precluded from claiming additional damages where an award for damages reliant on the same cause of action had already been given, the same is not true where purely declaratory relief had been awarded in the first action.

- The Court of Appeal went further than Birss J by determining not only that the first action could not be said to have extinguished the right to claim damages, but also that the "*basis and development of the doctrine shows that it has no application at all to declarations*".

- Accordingly, Mr Nasir's jurisdiction challenge failed and service of the claim form out of the jurisdiction was upheld.

### PH*lit* comment:

*This short judgment provides a valuable summary of the doctrine of merger (as well as res judicata more generally) which practitioners would do well to take note of. Above all, it is more than likely that a judgment awarding declaratory relief will not engage the doctrine. However, claimants must always be alert to second actions reliant on the same cause of action potentially constituting an abuse of the court's process.*

*The case also raises a procedural point of note. Mr Nasir's second ground of appeal stated that Birss J had adopted an approach that had not been argued before him by either party and, which Mr Nasir had therefore not had an opportunity to answer. The Court appeared to give this argument little credibility, principally because it was an issue that ought to have been raised when Birss J circulated his draft judgment.*

### High Court sets aside an extension of time to serve outside the jurisdiction where delays in service were attributed to the pandemic

***Qatar Investment and Projects Holding Co. and another v Phoenix Ancient Art SA*** **[2021] EWHC 2243 (QB) (judgment available here)**

*9 August 2021*

- The High Court has upheld a Master's decision setting aside an extension of time for the claimants to serve their claim form out of the jurisdiction in Switzerland. The Court was not satisfied that the claimant had taken reasonable steps to effect service, and, of particular note, the pandemic was not deemed to be a sufficient basis upon which to justify delay.

- In May 2013, the first claimant purchased from the defendant a statuette of the Greek goddess Nike (the "**Nike Statuette**"). On 24 January 2014, the first claimant purchased (again from the First Defendant) an ancient marble artefact depicting the Head of Alexander the Great as Heracles (the "**Alexander Artefact**"). The claimants subsequently formed the view that both purchased items were of recent manufacture and of very little value compared to the price paid. The claimants and the defendant thereafter entered into a series of discussions and negotiations in respect of the two purchased items.

- In early May 2019, the parties entered into a standstill agreement in respect of the Nike Statuette, which had the effect of interrupting the limitation period that would have otherwise lapsed that month (the "**Standstill Agreement**"). On 16 January 2020, shortly before the expiry of the limitation period in respect of the purchase of the Alexander Artefact, the first claimant's solicitors wrote to the defendant's solicitors explaining that an agreement had been reached to vary the Standstill Agreement so as to incorporate the Alexander Artefact. On 21 January 2020, the defendant's solicitors responded that the agreed variation was subject to certain conditions. In view of the limitation period concerning the Alexander Artefact expiring on 24 January 2020, the claimants issued proceedings on 22 January 2020.

- On 7 May 2020, the claimants' solicitors asked the defendant's solicitors whether they were instructed to accept service of the claim form. The defendant's solicitors did not respond (something the Court remarked they were entitled to do), with the result that service had to be effected in Switzerland on the defendant company itself, and within 6 months of the date of issue (i.e. by 22 July 2020).

- On 26 June 2020, the claimants applied to extend the time to serve the claim form (the "**Extension Application**"). The Foreign Process Section ("**FPS**"), which is the body through which extra-territorial service must be effected, advised the claimants' solicitors to await the outcome of the Extension Application before submitting the relevant documents for service. The FPS had in fact suspended operations due to the pandemic by 16 April 2020, and only reopened on 28 July 2020. The Extension Application was granted on 22 July 2020 (the "**Extension Order**"), following which the claimants' solicitors provided the relevant documents to the FPS for service on 11 August 2020.

- Service was then effected on 8 September 2020, and, on 14 September 2020, the defendant applied for an order to set aside the Extension Order, which was granted by Master Gidden on 19 February 2021 (the "**Set Aside Order**"). The claimants appealed the Set Aside Order on the following three grounds: (i) first, that the Master had erroneously determined the matter by reference to CPR 7.6(3) (which applies to extensions of time requested after the lapse of a relevant period) in circumstances where the Extension Application had been made before the expiry of the period to effect service; (ii) second, that the Master had failed to take into account certain material facts, particularly in respect of the pandemic; and (iii) third, that the Master had failed to give sufficient reasons for his judgment.

- The Court remarked that the claimants had to show that the Master at first instance had either "*made an error of law or principle or that his decision was outside the generous width of his discretion*".

- The Court considered the first ground of appeal to be "*without substance*". Whilst CPR 7.6(3) was not relevant to the Extension Application (or the resulting Extension Order), it specifically requires a claimant to have "*taken all reasonable steps*" and to have "*acted promptly*". These requirements were also relevant to an application under CPR 7.6(2), which applies to applications to extend time to serve a claim form during the relevant period for service (like the Extension Application) and which must be determined in accordance with the Overriding Objective. The Court agreed that insufficient steps had been taken by the claimants in order to effect service, in particular noting that the claim had been issued 2 days before the expiry of the limitation period and that no active steps had been taken in the period between the issue of the claim on 22 January 2020 and early May 2020. Where limitation is affected, the onus on claimants to act promptly is all the more acute. The Master at first instance commented that "*the Claimants simply failed to grasp the nettle of what had to be done*".

- As to the second ground of appeal, the Court agreed with the logic adopted by Master Gidden that the "*pandemic did not come wholly out of the blue*", and with that context the claimants should not have left anything to chance. There was more than sufficient time for the claimants to have taken steps to effect service prior to April 2020 when the FPS suspended operations; instead, the claimants did nothing until 5 May 2020.

- Turning to the final ground of appeal, the Court was satisfied that the Master at first instance had not left any doubt as to the basis for his decision, and tersely dismissed the claimants' argument in that regard.

- Therefore, the Court concluded that the Set Aside Order should be upheld, with the result that service of the claim form was vitiated.

### PH*lit* comment:

*Practitioners are reminded yet again of the importance of acting promptly, as well as to take all reasonable steps in order to comply with court rules. Whilst the claimant's solicitors had taken various steps to effect service and extend time after 5 May 2020, three and half months of inactivity was ultimately fatal to the application.*

*The case also reminds us that the Court is not likely to have the wool pulled over its eyes with the use of generic reasons for delay (or otherwise). In this case, the claimants had failed to show how the pandemic had been the root cause of the claimants' issues in effecting service, and the Court demonstrated that it will not entertain such a general reason without further substantiation.*

### Privy Council clarifies application of the *Prudential* reflective loss rule

***Primeo Fund (in official liquidation) v Bank of Bermuda (Cayman) Ltd and another (Cayman Islands)* [2021] UKPC 22 (judgment available here)**

*9 August 2021*

- The Privy Council has clarified the application of the 'reflective loss rule' derived from *Prudential Assurance v Newman Industries* (No 2) [1982] 1 Ch 204, and also known as the 'Rule in *Prudential*'. The Privy Council confirmed that the reflective loss rule is a rule of substantive law, associated with the rule in *Foss v Harbottle* (1843) 2 Hare 461, which states that the person entitled to seek relief for an injury done to a company is the company itself, and concerned with the law of particular types of loss. It is therefore **not** a procedural rule concerned only with the avoidance of double recovery.

- The case concerned a dispute between a fund, Primeo, and its professional service providers, R1 and R2, concerning certain investments made by Primeo in the Ponzi scheme operated by Bernard Madoff ("**BLMIS**") and the losses on those investments. Between 1997 and 2007, Primeo held direct investments in BLMIS, but its holdings were restructured in 2007. Following the restructuring, Primeo held its investments indirectly through holdings in two third parties, Herald and Alpha, which in turn held the BLMIS shares directly. At all relevant times, Primeo was serviced by R1 and R2, which acted as custodian and administrator respectively. Primeo alleged that if the service providers had performed their duties properly, it would have been alerted to the problems with BLMIS and would not have suffered the losses that it did.

- At first instance, the Grand Court of the Cayman Islands held that R1 and R2 owed relevant duties to Primeo and had breached those duties. However, the Court dismissed Primeo's claims on the grounds that they fell foul of the reflective loss rule because Herald and

Alpha, who held the BLMIS shares directly, also had claims against R1 and R2 which covered the same loss. The Cayman Court of Appeal upheld the Court's judgment because Primeo brought its claims against R1 and R2 at a time when it was no longer a shareholder in BLMIS, but instead held shares in Alpha and Herald. It therefore found that Primeo's loss was reflective of Herald's and Alpha's loss, so that Primeo had no right of recovery against R1 or R2. Primeo appealed to the Privy Council.

- At the outset, the Privy Council noted that the reflective loss rule applied in relation to claims against a person who is a common wrongdoer, which means that they have committed some act or omission against a company and the claimant who is a shareholder in such company. The Privy Council then had to determine at which point in time the reflective loss rule applied—at the time the proceedings were issued (at which point the investments were held through Alpha and Herald), or at the time when Primeo acquired its causes of action (i.e. when it first bought the investments and held the shares directly in BLMIS). If the latter, the Privy Council also considered whether Primeo could lose its right to claim for the loss suffered due to the restructuring of its investments.

- The Privy Council relied on the majority ruling in *Marex Financial Ltd v Sevilleja* [2020] UKSC 31, in which Lord Reed distinguished between: (i) cases where claims are brought by a shareholder in respect of loss suffered in that capacity (e.g. diminution in share value) which is a consequence of loss sustained by the company, and in respect of which the company has a cause of action against the same wrongdoer; and (ii) cases where claims are brought by a shareholder, or someone else, in respect of loss which does not fall within (i), but where the company has a right of action in respect of substantially the same loss. In the first type of case, the reflective loss rule applies and the shareholder is barred from seeking recovery for loss they may have suffered. In the second type of case, the reflective loss rule does not apply and the shareholder can sue for the loss that they have suffered.

- The Privy Council was therefore concerned with identifying the boundary between the first and second type of case. Primeo's case was that it suffered a loss each time it made a direct investment in BLMIS and because it did not redeem the shares before the restructure in 2007 (and the subsequent uncovering of the Ponzi scheme). The Privy Council agreed that the case fell within the second category and clarified that the reflective loss rule, as a substantive rule of law, required that the relevant time to assess whether or not it applies is the time that the loss is suffered: Primeo suffered an instant loss on paying money to BMLIS between 1997 - 2007 which was then immediately misappropriated. The Privy Council therefore found that the cause of action acquired by Primeo on each such occasion was *"the property of Primeo which formed part of its funds of assets"* and the loss was therefore not suffered in Primeo's *"capacity as shareholder".* Therefore, when Primeo no longer held the investments directly, this did not extinguish its claims as it had suffered genuine loss from an opportunity to redeem them before the restructuring, and acquiring shares as part of the restructuring could not deprive Primeo of its property rights (in the form of choses in action).

- In addition to the timing application, the Privy Council also clarified the requirement of the 'common wrongdoer'—an essential part of the reflective loss rule is that it only applies to exclude a claim by a shareholder where what is in issue is a wrong committed by a person who is a wrongdoer both as against the shareholder and the company.

**PH*lit* comment:**

*The Privy Council judgment is to be welcomed for its clear guidance on the reflective loss rule. This rule is a substantive rule of law, rather than a mere procedural rule on double recovery. The Privy Council's judgment confirmed that the assessment of whether or not the rule applies depends on the time at which the relevant cause of action was acquired, rather than when the proceedings were issued. Helpfully, the Privy Council also clarified that the common wrongdoer requirement will only be satisfied in a direct shareholder relationship between the parties.*

## *"The standard of impropriety is the high standard of unconscionability"* - Supreme Court clarifies lawful act economic duress

***Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 (judgment available here)**

*18 August 2021*

- The Supreme Court has clarified the parameters of the tort of lawful act economic duress. The Court unanimously upheld the existence of the tort and agreed on its three central elements as being: (i) an illegitimate threat made by the defendant to the claimant; (ii) a sufficient causal link between the threat and the claimant entering into the contract; and (iii) there being no reasonable alternative for the claimant but to give in to the threat.

- The underlying dispute was between a small travel agent, Times Travel, whose business model focused, almost exclusively, on selling tickets for flights to Pakistan, and Pakistan International Airlines ("**PAI**"), which offered the only direct flights at the time. The parties had entered into a one-sided contract in 2006 under which terms PAI could terminate with one month's notice. In 2011, PAI was in dispute with several travel agents over the non-payment of commission. Under pressure from PAI, including by PAI giving notice to terminate the contractual arrangements and cutting ticket allocation by 80%, Times Travel did not join a legal action in 2012 and instead signed a new contract, which included an onerous waiver of any prior rights and claims. Times Travel subsequently issued a claim in 2014 against PAI, alleging that it was entitled to rescind the new agreement because it had entered into it under economic duress.

- Both parties accepted that the second and third element of economic duress (i.e. causation and no reasonable alternative), were met in this case. In dispute between the parties was whether PIA exercising its legitimate contractual rights to give notice (i.e. lawful conduct), could amount to "an illegitimate threat". At first instance, it was held that Times Travel was entitled to overturn the contract for economic duress. The Court of Appeal, however, held that because the relevant threat was lawful, PIA's demand could only amount to economic duress if it had been made in bad faith. On the facts, no bad faith was found, so the Court of Appeal overturned the first instance decision. Times Travel appealed.

- The Supreme Court unanimously dismissed the appeal. The majority decision rejected the bad faith requirement of the Court of Appeal and found that the English Courts had only recognised two circumstances in which lawful act duress had been found: (i) first, where the defendant uses their knowledge of criminal activity by the claimant or the claimant's family to obtain a personal benefit from the claimant by the express or implicit threat to report the crime or initiate a prosecution; and (ii) second, where the defendant, having exposed themselves to a civil claim by the claimant, deliberately manoeuvres the claimant into a position of vulnerability which the law regards as illegitimate and thereby forces the claimant to waive their right. Lord Burrows agreed with majority but went further and found that there was a third situation in which a lawful act could amount to an illegitimate threat—this being where the threatened party can prove that the threatening party was acting in bad faith in the sense that it did not genuinely believe that it had any defence for its actions. The "bad faith demand" requirement, found by both the Court of Appeal and Lord Burrows, was however rejected by the majority.

- Finally, Lord Burrows helpfully summarised the position as follows (with which the rest of the panel agreed):

  – Lawful act duress, including lawful act economic duress, does and should exist in English law;

  – The three elements needed to establish lawful act economic duress are: (i) an illegitimate threat by the defendant; (ii) the illegitimate threat causing the claimant to enter into the contract; and (iii) the claimant having had no reasonable alternative but to give in to the threat;

  – As the threat is lawful, the illegitimacy of the threat is determined by focusing on the justification of the demand; and

  – A demand motivated by commercial self-interest is, in general, justified. Lawful act economic duress is essentially concerned with identifying rare exceptional cases where a demand, motivated by commercial self-interest, is nevertheless unjustified.

**PH*lit* comment:**

*Whilst this Supreme Court decision usefully and very clearly states the current law on lawful act economic duress, the majority judgment is conservative in its scope. It recognises only two situations where lawful act economic duress has previously been found (albeit not ruling out that there could not be any further circumstances), those being: (i) exploitation of knowledge of criminal activity by the claimant (or those associated with it); and (ii) using illegitimate means to manoeuvre the claimant into a position of weakness to force it to waive a claim. What constitutes "illegitimate" is closely aligned with the equitable concept of unconscionability. This does not mean that judges are arbiters of what is morally and socially acceptable; rather, equity has identified specific contexts which call for judicial intervention to protect the "weaker" party. However, the Court made it clear that the doctrine of lawful act duress should be applied restrictively and rarely—reflecting a narrowing of the doctrine.*

## Competition Appeal Tribunal gives the go-ahead for group action as first ever Collective Proceedings Order is granted

***Walter Merricks CBE v Mastercard Incorporated and others* [2021] CAT 28 (judgment available here)**

*18 August 2021*

- The Competition Appeal Tribunal ("**CAT**") has approved the first application for a collective proceedings order ("**CPO**") under the UK's nascent competition class action regime. The application, which was initially refused by the CAT, was remitted to it following an appellate process that ultimately concluded with the Supreme Court ruling that the CAT had made multiple errors of law in deciding that the case was not suitable for a CPO. MasterCard withdrew its objections to Mr Merricks' CPO application after the Supreme Court decision was handed down, however there remained a number of issues for the CAT's consideration before the application could be granted.

- The underlying proceedings arise out of an opt-out claim brought by Mr Merricks against MasterCard on behalf of approximately 46 million customers who purchased goods and services using a MasterCard payment card between May 1992 and June 2008. The European Commission found that MasterCard had infringed EU competition rules by charging multi-lateral interchange fees (fees charged between banks for credit card transactions) which were then passed on to the consumer in the form of higher prices (the "**Overcharge**").

- On remittance of the claim, there were three issues before the CAT for determination. Taking each of these issues in turn:

  – **Authorisation of Mr Merricks as the class representative** - there had been a number of developments in the circumstances surrounding the application that the CAT needed to consider in order to determine whether Mr Merricks could be authorised as the class representative. In particular, the CAT carefully considered the change of litigation funder to Innsworth Capital Ltd and the terms of the new litigation funding agreement ("**LFA**"). Where proceedings are supported by a third party litigation funder, the CAT has to consider whether the proposed representative can act fairly in the interests of the class or whether they might have a conflict of interest, such as a constraint imposed under the LFA. There were three clauses in the LFA which the CAT specifically considered as giving rise to a potential conflict:

    - The LFA provides that if Mr Merricks and Innsworth Capital disagree as to the appropriateness of a settlement, then their difference of opinion shall be referred to an independent Queen's Counsel ("**QC**"). However, under the terms of this provision, the QC's decision will not be binding and the decision as to whether to accept or reject a proposed settlement will be solely for Mr Merricks. The CAT considered that this provision satisfactorily protects Mr Merricks' right to act in the best interests of the class.

    - The CAT expressed concerns that Innsworth Capital had too broad a discretion to terminate the agreement in circumstances where termination would have serious consequences for the class representative's ability to conduct the proceedings. However, Innsworth Capital agreed that its decision to terminate would need to be based on "independent legal and expert advice" as to the merits of the claim and its financial viability.

    - Although the LFA provides cover for MasterCard's costs in the event of an adverse costs order, as a third party MasterCard had no right to enforce the terms of the LFA itself. Innsworth Capital agreed to provide an undertaking to the CAT that it would discharge a liability for costs ordered against Mr Merricks.

  – **Amending the claim to include 'deceased persons'** - when issuing a claim for collective proceedings, it is a requirement that the claim form provide a description of the class and an estimate of the number of class members. Mr Merricks excluded persons who had died from the class. Mr Merricks later sought to re-include approximately 13.6 million deceased persons.

    In principle, the CAT saw no difficulty in having a class definition that included the estates of deceased persons, with the opt-out rights to be exercised by the representatives of those estates. However, Mr Merricks' proposal simply sought to treat deceased persons as individuals within the class. The CAT agreed with MasterCard's objections that such an approach would be impermissible as deceased persons cannot themselves be class members.

  – **The compound interest issue** - the estimated quantum of the principal claim is stated to be 'up to' £7.2 billion. As at January 2021, the claim with simple interest would total approximately £13.8 billion, whereas with compound interest it is estimated to be £16 billion.

Mr Merricks included compound interest in his claim from the outset, arguing that all members of the class would have (at some point) either borrowed or saved money, and the Overcharge could have been used to either increase savings or pay off debt, thus either returning interest on savings or reducing the interest burden of debt. However, MasterCard objected to the claims for compound interest on the basis that it was not a common issue across the class and that no credible method had been put forward for calculating the loss suffered.

The CAT noted that compound interest *"constitutes a distinct head of loss, which must be separately established and cannot be presumed"*. Therefore, it is necessary to show, on the balance of probabilities, what the individual would have done with the additional money if there had been no Overcharge. The CAT concluded that no credible method had been put forward to arrive at an estimate, even by informed guesswork, of the extent of the Overcharge, which would have been saved or used to reduce borrowings. Accordingly, the claim for compound interest was unsuitable for an aggregate award and was excluded from the claim.

- With these issues resolved, the CAT duly authorised Mr Merricks as the class representative and ordered a CPO on an opt-out basis.

### PH*lit* comment

*Although this decision remains noteworthy as the first CPO issued under the 2015 regime, the fact that MasterCard withdrew its objections following the decision of the Supreme Court means that it was not necessary in this case to apply or stress-test the principles set out in the Supreme Court's decision. Overall, the CAT's vigilant consideration of the issues demonstrates that it will continue to examine each application for a CPO carefully. However, with a significant number of CPO applications pending before the CAT, it is unlikely that we will have to wait long before interested parties can witness the application in practice of the principles set out by the Supreme Court.*

*For more information on this case please refer to our Stay Current article.*

## High Court considers a defence of a "*combination or amalgam of all or some of*" the estoppels in Sex Pistols IP dispute

### *Jones and another v Lydon and others* [2021] EWHC 2321 (Ch) (judgment available here)

23 August 2021

- In a recent case, the High Court was asked to consider whether the claimant band members were estopped from relying on a term of a contract which purportedly permitted the exploitation of a number of jointly held IP rights on the basis of a majority (as opposed to unanimous) vote in favour of that exploitation. The defendant pleaded that the claimants were so estopped by *"a combination or amalgam of all or some of…"* estoppel by representation, estoppel by convention, promissory estoppel or proprietary estoppel. However, in finding that no estoppel arose in the circumstances, the Court ruled that the defendant had failed to establish any of the assumptions, representations or acquiescence necessary to *'begin to get an estoppel case off the ground'*.

- The parties in this case were all former members of the punk-band 'The Sex Pistols'. The dispute arose between two band members, Steve Jones and Paul Cook (the claimants), and John Lydon (aka Johnny Rotten) over the exploitation of certain songs in an upcoming television series. The parties had entered into a Band Member Agreement ("**BMA**"), which contained provisions dealing with how future decisions concerning the exploitation of IP rights were to be made. On the face of the BMA, in the event of a disagreement between band members as to how IP rights were to be exploited, decisions of the majority were able to bind the minority. Mr Lydon argued that the claimants were estopped from asserting their claims under the BMA, as the agreement had never been relied upon in the past and in practice various band members had been entitled to a veto over any proposed use of the IP rights.

- Put shortly, the issues for the Court to consider were threefold:
  - Were the claimants estopped from relying on the majority voting provisions in the BMA?
  - If not, did the BMA on its true construction, or alternatively as a matter of implication, require Mr Lydon's consent to the use of Sex Pistols music in the proposed TV series?
  - Were the claimants entitled to a declaration stating that Mr Lydon was obliged to comply with the majority wishes as to the grant of the IP rights?
- In respect of the first issue, Mr Lydon did not rely on, or plead, any particular type of estoppel, instead stating that he was relying on all conceivable kinds of estoppel, including *"a combination or amalgam of all or some of [them]".* The Court noted that the concept of an amalgam of all the different types of estoppel is not something known to English law. Instead, each type of estoppel has its own requirements, albeit they can be seen to be related. Accordingly, it was necessary for the Court to have the principles of all the different estoppels in mind when considering Mr Lydon's submissions.
- However, the Court dealt tersely with the attempt to assert all variants of the doctrine of estoppel, without pleading in full the elements of any one specie of the doctrine. The Court did not consider that the claims of proprietary estoppel, promissory estoppel or estoppel by representation warranted detailed consideration, noting that Mr Lydon's attempts to demonstrate that the consistent conduct of all members of the band in apparently requiring unanimity (and consistent conduct in not overruling a dissentient) suggested to the Court that estoppel by convention was the most appropriate estoppel.
- The Court rehearsed the well-established principles of estoppel by convention, noting that it arises where parties share a common understanding or assumption of a state of affairs which is not necessarily accurate, or *where one party acquiesces in the erroneous misunderstanding* or assumption of the other, and it is unjust to go back on the assumption. In the present case, the claimants never assumed that the BMA was not operative, nor had they forgotten about it—accordingly there could be no common assumption. As such, Mr Lydon needed to show that the claimants had acquiesced in his own misunderstanding that the BMA was not operative.
- Of the many and various incidents referred to by Mr Lydon in support of his position, the Court held that the majority of these incidents demonstrated no more than a recognition amongst the band members that a consensus was preferred, and so they would not press a dissentient member. However, the Court did not consider such behaviour to be the same thing as, or otherwise amount to, an assumption that the terms of the BMA would not be enforced. In particular, the conduct of the other band members clearly demonstrated that they had not acquiesced in any misunderstanding or assumption of Mr Lydon. Accordingly, Mr Lydon's estoppel arguments failed.

- Having found that Mr Lydon was not entitled to rely on any estoppel argument, the Court then went on to consider the second question as to whether it was necessary to imply a term into the BMA, which would require all band members to take all necessary steps to execute any proposed licensing agreement (or similar) in circumstances where there has been a majority vote, in order to give the BMA business efficacy. The Court held that it was indeed 'reasonable and equitable' to imply such a term, noting that a minority should not be able to frustrate the will of the majority when each individual has agreed to abide by the majority's will. The implication of such a term was deemed necessary to give business efficacy to the BMA.

- On the third issue concerning whether the claimants were entitled to a declaration stating that Mr Lydon was obliged to comply with the majority wishes, the Court considered that they would be so entitled in principle, but the wording of such a declaration was yet to be formulated.

### PH*lit* comment

*This case provides a helpful summary of the requirements necessary to succeed with a claim of estoppel—in particular estoppel by convention and estoppel by representation—but also serves as a useful reminder that the individual estoppels are separate and must be pleaded as such.*

*Estoppel by convention was a particular focus of this case, and in particular the form of the estoppel where one party acquiesces in the erroneous misunderstanding of the other and it is unjust to allow that party to then go back on the assumption. This case demonstrates the high hurdle that a party will need to meet in order to demonstrate that acquiescence has occurred. In spite of the numerous and various incidents put forward by Mr Lydon in support of his estoppel arguments, the Court held that these incidents did not even begin to get Mr Lydon's estoppel arguments 'off the ground'.*

## High Court rules on the CPR 51U extended disclosure models in a liquidator's preference claim

***Re CGL Realisations Ltd (formerly Comet Group Ltd) v Darty Holdings SAS* [2021] EWHC 2395 (Ch) (judgment available here)**

*25 August 2021*

- The High Court has rejected applications from both parties to extend the scope of a disclosure exercise, governed by the Disclosure Pilot Scheme under CPR PD 51U, in circumstances where granting the applications for further disclosure would have put the disclosure timetable in jeopardy.

- The underlying proceedings arise out of a payment of £115 million made in February 2012 by the Comet Group Ltd, shortly before it went into administration and then liquidation. In 2018, the liquidator of Comet (the "**Liquidator**") brought proceedings seeking recovery from the recipient of that payment, Darty Holdings SAS ("**Darty**"), on the basis that the payment had been made as a 'preference' contrary to section 239 of the Insolvency Act 1986.

- The proceedings fell within the Disclosure Pilot Scheme under CPR PD 51U, and the parties accordingly discussed and agreed a disclosure review document ("**DRD**"), in which Model D was identified as the most appropriate disclosure model for the majority of issues identified (with Model C also being identified for some issues). However, at a Case Management Conference, both the Liquidator and Darty brought separate applications seeking to widen the parameters of the previously agreed disclosure exercise. By way of background to the applications, it is worth noting that under CPR PD 51U:

- Model D disclosure is a *"narrow search-based disclosure, with or without narrative documents".* The obligation is to disclose documents likely to support or adversely affect the claim or defence of one of the parties in relation to the issues for disclosure.

- In contrast, Model E disclosure is a *"wide search-based disclosure"*, covering train of enquiry documents that might result in the identification of additional documents for disclosure. The test of what is to be disclosed goes further than Model D, in that it includes material which may be relevant to an issue without necessarily giving support for or adversely affecting a claim or defence.

▪ The Liquidator's application sought to widen the scope of disclosure to Model E on certain issues. The Liquidator sought 'train of enquiry' disclosure, having been informed that some potentially relevant documents (in the form of electronically stored data) had been destroyed in 2016 during the acquisition of the Darty group. The lost material was expected to shed light on the question of whether Comet was influenced to make the payment by a desire to put Darty into a better position in the event of an insolvent liquidation (Issue 10 of the DRD). In order to combat the impact of the lost material, the Liquidator's application sought three things:

- In relation to Issue 10, an order that Darty should give Model E disclosure as opposed to Model D;

- An order that Darty should conduct searches for, and give disclosure of, documents relating to the decision to delete its data at the time of the acquisition; and

- An order requiring Darty to give a witness statement concerning the decision to delete the documents at the time of the acquisition and a report from an IT expert as to the possibility of recovering the material.

▪ Darty cross-applied to widen the issues for disclosure that had been identified in the DRD, including the addition of four issues requiring Model C disclosure. Darty also asked the Court to read one of the existing issues identified in the DRD more broadly, so as to include a wider stance on Comet's conduct and relationship with an acquiring group (which included Darty).

▪ In considering the issues raised by the Liquidator's application, the Court noted that Model E disclosure was only to be ordered in exceptional cases. Although the Court had sympathy for the argument that the loss of data might be described as exceptional, and could give reason for ordering a disclosure exercise that required a train of enquiry, it ultimately held that in the present case such an order would not be appropriate. The reasons for this decision were threefold:

- The Liquidator had given no real warning that it intended to apply for Model E disclosure in the inter-solicitor correspondence.

- Widening the scope to Model E disclosure would have required Darty to essentially repeat the entire disclosure exercise that had been carried out to date, with the deadline for disclosure less than a month away. The Court did not think that this would be a productive exercise.

- Under section 239(6) of the Insolvency Act 1986, it is *presumed* that Comet was influenced to make the payment by a desire to put Darty into a better position than it would have been in, in the event of insolvent liquidation. The burden would be on Darty to rebut this presumption, and therefore the party hampered by the destruction of the data would be Darty, not the Liquidator. Accordingly, the orders sought by the Liquidator were not required for it to be able to make its case.

- With regard to deleted data, the Court additionally commented that Darty had already done enough to search for the data and explain the circumstances of its destruction in the DRD/inter-solicitor correspondence. Although there were some inconsistencies in the explanations for the loss between the different documents, the way to resolve this was not through further witness evidence in circumstances where a witness statement had already been provided.

- On Darty's cross-application, the Court was equally unreceptive, holding that the existing scope of disclosure provided for by the DRD was sufficient to cover all relevant documents. In reaching its conclusion, the Court referred to the purpose of the Disclosure Pilot Scheme, to direct disclosure specifically to defined issues arising in the proceedings, and reduce the amount of unnecessary documents that are irrelevant or peripheral to the issues. With this in mind, the Court noted that although it may be interesting for the Court to hear any information uncovered as a result of the additional issues, these issues were actually not relevant to the factual foundations of the claim and were therefore not appropriate as issues for disclosure.

- The Court rejected both applications for extended disclosure accordingly.

**PH*lit* comment:**

*Although highly fact specific, this case provides an interesting example of the way in which the court will deal with applications to extend the scope of previously agreed parameters of disclosure, particularly at short notice and when close to court-imposed deadlines. The Court was also mindful in this case that the object of the Disclosure Pilot Scheme is to reduce the amount of disclosure to focus on only those documents that have some bearing on the issues in the proceedings. Documents, which are peripheral or not relevant to the identified issues will not fall within the scope of the parties' disclosure obligations, no matter how objectively thought-provoking they might be.*

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