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The Supreme Court interprets "damage" widely for the purposes of the jurisdictional gateways and considers the governing law of an arbitration agreement in the context of a challenge to enforcement of an award; and the Court of Appeal rules that the courts are not bound to accept uncontroverted expert evidence

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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 public procurement claim in which the High Court granted the claimant relief despite multiple failures to comply with procedural service rules.
- We review a High Court ruling, which has levied scathing criticism over the handling of a "*very unedifying episode*" concerning a potential breach of confidentiality relating to a draft judgment.
- We reflect on a Court of Appeal ruling that the courts are not bound to accept uncontroverted expert evidence.
- We note a High Court ruling which provides guidance on Practice Direction 57AC concerning trial witness statements and, in particular, the requirement to provide a list of documents which the witness has seen for the purposes of preparing their statement.
- We consider a High Court decision in which the Court ruled that the defendants could only recover 30% of their costs where the claim against them had failed on causation but there was proven dishonesty by them.
- We discuss a highly anticipated ruling of the Supreme Court in which the Court found that injury and death sustained outside the jurisdiction met the jurisdictional gateway for claims

in tort under paragraph 3.1(9)(a) of Practice Direction 6B as the "damage" was sustained within the jurisdiction.

- We note an interesting ruling in which the Supreme Court refused recognition and enforcement of a New York Convention arbitral award where the respondent had not become a party to the arbitration agreement under English law.

- We review a Court of Appeal decision, which upheld the High Court's ruling concerning the so-called "battle of forms" doctrine in relation to jurisdiction.

- Finally, we consider the latest revisions to the Disclosure Pilot Scheme and note its extension to December 2022.

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Claimant's solicitors saved by the Court despite several service-related failings

***CitySprint UK Ltd v Barts Health NHS Trust* [2021] EWHC 2618 (TCC) (judgment available here)**

1 October 2021

- In a public procurement claim brought pursuant to the Public Contracts Regulations 2015 (the "**PCR 2015**"), the High Court granted the claimant relief despite multiple failures to comply with procedural service rules.

- The claimant, CitySprint UK Ltd ("**CitySprint**") was the incumbent provider of pathology transport and logistics services to the defendant, Barts Health NHS Trust ("**Barts**"). Barts initiated a competitive tender process for the re-procurement of those services, which CitySprint participated in but was ultimately unsuccessful. CitySprint in turn indicated that it intended to bring a procurement challenge in accordance with the PCR 2015.

- Time limits for bringing proceedings in respect of public procurement challenges are deliberately short in order to ensure the continued operation of public services. A claimant must issue proceedings within 30 days of it first becoming aware that "*grounds for starting the proceedings had arisen*", and the Claim Form and Particulars of Claim must be served on the defendant within 7 days of the date of issue. In the present case, the parties had entered into a standstill agreement extending the expiry of the 30-day limitation period to 27 July 2021.

- CitySprint, through its solicitors FG Solicitors Ltd ("**FGS**"), filed its claim together with brief details of claim and a £10,000 filing fee, on 27 July 2021 via the Court's e-filing service. The Court confirmed that the filing had been successfully submitted. FGS thereafter sent an unsealed copy of the claim form to Barts' solicitors, Bevan Brittan LLP ("**BB LLP**"), on the same day. However, because CitySprint issued a claim for monetary and non-monetary relief, the court fee payable was in fact £10,528. Accordingly, on 29 July 2021, the Court requested further payment from FGS.

- Whilst the sealed Claim Form displayed 27 July 2021 as the date of issue, the court's e-filing system stated the "Approved Date" as being 29 July 2021. FGS therefore computed the date for service of the sealed Claim Form and Particulars of Claim as being 5 August 2021 (i.e. 7 days from that "Approved Date"), rather than 3 August 2021, which was 7 days after the Claim Form had been issued. Moreover, FGS effected service by way of email, despite not having requested or received written confirmation from BB LLP that they

would accept electronic service of proceedings, as required by Practice Direction 6A of the Civil Procedure Rules.

- Various applications were then filed by both parties, all of which concerned whether service of the Claim Form and Particulars of Claim had been effected in accordance with the Court rules. There were three areas for the court to deal with: (i) first, the timing of CitySprint effecting service; (ii) second, the method by which it effected service; and (iii) third, whether the claimant was entitled to relief from sanction to remedy any defects in service.

- In respect of the first issue, the Court considered that there was "*no sensible way*" for the date of issue to be "*construed as anything other than the date provided on the electronic seal on the document itself*" – i.e. 27 July 2021. The Court was not persuaded that the subsequent payment of £528 to remedy the shortfall in the issue fee should render the date of issue as being 29 July 2021. The e-filing service had accepted the filing on 27 July 2021, and the shortfall in payment was a "*minor*" error of procedure. Whilst this finding was beneficial to CitySprint on grounds of limitation, CitySprint found itself "*on the horns of dilemma*" as service of the sealed Claim Form and Particulars of Claim on 5 August 2021 was therefore out of time.

- As to the second issue concerning the method of service, the Court determined that service by email was not permitted in circumstances where the party being served had not indicated in writing that it would accept electronic service; it matters not that the parties had generally communicated over email.

- Accordingly, it was necessary for the Court to consider the third issue of whether relief was available for late and ineffective service. It was ultimately crucial to the judgment that the unsealed version of the claim form had been served (albeit by email) on 27 July 2021 and therefore within the 7 day period for service.

- Under CPR 3.10, the Court has the power to rectify matters where there has been an error of procedure in the context of extant proceedings. The Court considered the 'error of procedure' to be twofold: (i) first, that CitySprint had served the unsealed as opposed to the sealed version of the Claim Form within the requisite period; and (ii) second, that service had been effected by way of email without consent from BB LLP. It was important that the unsealed version of the Claim Form had been sent after the court system had confirmed acceptance of it, which had the effect of commencing proceedings. Had the unsealed Claim Form been sent prior to the Court's confirmation, proceedings would not have been extant, with the effect that CPR 3.10 would not have been available at the time of the unsealed claim form being sent.

- BB LLP submitted that another (permissible) method of service should have been adopted by FGS. The Court interestingly remarked that this was "*technically accurate on a reading of the rules*" but given the strict time limits in procurement cases, it would be odd if the Court did not remedy FGS' error.

- The Court ultimately concluded that Barts was "*attempting to take opportunistic advantage of limited errors of procedure to achieve a technical knock-out*" in circumstances where the prejudice to Barts (i.e. having to face a claim) was not a result of the procedural errors. Therefore, the Court ordered, pursuant to CPR 3.10, that service of the unsealed claim form by email on 27 July 2021 should constitute good service. The Court separately ordered, pursuant to CPR 3.1(2)(a), a retrospective extension of time of two days for service of the Particulars of Claim.

PH*lit* comment:

Given that FGS had made several errors in effecting service, the Court's decision might seem surprising. However, the Court was eager to note that this case was specific to its facts as well as the context of the short timescales in public procurement cases, and that this "judgment should not be interpreted as the court being indulgent towards widespread failures to comply with such time limits*".*

The ultimate takeaway for practitioners is a straightforward one: be careful to ensure strict compliance with procedural rules. On another day, the Court may well have been less inclined to come to the rescue of FGS, but it was relevant that FGS had done everything that they understood to be required, and had instead misinterpreted the service rules. In Boxwood Leisure Limited v Gleeson Construction *[2021] EWHC 947 (TCC), the claimant's solicitors omitted to include the Claim Form when purporting to serve it by email together with the Particulars of Claim and related documents. In that case, the court was not minded to grant relief from sanctions, with the result that the case was dismissed.*

In light of the decision in Boxwood*, the present judgment will undoubtedly have come as a relief to FGS.*

High Court expresses "severe dissatisfaction" in parties' conduct, but stops short of contempt proceedings

***Optis Cellular Technology Inc v Apple Retail UK Ltd* [2021] EWHC 2694 (Pat) (judgment available here)**

5 October 2021

- The High Court has levied scathing criticism over the handling of a "*very unedifying episode*" concerning a potential breach of confidentiality relating to a draft judgment. Ultimately, Meade J considered that it would be disproportionate to escalate the matter to a consideration of contempt proceedings, and instead was of the view that the "*severe dissatisfaction*" expressed in his judgment should be an "*adequate sanction*".

- On 20 September 2021, Meade J sent a draft judgment (the "**Draft Judgment**") to the parties to the proceedings together with the standard notice of confidentiality, reminding those parties that any unauthorised disclosure of the judgment might be treated as a contempt of court. The substance of the underlying judgment is immaterial for present purposes.

- On 21 September 2021, counsel for the claimant, Optis Cellular Technology Inc ("**Optis**"), informed another barrister that judgment was expected to be handed down on 27 September 2021 (incidentally, Meade J made clear in the present judgment that there is no confidentiality in the date of a forthcoming judgment). That date was made known to a Mr Fogliacco, the CEO of Sisvel, which was not a party to the present proceedings. Mr Fogliacco then emailed Mr Friedman of Optis and said: "*I hear Monday will be a big day for you guys. Keeping my fingers crossed*". After receiving that email, Mr Friedman called Mr Fogliacco. Mr Friedman, on his evidence, had understood Mr Fogliacco to have been referring to the actual, as opposed to hypothetical, result of the Draft Judgment. Mr Fogliacco clarified in his evidence, which was accepted by the Court, that he was not aware of the result of the Draft Judgment but was rather simply referring to the date that final judgment was to be handed down.

- Subsequently, also on 21 September 2021, Mr Friedman messaged his solicitors – EIP Europe LLP ("**EIP**") – suggesting that Meade J's office had leaked the Draft Judgment to Sisvel, and incorrectly stating that the earlier call from Mr Fogliacco had in fact been a call made by him to Mr Fogliacco. The next day, EIP emailed the Court and explained that "*it would appear that there has been a breach of the confidentiality directions*", although at this stage EIP did not suggest that a leak had occurred from Meade J's office, as Mr

Friedman had suggested. The Court gave immediate directions for the matter to be investigated by all parties.

- On 24 September 2021, EIP sent a further email to the Court, which now identified Mr Fogliacco as the relevant third party who might have unauthorised knowledge of the Draft Judgment, and suggested that the leak may have come from Meade J's office. After further investigation, including of the call that took place on 21 September between Mr Friedman and Mr Fogliacco, it was ultimately determined that there had been no leak at all of the Draft Judgment.

- However, the Court made clear that, irrespective of Mr Friedman's intentions, it was unacceptable for him to have made the 21 September call to Mr Friedman, in circumstances where it risked breaching the confidentiality obligations in respect of the Draft Judgment. Further, the Court found that the initial instructions then given by Mr Friedman to EIP were entirely misleading and/or incorrect, and had resulted in "*a massive waste of time and money, and much completely unnecessary heartache and worry*".

- Meade J was principally critical of the instructions given by Mr Friedman, his "*remarkably casual*" approach to a very serious matter, and deliberately "*untrue*" statements made in his witness testimony. In particular, and unsurprisingly, Mr Friedman's incorrect allegation that the Draft Judgment had been leaked from Meade J's office drew heavy criticism, given the anxiety and stress that the suggestion created within the clerking team. In respect of EIP, the Court did comment that its lawyers had "*seriously mishandled*" the situation, including by failing to more urgently and comprehensively investigate the matter, as well as for failing to disclose relevant information to the Court immediately (including the involvement of Mr Fogliacco). Had EIP more thoroughly investigated the matter initially then the entire scenario might have been avoided, not least given that there had in fact been no unauthorised disclosure of the Draft Judgment to Mr Fogliacco.

PH*lit* comment:

As well as reminding practitioners and instructing clients as to the confidentiality attached to reserved judgments, this judgment offers a stark warning as to how parties should act in response to a potentially very serious situation. In the circumstances, the Court did not consider it proportionate to escalate the matter to contempt proceedings, being satisfied that its displeasure as expressed in the judgment was sanction enough, but instead required Optis to pay indemnity costs to the other parties.

The Court was critical of EIP's haste to contact it with inaccurate information, which had resulted in a waste of time and money that might have been avoided with fuller (and more thoughtful) investigation. Instead, the Court held that, in the first instance, they should have properly investigated with care what had happened.

Court of Appeal rules that the courts are not bound to accept uncontroverted expert evidence

***Mr Peter Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442 (judgment available here)**

7 October 2021

- In a split decision, the Court of Appeal restored the first instance judgment, determining that an uncontroverted expert report in a personal injury matter had not disclosed sufficient reasoning, with the result that the claimant's case could not discharge the requisite burden of proof.

- In August 2014, the claimant, Mr Griffiths, went with his family to Turkey on an all-inclusive holiday organised by the defendant, TUI (UK) Ltd ("**TUI**"). During the holiday, Mr Griffiths

contracted acute gastroenteritis, which manifested in stomach cramps, diarrhea and loss of appetite. Following admission to hospital, a stool sample was taken showing multiple pathogens present. Mr Griffiths subsequently brought proceedings against TUI in contract and pursuant to the Package Travel, Package Holidays and Package Tours Regulations 1992.

- TUI put Mr Griffiths to proof in respect of when, where and under what circumstances he had fallen ill, and further denied that any such proven illness had been caused by TUI. Mr Griffiths relied upon a report from a consultant microbiologist, Mr Pennington, in order to prove causation (the "**Report**"). Despite permission to adduce similar expert evidence, TUI failed to do so, with the result that the Report was the only evidence adduced in respect of causation.

- At first instance, the County Court considered there to be a number of deficiencies in the Report, principally as various conclusions were bare *ipse dixit*, that is to say that they had been reached without any clear reasoning. As the Court put it, "*[the] Court is not a rubber stamp to just accept what someone has said*". As the Report did not prove causation on the balance of probabilities, Mr Griffiths' claim was dismissed.

- On appeal to the High Court, the Judge drew a bright line between 'controverted' and 'uncontroverted' evidence. In this case, TUI had neither submitted contrary expert evidence nor cross-examined Mr Pennington, and it was only in closing submissions that TUI raised any challenges to the Report. The High Court therefore considered that the Report was uncontroverted (in that there was no factual evidence undermining the basis of the Report, no competing expert evidence and no cross-examination of Mr Pennington), and found that it substantially complied with the Practice Direction to CPR Part 35. Accordingly, it held that the Report should not have been dismissed at first instance, without competing evidence or otherwise, as failing to prove Mr Griffiths' case.

- TUI appealed to the Court of Appeal, which, in short, determined that the authorities did not create a bright line rule between uncontroverted expert evidence on the one hand, and controverted expert evidence on the other. The Judge at first instance had not rejected the Report for being wrong, but rather for not putting forward sufficient reasoning to satisfy the burden of proof. The court, not the expert, is the decision-maker, and the court does not have to accept uncontroverted expert evidence if there is reason not to. As to fairness, the Court of Appeal considered there to be no issue in raising challenges in closing submissions in respect of the expert evidence, provided that such challenges do not question the credibility or veracity of the expert.

- Lady Justice Asplin, supported by Lord Justice Nugee, therefore allowed TUI's appeal.

- In a strong dissenting judgment, Lord Justice Bean agreed that the court is not always bound to accept uncontroverted expert evidence; however, it would generally be bound to accept such evidence where it is not controverted by factual evidence and where the other side could have cross-examined the expert but chose not to do so. There were no exceptional reasons in this case to depart from that proposition. Moreover, he "*profoundly*" disagreed with the determination that there was nothing inherently unfair in raising challenges only in closing submissions, finding that such approach amounted to "*litigation by ambush*".

PH*lit* comment:

It remains the case that if an expert report deals with the relevant issues upon which the expert was instructed, is supported by logical reasoning and is the only evidence available on those issues, then it is difficult (albeit not impossible) to envisage a situation in which it would be appropriate to decide that the expert's report is wrong. That said, this case makes clear that there is no rule that requires a court to accept undisputed expert evidence, particularly where any conclusion has been reached without sound reasoning or logic. Practically speaking, and although this case is highly fact-specific, this judgment reminds practitioners of the need to ensure that experts present their findings in as clear and methodical manner as possible, and for all conclusions to be backed up by clear reasoning. As stated in Kennedy v Cordia LLP *[2016] 1 WLR 597,* "what carries weight is the reasoning, not the conclusion*".*

However, Lord Justice Bean was very clear in his dissenting judgment that Mr Griffiths should rightly feel that he has not received justice, in circumstances where his own factual evidence was accepted by the court and the evidence of an eminent microbiologist had not been contradicted or cross-examined. Although oral permission to appeal was refused in this case, it seems that it is only a matter of time before the Supreme Court will need to consider this issue further.

High Court gives guidance on Practice Direction 57AC concerning trial witness statements

Mansion Place Ltd v Fox Industrial Services Ltd **[2021] EWHC 2747 (TCC) (judgment available here)**

14 October 2021

- The High Court has given guidance on the requirements of Practice Direction 57AC ("**PD 57AC**"), including the appended Statement of Best Practice, which contains rules for trial witness statements in the Business and Property Courts and has been in force since 6 April 2021. For more information on PD57AC, see our April update.

- The underlying construction dispute arose out of certain contractual dates for completion of a development not having been met. The central issue between the parties is whether the parties subsequently entered into an oral agreement whereby the claimant agreed that it would not deduct liquidated damages for the delay in return for the defendant not claiming certain loss and expense.

- While preparing the trial witness statements, the claimant's solicitors emailed the defendant's solicitors to confirm how to cross-refer to documents referred to in the witness statements and listed in the list of documents required under PD 57AC, paragraph 3.2. In the email correspondence between the solicitors, it transpired that the defendant's solicitor had prepared the witness statements the "*old fashioned way*" by exhibiting the documents referred to in the statements, rather than simply listing them in the list of documents in accordance with paragraph 3.2.

- Following subsequent exchange of witness statements, the claimant raised concerns with the defendant's witness statements and their compliance with PD 57AC. Accordingly, it issued applications seeking: (i) redaction of certain parts of the witness statements for non-compliance with PD 57AC; and (ii) an amendment to the certificate of compliance to include that the requirements of PD 57AC were not discussed with, or explained to, the witnesses until after the statements had been drafted. In particular, the claimant submitted that PD 57AC could not be complied with retrospectively and the defendant's solicitor's admission that he was not aware that PD 57AC applied, meant that full compliance with PD 57AC was not possible. In addition, the claimant expressed concerns about a claims consultant for the defendant, who is not a qualified solicitor and is a witness in the proceedings himself, that had interviewed another witness and prepared their witness

statement. The defendant also raised concerns with the claimant's witness statements and issued an application seeking to strike out certain parts for non-compliance with PD57AC.

- The High Court, after reiterating the relevant rules for trial witness statements under both CPR 32 and PD 57AC, and applying *Mad Atelier International BV v Manes* [2021] EWHC 1899, noted that PD 57AC's purpose is not to change the law as to the admissibility of evidence at trial, but to "*eradicate the improper use of witness statements as vehicles for narrative, commentary and argument*". Importantly, the Court also noted that PD 57AC "*does not change the approach that should be taken to witness statements*" because, even prior to the introduction of PD 57AC, "*a proper approach to preparation of a trial witness statement would result in compliance with the Statement of Best Practice*".

- The Court found that it was common ground that the defendant's solicitor was aware of PD 57AC at the time of preparing the witness statements and that his admission merely related to the list of documents required under paragraph 3.2. Notably, the Court held that paragraph 3.2 did not require listing of "*every document which the witness has looked at during the proceedings*" but only those considered for the purpose of their witness statement. The Court noted that PD 57AC's primary purpose was transparency in respect of documents used to refresh a witness' memory to enable the Court and the other side to understand whether a witness might have been influenced by a review of contemporaneous documents.

- The Court further held that, whilst there was no prohibition on a draft witness statement being taken by a non-solicitor, the claimant was justified in raising concerns about this. In light of the claims consultant's own involvement in the case as a witness, it was difficult for him to record another witness' evidence "*without viewing it through the lens of his formed opinion*". However, as the defendant's solicitor and counsel took steps to revise the witness statement before service, to set out the words the witness had used, rather than paraphrasing, the Court was satisfied that the witness statement had been prepared in accordance with PD 57AC.

- In relation to both the claimant's and the defendant's applications for redaction of parts of the witness statements for non-compliance with PD 57AC, the Court carefully considered the witness statements in full. Whilst the Court's exact rulings were highly fact-specific, the following general observations can be derived from them:

  - very brief references to background matters are not considered sufficient for strike out;

  - a quotation from another witness statement in previous related proceedings in order to respond to it was not improper commentary but refutation of an allegation and therefore setting out direct evidence as to the state of the witness' knowledge at the time;

  - general commentary, such as comments on disclosed correspondence or documents forming part of the narrative or subjective commentary on allegations, should be redacted;

  - brief calculations of damages were relevant information in a case where these were in issue;

  - one witness purporting to confirm the contents of another witness statement was contrary to PD 57AC and should be redacted; and

- issues that should have been properly pleaded cannot be included in witness statements instead.

PH*lit* comment:

This is an important judgment as it gives additional and much-awaited guidance on PD 57AC, which is still in its relative infancy. In this regard, the Court's assessment that the "proper approach" to preparing witness statements has not changed from the regime under CPR 32 is particularly interesting considering that the perceived new requirements of PD57AC have caused many lawyers to re-assess their approach to taking evidence.

It is also worth noting that, whilst the parties were not criticised for taking a full day for their applications to be heard, as it enabled the Court to give guidance on PD57AC, the Court also noted that, in future cases, serious consideration needs to be given to finding a more cost-effective and efficient way to avoid satellite litigation and resolve disputes between parties relating to trial witness statements.

High Court rules defendants can only recover 30% of their costs where the claim against them had failed on causation but there was proven dishonesty by them

***TMO Renewables Ltd (in liquidation) v Yeo and others* [2021] EWHC 2773 (Ch) (judgment available here)**

18 October 2021

- The High Court has recently considered whether successful defendants to litigation could recover their costs from the unsuccessful claimant, in circumstances where they had pursued a dishonest case on liability, but the claimant had been unable to demonstrate that their conduct had caused the loss claimed. Although the defendants had ultimately succeeded at trial, the claimant argued that the Court should not award the defendants their costs, as a penalty for their dishonest conduct.

- In the underlying proceedings, the High Court found that the defendants had acted in breach of their statutory and fiduciary duties as directors of the claimant, and that they had done so recklessly and in bad faith. The claimant successfully demonstrated that the defendants issued thousands of shares for improper purposes and then concealed and dishonestly misrepresented the nature of those share issues to the company's shareholders. However, the claimant failed to demonstrate that the defendants' actions were causative of loss, and so its claim ultimately failed. The defendants, therefore, were the successful parties and argued that they should be able to recover their costs from the claimants in the ordinary way. The claimant argued that the proven dishonesty of the defendants should displace the ordinary rule that costs should follow the event.

- The High Court began by rehearsing the relevant principles:

  - The court has a wide discretion as to the allocation of costs, which is regulated by CPR 44.2. The "general rule" (as set out in CPR 44.2(2)) is that the unsuccessful party will be ordered to pay the costs of the successful party, but that the court may make a different order.

  - The aim is always to make an order that reflects the overall justice of the case by reference to the overriding objective and the "general rule" is a starting point from which the court can readily depart.

  - In deciding whether to depart from the "general rule" the court must have regard to all the circumstances of the case, including: (a) the conduct of all the parties (both prior to and during the proceedings); (b) whether a party has succeeded on part of

its case, even if that party has not been wholly successful; and (c) any admissible offer to settle which is drawn to the court's attention and which is not an offer to which Part 36 applies.

- In an appropriate case, where dishonesty is established against the winning party, this may be a ground for refusing to allow it to recover costs, in order to reflect the gravity of the misconduct. However, the court must be wary of double jeopardy.

- The Court then considered the arguments of the parties. First, and most importantly, it acknowledged that the defendants had pursued a case on liability which they knew to be false and it would not be fair or just to allow them to recover the costs that they had incurred in advancing that dishonest case. As a yardstick for calculating how much time the Court had spent on addressing the false case on liability, the Court looked at the time spent on, and the significance of, each issue as set out in the main judgment. In doing so, the Court relied on the judgment of Waksman J in *PCP V Barclays* [2021] EWHC 1852 (Comm) in which it was held that "*[o]ne guide, though not an exhaustive or necessarily authoritative guide, as to the relative importance or significance of the issues is the way in which and the extent to which*" those issues were dealt with in the judgment. Some 40% of the main judgment dealt with issues of liability, and therefore, this was taken as a starting point. However, the Court noted that the position was more nuanced than simply counting the paragraph numbers dealing with issues of liability.

- In that regard, the defendants argued that the claimant's overall conduct of the litigation was far from exemplary, noting, in particular, that the claimant failed to engage on the subject of quantification of loss, which added considerably to the defendants' costs. The substantial claim put forward by the claimant in its pre-action protocol letter was unsubstantiated and not consistent with the "cards on the table" approach that is encouraged by the Practice Direction on Pre-Action Conduct. The Court also noted that it was difficult to see how any sensible mediation could have been conducted without further information regarding how the loss had been calculated.

- In addition, the defendants highlighted that the claimant's expert evidence was produced by direct conversation between the expert and one of the fact witnesses, with no solicitor involvement and no detailed record of those conversations. The High Court held that this was not an appropriate or reasonable way to go about the production of an expert report, which undermined the independence of the expert and failed to ensure that the defendants were on a level playing field.

- The defendants also suggested that there had been flaws in the claimant's approach to disclosure, but the Court declined to determine any granular points about the disclosure process.

- Finally, the Court considered whether there had been any admissible offers to settle made by the defendants. Several early Calderbank offers had been made by the defendants, which the Court considered were genuine attempts to settle, or at the very least open up a dialogue as to the merits of the case. Accordingly, the Court held that real weight should be attached to those attempts to settle the case. The Court also noted that the offers should certainly not carry the consequences of a Part 36 offer, as whilst making these offers, the defendants did not acknowledge their own dishonest defences.

- Having considered these issues, the Court concluded that there were genuine and serious grounds for concern over some aspects of the claimant's conduct of the proceedings and that this should be reflected in the order for costs. Accordingly, the Court exercised its

wide discretion as to costs to move away from the "general rule" and take a broad brush approach which reflected:

- the defendants' overall success in the action;
- the claimant's success on liability (including the dishonest conduct of the defendants); and
- the unreasonable manner in which the claimant conducted the litigation, together with the existence of admissible offers to settle by the defendant.

- With this in mind, the Court concluded that the defendants should be deprived of 40% of their costs for running a dishonest defence, and a further 30% of their costs to reflect an element of the costs incurred by the claimant in pursuing those issues to trial. The defendants were therefore awarded 30% of their costs, which the Court considered to be broadly reflective of the relative success of the parties.

PH*lit* comment:

The award of costs is an often overlooked aspect of pursuing litigation, but one which can have significant consequences for the unsuccessful party. The "general rule" is straightforward enough, but it is rare that even a successful party will recover all that they have spent in defending or pursuing proceedings – and this is before the wide discretion of the court to award costs has been considered.

This case serves as a salutary reminder of the importance of conducting litigation in a reasonable and efficient manner. Although the defendants had pursued a dishonest case on liability, and were therefore subject to serious costs consequences, the claimant's haphazard conduct of the litigation was persuasively levied against them in deciding the level of costs the defendants should be entitled to. If the claimant had pursued the litigation in a more effective manner, it might not have been ordered to pay the costs of the defendants at all: instead, the claimant in this case was required to pay 30% of the defendants' costs, which is likely to represent a significant sum.

The Supreme Court interprets "damage" widely for purposes of jurisdictional gateway for a claim in tort under Practice Direction 6B

FS Cairo (Nile Plaza) LLC (Appellant) v Lady Brownlie [2021] UKSC 45 (judgment available here)

20 October 2021

- The Supreme Court has found that injury and death sustained outside the jurisdiction met the jurisdictional gateway for claims in tort under paragraph 3.1(9)(a) of Practice Direction 6B ("**PD 6B**") as the "damage" was sustained within the jurisdiction. The Supreme Court thereby interpreted "damage" widely and found that there was no principle which required that "damage" under the jurisdictional gateway is limited to the "damage" that is required to complete a cause of action.

- The dispute underpinning this appeal relates to a holiday the claimant, Lady Brownlie, took with her husband, their daughter and their grandchildren in Egypt in January 2010. On this holiday, the claimant and her family had gone on a guided driving tour, booked through their hotel, during which the vehicle crashed, killing the claimant's husband and daughter and seriously injuring the claimant and her grandchildren. The claimant subsequently brought claims under three heads against holding companies of the hotel through which she had booked the tour: (i) a claim for personal injury in her own right; (ii) a claim for damages in her capacity as executrix of the estate of her late husband for wrongful death;

and (iii) a claim for damages for bereavement and loss of dependency in her capacity as her late husband's widow.

- After first bringing her claims against the wrong entities, the claimant was permitted to: (i) amend her pleadings in 2017 in order to substitute the defendant to FS Cairo (Nile Plaza) LLC, a company incorporated under the laws of Egypt; and (ii) serve the proceedings on the new defendant out of the jurisdiction. The defendant unsuccessfully appealed the High Court's decision to permit service out of the jurisdiction to the Court of Appeal. The defendant subsequently appealed to the Supreme Court on two grounds:
  - *The tort gateway issue*: whether the claimant's claims in tort satisfy the requirements of the relevant jurisdictional gateway under PD 6B; and
  - *The foreign law issue*: whether the claimant, in order to show that her claims have a reasonable prospect of success, must adduce evidence of Egyptian law.

The tort gateway issue

- In order to determine whether the claimant could satisfy the jurisdictional gateway, the Court had to interpret paragraph 3.1(9)(a) PD 6B which provides that: "*A claim is made in tort where damage was sustained within the jurisdiction*". As the accident had taken place in Egypt, the defendant argued that the damage had not been sustained in the jurisdiction, whilst the claimant argued that her damage extended not only to the initial suffering (i.e. the accident), but included the extended and continued suffering back in the UK.

- With a majority of 4:1, the Court found that there was no justification to limiting the "damage" required under paragraph 3.1(9)(a) PD 6B to the "damage" required to complete a cause of action. The Court therefore drew a sharp distinction between the substantive tort and the jurisdictional rule, intended to identify the appropriate forum for the claim, and noted that, for the purposes of the jurisdictional rule only, it was not necessary to accord any special significance to a place simply because it was where the cause of action was completed. The Court also noted that, on considering the word "damage" in its ordinary meaning and in its context as a jurisdictional gateway, it extended to "*physical and financial damage caused by the wrongdoing*".

- Lord Leggatt dissented on the grounds that, as the accident had occurred in Egypt, this was the relevant jurisdiction where the damage was sustained. In contrast to the majority, he therefore did not find that the continuing pain and injury suffered by the claimant in the UK brought the claim within paragraph 3.1(9)(a) of PD 6B.

The foreign law issue

- It was common ground between the parties that the claims are governed by Egyptian law and that the claimant has to show that the claim as pleaded has a reasonable prospect of success for obtaining permission to serve out of the jurisdiction pursuant to CPR 6.37(1)(b). The defendant argued that the claimant had failed to show that her claim had a reasonable prospect of success as she had failed to adduce sufficient Egyptian law evidence, whereas the claimant argued that in the absence of satisfactory Egyptian law evidence, the Court should apply English law in the alternative.

- The Court upheld the Court of Appeal's judgment dismissing the appeal, although ordered the claimant to particularise her pleaded case on Egyptian law. Accordingly, the Court ruled in the claimant's favour but found, unanimously, that both parties' submissions were actually wrong on this point. The Court clarified that there was a difference between the "presumption of similarity" rule, which is concerned "*with what the content of the foreign*

law should be taken to be", and the "default rule", which is *"not concerned with establishing the content of foreign law but treats English law as applicable in its own right where foreign law is not pleaded*". The claimant had pleaded her claim, albeit only partly and without proper particularisation and evidence of all her claims, pursuant to Egyptian law and the default rule could therefore not apply.

- The Court held that in absence of evidence to the contrary, the Court was entitled to adopt the "presumption of similarity" and rely on the presumption that Egyptian law was materially similar to English law for the purposes of assessing whether the claims as pleaded had a reasonable prospect of success. However, as noted above, the Court also upheld the Court of Appeal's order requiring the claimant to properly particularise her claims, which it noted were within the court's wide case management powers, as the defendant was entitled to know the details of the case they have to meet.

PH*lit* comment

Whilst this decision will be welcomed by claimant lawyers in personal injury cases, the remit of the case seems to be limited to serious personal injury only. The fact that there is no definition of the level of pain and suffering required in order to meet the jurisdictional threshold, that Lord Leggatt dissented, and that Lady Brownlie originally issued proceedings in 2012, meaning it took 9 years just to get a final decision on service out of the jurisdiction, are likely going to be deterring for prospective claimants. However, it will be interesting to see how this case will be applied and whether, particularly as service of proceedings from overseas accidents had slowed down after Brexit due to the loss of the Brussels (Recast) regime, its parameters will be expanded.

The clarification provided by the Supreme Court concerning the "presumption of similarity" rule and the "default rule" provides helpful guidance concerning the pleading of foreign law and makes clear that the burden is not on the claimant to plead and prove the foreign law, but rather it is on the defendant if they wish to assert that the relevant foreign law is different to English law.

Supreme Court refuses recognition and enforcement of a New York Convention award where the respondent had not become a party to the arbitration agreement under English law

***Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 (judgment available here)**

27 October 2021

- The Supreme Court has unanimously dismissed an appeal relating to the enforcement of an arbitral award against a non-party. The Supreme Court held that the parties' choice of English law as the governing law of their agreement extended to the question of the validity of the arbitration agreement contained within the same document.

- The claimant (and appellant) is a Lebanese company which developed a distinctive restaurant specialising in Middle Eastern cuisines. Under a Franchise Development Agreement (the "**FDA**"), the claimant granted a licence to a Kuwaiti company, Al Homaizi Foodstuff Company ("**Al Homaizi**") to operate a franchise using its restaurant concept in Kuwait for a ten year period. The FDA was expressly governed by English law. In 2005, the Al Homaizi Group underwent a corporate restructuring and a new holding company, Kout Food Group ("**KFG**") was established. Al Homaizi became a subsidiary of KFG.

- A dispute arose under the FDA and the claimant brought arbitral proceedings against KFG alone under the rules of the International Chamber of Commerce ("**ICC**") in Paris. KFG participated in the arbitration under protest, maintaining that it was not a party to the FDA and therefore the arbitration agreement contained within the FDA was not binding on it. The arbitral tribunal found in favour of the claimant and, applying French law as the law of

the seat, considered that KFG was a party to the arbitration agreement. The arbitral tribunal also considered that if English law was applied, KFG would still be a party to the arbitration agreement as there had been a "novation by addition" whereby KFG became an additional party to the FDA alongside Al Homaizi by reason of the parties' conduct.

- The claimant sought to enforce the arbitral award against KFG through the English courts under section 101 of the Arbitration Act 1996 (the "**Arbitration Act**"). KFG resisted enforcement of the award on the basis that the arbitration agreement was invalid under section 103(2)(b) of the Arbitration Act. At first instance, the Commercial Court ordered that this be determined via a trial of preliminary issues and ultimately held that the claimant might be able to establish at trial that there was something approximate to consent in writing as to the addition of KFG as a party to the FDA and the arbitration agreement within it. This decision was overturned by the Court of Appeal, which gave summary judgment in favour of KFG and refused recognition and enforcement of the award. It held that:
  - the terms of the FDA provided for the express choice of English law to govern the arbitration agreement; and
  - as a matter of English law, in the absence of written consent as required by the terms of the FDA or any matters capable of giving rise to an estoppel, KFG could not have become a party to the FDA and, therefore, the arbitration agreement.
- The claimant appealed to the Supreme Court on the following three issues:
  - What law governs the validity of the arbitration agreement?
  - If English law governs it, is there any real prospect that a court might find at a further hearing that KFG became a party to the arbitration agreement in the FDA?
  - As a matter of procedure, was the Court of Appeal justified in giving summary judgment refusing recognition and enforcement of the award?
- In deciding the first question, the Supreme Court noted that the general approach in private international law where there is a dispute as to whether an agreement exists or is valid is to decide that question by applying the law that would govern the agreement if it did exist or was valid. The Court referred to its recent decision in *Enka v OOO Insurance Company Chubb* [2020] UKSC 38, in which it held that "*where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract. The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement*". In the present case, the FDA contained a governing law clause which expressly stated that the agreement would be governed by the laws of England. The Court concluded that that phrase ordinarily denotes, and is reasonably understood to denote, all clauses incorporated in the contractual document, including the arbitration agreement. Accordingly, English law applied.
- The Court then considered whether KFG had in some way become a party to the arbitration clause in the FDA, which was ultimately a contract between the claimant and Al Homaizi. The claimant could not point to any agreement in writing to this effect, which presented it with a difficulty as the FDA itself contained a number of provisions which prescribed that it may not be amended save in writing (a "*no oral modification*" clause and an "*amendment of agreement clause*"). Instead, the claimant argued that KFG's conduct over a sustained period of time by performing various obligations under the FDA was sufficient. The

Supreme Court rejected this argument, noting that the finding of the arbitral tribunal that there had been some sort of "novation by addition" did not sit well with English law principles; novation involves the substitution of one contracting party for another with the consent of all parties. However, the Court did not have to expand on this further, as the "*no oral modification*" clause was an insurmountable obstacle to the claimant's case of novation by addition, and therefore it did not even need to consider the difficulty of establishing the terms of any such novation. Accordingly, it held that the Court of Appeal was correct to conclude that there was no real prospect that a court might find at a further hearing that KFG became a party to the arbitration agreement in the FDA.

- Finally, in respect of the third issue for determination, the Supreme Court rejected the claimant's submission that a full evidential hearing was required by section 103 of the Arbitration Act in order for KFG to prove that there was no valid arbitration agreement binding it. The Court noted that summary determination may be in the interests of justice and achieve significant savings in time and costs, such that it has long been recognised as a beneficial procedural tool. If there is no real prospect of a party succeeding at trial, then it is generally appropriate to determine the issue summarily, regardless of whether it is the party seeking to enforce, or the party resisting enforcement of, an arbitral award. Nothing in the Arbitration Act itself requires the "proof" to be established by way of a particular procedure. Accordingly, the Court of Appeal was entitled to give summary judgment in favour of KFG as the claimant had been unable to show that an opportunity to adduce further evidence could make any realistic difference as to the outcome.

- In light of these findings, the Supreme Court dismissed the claimant's appeal in its entirety.

PH*lit* comment

This judgment, in the wake of the Supreme Court's decision in Enka*, provides further clarification of the approach of the English courts to the question of choice of law in the context of determining the validity of an arbitration agreement. In particular, where the parties have expressly included an applicable governing law clause in their contract, that choice of law will normally be taken to represent an indication of the law to which the parties have subjected an arbitration agreement contained within that contract.*

However, whilst the English law approach to determining the law applicable to an arbitration agreement is now clearer, there remains uncertainty at the international level. For example, in June 2020, the Paris Court of Appeal considered the same award as the English courts in Kabab-Ji*, but reached the opposite conclusion on which governing law applied to the parties' arbitration agreement. An appeal is currently pending before the* Cour de Cassation*, the highest French court, and it is expected that the* Cour de Cassation *will uphold the decision of the Paris Court of Appeal.*

Practically speaking, if it is desirable to make it absolutely clear which law governs the terms of the arbitration agreement (and in particular if that law is different to the law governing the rest of the contract), the arbitration clause should be drafted to include its own express governing law provision. This small step has the potential to save significant time and costs in avoiding procedural disputes of this nature.

The "last shot" still misses the target – Court of Appeal upholds High Court decision concerning "battle of forms" in relation to jurisdiction

TRW Ltd v Panasonic Industry Europe GmbH and another company **[2021] EWCA Civ 1558 (judgment available here)**

28 October 2021

- The Court of Appeal has upheld a High Court judgment concerning conflicting terms and conditions of purchase – a classic "battle of the forms" – by which it was held that the English courts had no jurisdiction to hear a claim under the Recast Brussels Regulation (the "**Regulation**"). Perhaps unusually for a battle of the forms case, where the traditional

analysis of offer and acceptance usually means that the last terms and conditions which have been presented prevail, the High Court had held that the "last shot" missed the target and that earlier terms and conditions prevailed. To read our update on the High Court judgment, see our January update.

- The underlying dispute concerned an order of certain faulty car parts which the defendants, based in Germany, supplied to the claimant, based in England. The parties had long-standing commercial relations, and in 2011 a representative of the claimant signed a "customer file" which recorded payment terms and delivery conditions. These terms and conditions included: (i) a stipulation that Hamburg was the place of performance and the jurisdiction of the contract; (ii) a provision that the contract was subject to German law; and (iii) a provision noting that the terms applied exclusively between the parties unless different conditions had been expressly confirmed in writing by the defendants (the "**2011 terms**"). The claimant subsequently placed two orders with the defendants in March 2015 and January 2016, which on their face required the goods to be delivered in accordance with the claimant's own conditions of purchase (as opposed to the 2011 terms). The claimant argued that the commencement of work by the defendant constituted confirmation that its terms had been accepted. The claimant's terms provided for the contract to be governed by English law and subject to English jurisdiction.

- At first instance, the High Court held that the 2011 terms prevailed, given their careful drafting which meant that they could only be displaced on express written confirmation, such that the "last shot" doctrine was displaced – i.e. "the last shot missed the target". The claimant appealed on three grounds: (i) first, that the judge was wrong to hold that the 2011 terms had contractual effect; (ii) second, that the judge had failed to assess whether the standard mandated by Article 25 of the Regulation, that the claimant had consented to Hamburg jurisdiction, had been demonstrated; and (iii) third, that there was no evidence to support the inference drawn by the judge that the parties had regularly contracted subject to the jurisdiction of the German courts.

- In relation to ground one, the Court noted that the usual position in a battle of the forms was that the last shot doctrine applied. However, applying *Tekdata Interconnections Ltd v Amphenol Ltd [*2009] EWCA Cib 1209, the Court noted that the last shot doctrine could be displaced by evidence of the parties' objective intention that it should not apply. On the facts of the case, the conclusion that the High Court had drawn, namely that the 2011 terms applied, was, in the Court of Appeal's view, plainly one that was open to it and also seemed to be right. An argument that no consideration had been given for the 2011 terms was dismissed, on the basis that "consideration" is not a concept known to German law (which applied by virtue of the 2011 terms). The claimant had also only raised this argument on appeal, which was a factor that the Court held against it. The Court of Appeal concluded that the 2011 terms were deliberately and carefully drafted to protect the defendants against the last shot doctrine.

- The Court of Appeal also dismissed ground two of the appeal by holding that the claimant's legally binding signature on the 2011 terms had provided the necessary clarity and precision under Article 25 of the Regulation as to the consensus reached in relation to jurisdiction between the parties. The argument that the effluxion of time between the 2011 terms and the orders placed in 2015 and 2016 made consensus less clear was similarly rejected by the Court.

- In relation to the third ground of appeal, the Court of Appeal, applying *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, noted that the appellate courts should not generally interfere with a judge's decision unless there has been: (i) a

material error of law; (ii) a failure to take into account material facts; (iii) a taking into account of immaterial facts; (iv) a demonstrable misunderstanding; or (v) an unreasonable evaluation of the evidence. On the present facts, the Court found that the judge was entitled to draw the inference he did and therefore also dismissed ground three of the appeal.

PH*lit* comment:

Much like the High Court judgment, the Court of Appeal's judgment is of particular interest, and will likely caution commercial parties against the notion that the last shot doctrine will always apply in commercial disputes. All contractual terms passing between the parties must be carefully considered, and careful contractual drafting can protect parties against the last shot doctrine.

Disclosure Pilot Scheme revised and extended to December 2022

Practice Direction 51U – Disclosure Pilot for the Business and Property Courts (access PD 51U here and the Judiciary announcement of the changes here)

- The Disclosure Pilot Scheme, set out in PD 51U (the "**DPS**"), was introduced in the Business and Property Courts on 1 January 2019 and replaced almost entirely the disclosure regime set out in CPR 31. The DPS was introduced with the purpose of seeking to make the disclosure process a more proportionate and efficient process.

- After feedback from professionals, the Disclosure Working Group has revised certain aspects of the DPS. These changes came into effect on 1 October 2021. The principal ones are set out below:

  - **Time extension:** The DPS has been extended to 31 December 2022.

  - **Disclosure Guidance Hearing:** The references to "disclosure guidance hearings" have been changed to "disclosure guidance" to encourage parties to apply for guidance from the court on paper, rather than through costly counsel-led formal hearings.

  - **Lists of issues:** Some cases under the DPS saw extensive lists of issues for disclosure, including one in which 135 issues were identified. However, a list of issues for disclosure is not the same as a list of issues for trial and should not be that extensive. As such, the Disclosure Review Document has been shortened from 14 to 6 issues. In addition, further changes have been introduced with the aim of making the process of agreeing a list of issues for disclosure easier and less contentious between the parties: (i) Model C has been renamed to reflect the focus on particular documents only (the Working Group believes Model C was over- and mis-used); and (ii) parties are encouraged to exclude narrative documents under Model D.

  - **Less complex claims:** There were concerns that the DPS was too onerous for less complex claims. Therefore, a new regime within the DPS now applies to less complex claims which will cover most claims worth less than £500,000. A claim can be designated "less complex" by the agreement of the parties or designation by the court. For less complex claims, only Models A, B, and D will be available and the list of issues is limited to five issues.

  - **Multi-party claims:** Much like less complex claims, the rigidity of the DPS did not work particularly well for multi-party claims. Whilst the DPS still applies to multi-party claims, the DPS now includes express recognition that disclosure in multi-party claims is likely to need a bespoke approach from the court.

PH*lit* comment:

The changes recognise that a "one size fits all" approach does not work when it comes to disclosure, and the revisions to the DPS, particularly in relation to less complex claims and multi-party actions, are therefore welcome. However, it remains to be seen how these will work in practice. In this regard, the Disclosure Working Group has emphasised that the DPS is very much a living pilot scheme and, as such, practitioners are encouraged to provide further feedback on it before a decision is taken whether to change the disclosure regime permanently.

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