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

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

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In this edition…

- We consider a decision of the High Court in which competing jurisdiction clauses in the standard terms and conditions of purchase orders raised a question of whether the court had jurisdiction to hear the claim under the Recast Brussels Regulation—a question ultimately determined by reference to the *"battle of the forms"* or "*last shot"* doctrines of contract formation.
- We note a novel Court of Appeal ruling on whether an expert witness to an arbitration owes a fiduciary duty to its client where a conflict of interest exists, or whether this question is better determined by reference to the terms of the retainer in place between them.
- We explore a Court of Appeal judgment regarding the standard an applicant must meet in order to remove the cloak of without prejudice privilege where it is alleged that there has been an unambiguous impropriety in settlement discussions.
- We analyse the Supreme Court's ruling in favour of policyholders in the FCA Business Interruption Insurance Test Case and, in particular, the comments of the Court on the application of "but for" causation to situations arising from multiple concurrent causes.
- We note a High Court decision which serves as the first time—in the UK at least—that the GDPR's extra-territorial reach, particularly in respect of foreign websites, has really been tested.
- We consider the much-discussed Court of Appeal ruling concerning termination provisions in Damages Based Agreements and their effect on enforceability.
- We examine a Court of Appeal judgment which determines conclusively that "inconsistent dealings" is not a separate cause of action from the economic tort of inducing breach of contract—a point long debated by commentators.

- We review a decision of the Court of Appeal, which confirms the narrow reach of the "reflective loss" principle and concludes that the principle does not apply to ex-shareholders in the relevant company.

- Finally, we note a decision of the High Court in which the Court, unusually, declined permission to appeal by way of a fully reasoned judgment in the face of the *"relentless documentary attrition"* conducted by the parties.

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"The last shot missed the target" – High Court determines battle of the forms jurisdictional issue under the Recast Brussels Regulation

***TRW Limited v Panasonic Industry Europe GmbH and Panasonic Automotive Systems Europe GmbH* [2021] EWHC 19 (TCC) (judgment available here)**

8 January 2021

- The High Court has considered an application for a declaration that the English courts had no jurisdiction to hear a claim under the Recast Brussels Regulation (the "**Regulation**"), against the factual background of conflicting terms and conditions of purchase (a so-called *"battle of the forms"* dispute).

- The claimant, TRW, based in England, supplied vehicle parking brakes and electronic stability control which included, as a component, resistors made by Panasonic, the German defendant. Some of the resistors supplied to the claimant by the defendant were faulty, and the faulty resistors were the subject of the proceedings.

- The terms and conditions of the claimant provided for English law and jurisdiction to govern certain purchase contracts, but the terms and conditions provided by the defendant called for German law and jurisdiction. Proceedings were commenced in England, and Panasonic argued that the English court should either decline jurisdiction to hear the claim or mandate that proceedings should be stayed in favour of proceedings in the German courts, in accordance with the terms of the Regulation.

- The parties had long-standing commercial relations (since at least 1998) and it was common for Panasonic's customers to sign a "customer file" which recorded payment terms and delivery conditions, stipulated Hamburg as the *"place of performance and jurisdiction"* and provided that *"contracts concluded with us are subject to German law"*. A representative of TRW signed such a customer file in January 2011. In addition, the file stated: *"even if no reference is made to them in particular cases, the following terms and conditions shall apply exclusively to the entire business relation[ship] with us… unless different conditions, particularly conditions of the contracting party, have expressly been confirmed by us in writing".*

- The claimant placed two orders with the defendant in March 2015 and January 2016. Both orders required goods to be delivered in accordance with the claimant's conditions of purchase and went on to state that *"commencement of any work or delivery of any goods or service under this order… shall constitute your confirmation [that you] are aware of and accept such terms, conditions and requirements".* The terms referred to in both orders contained the following governing law clause: *"the order will be governed by the laws of the state or country shown in the Buyer's address",* which was England.

- Ultimately, the Court found the terms of the 2011 customer file decisive, having been specifically signed and agreed by a representative of the claimant. The practice of signing these customer files had been common between the parties, and, whilst the customer file did not create any obligation to buy resistors, it did provide that any purchase made would be on those terms unless other terms were specifically agreed to by Panasonic in writing. TRW's orders in 2015 and 2016 did not contain a written agreement from Panasonic to displace the 2011 terms. The Court noted that, although unusual, the last shot doctrine could not apply given the careful draftsmanship in the 2011 customer file which provided that *"even if no reference is made to them in particular cases, the following terms and conditions shall apply exclusively… unless different conditions… of the contracting party have expressly been confirmed by us in writing".* Accordingly, the Court held that that the Hamburg court had exclusive jurisdiction over the dispute.

PH*lit* comment:

*The Court's application of the "*last shot*" doctrine in this case is of particular interest. Parties often assume that, provided they "*fire the last shot*", their contractual terms will apply. However, in this case, the Court reasoned that the claimant's position depended on an "*over-rigid application of the orthodox last shot doctrine*". In contrast, the defendant's arguments proceeded directly from the signed customer file and were preferred by the Court. The customer file made it clear that the defendant's terms and conditions would apply exclusively to the parties' dealings and would only be superseded by another set of terms and conditions where express confirmation had been given by the defendant in writing.*

*Accordingly, this is a useful reminder that the "*last shot*" doctrine will not always prevail in the face of careful contractual draftsmanship.*

Court of Appeal considers whether an expert witness to an arbitration owes a fiduciary duty to its client where a conflict of interest exists

***Secretariat Consulting Pte Ltd and others v A Company* [2021] EWCA Civ 6 (judgment available here)**

11 January 2021

- The appellants in this case, Secretariat Consulting PTE Ltd ("**Secretariat Consulting**"), Secretariat International UK Ltd ("**Secretariat International**") and Secretariat Advisors LLC (together, the "**Secretariat Group**") are a group of companies that provide expert litigation support in construction matters. Secretariat Consulting had been instructed to act as an expert witness in a construction arbitration relating to claims of delay by "A", the claimant in that arbitration ("**Arbitration 1**") under the terms of a retainer between the two parties (the "**Retainer**"). Later, Secretariat International was instructed by the claimant in a different arbitration in connection with the same facts, where A was the respondent ("**Arbitration 2**").

- Arguing that this gave rise to a conflict of interest, A succeeded in an *ex parte* application for an interim injunction against the Secretariat Group for breach of fiduciary duty and breach of confidence. The interim injunction prevented Secretariat International from doing any work in relation to Arbitration 2.

- At the return date, A abandoned its claim for breach of confidence. However, relying on *Jefri Bolkiah v KPMG* [1992] 2 AC 222, the High Court found that a fiduciary duty of loyalty was owed to A by the entire Secretariat Group and that such duty was not satisfied by measures which the Secretariat Group had put in place to preserve confidentiality and privilege. The Court held that the Secretariat Group was in breach of its fiduciary duty of loyalty on the basis that there was "plainly" a conflict of interest for the Secretariat Group to act for A in Arbitration 1 and against A in Arbitration 2, in circumstances where the

arbitrations concerned the same underlying facts and there was significant overlap in the issues. Accordingly, the High Court continued the injunction, preventing Secretariat International from acting in Arbitration 2.

- On appeal, the Court of Appeal noted that the High Court decision was the first time the English courts had found that an expert owed a fiduciary duty to its client. As a result, there was no direct English authority on the point.

- Noting that there is no generally accepted definition of a fiduciary, the Court observed that fiduciary duties normally arise in certain settled categories, such as between a trustee and a beneficiary, a solicitor and their client and an agent and their principal. The Court restated the principles laid down in *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm) that in order to find a fiduciary relationship outside of established categories it was necessary that the person owing the fiduciary duty acted unselfishly "*in what they perceive to be the best interest of their principal"*. In relation to expert witnesses, the Court acknowledged that, whilst they are required to act in their clients' best interests, they also owe an overriding duty to the court.

- Unfortunately, the Court declined to reach a conclusive view on the question of whether a fiduciary duty had arisen. Instead, the case was decided based on the contractual interpretation of the Retainer. In the Retainer, Secretariat Consulting confirmed that there was no conflict of interest existing at that point, and undertook to *"maintain this position for the duration"* of the engagement, i.e., it promised that it would not create a conflict of interest in the future. The Court, therefore, concluded that Secretariat Consulting was under a contractual duty to avoid any conflict of interest and held that this duty extended to the whole Secretariat Group, based on the High Court's finding that the Secretariat Group marketed itself as one global firm and ran conflict checks across all entities. Finally, the Court found that there was a conflict of interest in Secretariat Consulting and Secretariat International purporting to act in both arbitrations and, by accepting the engagement in relation to Arbitration 2, the Secretariat Group (as a whole) had breached its conflict of interest obligation to A under the Retainer. Accordingly the Court of Appeal upheld the injunction, but on the contractual, not fiduciary, basis.

PH*lit* comment:

Whilst the Court of Appeal ultimately declined to rule on whether an expert could owe a fiduciary duty to their client, the judgment is nevertheless useful in its clarification of conflicts of interest that can arise when several entities in the same group purport to act for clients with competing interests.

Helpfully, the Court of Appeal noted that its judgment did not amount to a piercing of the corporate veil, as the Secretariat Group had suggested, but was instead based on the particular contractual obligations and the way the Secretariat Group presented itself to potential clients—as one global firm. Further, the Court clarified that its judgment was not designed to prevent the same expert acting for and against the same client over time. Crucially, a conflict of interest is a matter of degree; in this case, the "all-pervasive" overlaps of parties, roles, project and subject matter (and contractual relationship) meant that there was a conflict of interest which justified the injunction.

Court of Appeal rules on the unambiguous impropriety exception to without prejudice privilege

***Motorola Solutions, Inc & Anor v Hytera Communications Corporation Ltd & Anor* [2021] EWCA Civ 11 (judgment available here)**

11 January 2021

- Without prejudice privilege generally prevents written or oral statements made in a genuine attempt to settle an existing dispute from being put before a court as evidence of admissions against the interest of the party that made them. There are certain exceptions that allow without prejudice communications to be placed in evidence, including where exclusion of them would act as a cloak for perjury, blackmail or other "*unambiguous impropriety*". The exception is based on the undesirability of wrongdoing being covered up.

- The Court of Appeal has recently considered the *"unambiguous impropriety"* exception, the standard that an applicant will have to meet in order for the exception to be applied, and the evidence from the relevant without prejudice communications to be admitted into the proceedings. The Court concluded that it was insufficient for the applicant to establish a "*good arguable case"* or a *"plausible evidential basis"* that an improper threat had been made in without prejudice discussions; instead, the evidence must establish an unambiguous impropriety.

- Motorola had successfully obtained a US judgment against Hytera for theft of trade secrets in which it was awarded $345 million in compensatory damages and $418 million in punitive damages. Whilst various outstanding post-trial motions filed by Hytera were under consideration, the judgment could not be enforced, and so Motorola applied for a domestic freezing order against Hytera and two of its indirect UK subsidiaries.

- In its application, Motorola relied on statements made by Hytera's former CFO during without prejudice settlement meetings that had taken place in November 2019. Motorola argued that the statements suggested that Hytera would take various steps to dissipate its assets, thereby limiting Motorola's ability to enforce a judgment in Western jurisdictions, such as the United States or the United Kingdom. It was noted that this strategy was labelled as a *"retreat to China"*. Hytera argued that the strategy of retreating to China was merely a representation of the commercial reality that would result from a judgment against Hytera's business.

- The High Court concluded that the statements made by Hytera were admissible in connection with the application for a freezing injunction on the basis that there was a *"plausible evidential basis"* for Motorola's account of the settlement discussions, following the reasoning in *Dora v Simper* [1999] 3 WLUK 273. The Court concluded that a threat by Hytera to deal with assets so as to frustrate a judgment fell within the realm of the unambiguous impropriety exception. As a result, the domestic freezing injunction was granted to preserve Hytera's UK assets.

- However, the Court of Appeal considered that the High Court had erred in following the "*good arguable case*" approach in *Dora* and that material from the without prejudice meetings should not be admitted. The Court of Appeal reasoned that *Dora* was not a binding authority because it was inconsistent with prior authority and was not followed in subsequent case law. Instead, the correct test was whether the evidence provided established an unambiguous impropriety.

- The Court of Appeal went on to say that the approach taken in *Dora* undermines the purpose of without prejudice discussions: to encourage parties to speak frankly to one another with the objective of reaching a settlement. The courts must safeguard without prejudice privilege and rigorously scrutinise any evidence that is asserted to satisfy the unambiguous impropriety test. In those truly exceptional cases where the test had been satisfied, there was no scope to dispute the statements made (either because they were recorded or were in writing) and so firm conclusions on impropriety could be reached.

- The interpretation of statements submitted by Motorola did not meet that indisputable threshold—Hytera's version of events was equally plausible—and, accordingly, the Court of Appeal held that the without prejudice statements should not have been admitted in evidence.

PH*lit* comment:

The judgment is not only a useful clarification of how the courts will approach the unambiguous impropriety exception to without prejudice privilege, but also a reminder that exceptions to the rule will be construed narrowly.

*Of course, parties entering into without prejudice discussions should be aware that, if there is clear evidence of unambiguous impropriety, the cloak of privilege will be removed. However, as the Court pointed out, to promote frank settlement discussions, the without prejudice rule must be "*scrupulously and jealously protected*".*

Supreme Court rules in favour of policyholders in FCA Business Interruption Insurance Test case

***Financial Conduct Authority v Arch & Others* [2021] UKSC 1 (judgment available here)**

15 January 2021

- The Supreme Court has recently handed down judgment in the highly anticipated test case regarding insurance coverage for business interruption losses arising out of the COVID-19 pandemic. The test case is significant for a number of reasons, not least because of the potential impact for the insurance coverage available to SME businesses. The points of appeal can be summarised as:

  – certain matters of construction relating to:

    - "**Disease Clauses**" (those triggered by the occurrence of COVID-19, typically within a specified distance of the insured's premises);

    - "**Prevention of Access Clauses**" (those triggered by public authority intervention preventing access to, or use of, premises); and

    - **Hybrid Clauses** (those containing wording from both Disease and Prevention of Access Clauses); and

  – whether the High Court was correct:

    - to apply certain counterfactual scenarios in relation to the operation of the clauses in relevant policies which provided for loss adjustments (the "**Trends Clauses**"); and

- in its analysis of *Orient-Express Hotels Ltd v Assicurazioni Generali S.p.A* [2010] EWHC 1186 (Comm) which concerned the application of a Trends Clause to a hotel's business interruption losses arising out of Hurricanes Katrina and Rita. In this case, the High Court held that hurricane damage to the surrounding area (and the resultant loss of tourism) was part of the counterfactual and so could form part of the loss adjustment when calculating the hotel's losses.

- This case continues to be of great interest to litigators as the first case to be brought under the Financial Market Test Case Scheme (under Practice Direction 51M of the Civil Procedure Rules). The rapid-fire progress of the case—from issue of the claim in June 2020 to the Supreme Court handing down final judgment in January 2021 (a mere seven months)—demonstrates the success of the Test Case Scheme procedure, allowing an important legal issue affecting thousands of individuals to be determined quickly.

- The judgment of the Supreme Court may be usefully considered under three headings: (i) contractual construction; (ii) causation; and (iii) Trends clauses.

Contractual Construction

- The Supreme Court, applying the standard rules of contractual construction (i.e., what would the reasonable observer have understood the contract to mean), overruled the High Court on the correct interpretation of the Disease Clauses, holding that such clauses only cover relevant effects of cases of COVID-19 that occur at or within the specified radius of the insured premises. As such, a much narrower view of these clauses was taken, and the Court's view on causation (discussed below) is crucial for policyholders seeking to claim under a Disease Clause.

- In relation to the Prevention of Access Clauses, the Supreme Court disagreed with the High Court's restrictive view on the meanings of *"imposed by a public authority"*, *"inability to use"* and *"prevention of access*", holding that: (i) *"imposed"* does not require the force of law; and (ii) *"inability to use"* and *"prevention of access"* can mean inability to use or prevention of access to a discrete part of the premises, or to the whole or part of the premises for the purposes of a discrete part of the policyholder's business activities. This will be welcome news for policyholders.

Causation

- The Supreme Court suggested that the *"proximate cause"* or the *"efficient cause"* of an event can be described as the cause which *"made the loss inevitable in the ordinary course of events"*. This is a helpful clarification of the term *"proximate cause"* which, in prior authorities, was simply considered to be a matter of judicial common sense.

- As to causation in general, the Supreme Court recognised that, in situations where there may be multiple causes (e.g., several thousand occurrences of a disease such as COVID-19), the "but for" test may not be adequate for identifying the true cause of the loss. Instead, the Court considered that: *"[w]hether an event which is one of very many that combine to cause loss should be regarded as a cause of the loss is not a question to which any general answer can be given. It must always depend on the context in which the question is asked. Where the context is a claim under an insurance policy… All that matters is what risks the insurers have agreed to cover… this is a question of contractual interpretation… answered by identifying (objectively) the intended effect of the policy as applied to the relevant factual situation".*

Trends Clauses

- The Court considered that the simplest way to construe a Trends Clause is to recognise that the aim of such clauses is to arrive at the result that would have been achieved by the business but for the insured peril and circumstances arising out of the same underlying or originating cause. As such, adjustments should be made only for trends or circumstances that are unrelated or unconnected to the insured peril.

- Finally, the Supreme Court considered the decision of the High Court in *Orient Express,* which has long been considered a problematic decision for policyholders. Indeed, Lord Leggatt and Lord Hamblen held that *Orient Express* was wrongly decided and should be overruled. In reaching this conclusion the Supreme Court considered that the Trends Clause in *Orient Express* should have been construed so as to exclude from assessment all circumstances which had the same underlying or originating cause as the damage, namely the hurricane.

PH*lit* comment:

Overall, the decision of the Supreme Court represents a high degree of judicial pragmatism. The Supreme Court disagreed with the High Court on issues of contractual construction, but (given that each contract will be construed on its own words rather than by reference to previous authority) this element of the decision is unlikely to be of wider relevance. In contrast, whilst arguably reconcilable with our general understanding of causation principles, the Court's marked divergence from the "but for" test, represents an unorthodox approach and may well have a wider impact on how issues of causation are determined in the future where there are multiple concurrent causes of loss.

In addition, the first use of the Financial Market Test Case Scheme seems to have operated exactly as intended: to enable a claim raising issues of general public importance to financial markets to be determined expeditiously, where immediately relevant and authoritative guidance is needed—a remarkable success. The FCA had estimated that in addition to the policy wordings expressly considered by this decision, some 700 policies across 60 different insurers and 370,000 policyholders might now benefit from some measure of legal certainty as a direct result of this litigation. Given the success of this first use of the Test Case Scheme, it may well be that we see the FCA initiate more cases under this regime in the future.

Our commentary on the High Court judgment in *FCA v Arch & Ors* [2020] EWHC 2448 (Comm) can be found here.

High Court weighs up permission to serve claims of harmful publication out of the jurisdiction in first consideration of extra-territorial reach of the GDPR

***Soriano v Forensic News LLC and Others* [2021] EWHC 56 (QB) (judgment available here)**

15 January 2021

- The specialist Media and Communications List of the High Court has handed down judgment on a contested application for permission to serve proceedings out of the jurisdiction, where the defendants were domiciled in the United States.

- The proceedings concerned claims brought by a British citizen for breaches of data protection legislation, malicious falsehood, harassment, misuse of private information and libel, principally in relation to eight internet publications on the first defendant's website (Forensic News).

- For the purposes of the application, the Court had to determine whether each claim failed for lack of (i) jurisdiction, and/or (ii) any real prospect of success. The judgment did not dwell on the content of any of the publications complained of, save to note that they made *"extremely serious allegations against the claimant"*.

- The claimant was ultimately granted permission to serve out of the jurisdiction in respect of his claims in libel and (to a limited extent) misuse of private information. The application failed as regards all his other claims. Each of the claims are briefly addressed below:

The Data Protection Claim

- The Court considered there to be no dispute that the claimant was habitually resident in England and Wales, thereby satisfying the alternative jurisdictional gateway under article 79(2) of the General Data Protection Regulation (the "**GDPR**").

- As to the merits of the claim, the Court agreed with the defendants that it did not fall within the territorial scope of Article 3 GDPR:

  – on Article 3.1 - the claimant failed to show that the first and second defendants (as data controllers) had an "establishment" in the UK;

  – on Article 3.2(a) - the Court determined that there was nothing to show that the first defendant was targeting goods and services towards the UK; and

  – on Article 3.2(b) - it was determined that the mere use of cookies for advertising purposes did not amount to "monitoring" that underpinned the claimant's complaint.

The Malicious Falsehood Claim

- The Court identified the "*straightforward route*" as requiring proof of malice through either (i) publishing words knowing them to be false, or (ii) publishing words predicated on a "*dominant improper motive*".

- The second route (known as "*Loutchansky"* malice) required proof that publication continued without amendments despite "*clear and categorical denials*".

- However, the Court found both routes failed for lack of evidence.

The Harassment Claim

- The question for the Court to decide was whether a number of social media publications, taken as a whole, amounted to a *"conscious or negligent abuse of press freedom"*. The Court dealt with this claim tersely, concluding that the social media posts achieved little more than drawing attention to other relevant publications, and did not amount to harassment.

The Misuse of Private Information / Privacy Claim

- The Court had to consider whether the claimant had a reasonable expectation of privacy in relation to the content of the relevant publications and four published photographs that accompanied them.

- As regards the content of the publications, it was not appropriate to generally assert a cause of action over material "*in an undifferentiated and indiscriminate manner*". The claimant had not met the pleading requirements as set out at paragraph 8.1 of Practice Direction 53B.

- As to the four photographs, whether the publication was sufficiently intrusive required a "*fact-sensitive balancing exercise*", which could not be performed at this stage, leaving the Court to be satisfied as to the merits threshold in respect of the four photographs only.

The Libel Claim

- The question was whether the courts of England and Wales were clearly the most appropriate place to bring the claim (under section 9 of the Defamation Act 2013).

- The Court ultimately concluded that the claimant had discharged the evidential burden to satisfy this test, principally on the following grounds:

  – he was a British citizen whose personal and professional interests lay, mainly, within this jurisdiction;

  – the remedies were sought in respect of harm to reputation centred in the UK, and in respect of publications that were in fact made in this jurisdiction (notwithstanding that there was a far greater incidence of publication in the US);

  – he was not a libel tourist; and

  – a lack of expert evidence as to US state law.

PH*lit* comment:

Whilst there is nothing particularly revelatory in this judgment, it is the first time—in the UK at least—that the GDPR's extra-territorial reach, particularly in respect of foreign websites, has really been tested. Practitioners are neatly reminded of the various factors to consider in determining relevant jurisdictional and merits thresholds, particularly in the context of privacy, data and libel actions.

Of particular current relevance, the Court remarked that, whilst the relative difficulties faced by foreign-domiciled parties litigating in England and Wales is a relevant factor when weighing up jurisdictional considerations, the pandemic has demonstrated that litigation can take place fairly without parties being physically present.

Court of Appeal determines termination provisions in retainer are compatible with Regulations governing Damages Based Agreements

***Shaista Zuberi v Lexlaw Limited* [2021] EWCA Civ 16 (judgment available here)**

15 January 2021

- The Court of Appeal has confirmed that a Damages Based Agreement ("**DBA**") can include a term that permits the legal representative to charge the client on a time costs basis in the event that the DBA is terminated by the client before the conclusion of the litigation. The decision brings important clarity to the validity of such terms.

- DBAs are a form of retainer in which the legal representative charges a fee if the claim is successful, but recovers nothing if the claim fails (so-called *"no win, no fee"* arrangements). Such arrangements had been prohibited under the common law but were introduced via the Damages Based Agreement Regulations 2013 (the "**2013 Regulations**") in order to promote access to justice by allowing litigants as many funding methods as possible.

- The 2013 Regulations have, however, been considered by practitioners as unclear, particularly in terms of:
  - the question of whether a legal representative can make provision for payment on a time cost basis if the retainer is terminated before settlement or trial; and
  - the validity of so-called *"hybrid"* DBAs, which combine a success payment with some other form of payment. There was some speculation that *"sequential hybrid"* DBAs which provide for different payment arrangements for different stages of the proceedings (e.g., a success fee if the claim succeeds at trial, but fees charged on a time cost basis for any appeal) might be permissible under the regime. However, *"concurrent hybrid"* DBAs that provide for different payment arrangements to run in parallel (e.g., charging on a time costs basis at reduced rates but with a top-up payment if the claim is successful) were widely considered to be prohibited.
- Ms Zuberi had borrowed money from a bank and subsequently alleged that she had been mis-sold certain financial products. She retained Lexlaw to represent her in her claim against the bank. The written retainer between Ms Zuberi and Lexlaw was a DBA. However, it also contained a termination clause, which allowed Lexlaw to recover its time costs in the event that Ms Zuberi terminated the agreement. Ms Zuberi argued that the termination clause invalidated the whole contract under Regulation 4(1) of the 2013 Regulations.
- The Court of Appeal unanimously dismissed Ms Zuberi's appeal, holding that Regulation 4(1) does not preclude an agreement to pay time costs on termination. However, the judges arrived at that conclusion by different routes. Lewison and Coulson LJJ in the majority found the term *"DBA"* relates only to those provisions within the retainer that deal with payments made out of recoveries, and, therefore, the termination clause in issue did not form part of the DBA itself. This interpretation of the definition of a DBA indicates that so-called *"hybrid"* DBAs would be permissible.
- In Newey LJ's minority view, this narrow construction was not justified; he considered that the definition of DBA should be read to encompass the entire retainer and, therefore, "hybrid" DBAs are not permitted by the legislation. However, in spite of disagreeing on the construction of the DBA definition, Newey LJ also considered that Regulation 4(1) would not apply to termination provisions. He reached this conclusion on the basis that, although the 2013 Regulations contained express controls relating to termination provisions in employment matters, whilst remaining silent on other areas of civil litigation, this was because employment matters can be undertaken by non-lawyers and therefore required express regulation in a way that other civil litigation matters did not.

PH*lit* comment:

The 2013 Regulations have been criticised since their implementation for being so unclear that practitioners have been cautious about adopting DBAs as a standard method of retainer. The uncertainty surrounding whether a DBA could include a clause for payment on some other basis (e.g. time costs) than a share of recoveries if the DBA was terminated, or whether this would render the agreement invalid provided little incentive for practitioners to take on recovery risk and embrace DBA arrangements. However, the Court of Appeal's decision confirms that such terms are unproblematic and will not impact the validity of a DBA.

*It is also notable that the reasoning of the majority of the Court of Appeal would mean that both "*concurrent hybrid*" and "*sequential hybrid*" DBAs would be permissible under the 2013 Regulations. This may give some comfort to practitioners and, as a result, we may see a broader-take up of DBA arrangements amongst legal advisers and sophisticated commercial clients who are willing to share the risks and rewards of litigation.*

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

Court of Appeal rules that "inconsistent dealings" are not a separate cause of action to economic tort of inducing breach of contract

***Kawasaki Kisen Kaisha Ltd v James Kemball Limited* [2021] EWCA Civ 33 (judgment available here)**

16 January 2021

- The Court of Appeal handed down judgment in an interesting case regarding the *"economic tort"* of inducing breach of contract. The so-called *"economic torts"* have been present in the common law since the Victorian era. However, modern understanding was radically shifted by the House of Lords in the seminal decision of *OBG v Allan* [2008] 1 AC 1. In that case, the House of Lords made clear that the economic torts of (i) causing loss by unlawful means, and (ii) inducing breach of contract, should be considered as two separate causes of action. This decision left practitioners wondering if other economic torts identified in earlier authorities would survive the re-statement; including that of *"inconsistent dealing"*, where one party causes another to behave inconsistently with the terms of their contract with a third party, perhaps by offering that party an alternative arrangement such that it is impossible for it to fulfil its contractual obligations to the third party.

- In *Kawasaki*, the Court of Appeal held that such authorities did not survive *OBG v Allan*. The Court made clear that conduct described as *"inconsistent dealing"* is not in itself a tort, but may constitute one form of the tort of inducing breach of contract. However, it will not do so if it does not have the necessary character of causative participation required for accessory liability, which is one of the essential elements of the tort.

- In the case, Kawasaki Kisen Kaisha ("**Kawasaki**") had merged its container liner business with those of two other operators via a new joint venture (the "**JV**") and ceased its own operations. This had an adverse impact on the claimant, James Kemball Limited ("**JKL**"), a haulier of containers between ports. JKL held contracts with Kawasaki's subsidiary, K-Euro, under which K-Euro was obliged to offer JKL a certain number of haulage jobs (the "**Haulage Contract**"). As a consequence of Kawasaki ceasing to operate its own container liner business, K-Euro was unable to discharge its obligations under the Haulage Contract. JKL brought proceedings against K-Euro for breach of contract and a tortious claim against Kawasaki, alleging that it induced K-Euro's breach.

- JKL required permission to serve its pleading on Kawasaki out of the jurisdiction. Kawasaki argued the Court should decline permission, because JKL's case had no real prospect of success in establishing any of the three key ingredients of the tort of inducing a breach of contract: (i) inducement; (ii) intention; and (iii) causation.

- The Court of Appeal reviewed the authorities and concluded that conduct by "A" cannot qualify as inducement if it constitutes no more than preventing "B" from performing his contract with "C". There must be some conduct by "A" amounting to persuasion, encouragement or assistance of "B" to break the contract with "C". Further, the participation by "A" in "B"'s breach must have a sufficient causal connection with the breach so as to amount to accessory liability. The Court found that the breach of the Haulage Contract by K-Euro was simply a consequence of Kawasaki freely acting in its own commercial interest; there was no encouragement or persuasion on the part of Kawasaki that acted on K-Euro's mind or will.

- The Court dismissed JKL's alternative argument that Kawasaki was engaged in inconsistent dealings (in establishing the JV). The Court concluded that:

  - inconsistent dealings are not a separate cause of action from inducing breach of contract—they are simply an example of conduct which is capable of amounting to inducement or persuasion. As such, JKL's argument based on inconsistent dealing would fail for the same reasons as its argument based on encouragement; and

  - there were no *"dealings"*—Kawasaki was under no legal or other obligation to provide business to K-Euro. A mere failure to act, when there is no obligation to do so, cannot constitute an *"inconsistent dealing"*.

- As regards the "intention" element of the tort, the Court concluded that there must be an intention for the breach of contract to serve as a means to an end, not merely a foreseen consequence of the conduct. Kawasaki's intention when forming the JV was evidently the commercial and economic benefits of the JV, not to persuade K-Euro to breach the Haulage Contract.

- The Court allowed the appeal and set aside the order granting permission to serve the claim on Kawasaki out of the jurisdiction. Accordingly, JKL was unable to pursue its claim for inducing breach of contract against Kawasaki, and was limited to its claim against K-Euro for breach of contract.

PH*lit* comment:

*This decision is particularly interesting because it ends any speculation that there may be another basis (e.g., "*inconsistent dealing*") to bring a claim for an "*economic tort*" other than the heads of claim set out in* OBG v Allan, *namely (i) inducing breach of contract and (ii) causing loss by unlawful means. We note that, in* OBG v Allan, *Lord Hoffman conceived of the economic torts of "*intimidation*" and "*conspiracy*" as part of the tort of "*causing loss by unlawful means*" but not all commentators have embraced this categorisation and therefore maintain that there are four economic torts. Accordingly, what this case tells us is that where a claim for economic tort is contemplated, it should be brought within the existing causes of action.*

The case also serves as a warning that any claim against a parent company relating to the breach of contract by its subsidiary will fail unless that parent company has, with the necessary element of intention, encouraged or persuaded the subsidiary to breach the contract or assisted with the same. Absent such intention, the contractual breach being a foreseeable consequence of the parent company's actions will not save a claim for inducing breach of contract.

Court of Appeal confirms narrow reach of "reflective loss" principle

Nectrus Ltd v UCP PLC [2021] EWCA Civ 57 (judgment available here)

21 January 2021

- The *"reflective loss"* principle (the "**Principle**"), established in *Prudential Assurance Co Ltd v Newman Industries (No 2)* [1982] Ch 204, prevents a shareholder of a company from bringing a claim for personal losses (e.g., a diminution in share value or of dividend) arising from breach of a contract or duty owed to the company. The shareholder's loss is said to be merely a *"reflection"* of the loss suffered by the company, and the company (or its liquidator) is the proper claimant.

- Last year, the Supreme Court handed down judgment in *Sevilleja v Marex Financial Ltd* [2020] UKSC 31, confirming that the Principle is strictly limited to claims by direct shareholders who allege that the value of their shares, or the distributions they receive, have been diminished as a result of loss suffered by the company. It does not apply to creditor claims. It was further clarified in *Broadcasting Investment Group & others v Smith & others* [2020] EWHC 2501 (Ch) that the Principle would not bar a claim made by a shareholder in a shareholder of a relevant company (noted in our September blog).

- Here, UCP, Candor (UCP's 100% subsidiary) and Nectrus had entered into an Investment Management Agreement ("**IMA**"), pursuant to which Nectrus was to provide investment advice to Candor. In a judgment dated 5 July 2019, the Commercial Court found that Nectrus was liable for breach of the IMA, by having caused or permitted investments in "*manifestly inappropriate companies*".

- In a separate hearing on quantum, Nectrus argued that UCP could not recover losses that were reflective of the losses sustained by Candor, notwithstanding that UCP had sold its shareholding in Candor before bringing its claim. At first instance, the Commercial Court held that the Principle did not apply to a claim made by a party who was an ex-shareholder in the company at the time of the claim.

- Nectrus applied for permission to appeal on the issue of reflective loss. At the time of its application, *Marex* had not been decided, so Nectrus was granted permission to appeal pending the outcome of that case. Following judgment, Nectrus argued that, whilst the Supreme Court had reaffirmed the Principle, the issue of whether it applied to former (as opposed to current) shareholders was left unresolved.

- Lord Justice Flaux, sitting in the Court of Appeal, considered Nectrus' application for permission to appeal on paper (i.e., without a hearing). He held that the *Marex* ruling confirmed that the Principle did not extend to former shareholders and refused permission to appeal on the reflective loss issue.

- Nectrus subsequently made an application under CPR 52.30 seeking reopening of the appeal, arguing that it should have been afforded the opportunity to make submissions as to the consequences of *Marex*. In determining the application, Flaux LJ observed that the Court's jurisdiction to reopen an appeal was limited and should be exercised only in truly exceptional circumstances. He noted that, where the consideration of an application for permission to appeal is said to have been critically undermined, the first question will be whether the judge whose decision is the subject of the application has sufficiently confronted and dealt with the grounds of appeal. Even if the conclusion is reached that they did not, it will still be necessary for a court to consider whether there was a "*powerful probability*" that, if they had done, the decision on the application for permission to appeal would have been different and permission would have been granted.

- The Court dismissed the application for a number of reasons. It found that (i) Nectrus' arguments that there had been a breach of natural justice or that an unfair procedure had been adopted were misconceived, and (ii) Nectrus had not shown there to be a "*powerful probability*" that the Court had erred in his application of *Marex* on the reflective loss issue.

PH*lit* comment:

The case confirms the scope of the reflective loss principle, including that it does not extend to former shareholders.

The case also serves as a reminder of the high bar that is set in relation to applications under CPR 52.30 for the reopening of an appeal. It seems clear that such applications will only be successful in truly exceptional circumstances and only where it is shown that a significant injustice has occurred.

While Nectrus' application was ultimately dismissed on a number of grounds, it is worth noting the Court's comment that its delay in making the application would also have weighed heavily against it, even if it had been able to show that there was a powerful probability that the decision to refuse permission to appeal had been wrong. Accordingly, not only is the jurisdictional threshold under CPR 52.30 a high one, a party who wishes to invoke it must ensure that any application is pursued expeditiously.

High Court declines permission to appeal in latest case of "class action tourism" in the face of "relentless documentary attrition" by the parties

***Municipio de Mariana v BHP Group Plc and others* [2021] EWHC 146 (TCC) (judgment available here)**

29 January 2021

- The High Court has refused to grant the claimant (Municipio de Mariana) permission to appeal a judgment handed down by Mr Justice Turner on 9 November 2020, by which he struck out its English court claim relating to the collapse of the Fundão dam in south-eastern Brazil in November 2015 (the "**First Instance Judgment**"). Our commentary on the First Instance Judgment can be found here.

- Whilst it is an *"unusual course"* for a written judgment to be handed down on a permission application, the Court was satisfied that the scale and complexity of the case (the largest in terms of number of parties ever brought in this jurisdiction) warranted such a judgment. It remains open for the claimant to appeal to the Court of Appeal.

- The claimant, acting on behalf of a class of over 200,000 individuals, had originally pursued its claims for compensation in the Brazilian courts. However, unhappy with that process, it subsequently commenced proceedings before the English courts. In November, the High Court struck out the claims for abuse of court process. Had the abuse arguments failed, the Court remarked that it would nevertheless have still ordered a stay under article 34 of the Recast Brussels Regulation and declined jurisdiction on the basis of *forum non conveniens*.

- An application for permission to appeal under CPR 52.21 must be made on the basis that parts of the original judgment were (i) wrong, and/or (ii) unjust because of a serious procedural or other irregularity in the proceedings. In this case, the claimant sought permission to appeal on fifteen separate grounds. The Court addressed these fifteen grounds in turn, refusing permission in each case. Above all, the Court drew attention to a comment in the First Instance Judgment that the claim *"would be not merely challenging but irredeemably unmanageable if allowed to proceed any further in this jurisdiction".* Accordingly, the claim could not be *"categorised as anything other than an abuse of the process of the court"*.

- In the context of negative remarks made in respect of the claimant's conduct, Mr Justice Turner made clear the sensitivity that an individual judge must have in *"marking his own homework".* He was particularly dissatisfied with the claimant's continued approach of *"relentless documentary attrition*", despite remarks at first instance as to *"chronic forensic hyperactivity"* of both parties.

- The Court was also unimpressed by the manner in which the grounds of appeal were presented. Paragraph 5(2) of Practice Direction 52C states that: *"[the] reasons why the decision under appeal is wrong or unjust must not be included in the grounds of appeal and must be confined to the skeleton argument".* On this basis, the claimant's grounds of appeal, consisting of *"39 closely typed pages",* was plainly not compliant with the Practice Direction, and only served to obfuscate the claimant's own arguments. The Court was further displeased with the *"hyperbolic utterances"* from the claimant's solicitor, disparaging both the defendants and the court in equal measure.

- As to costs, the Court:

- was not persuaded that the defendants should be awarded anything but their full costs (subject to detailed assessment);
- commented that a party who pleads an alternative argument should not necessarily be penalised on costs if that claim is narrowed or abandoned in the interests of pragmatism and lightening the court's load;
- acknowledged a number of factors as justifying the high legal costs of the defendants, including the scale and complexity of the litigation and *"the vast volume of material from the claimants";* and
- commented that, whilst an unsuccessful party is entitled to withhold its own costs, such lack of disclosure will likely serve to weaken that party's attacks on the other party's costs.

PH*lit* comment:

This case serves as a reminder to practitioners that the grounds for permission to appeal are not the place to advance arguments; these must be reserved for skeleton arguments. To do otherwise might incur sanctions, undermine the strength of such arguments and irritate the court.

*As a point of more general applicability, the case also serves as a stark warning to deter litigants from producing "*bloated*" submissions and engaging in unnecessary "*documentary attrition*", which will typically not be well received by the courts. It is also clearly not advisable to be making disparaging comments in public about the court (or indeed the other side), as these may well be picked up and noted by the court in future.*

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Our London litigators understand the business implications of litigation and are trusted by clients to counsel them through their most complex and significant disputes. Please do not hesitate to contact any of the following Paul Hastings' London litigators:

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