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Court of Appeal rules that a recipient's prior knowledge should be considered when determining whether a notice of claim contained "reasonable detail"; a delay of 19 months in delivering judgment is sufficient to vitiate the trial judge's factual conclusions; and payment of contractual performance fees is not dependent on full performance of a JV

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

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

In this edition…

- We discuss the key issues for parties to cross-border agreements to consider arising out of the "Brexit Deal" being silent on matters of judicial co-operation in civil matters.

- We consider a High Court decision in which the Court considered whether sellers were able to rely on contractual limitation of liability provisions against claims for breach of warranty and an "entire agreement" clause to exclude a parallel claim for misrepresentation.

- We review a High Court ruling that required a defendant to provide further disclosure in order to comply with an order for Extended Disclosure, on the basis that the costs associated with the additional searches were "reasonable and proportionate" in the context of a claim for US$875,740,000 and where the defendant had already spent some £2.9 million on disclosure.

- We reflect on a Court of Appeal decision that a notice of claim given by the buyer under a share purchase agreement did not lack "reasonable detail" in circumstances where the recipient already had knowledge of all relevant information relating to the buyer's claim.

- We note a Court of Appeal ruling that a delay of 19 months in handing down judgment cast sufficient doubt on the veracity of the trial judge's factual findings of dishonesty that the matter should be remitted for retrial.

- We consider a High Court decision in which the court determined that a franchisor had acted unreasonably in failing to correctly designate COVID-19 as a force majeure event under a franchise agreement.

- We discuss a ruling of the Court of Appeal in which the court determined that payment of contractual performance fees was not conditional on the full performance of a joint venture.

- We note a novel Court of Appeal ruling that declaratory relief granted in an earlier case did not create a shortcut for a subsequent tracing claim against a defendant who was not a party to the earlier proceedings.

- We review a High Court decision that refused permission to serve a Claim Form on "persons unknown" by alternative means in circumstances where the claimant had no way of identifying the persons unknown – with the Court concluding that the claimant was shooting *"without a target to aim at"*.

- Finally, we consider a Court of Appeal decision that, where a solicitor gives negligent advice falling outside of the six-year limitation period and subsequently reaffirms that advice on a date falling inside the limitation period, there are (typically) two causes of action and therefore losses arising from the second breach of duty are not statute-barred.

LugaNO: What Next for Cross-Border Commercial Disputes?

May 2021

- The European Commission (the "**Commission**") has recommended to the Council of the EU (the "**Council**") that the U.K.'s application to join the 2007 Lugano Convention (the "**Lugano Convention**") should be refused.

- For a fuller commentary on what this means for commercial parties wishing to rely on English jurisdiction clauses or enforce English judgments, please see our Stay Current article available here.

Civil Judicial Cooperation Post-Brexit

- As a result of the silence in the so-called "Brexit Deal" on judicial cooperation in civil matters, the U.K. has lost the benefits that it previously enjoyed as a member of the EU.

- In a bid to plug this gap, the U.K. has applied to join the Lugano Convention. If the Council follows the Commission's recommendation and rejects the U.K.'s application to join the Lugano Convention, then deciding which country's court has jurisdiction over a legal issue and whether a judgment will be recognised will be more complex and uncertain than before the U.K.'s exit from the EU. There is also a risk that parties in dispute may "race" to be the first to issue proceedings in their preferred country in order to obtain a jurisdictional advantage over the other party.

- The U.K. has also acceded to the 2005 Hague Convention on Choice of Court Agreements (the "**Hague Convention**"). However, the Hague Convention is generally understood not to apply to asymmetric clauses. In addition, there is a question as to its application to any exclusive jurisdiction clauses concluded between the entry into force of the Hague Convention (on 1 October 2015) and the date that the U.K. became a contracting party to the Hague Convention in its own right (23:00 GMT on 31 December 2020).

- The U.K. can also fall back on bilateral treaties with some key EU jurisdictions, and general principles of international comity, which mean that respect for, and enforcement of, clear jurisdiction agreements are the norm, even where no binding commitment to do so exists.

PH*lit* comment:

If you are, or soon will be, party to commercial contracts involving parties based in EU and non-EU countries (the latter now including the U.K.), consideration should be given to whether any jurisdiction clauses are likely to be effective and, if not, what steps can be taken in response. That might include:

- *restating any exclusive jurisdiction clauses entered into prior to 23:00 GMT on 31 December 2020 (to ensure that EU member state courts apply the Hague Convention);*
- *reviewing and amending jurisdiction clauses to ensure that they are exclusive (which should engage the Hague Convention);*
- *including an arbitration agreement in international contracts (the New York Convention, which governs the recognition and enforcement of arbitral awards, continues to apply to the U.K. and EU member states); and/or*
- *commencing legal proceedings sooner than might otherwise have been intended.*

High Court rules that "entire agreement" clause is insufficient to preclude a misrepresentation claim brought in addition to breach of warranty claims

MDW Holdings Ltd v Norvill and others **[2021] EWHC 1135 (Ch) (judgment available here)**

4 May 2021

- In a useful reminder of the importance of taking steps to ensure that responses to pre-contractual enquiries are accurate, the High Court has considered the application of certain contractual defences to a breach of warranty claim, in circumstances where the sellers had deliberately concealed breaches by the target of certain environmental regulations, which were known to them before the transaction concluded. The High Court also held that the claimant, MDW, was entitled to bring a parallel claim in misrepresentation, as the terms of the sale agreement, and specifically the entire agreement clause, did not preclude it.

- The claim concerned breaches of various environmental warranties contained in a Share Purchase Agreement dated 14 October 2015 (the "**SPA**") pursuant to which MDW purchased the entire share capital of G.D. Environmental Services Limited ("**GDE**") from the defendant shareholders for c. £3.5 million.

- GDE is a waste disposal company and was subject to a number of statutory environmental regulations, as well as additional restrictions imposed by: (i) its regulator, Natural Resources Wales ("**NRW**"), as a condition for it being granted an environmental permit (the "**Permit**"); and (ii) the sewage undertaker, Dwr Cymri Welsh Water ("**DCWW**"), as a condition for DCWW allowing it to make use of public sewers to dispose of trade effluent (the "**Consent**").

- During the acquisition process, MDW issued a due diligence questionnaire which specifically asked the first defendant, the directors and key employees of GDE whether they knew of any breaches of the Permit or Consent, or whether there were any investigations, enquiries, prosecutions or enforcement actions underway by any governmental, regulatory or other organisation. The defendants failed to disclose ongoing discussions that GDE was having with its regulators regarding the continuing breaches of the Permit and Consent, and the potential for related proceedings.

- Shortly after the SPA was concluded, it came to the attention of the newly appointed directors that DCWW had observed *"severe and consistent"* breaches of the Consent and in November 2015, DCWW's legal department wrote to GDE warning it of potential prosecution. In March 2016, the NRW also issued a formal letter to GDE regarding breaches of the Permit conditions. In both cases, the contraventions were said to have occurred both before and immediately after the conclusion of the SPA.

- In August 2017, MDW served a notice of claim on the defendants alleging warranty claims arising out of breaches by GDE of the Consent, the Permit and its regulatory obligations (the "**August 2017 Notice**"). No response was received and, in January 2019, MDW sent a letter before action to the defendants, which sought to notify additional warranty claims (the "**January 2019 Letter**"). In February 2019, MDW then brought proceedings against the defendants for breach of warranty and misrepresentation based on the defendant's written responses to the due diligence questionnaire and other oral representations allegedly made during the due diligence process. On 5 August 2019, MDW sent the defendants a further notice of claim alleging certain additional breach of warranty claims (the "**August 2019 Notice**"), which (with the permission of the Court) MDW amended its Particulars of Claim to include.

- To defend the claims, the defendants relied on the contractual notice provisions contained in the SPA, which provided that:

  - notice of a breach of warranty claim must be provided within two years of the completion date (i.e. by 14 October 2017) and proceedings must be brought within 18 months of the service of such notice (although such limitations would not apply where any delay resulted from dishonesty, fraud, wilful misconduct or wilful concealment by the defendants);

  - a notice of claim must summarise, as far as reasonably practicable, the amounts claimed; and

  - the defendants would not be liable for any claim concerning matters fairly disclosed to MDW.

- The defendants also argued that MDW's claim for misrepresentation was precluded by the "entire agreement" clause contained in the SPA, which provided that the SPA constituted "*the entire agreement between the parties and supersedes and extinguishes all previous discussions, correspondence, negotiations, drafts, agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter*".

- On the evidence available to it, the Court concluded that GDE had engaged in certain non-compliant practices prior to completion of the SPA (the "**Actionable Practices**"), which meant that they were in breach of multiple warranties.

- The Court first considered the defendants' argument that matters relevant to the breaches had been "fairly disclosed", and dealt with it tersely. The Court re-iterated the well-established principle that a disclosure letter which purports to disclose specific matters merely by referring to other documents will generally not be sufficient to satisfy an obligation to disclose. In addition, the term *"fairly disclosed"* requires *"some positive statement of the true position and not just a fortuitous omission from which the buyer may be expected to infer matters of significance"*. Accordingly, the defendants' disclosure of a one-off breach of the Consent could not amount to fair disclosure of a far more significant

history of non-compliance with its environmental obligations, provision of false data to the DCWW or the warnings of potential prosecution.

- The Court then dealt with the issue of notification, noting that every notification clause turns on its own individual wording. When considering whether the level of detail contained in a notice was sufficient, the proper question is: how would the notice be understood by a reasonable recipient with knowledge of the context in which it was sent? In the present case:

  – The defendants' argument that the August 2017 Notice contained insufficient detail as to the quantification of MDW's losses was dismissed by the Court. The notification requirement in the SPA set a low threshold. It did not require MDW to set out the specific grounds of the Claim, to provide reasonable detail concerning the matters said to constitute the breach, to explain how the amount claimed had been calculated or to explain how that amount was causally related to the matters complained of. While the value of the claims notified in the August 2017 Notice had increased significantly by the time proceedings were commenced, the Court found that MDW had done the best it could to summarise the amount it would be claiming at the time the notice was given.

  – The additional claims alleged in the January 2019 Letter and August 2019 Notice had not been notified within the two-year time limit. Accordingly, these claims would be contractually time-barred unless MDW was able to rely on the "wilful concealment" exception to the limitation of liability provisions. However, the Court ultimately found that the relevant claims were not made out on the facts in any event and therefore it did not have to consider this point further.

- Accordingly, the defendants could not rely on the contractual defences to avoid liability for the breaches of warranty set out in the August 2017 Claims Notice and was held to be liable in respect of the same.

- As to the misrepresentation claim, the Court disagreed with the defendants' argument that the claim was excluded by the "entire agreement" clause contained in the SPA. The Court held that the clause meant that nothing said, written or done before the SPA could create any binding obligations or liabilities. It did not preclude claims for pre-contractual misrepresentation.

- As to the representations themselves, the Court concluded that MDW had successfully made out its claim in respect of the written misrepresentations given by the defendants in response to the Due Diligence Questionnaire. The Court was without doubt that these representations had been made fraudulently and that MDW had relied upon them in entering into the SPA.

- However, in respect of the oral representations alleged, the Court considered that: (i) these had not been made out by the evidence presented to the Court; and (ii) even if they had, the representations had been given by the key employees of GDE and not the defendants themselves. MDW had not shown any legal basis for considering those key employees to be agents of the defendants and therefore they could not succeed in a misrepresentation claim against the sellers in respect of them.

- As such, the Court found that the defendants were liable for breach of warranty and fraudulent misrepresentation in respect of the Actionable Practices, which had caused MDW to suffer loss as the true value of the shares in GDE was less than the amount paid by

MDW. MDW was awarded damages, the measure for which was the difference between the value of GDE paid by MDW based on the warranties being true, and the actual value of GDE given the warranties were false.

PH*lit* comment:

This case highlights the importance of providing complete and accurate responses to pre-contractual enquiries and to disclose fully and properly against the warranties that have been given. Failure to do so creates significant risk of claims following completion. Sellers should also consider expressly excluding liability for misrepresentation (wherever possible) and/or include a so-called "no reliance" clause to reduce the risk that statements made in the course of negotiating the transaction (but which do not form part of the sale agreement) will give rise to any liability if they later prove inaccurate.

The judgment also serves as a reminder that, when faced with a breach of warranty claim, very often the first thing a defendant is likely to rely on are the contractual limitation of liability provisions set out in the sale agreement. They may provide a complete defence to the claim, without the need to engage with the underlying facts of the alleged breaches. Accordingly, a buyer must ensure that they comply strictly with notification requirements, albeit that this case, and the recent decision in Dodika (discussed below), demonstrate that the courts will typically take a common sense approach when determining compliance and a buyer should be wary of: (i) avoiding giving information on which it is unsure and may need to row back on later, as this could itself affect the validity of the notice; and (ii) providing so much information that it is effectively prevented from developing the claim any further in the future.

Court orders disclosure of internal compliance documents held in the United States and gives guidance on *Quincecare* duty

***The Federal Republic of Nigeria v JP Morgan Chase Bank, N.A.* [2021] EWHC 1192 (Comm) (judgment available here)**

6 May 2021

- The High Court has granted an application requiring the defendant bank to carry out additional searches in order to comply with its disclosure obligations, noting that the attendant costs of approximately £270,000 were reasonable and proportionate in the context of a claim for US$875,740,000 and where the defendant had already spent some £2.9 million on disclosure.

- The underlying proceedings concern the payment of US$875,740,000 in two instalments from a depositary account held by the claimant at the defendant bank to a third party (the "**Payments**"). The claimant to these proceedings (the Federal Republic of Nigeria) had been in long-running disputes with the third party, and others, in relation to the ownership rights of an off-shore oil field. The disputes were settled by way of various settlement agreements, pursuant to which Shell was required to pay US$1 billion into a depositary account in the claimant's name, which would then be used to make payments to the third party. The defendant bank subsequently made the Payments to the third party on the instruction of certain government officials who were authorised signatories of the claimant, which the claimant alleges was part of a corrupt scheme of which it was the victim (the "**Scheme**"). Whilst it is not alleged that the defendant knew or was involved in the Scheme, the claimant alleges that the defendant breached its *Quincecare* duty in failing to take reasonable care in executing the payment instructions given by the government officials.

- The *Quincecare* duty requires banks to take reasonable skill and care in executing client instructions, and applies the standard of the "*ordinary prudent banker, armed with whatever knowledge [the defendant] had at the time it made the relevant payments*". Therefore, a key issue in the proceedings is what the defendant knew and when. Following

the first instalment of the Payments in 2011, concerns were raised within the bank, resulting in the submission of several Suspicious Activity Reports ("**SARs**") (both in the UK and in the US). There were also widespread reports that the Payments were used for bribes. Most notably, the defendant's own compliance function recommended that the recipient third party be placed on a watch list; however, this recommendation was not implemented in time to stop the second instalment of the Payments being made in 2013. Accordingly, the claimant alleges that the defendant failed in its *Quincecare* duty in authorising the second instalment of the Payments in 2013.

- The proceedings are subject to the Disclosure Pilot Scheme set out in Practice Direction 51U ("**PD 51U**") and, following the first case management conference, the parties were ordered to give Extended Disclosure. The present application related to two issues for which Model D (narrow search-based disclosure) had been ordered and in respect of which the defendant had refused to provide specific documents and undertake specific searches requested by the claimant. The claimant therefore argued that the defendant had failed to "*adequately comply with an order to Extended Disclosure*" and sought an order requiring the defendant to take additional steps set out in paragraphs 17.1(2) – (4) of PD 51U to ensure compliance with the order for Extended Disclosure.

- The claimant's specific concerns were as follows:

  – the defendant had refused to provide documents concerning the "watch list" recommendations, which the claimant said were relevant to the issue of whether the defendant became aware of facts and matters so as to put it (or the reasonable and honest banker) on inquiry that there was a real risk that the claimant was being defrauded and what, if any, inquiries it conducted in this regard; and

  – as to what actions were taken by the defendant in light of the above and on what basis the defendant filed the SARs, the defendant had refused to provide documents, or carry out searches for documents, held by certain members of its compliance team.

- The defendant argued that it was a long and well-established principle that there is no duty for a party to search all potentially relevant data sources for documents, given that disclosure exercises are always subject to considerations of proportionality. The defendant also argued that PD 51U had furthered the emphasis on proportionality by intending to focus the parties' efforts on the key issues in dispute.

- In this regard, the defendant had given disclosure from 57 custodians during the period from 2003 to 2014. More than 200 search terms had been applied to a universe of approximately 15.1 million documents, which resulted in 350,000 documents, all of which had been manually reviewed, with 14,202 being disclosed. Given this extensive disclosure, the defendant did not think it reasonable and/or proportionate to carry out further searches or provide further documents.

- The Court dismissed the defendant's argument that carrying out further searches would amount to an "*archaeological dig*", noting that the defendant had only searched its UK data despite some of its relevant compliance team being based in the US. In granting an order requiring the defendant to include three US-based custodians and carry out further searches, the Court relied on the fact that there appeared to have been liaison between the defendant's UK and US compliance teams.

- The Court also noted that an additional disclosure exercise that would cost £270,000 could not be considered disproportionate in circumstances where the defendant had not only

already incurred a "*staggering*" £2.9 million in costs for disclosure, but had also spent around £290,000 in resisting the claimant's application.

- Finally, it is worth noting that the Court dismissed the claimant's argument that, for the purpose of establishing knowledge under the *Quincecare* duty, seniority was irrelevant. Instead, the Court noted that seniority was material in three respects:
  - if the relevant knowledge were held by a senior employee, a breach of the bank's *Quincecare* duty may be easier to prove;
  - senior personnel may have the power to take steps required to comply with the *Quincecare* duty, which less senior personnel may not; and
  - senior personnel may hold documents that summarise strategic decisions at a high level in light of information provided to them by less senior personnel.

PH*lit* comment:

Whilst this case usefully restates the standard of the Quincecare duty and helpfully notes that seniority of the relevant individuals at the bank may be important in establishing the same, the Court's comments in relation to proportionality in large disclosure exercises under the Disclosure Pilot Scheme are of most interest. Those comments confirm that the Court will not shy away from ordering further (expensive) disclosure where it considers it necessary, reasonable and proportionate to do so. This is notwithstanding the core intention of PD 51U to lighten the time and cost burdens of disclosure.

There is also perhaps some irony in that the very high disclosure costs already incurred by the defendants encouraged the Court to order additional disclosure. The judgment serves to remind practitioners that the Court expects parties to approach disclosure in the spirit of cooperation and to deal appropriately with their Extended Disclosure exercises from the outset, so as to avoid costly applications and additional disclosure costs further down the line.

Court of Appeal rejects "empty formalism" in allowing an appeal to challenge the form of notice of a claim clause under an SPA

***Dodika Ltd and Others v United Luck Group Holdings* [2021] EWCA Civ 638 (judgment available here)**

7 May 2021

- The Court of Appeal has found that a notice of claim given by the buyer under a share purchase agreement did not lack *"reasonable detail"* in circumstances where the recipient already had underlying knowledge of all relevant information relating to the buyer's claim. To require a notice to contain details the recipient was already aware of was considered by the Court to be little more than *"empty formalism"*.

- United Luck Group Holdings (the "**Buyer**") had entered into a share purchase agreement with various sellers (the "**Sellers**") for the sale and purchase of the entire issued share capital in Outfit7 Investments Ltd for the sum of US$1 billion (the "**SPA**"). The SPA included a tax covenant given by some of the Sellers, pursuant to which they agreed to reimburse the Buyer for any tax liabilities of the target group arising from certain pre-completion matters. In order to claim under the tax covenant, the Buyer was required to give written notice to the Sellers by 1 July 2019 setting out various matters in *"reasonable detail"*, including *"the matter which gives rise to such Claim"*.

- In July 2018, the Slovenian tax authority commenced an investigation into the transfer pricing policies of one of the companies within the target group, Ekipa2 d.o.o. ("**Ekipa2**").

From an early stage in the investigation, the Sellers were kept informed of the progress of the investigation by the Buyers.

- On 24 June 2019, the Buyer sent a letter to each of the relevant Sellers stating *"we hereby give you notice … of Claims under the Tax Covenant of the SPA. Such claims relate to an investigation by the Slovene Tax Authority … into the transfer pricing practices of Ekipa2"* (the "**24 June Notice**"). Other than stating that the period under investigation for Ekipa2's transfer pricing practices was 2013 – 2017, the 24 June Notice only set out the chronology of the engagement with the Slovenian tax authority and confirmed that the investigation was ongoing.

- In December 2019, the Sellers issued a Part 8 claim seeking a declaration, and later summary judgment, that the 24 June Notice failed to comply with the SPA because it did not give *"reasonable detail"* of the *"matter"* giving rise to the Buyer's claim. The judge at first instance agreed that the 24 June Notice had not provided *"reasonable detail"* of the *"matter"* giving rise to the claim, as he concluded that the "*matter*" for this purpose was not the tax investigation itself but rather the underlying facts, events or circumstances on which the claim was based. The judge noted that the mere existence of the tax investigation, without providing more detail as to the facts underpinning it, did not serve the purpose of informing the Sellers of the *"matter"* giving rise to the claim, irrespective of the Seller's knowledge of the facts.

- The Buyer appealed. At appeal, the Court of Appeal considered the following two questions: (i) what was the *"matter"* which gave rise to the claim; and (ii) whether the 24 June Notice provided *"reasonable detail"* of that "*matter*". The Court of Appeal agreed with the High Court that the *"matter"* giving rise to the claim constituted more than the mere fact of the tax investigation. The Court found that while the fact that there had been an investigation was relevant, the *"matter"* giving rise to the claim also included the underlying events, facts and circumstances which took place before completion and, in particular, those relating to the transfer pricing practices which had been adopted by Ekipa2.

- On whether or not the matter was stated in *"reasonable detail"*, the Court noted that this was not a straightforward question and that the 24 June Notice did not set out much about the underlying facts giving rise to the tax liability. The Court noted that a notification clause, in principle, must be complied with strictly. In the present case, the SPA did not specify what kind of information the notice was required to contain and so the Court held that what constituted *"reasonable detail"* would depend on all of the circumstances.

- In the Court's view, such circumstances must include what is already known to the recipient. In this regard, it relied on the decision of the House of Lords in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, which showed that the information conveyed by a unilateral notice to the reasonable recipient was capable of being affected by the background context, including the knowledge of the recipient. In this case, the Court held that it was unnecessary for the 24 June Notice to say more than it did in order to provide "*reasonable detail*" and that requiring the Buyer to include details which the Seller already knew would *"elevate the requirement to state matters in reasonable detail into empty formalism"*. Accordingly, the notice was not invalid.

PH*lit* comment:

Notwithstanding that this was a summary judgment application, a detailed analysis of the relevant terms of the contract was conducted, showing that points of law and construction can be dealt with summarily if the exercise leads to a conclusion that the respondent party has no real prospect of success and that there is no other compelling reason for a trial.

In determining whether a notice is valid, the fundamental question is what a "reasonable recipient", with knowledge of the underlying context, would understand by the notice. While the decision will be welcomed as endorsing a more common-sense approach, by which the provision of detail may be deemed unnecessary if it serves no commercial purpose when taking the parties' knowledge into account, it must be considered in its context. In this case, the Sellers were very aware of the tax investigation and had been kept informed on a rolling basis. However, it will not always be the case that a recipient will have as much knowledge about all of the matters which form the basis of a claim, and knowledge should certainly not be assumed. In addition, the SPA in this case was not particularly prescriptive as to the requirements of the notice. However, notice requirements invariably differ, and provisions which specify precisely what information is required to be given leave far less room for manoeuvre, and any failure to comply with the prescribed requirements may render the notice invalid.

For a fuller commentary, please see our Stay Current article available here.

Court of Appeal rules that long delay in giving judgment casts serious doubt on trial judge's findings of dishonesty

***Natwest Markets plc and another v Bilta (UK) Ltd (in liquidation) and others* [2021] EWCA Civ 680 (judgment available here)**

10 May 2021

- The Court of Appeal has held that a delay of 19 months in handing down judgment cast sufficient doubt on the veracity of the trial judge's factual findings of dishonesty that the matter should be remitted for retrial. As a result, the High Court will now rehear the claim for dishonest assistance, which arises out of a fraud committed by the directors of various companies trading in carbon credits, in its entirety.

- The underlying fraud, known as a "missing trade intra-community VAT fraud" ("**MTIC fraud**"), involved the exploitation of the VAT exemption on the import and export of goods between EU Member States. In short, the importer, who does not pay VAT on the goods, charges the buyer VAT, syphons-off the VAT paid by the buyer and then puts the importing company into liquidation without accounting to the relevant tax authority for the VAT. In the present case, the MTIC fraud related to spot trading in carbon credits issued under the EU Emissions Trading Scheme, known as EU Allowances ("**EUAs**").

- In 2008, the first defendant (then known as the Royal Bank of Scotland ("**RBS**")) entered into a joint venture with Sempra Energy. As part of that joint venture, the second defendant, RBS Sempra Energy Europe Ltd ("**RBS SEEL**"), traded carbon credits, including EUAs, on behalf of RBS. RBS SEEL provided traders to RBS to conduct the trades.

- The ten claimant companies were used by their directors as vehicles for MTIC frauds involving spot trades in EUAs. The relevant transactions began with these companies trading through a broker called CarbonDesk Ltd ("**CarbonDesk**"). The EUAs were sold to CarbonDesk, and the directors of the ten claimant companies diverted the VAT received from those trades, with the result that each company was left without assets and defaulted on its obligations to HMRC for VAT.

- The ten claimant companies went into insolvent liquidation and the liquidators brought claims for dishonest assistance against RBS for its role in trading with CarbonDesk. The liquidators claimed that, between 15 June and 6 July 2009, the number and frequency of spot trades between CarbonDesk and RBS increased suddenly and dramatically during a period when rumours of VAT fraud in the sector were rife. They alleged that the RBS traders were aware that there was suspicious activity, which should have called for an inquiry as to the legitimacy of the trades. Furthermore, it was alleged that RBS and RBS SEEL were vicariously liable for the dishonest actions of the individual traders.

- The trial judge agreed, determining that any reasonably attentive trader would have had acute suspicions and that the traders provided by RBS SEEL chose not to take appropriate action. The judge also considered that both RBS and RBS SEEL were vicariously liable for the conduct of the traders. Consequently, at first instance, both defendants were held liable for dishonest assistance and knowingly being a party to fraudulent trading.

- The defendants appealed, on the basis that the trial judge's key findings that the traders acted dishonestly was plainly wrong and that he had failed to consider material evidence. The judgment was further called into question as a result of the 19-month delay in its handing down. RBS SEEL also appealed on the basis that they should not be held vicariously liable for the actions of the traders alongside RBS, as the traders were acting on behalf of and for the benefit of RBS.

- On the question of delay, the Court of Appeal considered that a "*delay of th[is] magnitude … whatever the explanation may be, is plainly inexcusable*", noting that delay in handing down judgment denies justice to the winning party, undermines the loser's confidence in the correctness of the decision, and weakens public confidence in the judicial process. However, delay alone is insufficient grounds for setting a judgment aside; there must be some other identifiable error, such as an error of law, a misunderstanding of the evidence, or a finding of fact without basis in the evidence.

- The defendants pointed to a number of documents which the trial judge had not addressed in his judgment (the "**Documents**"), but the Court of Appeal considered that the judge's assessment of the evidence was within the "*reasonable margins of appreciation afforded to a trial judge*", and therefore this alone was not sufficient to allow the appeal. However, the 19-month delay meant that the Court could not assume that the trial judge had prepared the judgment with the Documents in mind. Accordingly, although the Documents did not demonstrate that the trial judge was plainly wrong in his conclusions, the Court could not be satisfied that the judge's decision was right and therefore remitted the case for re-trial. The Court noted that it reached its decision reluctantly, given that the judgment as a whole was carefully considered and paid great attention to detail.

- Turning to RBS SEEL's appeal as to vicarious liability, RBS SEEL argued that all responsibility and supervision for the traders had been transferred to RBS under the agreements governing the joint venture arrangements and accordingly the trial judge had erred in finding dual liability for the trader's actions.

- In rejecting this aspect of the appeal, the Court of Appeal noted that the trading took place on RBS's behalf and the traders were acting in RBS's name. Nevertheless: (i) they were paid their salaries, bonuses and expenses by RBS SEEL (albeit these were reimbursed by RBS); (ii) they were located in RBS SEEL's office; (iii) they were managed by RBS SEEL employees; and (iv) the trading was carried out on RBS SEEL's systems. The Court of Appeal considered that neither the joint venture arrangements (noting that you cannot contract out of vicarious liability, as a matter of public policy) nor the question of control

were determinative. The correct test was whether the traders were so much a part of the work, business and organisation of both RBS and RBS SEEL that it was just to make both employers answer for their tortious acts. Accordingly, the Court of Appeal found that the trial judge was correct to find dual vicarious liability in the circumstances.

PH*lit* comment:

This case marks a rare example of an appellate court overturning a first instance decision on factual grounds. The trial judge's findings of dishonesty, although seemingly carefully considered in a detailed judgment, were vitiated by the lengthy delay in giving said judgment. The Court noted: (i) the difficulties this would present for the factual witnesses, given that, by the time the trial is re-heard, it will have been approximately twelve years since the relevant events occurred; (ii) that there would also be the potential for inconsistencies in the evidence between the two trials. However, in spite of these potential issues, the Court was satisfied that the judgment should be overturned.

Whilst delay is an insufficient ground for appeal in itself, the delay in giving judgment dictated the manner in which the Court applied the principles governing appellate review of factual findings. However, there is no hard and fast rule as to what will constitute a delay in giving judgment, and so it is difficult to know with any certainty when an appellate court will consider a delay to be so egregious that it impacts the approach to the Court's review of the factual findings. That said, in the present case, the Court of Appeal noted comments made by Sir Geoffrey Vos in Bank St Petersburg v Arkhangelsky [2020] EWCA Civ 408 that the general, albeit unwritten, rule is that a judgment should be delivered within three months of the hearing, even in long and complex cases.

High Court holds COVID-19 to be a force majeure event and restraint of trade covenants to be unreasonable

***Dwyer (UK Franchising) Limited v (1) Fredbar Limited (2) Mr. Shaun Rowland Bartlett* [2021] EWHC 1218 (Ch) (judgment available here)**

11 May 2021

- The High Court has found in favour of a claimant-franchisor (Dwyer) in respect of its franchisee's (Fredbar) repudiatory breach of their franchise agreement (the "**Agreement**"), notwithstanding that the franchisor had itself repudiated the agreement by failing to correctly designate COVID-19 as a force majeure event. In the same ruling, the Court also declined to award injunctive relief to prevent the franchisee from infringing certain restraint of trade provisions, as such provisions were deemed unreasonable and therefore unenforceable.

- Dwyer is a large company that franchises the "Drain Doctor" plumbing and drain repair services. In October 2018, Dwyer entered into the Agreement with the first defendant, Fredbar, as franchisee and the second defendant, Mr Bartlett, as guarantor. Mr Bartlett was trading as a sole trader through Fredbar.

- Pursuant to its terms, the Agreement could be suspended during any period in which Dwyer designated a force majeure event to have occurred. On 27 March 2020, Mr Bartlett sought a force majeure suspension due to the adverse impact of the COVID-19 pandemic on turnover. Dwyer did not consider that this gave rise to force majeure, as it was still possible to conduct business. Subsequently, on 30 March 2020, Mr Bartlett explained to Dwyer that he had to self-isolate because his son was considered to be a medically vulnerable person. However, Dwyer still refused to designate a force majeure event.

- Later, on 2 April 2020, Dwyer made an offer to Mr Bartlett, which permitted him to self-isolate with certain contractual obligations being suspended (the "**Revised Terms**"). The Revised Terms were accepted by Mr Bartlett.

- On 16 July 2020, Mr Bartlett sent an email seeking to terminate the Agreement on a number of grounds, including that: (i) Dwyer had originally misrepresented the franchise opportunity; (ii) he had entered into the Agreement under undue influence; and (iii) Dwyer had failed to correctly designate COVID-19 as a force majeure event (the "**16 July Email**").

- Dwyer rejected Mr Bartlett's assertions that he had any rights to terminate, meaning that Mr Bartlett's termination was wrongful and therefore constituted a repudiatory breach of contract by renunciation. Dwyer accepted the supposed repudiation, thereby terminating the Agreement, and subsequently commenced proceedings for: (i) damages arising from the wrongful termination; and (ii) injunctive relief to restrain Fredbar and Mr Bartlett from breaching the restraint of trade covenants under the Agreement. Mr Bartlett's defence and counterclaim were largely based on the arguments advanced in the 16 July Email.

- The Court considered the various arguments chronologically as follows:

  - **Misrepresentation:** The defendants argued that in the course of negotiations, Dwyer had made a number of representations as to the projected franchise turnover. The Court considered that these allegations failed on two fundamental grounds: (i) the projections were based on actual data from franchisees, and were therefore not false; and (ii) the associated representations were not shown to have induced Mr Bartlett to enter into the Agreement.

  - **Undue influence:** In asserting undue influence, the defendants relied on the inequality of bargaining power between the parties and the fact that Mr Bartlett had been given one day to consider the 100-page Agreement, at which point it was put to him on a "*take it or leave it basis*". The Court was unconvinced by Mr Bartlett's "*vague recollection*" of the events leading up to the Agreement being signed and considered it fatal that, on the evidence, it appeared that Mr Bartlett had, in fact, already decided to enter into the Agreement, notwithstanding any alleged undue pressure.

  - **Force majeure:** Applying *Braganza v BP Shipping Ltd* [2015] UKSC 17, the Court confirmed that, in exercising its discretion to designate a force majeure event, there was an implied term of rationality, which included an obligation for Dwyer to take relevant matters into account in reaching its decision. The Court determined Dwyer's failure to take into account Mr Bartlett's family situation to be irrational and therefore a breach. Interestingly, the Court determined the breach to be of a fundamental term, on the basis that whilst the term's application "*would only arise in exceptional circumstances […] that did not mean its exercise was not essential when those circumstances occurred*".

  - **Repudiatory breach:** Notwithstanding the Court's finding that Dwyer had repudiated the Agreement on 27 and 30 March by failing to exercise rational discretion in refusing to designate COVID-19 as a force majeure event, Mr Bartlett's acceptance of the Revised Terms on 2 April had affirmed the Agreement. Therefore, Mr Bartlett's attempted termination of the Agreement by way of the 16 July Email was wrongful as no termination right subsisted by the date it was sent. Dwyer had relied on such wrongful termination so as to lawfully terminate and thereafter claim damages.

  - **Restraint of trade:** The defendants were bound by a post-termination restrictive covenant whereby, for a period of 12 months following termination, they could not engage in any business competing with the "Drain Doctor" within the franchise area or within a 5-mile radius of that territory. Mr Bartlett's precarious personal circumstances (including risk of unemployment and mortgagee possession

proceedings) were known to Dwyer at the time of the Agreement. Given Dwyer's knowledge, the Court determined the restrictions unreasonable due to the acutely adverse effect that they would have on Mr Bartlett in particular.

- In conclusion, the Court found in favour of Dwyer that the Agreement had been affirmed prior to Mr Bartlett's attempt to terminate the Agreement on 16 July 2020, with the result that Dwyer was entitled to rely on such wrongful termination so as to terminate the Agreement lawfully and claim damages. However, the Court was not minded to award injunctive relief in favour of Dwyer on the basis that the restraint of trade covenants were unenforceable.

PH*lit* comment:

Perhaps the most notable element of this case was the treatment of COVID-19 as a force majeure event. That ratio may well be seized upon by parties seeking to exit unfavourable agreements. However, practitioners should proceed cautiously when considering the case's general applicability. The critical element of the force majeure clause was that Dwyer had discretion to designate a force majeure event. Consequently, it was the irrational conduct of Dwyer, considered alongside the particular circumstances of Mr Bartlett, that was of relevance. Accordingly, this case is unlikely to open the floodgates to COVID-19 force majeure claims more generally.

The case also provides a useful reminder of the restrictions the law places on restraint of trade covenants, which are prima facie contrary to public policy. Those drafting such covenants would do well to consider the precise circumstances of the restrained party at the point of signature of the relevant agreement, and to consider whether the restrictions go too far.

As a final point, the Court commented that Dwyer's evidence in respect of the restraint of trade argument was insufficient and appeared "more to be lawyer than witness led in its drafting", a criticism that speaks directly to the recently enacted Practice Direction 57AC for trial witness statements (see our Stay Current piece on PD57AC here).

Court of Appeal holds that performance fees under a Joint Venture Agreement were not conditional on full performance

***Daniel Donovan and Nales Limited v Grainmarket Asset Management LLP* [2021] EWCA Civ 686 (judgment available here)**

12 May 2021

- The Court of Appeal has upheld a first instance judgment in determining that payment of contractual performance fees was not conditional upon the full performance of a joint venture agreement.

- Mr Crader (the principal of the defendant, Grainmarket Asset Management LLP ("**GAM**")) and Mr Donovan (the first claimant and principal of the second claimant, Nales Limited) agreed to enter into a property development joint venture by which they would seek investment to purchase and redevelop properties. Under the applicable joint venture agreement (the "**JV Agreement**"), which comprised both written and oral terms, it was envisaged that the investors would pay an administration fee for the management of the properties and, upon sale, the joint venture would receive a performance fee.

- The JV Agreement was striking for its lack of formality and clarity, including the absence of precision surrounding: (i) the parties' respective obligations; and (ii) the conditions to be fulfilled for the parties to earn their respective performance fees.

- The relationship between Mr Crader and Mr Donovan eventually broke down, leading to exchanges of emails in which the parties discussed the best way to take the joint venture forward. These exchanges culminated in the parties agreeing that Mr Donovan would step

aside. Following his departure, the parties disputed what performance fees were owed to him and Mr Donovan subsequently brought proceedings against GAM seeking recovery of the fees.

- GAM denied liability on the basis that Mr Donovan had repudiated the agreement by renunciation (through his suggestion in the email exchanges that he should step aside from the joint venture) without performing all of his duties thereunder, with the result that he was not entitled to any fees. At first instance, the Court determined that, amongst other things: (i) payments under the JV Agreement were not conditional upon performance of a party's obligations; and (ii) Mr Donovan had not, in fact, repudiated the JV Agreement.

- GAM appealed on four principal grounds, as below:

  - **Mr Donovan's right to receive the performance fees was not independent of his obligations under the JV Agreement.**

    As there was no presumption in law that a performance fee was conditional upon performance of the agreement, absent express terms, such conditionality would have to be created by way of an implied term. The Court of Appeal considered there to be no necessity to imply such a term, and therefore dismissed this ground of appeal.

  - **Mr Donovan had renounced the JV Agreement by way of email following the breakdown in the parties' relationship.**

    A party will repudiate a contract by renunciation where that party demonstrates a clear and unequivocal intention not to perform its duties. The Court of Appeal agreed with the first instance judge that Mr Donovan had not renounced the JV Agreement. Instead, the email by which he suggested that he should step aside was part of a wider discussion about the future of the joint venture and was a suggestion that GAM accepted.

  - **Mr Donovan was, alternatively, in repudiatory breach of the JV Agreement for failing to continue to work after stepping aside.**

    The Court of Appeal agreed that this alternative angle took the matter no further. Mr Donovan was simply stepping down from his day-to-day roles, and would become a "passive investor" before his exit.

  - **The judge's findings as to whether the agreement had been terminated were inconsistent, and that inconsistency should be resolved by finding that the JV Agreement had been terminated.**

    Whilst the Court of Appeal agreed that there was inconsistency in the first instance judgment as to when the JV Agreement came to an end, such inconsistency was immaterial to GAM's case, which was purely advanced on the basis that the JV Agreement terminated upon GAM's acceptance of the alleged repudiation. GAM was therefore precluded from pleading a new case in the Court of Appeal that relied on an earlier termination date, which (on GAM's case) might have prevented Mr Donovan from receiving his performance fees.

- Accordingly, GAM's appeal was dismissed in its entirety, thereby maintaining the first instance decision that Donovan had not repudiated the Agreement and was entitled to performance fees thereunder.

PH*lit* comment:

Notably, the first instance judgment extended to some 236 pages – predominantly as a result of the lack of formality around the JV Agreement. This is as clear a case as any that parties entering into business transactions of any complexity should engage legal advisers from the outset so as to unambiguously set out (amongst other things) the relevant obligations, expectations and benefits (including remuneration) of the parties.

This case also serves as a stark reminder to potential parties to litigation to ensure that their case is fully pleaded at first instance. Seldom will the Court of Appeal allow a new case to be pleaded, as GAM attempted to do by way of its fourth ground of appeal. As Lewison LJ commented in FAGE UK Ltd v Chobani UK Ltd (and as quoted in the present case): "The trial is not a dress rehearsal. It is the first and last night of the show."

Court of Appeal rules that declarations granted in an earlier case could not be used for the purposes of pursuing a subsequent tracing claim

***Ward and others v Savill* [2021] EWCA Civ 1378 (judgment available here)**

14 May 2021

- The issue in this case was whether the appellants (the claimants in the underlying action) were able to rely on declarations made in earlier proceedings against the perpetrators of a fraud for the purposes of a subsequent tracing claim against an alleged recipient of proceeds of the fraud who had not been a party to the earlier proceedings.

- The case arose out of a number of film development schemes, in which the 65 claimants alleged that they were fraudulently induced to invest £33 million. In 2015, those claimants brought a claim against the promoters of the scheme (the "**Main Proceedings**"), which was stayed pending the outcome of criminal proceedings against the promoters. When the case resumed in 2017, the promoters did not file defences. The claimants were accordingly granted judgment in default and successfully obtained declaratory relief which allowed them to trace into the promoters' property to locate the funds the claimants had invested (the "**Declarations**").

- The same claimants then brought the present proceedings against the wife of one of the promoters, who they alleged had used traceable proceeds from the fraudulent scheme, which had been given to her by her husband, to purchase a property in London. The claimants sought to rely on the Declarations given in the Main Proceedings to found their proprietary claim to the London property. In her defence, the defendant argued that she could not be bound by the Declarations, as she was not a party to the Main Proceedings. Instead, insofar as the claimants wanted to rely on an assertion that they were entitled to trace the invested monies into her property, they were required to plead and prove the factual and legal basis for that assertion against her. The High Court agreed and held that the Declarations could not be said to take effect *in rem* (i.e. they did not fix the status of the relevant property on a basis that bound the whole world) and therefore they could not be relied upon by the claimants against the defendant to establish their beneficial interest.

- The claimants appealed on two grounds:

  - first, that the judge had erred in finding that the Declarations had no legal effect or consequences to enable them to establish their proprietary claim against the defendant; and / or

- second, that the judge was wrong to conclude that the default judgment and Declarations was not a judgment *in rem* and was thus ineffective against the rest of the world.

- Taking the second ground of appeal as their starting point, the Court of Appeal agreed with the defendant that the circumstances in which a judgment should be considered *in rem* were highly limited, and rightly so, in order to avoid procedural injustice through a party being bound by a judgment without an opportunity to be heard. The mere fact that a judgment involves declarations as to proprietary rights cannot, without more, make it *in rem*. The Court concluded that, if a trial judge intended an order to be made *in rem*, it should be stated in clear terms that it was being made against the whole world, and not just against the defendants before the court. The Declarations made no such statement, Accordingly, the judgment only determined the legal state of affairs between the parties to the Main Proceedings (i.e. it was *in personam*); it did not create a legal state of affairs *in rem* simply because it made a declaration as to proprietary rights.

- The Court also concurred with the defendant on the first ground of the appeal, holding that the authorities did not support the purported distinction advanced by the claimants between the factual findings in a judgment (which are not binding on a stranger to the proceedings), and the legal effect of a judgment (which would be binding on a stranger). It has long been established that it would be contrary to the fundamental principles of natural justice if a stranger to an earlier judgment was to be bound by it, be that the factual findings or the legal effect of said judgement. Accordingly, the Court held that the defendant was entitled to require the claimants to plead and prove all elements of their case against her and could not simply rely on the Declarations to prove their case.

PH*lit* comment:

The judgment of the Court of Appeal in this case reinforces the fact that judgments in rem (i.e. judgments which are binding as against the whole world rather than just on the parties to the proceedings) are rare. A declaration made against one party in one set of proceedings cannot generally be used as an evidential shortcut against another party in a second set of proceedings.

The practical point here is that all potentially relevant parties should be joined to a case so as to enable the findings in that case to be used against them. In tracing claims arising out of a fraud, where subsequent proceedings are brought against a recipient of traceable proceeds who was not a party to the original action, it will be necessary to prove the fraud that is said to give rise to the entitlement to trace against the recipient, in order to make good the tracing claim.

"Without a target to aim at" – the High Court denies an application to serve the Claim Form on "persons unknown" by an alternative method

***City of London Corp v Persons Unknown (as defined in Appendix 1)* [2021] EWHC 1378 (QB) (judgment available here)**

24 May 2021

- The High Court has refused an application for permission to serve a Claim Form on "persons unknown", in circumstances where the claimant had no way of identifying the "persons unknown".

- The claimant in this case owns Epping Forest, an area comprised of some 8,000 acres, the majority of which is made up of conservation land. Under byelaws passed in relation to the land, certain behaviour, such as *"damaging or injuring or climbing upon any tree or other growing thing"*, *"bonfire[s] or any other fire"*, *"dancing in such a manner or accompanied*

by such a noise that it may be a nuisance or annoyance to the public" or *"using or operating any radio, record or cassette-player or other similar instrument in such a manner as to cause a nuisance or annoyance to the public",* is expressly prohibited.

- Since the beginning of the COVID-19 pandemic, visitor numbers to Epping Forest have increased considerably, from approximately 4.5 million to around 11 million annually. Consequently, there has been an increase in incidents of public nuisance, including spontaneous social gatherings and unlicensed music events, both of which can cause damage to the forest, and threaten and harm the local habitat. The claimant therefore sought an injunction against "persons unknown" to prevent future incidents of public nuisance and to protect the conservation land.

- As the identity of the defendants was unknown, the claimant applied for an interim injunction against "persons unknown" and for permission to serve the Claim Form by alternative means under CPR 6.15, with service deemed to have been effected 48 hours later. The claimant proposed to serve the Claim Form by: (i) placing it in a transparent envelope and attaching it to various locations in Epping Forest, including gates, fences and hedges; (ii) posting it on the claimant's website; and (iii) posting it on the Epping Forest website (the "**Proposed Alternative Service**"). The claimant had displayed similar notices in relation to its application notice to serve the Claim Form by alternative means around Epping Forest, including a reference to a website to download the whole application pack.

- The Court was prepared to hear the present application on the basis of the efforts the claimant had made to give notice of it, but held that it would not formally dispense with the requirement to serve the application notice. In turning to the question of the Proposed Alternative Service for the Claim Form, relying heavily on *LB Barking & Dagenham v Persons Unknown* [2021] EWHC 1201 (QB) and *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471, the Court noted that an anonymous but identifiable defendant could be served with a Claim Form by alternative means which *"can reasonably be expected to bring the proceedings to the notice of all of those who fall within the definition of 'Persons Unknown'"*. The Court also noted that deeming that persons unknown had been served, when in fact they had not, offended the fundamental principle of justice that each person subject to the jurisdiction of the court should have sufficient notice to enable them to be heard.

- In dismissing the application, the Court noted that it was not satisfied that the Proposed Alternative Service could reasonably be expected to bring the proceedings to the attention of the individuals, which would be bound by the injunction. The Court noted that there was a distinction, as drawn in *Cameron*, between (i) *"anonymous defendants who are identifiable but whose names are unknown"*, such as squatters occupying a certain property, and (ii) defendants *"who are not only anonymous but who cannot even be identified"*, such as those persons, out of the 11 million visitors to Epping Forest who had been responsible for the acts of public nuisance. Whilst the first category of defendant could, practically and conceptually, be identified and communicated with, the latter category could not. Finally, the Court noted that if it had granted the application for an injunction, it would have done so without having established jurisdiction over anyone.

PH*lit* comment:

This judgment is a useful reminder of the law on service by alternative means where the counter party is comprised of "persons unknown". The Court forcefully stated that, in such cases, the relevant question was when the proceedings were likely to come to the attention of the relevant individuals.

In the present case, the Court determined that posting the Claim Form around Epping Forest and on some websites, and then deeming service within 48 hours, "would be almost a complete fiction". In addition, the Court reprimanded the claimant for trying to fashion a remedy against the world at large by, for all practical purposes given the 11 million annual visitors, seeking an injunction binding the whole world. This, the Court noted, was frankly not an appropriate use of civil litigation as the Court was effectively being asked to legislate to prohibit the conduct complained of.

Court of Appeal confirms point at which cause of action accrues in respect of potentially negligent advice given on two occasions

***Lillo Sciortino v Marc Beaumont* [2021] EWCA Civ 786 (judgment available here)**

25 May 2021

- In overturning decisions of the lower courts, the Court of Appeal has held that where a professional party gives the same negligent advice on two separate occasions, there are (typically) two causes of action. Therefore, in the event that proceedings are issued more than 6 years after the initial advice was given, those proceedings may not be statute-barred where they have been issued within 6 years of the date when the same advice was given a second time.

- The underlying facts in this case date back to 2007. Subsequent to the appellant's (Mr Sciortino) bankruptcy in 2007, the trustees in bankruptcy applied for, and eventually obtained, a possession order in respect of his freehold property (the "**Possession Order**"). Mr Sciortino sought legal advice in respect of the Possession Order from the Kingston and Richmond Law Centre, who instructed the respondent (Mr Beaumont, a barrister) to advise on the prospects of an appeal.

- In April 2011, Mr Beaumont advised in conference that the appeal had reasonable prospects of success, but that the appellant should settle the case once permission to appeal had been granted and before the hearing of the appeal itself (the "**First Advice**"). The Court subsequently ordered on 14 July 2011 that the hearing for permission and the hearing of the appeal should take place concurrently, thereby nullifying Mr Beaumont's strategy (though the present judgment noted that this was no fault of Mr Beaumont).

- Later, in October 2011, Mr Beaumont was asked to provide a merits assessment for the purposes of extending Mr Sciortino's legal aid certificate from £5,000 to £12,500. On 26 October 2011, Mr Beaumont provided written advice, stating (amongst other things) that he considered the appeal to have a 55% to 60% chance of success (the "**Second Advice**", and together with the First Advice, the "**Advices**"). Mr Sciortino's appeal was heard on 15 November 2011, and was unsuccessful.

- On 25 October 2017, Mr Sciortino issued proceedings against Mr Beaumont and made five different allegations of negligence, including in respect of the alleged "*negligently optimistic*" Advices. As Mr Sciortino accepted that the First Advice was statute-barred on grounds of limitation, the question for the Court was whether the Second Advice constituted a new cause of action, which would not be statute-barred. The lower courts found in favour of Mr Beaumont and held that the Second Advice, being based on the same factual matters and law as the First Advice, constituted the same cause of action and

therefore the limitation period was not interrupted as a result of the Second Advice – instead it expired 6 years following the giving of the First Advice in April 2011.

- The Court of Appeal disagreed. Whilst noting the decision in *Khan v RM Falvey* [2002] EWCA Civ 400) that: "*a claimant cannot defeat the statute of limitations by claiming only in respect of damage which occurs within the limitation period, if he has suffered actual damage from the same wrongful acts outside that period*", the Court of Appeal did not consider the Advices to be the same wrongful acts, and, accordingly, *Khan* was distinguishable.

- The First Advice related to the prospect of the appeal of the Possession Order, and specifically recommended settlement as and when permission to appeal was granted. By the time of the Second Advice, the opportunity for settlement had not arisen as envisaged in Mr Beaumont's original strategy, and Mr Beaumont's instruction was then to provide merits advice in relation to Mr Sciortino increasing his legal aid. In view of the different context of the Second Advice, including the opportunity for Mr Beaumont to have reconsidered the realistic prospects of success, the Court of Appeal considered that the Second Advice constituted separate advice and therefore a fresh cause of action. Mr Beaumont was therefore liable for any damages caused by the Second Advice.

- As a final point, Mr Beaumont also contended (in the alternative) that the claim in respect of the Advices should be summarily assessed for want of merit. The lower courts did not consider the claim capable of summary assessment, which was upheld at the appellate level. The Court of Appeal added a point of practicality and use of court resources: if summary judgment were granted on the Advices-claims, and subsequently appealed, that appeal would likely take longer than the final trial on the four other allegations pleaded by Mr Sciortino (which allegations had not been subject of this appeal).

PH*lit* comment:

The Court of Appeal remarked that a second confirmatory piece of advice will not always interrupt limitation; for example, where the recipient of the advice was firmly committed to a given course of action that was not affected by any later advice. Furthermore, the Court confirmed that there is no continuing duty upon legal advisers to review previous advice for potential errors (subject to the terms of any retainer). However, that situation is distinct from an adviser being instructed to review or reassess the previous advice and therefore advise on a separate occasion.

Whilst these clarifications will be of some comfort to professional advisers, particularly solicitors and barristers, this case has opened up the potential for claimants to bring professional negligence claims in circumstances where the original advice was provided outside of the limitation period, but the same advice is then given again which effectively restarts the limitation period.

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

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

Harry Denlegh-Maxwell
Senior Associate
Litigation and Investigations
T: +44 (0)20 3321 1008
harrydenlegh-maxwell@paulhastings.com

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

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

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

Paul Hastings (Europe) LLP

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