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New rules for trial witness statements in the Business and Property Courts; Court of Appeal rules that 'without prejudice' statements are admissible to defend against allegations of fraud; and Court of Appeal confirms that the Quincecare duty is limited to customers of a financial institution

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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 discuss the key points arising out of the new Practice Direction 57AC, which sets out revised rules for producing trial witness statements in the Business and Property Courts and aims to reduce the "over-lawyering" of witness evidence.
- We consider a High Court decision in which the Court granted the claimant summary judgment but nevertheless gave permission for the defendant to proceed with part of its counterclaim alleging fraudulent breach of warranty.
- We review a High Court finding that the desirability of proceeding against all defendants simultaneously in the same jurisdiction provides sufficient reason to grant permission to serve out in a libel claim.
- We reflect on a Court of Appeal decision that a claim for equitable rescission of a settlement agreement brought by HMRC was time barred under the Limitation Act 1980 because it was analogous to the common law claim of deceit which is subject to a six-year limitation period.
- We note a Court of Appeal ruling that "without prejudice" statements contained in a mediation paper were admissible to defend against allegations of fraud.
- We consider a Court of Appeal decision that confirms the so-called *Quincecare* duty, which is owed by a bank to its customers, does not extend to the customers' creditors.

- We discuss a pertinent High Court ruling in which the Court granted an application for summary judgment in respect of a claim for rent arrears and dismissed a number of COVID-19 related defences.

- We note a novel High Court decision in which a non-party disclosure order was granted, but the respondent was not required to produce any material that might be protected by privilege against self-incrimination.

- We review a High Court ruling that considered whether a court order which allowed the claimant to serve a foreign defendant via an alternative method of service was valid in circumstances where permission to serve out of the jurisdiction had not been obtained first.

- Finally, we consider a High Court decision on whether a Damages Based Agreement was enforceable in circumstances where the client, a defendant in the underlying litigation, had not recovered anything from those proceedings but had instead retained a benefit which he might otherwise have lost.

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Practice Direction 57AC: combatting "over-lawyered" witness statements

CPR Practice Direction 57AC (available here)

6 April 2021

- Last month saw the introduction of the new Practice Direction 57AC: Trial Witness Statements in the Business and Property Courts ("**PD 57AC**"), together with its appended "Statement of Best Practice" (the "**SOBP**").

- We set out below the key points to be aware of in respect of PD 57AC. For a fuller commentary, please see our Stay Current article available here.

Scope

- PD 57AC applies to all *"trial witness statements"* signed on or after 6 April 2021 in new and existing cases before the Business and Property Courts, with certain limited exceptions. It does not apply to witness statements used in interim/interlocutory applications.

Preparation and interviews

- One of the key concerns PD 57AC has sought to address is the perceived "over-lawyering" of witness evidence. Under the new rules, whilst it is still expected that legal representatives will take carriage of drafting witness statements, the lawyer's influence should be minimised. Wherever possible, a witness statement should be based on records or notes obtained directly from the witness during the conduct of an interview. In this regard, the interview should be recorded as fully and accurately as possible, dated and retained by the legal representatives (paragraph 3.11 of the SOBP). Interviewers should avoid asking leading questions (paragraph 1.2 of the SOBP), particularly where critical points of fact are concerned, and instead open questions should be used as much as possible.

- The use of other means of obtaining witness evidence (for example by way of written questionnaire), whilst not prohibited, is clearly discouraged. If a trial witness statement is not based upon evidence obtained by means of an interview (or interviews), then this

should be confirmed in writing at the beginning of the witness statement and the process that has been used should be described (paragraph 3.12 of the SOBP).

- The overall preparation of a trial witness statement should involve as few drafts as possible (paragraph 3.8 of the SOBP). Where further clarification of a witness's evidence is required, this should be sought by non-leading questions for the witness to answer in their own words, without the lawyer suggesting a response.

Documents

- A trial witness statement should only refer to documents where absolutely necessary. Importantly, all documents shown to the witness during the preparation of their statement or that are referred to in the statement must be set out by way of an enclosed list (paragraph 3.2 of PD 57AC). The list should identify or describe the documents in such a way that they may be located easily, but where documents are privileged, they can be identified by category or general description in order to maintain privilege (paragraph 3.5 of the SOBP).

- Referenced documents are only to be exhibited to a witness statement if they have not already been produced or disclosed in the proceedings (paragraph 3.8 of the SOBP).

Form and Content of trial witness statements

- A witness statement should only address matters of fact: (i) that are within the witness's own personal knowledge; (ii) that are not common ground; and (iii) in respect of which the witness can add substance beyond the documentary evidence (paragraph 4.1 of PD 57AC). The content must be in the witness's own words (paragraph 3.7 of the SOBP and paragraph 18.1 of Practice Direction 32) and, as far as practicable, be lifted from the contemporaneous record of witness interviews. The SOBP provides that witness statements:

  - should be as concise as possible without omitting anything of significance;

  - should not quote at length from any document;

  - should not seek to argue the case;

  - should not take the court through the documents in the case or set out a narrative derived from the documents (those being matters for argument);

  - should not include any matters of belief, opinion or argument; and

  - in relation to important disputed matters, should record how well the witness recalls the relevant events, and whether their recollection has been refreshed by any documents.

Confirmation of compliance

- Tying the salient threads of PD 57AC together is a newly mandated statement that a witness must sign together with the usual statement of truth (set out in paragraph 4.1 of PD 57AC). In addition, the relevant legal representative must endorse the witness statement with a certificate of compliance (in the form set out in paragraph 4.3 of PD 57AC) confirming that the witness statement has been produced in a manner compliant with PD 57AC and Practice Direction 32.

Sanctions

- Whilst the sanctions for failing to comply with PD 57AC were previously already available to the court, the codification of such sanctions in paragraph 5.2 serves as a stark warning that the court may be taking a stricter approach towards compliance.

PH*lit* comment:

Practically speaking, the most significant change for practitioners is likely to be the interview phase, which can no longer be predicated upon a chronological run of documents. Interviews will have to be event-led rather than document-led. The selection of documents to show the witness will likely prove a difficult balancing act between ensuring that the witness is able to give their best evidence, without producing an extensive list of documents, which may call the witness's credibility into question, and potentially draw attention to adverse documents not previously in the spotlight.

In short, and at least in theory, the intention of PD 57AC is to improve the authenticity of witness statements by encouraging an oral evidence-in-chief-style approach to preparation, whilst maintaining the efficiencies of "cards on the table" litigation generated by pre-prepared witness statements. Only time will tell as to whether lawyers are able to kick their old habits.

Summary judgment awarded to claimants but defendant still granted permission to proceed with counterclaims of fraud

***Arani and others v Cordic Group* [2021] EWHC 829 (Comm) (judgment available here)**

7 April 2021

- The High Court has granted an application for summary judgement in respect of a claim for recovery of monies held in a retention account following a share sale, despite also granting permission for the respondent to proceed with a counterclaim based on alleged fraudulent breaches of warranty.

- The case concerned a share purchase agreement dated 1 November 2018, pursuant to which the claimants sold shares in a company to the defendant for the total consideration of £10.2 million (the "**SPA**"). Of that consideration, £2 million was paid into a retention account (the "**Deferred Consideration**") and held on escrow to be released to the claimants 16 months following completion (i.e. by 1 March 2020), unless a "Claim" (as defined in the SPA) had been notified by the defendant in accordance with the provisions of the SPA.

- The Deferred Consideration was not released by 1 March 2020 and no Claim had been notified. However, on 2 March 2020, the defendant's solicitors sent letters to each of the claimants alleging breaches of certain warranties under the SPA (the "**2 March Letters**"). In response, the claimants asserted, amongst other things, that the letters had been sent out of time.

- On 17 April 2020, the claimants issued proceedings seeking specific performance of the defendant's obligation to release the Deferred Consideration. On 1 June 2020, the defendant served a Defence and Counterclaim: (i) denying the claimants' right to the Deferred Consideration; (ii) claiming damages for breach of warranties on the grounds of breach of contract and misrepresentation; and (iii) asserting a right to set off the Deferred Consideration against the sums claimed pursuant to the counterclaim.

- One day into the claimants' summary judgment application, the defendant issued an application to amend their Defence and Counterclaim to include an additional claim for fraudulent breaches of warranty against three of the five claimants, which led to the

hearing being re-listed. Shortly before the next hearing was due to take place, the defendant's counsel submitted a skeleton argument arguing that, on the basis of recently discovered documents, the claimants should not be entitled to release of the Deferred Consideration because they had come to the court with *"unclean hands"*. As a result, the hearing was re-listed again.

- When the hearing eventually took place the defendant, relying on *Quadrant Visual Communications Ltd v Hutchinson Telephone (UK) Ltd* [1993] BCLC 442, argued that the Court had to consider the merits of an adequately pleaded fraud case and should not, therefore, exercise its discretion to order summary judgment.

- The Court held that the claimants were entitled to summary judgment in respect of the claims in fraudulent misrepresentation only (but granted permission for the defendant to proceed with the action for fraudulent breach of warranty) as the 2 March Letters were sent outside the contractual limitation period and did not otherwise conform with the SPA's notice requirements because they did not: (i) set out "full particulars" of a claim; (ii) state that a claim was actually being made; and (iii) include an estimate of the claim amount.

- The Court described the 2 March Letters as *"a last-minute tactic, designed to avoid having to pay the claimants the money in the retention account"* and also held that, whilst the defendant was entitled to bring a claim for fraudulent breach of warranty after the contractual limitation period, such a claim did not fall within the contractual definition of "Claim" and therefore did not in any event entitle the defendant to withhold payment of the Deferred Consideration. Further, there was similarly no right of set-off of the Deferred Consideration as against the counterclaimed amount.

- As to the defendant's argument that the claimants' application should be rejected on the basis that they had come to Court with "*unclean hands*", the Court was not satisfied that it was appropriate for payment of the Deferred Consideration to be withheld on this basis, given that the defendant had no defence to the claim for specific performance. The Court distinguished the case of *Quadrant* on the facts, as there had been a clear finding of *"unclean hands"* in *Quadrant*. Furthermore, as the allegation of *"unclean hands"* only concerned three of the five claimants, the judge commented that it *"would not be fair to deprive [the fourth and fifth claimant] of their share"* of the Deferred Consideration.

PH*lit* comment:

This case gives rise to a number of pertinent points. First, although the defendant's claim for fraudulent breach of warranty was allowed to proceed, it serves as a useful reminder as to the strict approach that the court takes towards compliance with contractual limitation and notice provisions; purchasers should ensure that they pay close attention to such provisions as any mistake will likely be fatal to their case.

Further, it demonstrates that an effective no set-off clause can mean that a purchaser is unable to defend a claim for release of deferred consideration by setting off potential counterclaims.

The judgment is also interesting for its approach to late allegations of fraud. Whilst the Court granted the defendant's late application to amend its counterclaim to include an allegation of fraudulent breach of warranty (which ended up being the only part of the counterclaim that survived summary judgment), it demonstrated that it will be alert to the timing and other circumstances surrounding late allegations of fraud which it considered at length before granting permission to proceed.

High Court finds that the desirability of hearing all claims together is sufficient reason to grant permission to serve out

Soriano v Forensic News LLC and others **[2021] EWHC 873 (QB) (judgment available here)**

13 April 2021

- In January 2021, as reported in PH*lit*, the High Court granted the claimant permission to serve its claims out of the jurisdiction against the first to fifth defendants in these proceedings. The application as against the sixth defendant, a resident of the US, was adjourned due to lack of notice of the original hearing date.

- In the main proceedings, the claimant alleges the following against the sixth defendant: (i) defamation in respect of two separate publications; and (ii) misuse of private information concerning the publication of two photographs. This latest interim hearing concerned the claimant's adjourned service-out application against the sixth defendant (the "**Service-Out Application**"), together with the sixth defendant's application for relief from sanctions for failure to serve witness evidence in time in response to the Service-Out Application (the "**Relief Application**").

- The Relief Application was granted, as was the Service-Out Application, but only in respect of the claimant's defamation claim.

The Relief Application

- The sixth defendant filed its evidence in response to the Service-Out Application four months late. In determining whether the sixth defendant should be granted relief, the Court considered the tripartite test for relief established in *Denton v TH White Limited* [2014] EWCA Civ 906 [2014] 1 WLR 3926:

  - Was the breach serious or significant? – the delay in filing the witness evidence was seen to "*significantly disrupt the preparation for the hearing*", resulting in a considerable time and cost impact. The Court therefore considered the breach serious and significant;

  - Was there a good reason for the breach? – the Court considered that compliance had been (wrongly) left to the last possible moment, and as such the sixth defendant was "*courting disaster*". There was no good reason for the four-month delay; and

  - Considering all the circumstances, should relief be granted? – the claimant's conduct of the claim was deficient in a number of ways, having failed to: (i) comply with the pre-action protocol; (ii) provide advance notice of the claim; (iii) notify the sixth defendant of the outcome of the January hearing; and (iv) serve the court order requiring the sixth defendant to file witness evidence by 15 March. The Court considered that such failings meant that the claimant shared "*a considerable allocation of responsibility for the procedural confusion*". In addition, the evidence subject to the Relief Application was considered "*highly relevant*" for the purposes of fairly and properly determining the Service-Out Application.

    Accordingly, notwithstanding that the Court considered the sixth defendant's failure to comply with the deadline for service of its witness evidence to be a serious breach for which there was no good reason, it found that, in the context of the litigation as a whole, it was just and appropriate for the Relief Application to be granted.

The Service-Out Application

- For permission to serve both claims for defamation and misuse of private information out of the jurisdiction, the claimant had to show that:
  - there was a good arguable case that the relevant claim fell within one of the 'jurisdictional gateways' set out in paragraph 3.1 of CPR PD 6B;
  - there was a serious issue to be tried, measured by reference to the summary judgment standard of there being a real prospect of success; and
  - England and Wales, on the balance of probabilities, was clearly the *forum conveniens*.

Defamation

- It was accepted by the sixth defendant that the defamation claim fell within paragraph 3.1(9)(a) of CPR PD 6B as: "*A claim made in tort where […] damage was sustained […] within the jurisdiction*".
- As to whether there was a serious question to be tried, the Court considered that there had to be a real prospect that both publication of the offending material, and serious damage, had occurred within the jurisdiction of England and Wales:
  - Publication: that the two articles had been published 792 and 142 times (respectively) in the UK was held to demonstrate a real prospect of publication within the jurisdiction.
  - Serious damage: following *Lachaux v Independent Print Ltd* [2019] UKSC 27, the claimant had to show serious damage not just by reference to the meaning of the offending words but also by reference to actual evidence as to the impact of those words on the claimant's reputation. Whilst noting inadequacies in the claimant's evidence, the Court was satisfied with the totality of the evidence to the summary judgment standard that the publications "*arguably amount to a serious attack on the Claimant's integrity capable of causing significant harm to business interests*".
- With respect to whether England and Wales was clearly the *forum conveniens*, the Court found that, when considering the claim against the sixth defendant in isolation, it was not, due to (amongst other things): (i) the higher ratio of publications in foreign jurisdictions, compared with England and Wales; (ii) the lack of evidence as to the damage to the claimant's reputation in England; and (iii) the fact that, while Washington state law would include a claim for damage sustained in England and Wales, it was unlikely that a libel judgment given by an English Court would be enforceable against the sixth defendant in the USA.
- However, notwithstanding that England and Wales was not clearly the *forum conveniens*, the claim did not stand in isolation. The Court determined that it was preferable for the case to be tried in England and Wales, together with the other claims against the first to fifth defendants, so that they could all be determined in one forum. The Court therefore granted the Service-Out Application in respect of the defamation claim.

Misuse of private information

- In respect of the claim for misuse of private information arising out of the publication of two photographs, the claimant sought to rely on the jurisdictional gateway under paragraph 3.1(21)(a) which provides that: "*A claim is made for breach of confidence or misuse of private information where […] detriment was suffered, or will be suffered, within the jurisdiction*". In view of the prior "*mass publication*" of the claimant's image generally

in the media (including the photographs in question), the Court found that the claimant had not demonstrated a good arguable case of a detriment being suffered.

- The Court did not consider that the claimant enjoyed a reasonable expectation of privacy in the two photographs, with the result that there was no serious issue to be tried. Accordingly, and notwithstanding that the third part of the service-out test (*forum conveniens*) was satisfied, the claimant was denied permission to serve the claim for misuse of private information out of jurisdiction.

PH*lit* comment:

This case provides useful guidance in respect of a number of issues. With respect to applications for service out of the jurisdiction, it demonstrates that the existence of related claims already before the English courts, can be a determinative factor of whether England and Wales is the forum conveniens*, even if other factors suggest that ordinarily it would not be.*

As to applications for relief from sanction, the Court has again demonstrated the seriousness with which it regards rule breaches. However, where the respondent to a relief application has contributed in some way to the breach in question, this may tip the balance in favour of the applicant, even where the breach has been significant.

Court of Appeal holds that a claim for equitable rescission was time barred by analogy to the common law claim for damages in the tort of deceit

IGE USA Investments Ltd (formerly IGE USA Investments) v Revenue and Customs Commissioners **[2021] EWCA Civ 534 (judgment available here)**

14 April 2021

- The Court of Appeal has confirmed that a claim for equitable rescission of a contract for fraudulent misrepresentation is subject to a six-year limitation period by analogy to a common law claim for damages in the tort of deceit in circumstances where the underlying facts would support either claim.

- This case concerned a settlement agreement concluded between the parties in 2005 after the appellants, IGE USA Investments Ltd (formerly IGE USA Investments) ("**IGE**"), approached HMRC seeking clearance for certain transactions. Without such clearance, HMRC could have issued a notice to negate the various tax advantages that IGE obtained under the transactions.

- From 2011 onwards, HMRC began to receive further information which suggested that the nature of the transactions was different to that originally represented to it by IGE. Based on this new information, HMRC purported to rescind the settlement agreement on the basis of a material misstatement of facts and/or a failure to provide adequate disclosure, and sought a declaration from the court that the rescission was valid. HMRC subsequently applied to amend its particulars of claim to introduce a claim that IGE made the past representations fraudulently.

- IGE resisted the application on the grounds of limitation. They relied on section 36 of the Limitation Act 1980, which provides that the time limit for actions founded on tort shall not apply to equitable relief *"except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939"* (and before it, the Limitation Act 1623).

- In support of its case, IGE relied on *Molloy v Mutual Reserve Life Insurance Company* (1906) 94 LT 756 in which the Court of Appeal held that the claimant's claim for a

declaration that an insurance policy entered into by him with the defendant was induced by fraudulent misrepresentation was time-barred because, despite there being no statutory bar to a claim for equitable relief, the six-year limitation period that applied to a claim for damages in the tort of deceit applied by analogy.

- In response, HMRC sought to distinguish *Molloy* on the basis that the relief sought was recovery of money paid under the insurance policy for which the claimant needed a court order, whilst the relief sought by HMRC would enable it to recover tax for which no court order was needed.

- At first instance, the High Court preferred the arguments advanced by HMRC and distinguished *Molloy*. It also found that the appropriate analogy to HMRC's claim for equitable rescission based on fraudulent misrepresentation was the common law claim for declaratory relief (for which no limitation period applies), rather than a claim in the tort of deceit. The High Court therefore allowed HMRC's application to amend its particulars of claim and for the proceedings to move forward to trial.

- The defendants appealed and argued that the High Court had wrongly interpreted the decision in *Molloy*. The Court of Appeal was therefore required to undertake a detailed examination of *Molloy* to determine the principle that it establishes.

- Crucially for the Court of Appeal, the judgment in *Molloy* stated that, in cases of fraud, a claimant could either bring an action for damages at common law or seek equitable relief by rescinding the contract. If equitable relief is sought, the statute of limitation does not apply directly, but *"it applies indirectly, for it is settled law that where it is only a question of the remedy and you come into equity […] for the purpose of getting equitable relief, then the equity of the court acts by analogy"* to the statute of limitations. In determining what is the relevant analogy, it was noted in *Molloy* that it was enough that the relief sought was *"similar"*.

- The Court of Appeal agreed with the court in *Molloy*, that if the relief sought is a payment of money, then the correct analogy would be with a claim in damages for the tort of deceit. The Court also noted that it would be contrary to public policy if claims for equitable relief based upon fraud could be brought without being subject to any limitation period in circumstances where the relief sought is the same or similar to that which the claimant could have sought in a different, but similar, action which is subject to a limitation period. The Court of Appeal therefore found that the ratio of *Molloy* was that *"any claim for equitable rescission of a contract on the grounds of fraudulent misrepresentation is subject to a six-year limitation period by analogy to a claim for damages in the tort of deceit, where the facts as pleaded would allow either claim"*.

- The Court then considered whether it was required to follow its own precedent and find against HMRC. The Court noted that it was bound by its own decision unless an exception applied. Accordingly, it considered the following exceptions identified in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 CA:

  - the court is entitled to decide which of two conflicting decisions of its own it will follow;

  - the court must not follow a decision of its own which, although not explicitly overruled, cannot stand with a decision of the House of Lords / Supreme Court; and

  - the court is not bound to follow its own decision if it is satisfied that it was given *per incuriam*: i.e. the previous court acted in ignorance of: (i) a previous decision of its

own; (ii) a decision of the House of Lords / Supreme Court; or (iii) the terms of a statute or other rule.

- As the Court did not find that any of the exceptions applied on the facts, it was bound by *Molloy* and therefore upheld IGE's appeal and refused HMRC permission to amend its pleadings.

PH*lit* comment:

This case provides helpful guidance on the curious position regarding limitation periods applicable to equitable remedies in English law. It appears that the starting point is for the court to engage in an investigation as to whether the relief sought is analogous to a common law remedy which might carry a limitation period. As regards the equitable relief of rescission specifically, the Court of Appeal has now clarified that such relief is analogous to the tort of deceit and therefore is subject to a six-year limitation period. Whilst applying a six-year limitation period for cases concerning fraud may seem harsh, it is worth remembering that the clock will only start running once the claimant has discovered the fraud or could with reasonable diligence have done so.

Court of Appeal finds statements contained in a "without prejudice" mediation paper were admissible in order to rebut allegations of fraud

***Berkeley Square Holdings Ltd & Ors v Lancer Property Asset Management Ltd & Ors* [2021] EWCA Civ 551 (judgment available here)**

15 April 2021

- The Court of Appeal has upheld a decision of the High Court that ruled the defendants were entitled to rebut the claimants' allegations of fraud by relying on without prejudice statements made in a mediation paper.

- The proceedings arose out of an alleged fraud committed by the defendant ("**Lancer**"), which managed the claimants' London property portfolio, its directors and holding company, pursuant to which Lancer significantly increased its management fees and paid part of them to an appointed representative. A significant area of dispute between the parties was whether the claimants had in fact authorised or affirmed the payments.

- The defendants' position was that the claimants had affirmed the payments, and they sought to rely on the fact that the payments were detailed in a mediation position paper provided to the claimants as part of a previous dispute regarding Lancer's performance bonus. The position paper was marked *"without prejudice"*, however the defendants sought to rely on the "fraud exception" to the without prejudice rule, in order to admit the relevant statements into evidence. In brief, the "fraud exception" allows a party to rely on without prejudice material to show that an agreement should be set aside as it was entered into following misrepresentation, fraud or undue influence.

- At first instance, the High Court considered that it would be *"contrary to principle"* if the "fraud exception" could be used to admit without prejudice material to evidence a fraud, but not to defend against allegations of fraud. Accordingly, the without prejudice material was ruled admissible. In addition, the High Court considered that the statements would also have been admissible under the "*Muller* exception", which derives from the case of *Muller v Linsley and Mortimer* [1996] PNLR 74 where without prejudice negotiations were admitted to show whether a party had acted reasonably in reaching a settlement with a third party to mitigate its loss. In the present case, the High Court considered that the "*Muller* exception" was of more general application, and allowed without prejudice material to be admitted into evidence where a claim could not be fairly determined without reference to that material. The claimants appealed.

- The Court of Appeal, generally agreeing with the High Court's reasoning, dismissed the appeal. The Court noted that the "fraud exception" is intended to encompass cases where an apparent agreement has been made, but the parties' consent to entering into that agreement is questioned because of fraud, misrepresentation or undue influence (in addition to other circumstances which would vitiate consent). The Court concluded that there was no principled ground for distinguishing between, on the one hand, allowing without prejudice material into evidence to demonstrate a fraud, but on the other, not allowing such material into evidence to defend against such allegations.

- Regarding the application of the "*Muller* exception", the Court of Appeal considered that the High Court had erred in its application, with its analysis moving *"a long way from the facts of Muller"*. The Court of Appeal concluded that raising an issue which cannot be fairly determined without reference to the without prejudice material might give rise to waiver of without prejudice privilege, but the counterparty to the negotiations to which the privilege attaches (if they are also a party to the litigation) must then choose to accept that waiver. In the present case, the defendants did not argue that there had been a waiver of privilege so the point was not considered further.

PH*lit* comment:

This decision confirms that the ambit of the "fraud exception" to the without prejudice rule is broader than previously thought. It has long been established that a party can rely on without prejudice material to show that an agreement should be set aside on the grounds of misrepresentation, fraud or undue influence. However, this case now confirms that a party can also rely on without prejudice material to defend against such allegations.

The decision is also notable for the Court's comments on the scope of the "Muller exception", and, in particular, its observation that the exception is not as broad as suggested by the High Court, but rather is of narrow application. It does not apply simply because a party seeking to rely on without prejudice material has raised an issue which cannot be fairly determined without reference to that material, as the High Court had suggested. Instead the Court held that it is more limited; in a two-party case it might be invoked where one party has raised an issue which necessitates a waiver of without prejudice privilege in order to be properly determined, but the second party must consent to waiver of that privilege. However, the question left open by Muller is whether, in circumstances where the privilege belongs to a third party who is not party to the proceedings, that third party's consent is required before without prejudice privilege is overridden.

Court of Appeal strikes out claims for breach of *Quincecare* duties - confirming that such duties are limited to protecting customers of financial institutions

***Stanford International Bank (in liquidation) v HSBC Bank Plc* [2021] EWCA Civ 535 (judgment available here)**

15 April 2021

- The Court of Appeal has overturned a decision of the High Court and struck out claims for dishonest assistance and breach of the so-called *Quincecare* duty brought by the liquidators of a company against the defendant bank who had operated a number of the company's accounts.

- The claimant, Stanford International Bank ("**SIB**"), was an Antiguan bank which went into liquidation in 2009 following the uncovering of a substantial fraud, with the bank owing in excess of £5 billion and 80% of investors' money misappropriated. The liquidators suggested that the entire bank was a Ponzi scheme.

- The defendant had operated four bank accounts for SIB and paid out £118 million to SIB investors between August 2008 and February 2009. SIB, acting by its liquidators, argued

that the defendant had breached its *Quincecare* duty by failing to recognise various red flags and take sufficient care that monies under its control were properly paid out.

- The *Quincecare* duty, established by the case of *Barclays Bank plc v Quincecare* Ltd [1992] 4 All ER 363, is an implied obligation that a bank will observe reasonable skill and care when executing a customer's instructions. A bank will be found to have breached its *Quincecare* duty where it has: (i) executed the customer's instructions, either knowing that they were dishonestly given or having shut its eyes to the obvious fact that the instructions were dishonestly given; (ii) acted recklessly in failing to make enquiries into the customer's instructions that an honest and reasonable person would make; and/or (iii) executed the customer's instructions whilst having reasonable grounds for believing that the instructions were an attempt to misappropriate funds.

- In the present case, the liquidators of SIB claimed that the defendant had breached its *Quincecare* duty by failing to identify red flags which indicated that SIB was being run as a Ponzi scheme. They argued that the creditors of SIB, once it had gone into liquidation, were prejudiced by the defendant's breach and loss arose from the fact that SIB had less cash to distribute to its creditors than it would have had but for the defendant's breach.

- The defendant argued that SIB had not suffered any loss and so the claim should be struck out or summary judgment issued in its favour. The crux of the defendant's argument was that SIB could not have suffered a loss as its net assets remained the same - the payments made by the defendant to its investors reduced its assets, but, equally, they discharged contractual liabilities which SIB owed to its investors by the same amount.

- At first instance, the High Court refused to strike out the claim on the basis that SIB's state of insolvency was a key factor in its inability to pay its creditors, and if the defendant had performed its *Quincecare* duty, more cash would have been available for this purpose. The High Court held that there was a distinction between determining the loss of a solvent and an insolvent company. As SIB was insolvent, the reduction of its liabilities to its investors (which resulted from the payments made by the defendant) did not represent a corresponding benefit to SIB's net assets.

- The Court of Appeal disagreed with this analysis, finding that SIB had not suffered any loss, and therefore could not sustain a claim in damages. In the Court of Appeal's view, the defendant did not owe a direct duty to SIB's creditors, its duty was to SIB alone as the customer. In addition, arguments about SIB's inability to pay its creditors did not pass muster as SIB itself did not lose anything: the payments made to investors also discharged its obligations to those same investors and thus the net asset position remained the same.

- In reaching this conclusion, the Court of Appeal considered that the High Court had confused SIB's position before and after the inception of the insolvency process: before an insolvency process commences, the fact that a company (even a heavily insolvent company) has slightly lower liabilities is a corresponding benefit to its net assets. In addition, having cash available to pay creditors upon insolvency is a benefit to creditors, not the company whilst it is still trading.

PH*lit* comment:

Financial institutions will welcome this decision as it confirms that the scope of the Quincecare *duty is limited: it is a duty owed by a bank to its customer and will not extend to the customer's creditors or other third parties. The decision also suggests that claims brought by the liquidators of a company, where the true loss lies in the inability to pay creditors, will face substantial hurdles.*

In addition, the decision puts to bed the High Court's finding at first instance that calculations of loss suffered by a claimant that is "hopelessly and irredeemably" insolvent might be performed on an alternative basis to the usual assessment of loss principles.

COVID-19 defences fail as High Court awards summary judgment in claim for commercial rent arrears

***Commerz Real Investmentgesellschaft mbH v TFS Stores Ltd* [2021] EWHC 863 (Ch) (judgment available here)**

16 April 2021

- In the first reported judgment concerning the recovery of commercial rent arrears in the wake of the COVID-19 pandemic, the High Court has awarded summary judgment in favour of the landlord, dismissing various defences raised by the defendant grounded in the economic circumstances arising from the pandemic.

- The claimant landlord, the leasehold owner of the Westfield Shopping Centre in West London, demised a unit to the defendant tenant (trading as "The Fragrance Shop"). As a result of the pandemic, the tenant was legally obliged, as a non-essential retailer, to close its premises during the periods of lockdown. The tenant, relying on the adverse financial consequences caused by the pandemic, had failed to pay rent since April 2020, as well as certain monthly service charges, resulting in the landlord's claim for £166,884.82.

- The landlord issued proceedings and then applied for summary judgment under CPR 24.2, which required it to show that: (i) the tenant had no real prospect of defending the claim at a trial; and (ii) there were no compelling reasons why the claim should go to trial.

- Resisting the application, the tenant sought to rely on the following three grounds to demonstrate that there was a real prospect of defending the claim:

  - The claim was issued prematurely and contrary to the Code of Practice for Commercial Property Relationships during the COVID-19 Pandemic (the "**Code**").

  - The claim attempted to circumvent the measures put in place to prevent forfeiture, winding-up and recovery of unpaid rent using the statutory procedure of Commercial Rent Arrears Recovery (CRAR).

  - The landlord was in breach of its obligations under the lease to insure the demised premises so as to cover forced closures and/or denial of access due to notifiable disease and/or government action.

- On the first ground, the Court considered that whilst the Code encourages landlords and tenants to work cooperatively, it nonetheless remains voluntary and, above all, does not affect the underlying legal relationship between the parties or the tenant's contractual obligation to pay rent. This ground was not maintained with any vigour at the hearing, and was rejected.

- As to the second ground, the Court dealt with it in equally terse terms, noting that although the Government had placed certain restrictions on the remedies available to landlords, such measures placed no restriction on landlords bringing a claim for rent arrears through the Court. Therefore, this second ground was also dismissed.

- Finally, the Court dismissed the tenant's insurance argument on the basis that: (i) the landlord was not obliged to insure the premises for events not specified in the lease

(including the pandemic), and therefore it was not in breach of the lease; and (ii) the landlord's insurance policy only covered damage/interruption to the landlord's business and not that of the tenant. The Court agreed with the landlord's submission that it could only claim under its insurance policy for non-payment of rent in circumstances where the lease's "rent cesser" clause was engaged. However, that clause only served to suspend rent where there had been physical damage to the demised unit, which did not cover the pandemic. The Court was not persuaded by the tenant's argument that a term should be implied to widen the scope of the rent cesser clause.

PH*lit* comment

This is the first reported judgment in relation to a landlord's claim for commercial rent arrears where the tenant has raised defences based on pandemic-related circumstances. The judgment confirms that, notwithstanding the protections that have been put in place for tenants over the last year, such measures do not prevent a landlord's ability to recover unpaid rent through the courts.

This will be of great relief to landlords, many of whom will be eager to recover for significant periods of unpaid rent. Naturally, it will come as a disappointment, and worry, to tenants, who have suffered significantly over the past year. Some have managed to reach agreements with their landlords, while others have held off claims for unpaid rent through reliance on the Code. However, this judgment shows that the Code does not impact the obligations of a tenant to pay rent and, as restrictions continue to be eased, we are likely to see landlords step up efforts to recover outstanding rent payments. It is, of course, also important to note that the moratorium on forfeiture is due to end on 30 June 2021. While this may mean that tenants are more willing to dig even deeper to make rent payments, or otherwise increase what they may be willing to offer as a short-term compromise until trading gets back to normal, it will may well be that some are simply unable to and that landlords will seek to enforce rights of forfeiture to bring in new tenants if they think that those tenants will be able to pay.

It is also worth noting that the doctrine of contractual frustration, which some commentators have suggested might be arguable as a means of escaping obligations to pay rent, was not in issue in this case. However, any hopes for tenants in this regard may have been short lived. On 22 April, the High Court handed down judgment in three conjoined landlord/tenant cases, involving Bank of New York Mellon and AEW UK Reit PLC as the claimant landlords: [2021] EWHC 1013 (QB). As part of the judgment, the High Court held that the pandemic did not constitute either a "full" or "temporary" frustrating event so as to discharge the parties from their contractual obligations, with the latter (a temporary frustration) held not to have any basis in law. However, the fact that each of the three leases in question still had a significant term left to run was a key factor behind the Court determining that frustration could not be invoked. As such, the door has still been left slightly ajar for either short-term leases and/or (in particular) leases that ended during lock-down.

High Court awards Norwich Pharmacal relief with a carve-out for self-incriminating material

Rowland and another v Stanford [2021] EWHC 988 (Ch) (judgment available here)

21 April 2021

- Taking a self-confessed "novel approach", the High Court has granted a Norwich Pharmacal Order ("**NPO**") against a non-party to litigation, which included a provision that meant that the defendant to the application was not required to provide documents otherwise protected by the privilege against self-incrimination.

- The claimants' application concerned an electronic file (the "**Archive**") which contained a back-up of certain emails belonging to them. Some of the emails were personal in nature, whilst others concerned financial matters that impacted the defendant. In circumstances unknown to the claimants, the defendant had obtained the Archive. The claimants subsequently applied for the NPO so as to: (i) require the defendant to disclose the Archive to enable them to take an image of the material contained within it; and (ii) require the defendant to swear an affidavit explaining how the Archive came into his possession, including:

a. explaining who supplied him with the Archive;

b. confirming which third parties had received information contained within the Archive; and

c. exhibiting correspondence falling within (a) and (b).

- The defendant resisted the application, arguing that such relief effectively enabled the claimants to obtain an order for disclosure without putting forward any proper case against him, thereby shielding them from the "*rigours of the court process*". In addition, the defendant submitted that he was concerned that the order would require him to self-incriminate and was being used by the claimant for the purpose of advancing future claims against him, noting that the claimants had *"harass[ed] and pursue[d] him"* for a number of years. For this reason, the defendant also argued that the relief should not be granted as the claimants had not come to the court with *"clean hands"* because of their involvement in a prior alleged fraud against him.

- The Court accepted the claimants' argument that the Norwich Pharmacal jurisdiction is broad and flexible, and applied the test set out in *Collier v Bennett* [2020] 4 WLR 116:

  - the applicant must demonstrate a good arguable case that a form of legally recognised wrong has been committed against them;

  - the respondent must be mixed up in the wrong so as to have facilitated the wrongdoing;

  - the respondent must be able, or likely to be able, to provide the requested information; and

  - requiring disclosure from the respondent must be appropriate and proportionate in all the circumstances.

- The Court found that limbs one to three had been easily satisfied. First, there was plainly a good arguable case that the first claimant's data, containing personal and confidential information, had been taken without authorisation. Second, the Court found that it was *"inescapable"* that the defendant was mixed up in the wrongdoing and had facilitated it, given that he had received the Archive with a view to making use of its contents. Third, the Court found that the defendant was obviously in possession of the Archive.

- In relation to the fourth limb, the Court noted that the clean hands doctrine was too narrow to be invoked as suggested by the defendant. Applying *RBS v Highland Financial Partnerships* [2013] EWCA Civ 328, the Court commented that the *"misconduct or impropriety of the claimant must have an 'immediate and necessary relation to the equity sued for'".* This was not satisfied in the present case, as the claimants had confirmed that they had no present intention to *"harass"* the defendant by pursuing him in potential future litigation.

- In relation to the point raised on self-incrimination, the Court noted its dissatisfaction with the "*crude*" arguments advanced by: (i) the claimants, who effectively sought to sidestep the issue as to whether they would bring proceedings against the defendant in the future in relation to the circumstances in which he obtained the Archive, despite having described the defendant's conduct as *"blackmail"*; and (ii) the defendant, who failed to properly particularise the alleged risk of future claims against him. The Court therefore struck a middle ground by granting the NPO, but including a provision entitling the defendant to

refuse to provide self-incriminating information, noting that wrongful refusal constitutes contempt of court.

PH*lit* comment:

This case reminds practitioners of the broad discretion afforded under the Norwich Pharmacal jurisdiction and helpfully restates the test applied by the courts. By including a carve-out which allowed the defendant to refuse to provide information likely to incriminate him, something typically found in freezing orders, the Court used its broad discretion to safeguard the defendant whilst ensuring that the claimants obtained access to relevant information.

The fact that a respondent to a Norwich Pharmacal application might in the future be involved in substantive litigation relating to the material which is the subject of the application, does not preclude the court from ordering non-party disclosure. In addition, while NPOs are often sought against innocent parties, which are not involved in any alleged wrongdoing, the Court confirmed that the Norwich Pharmacal jurisdiction can also be invoked to obtain disclosure against potential wrongdoer or knowing facilitator of an alleged wrong.

High Court rules on alternative methods of service where permission to serve out of the jurisdiction had not been granted first

***Goshawk Aviation Ltd and other companies v Terra Aviation Network SAS and other companies* [2021] EWHC 1029 (Comm) (judgment available here)**

23 April 2021

- The High Court has set aside an order granting permission for the claimants to use an alternative method of service under CPR 6.15 in circumstances where permission to serve out of the jurisdiction had not been granted first.

- The claimants brought a claim to recover sums due under various leases and other agreements, including a side letter (the "**Side Letter**"), entered into with the defendants, who were all based outside of the jurisdiction. The claimants served their claim on two process agents in England under provisions contained in the leases. All but the second and third defendants acknowledged service and indicated their intention to defend.

- The second and third defendants acknowledged service, but indicated an intention to contest jurisdiction and/or to seek to set aside service of the Claim Form, because some of the claims against them were brought under the Side Letter, which did not permit service via a process agent. Conceding the point, the claimants' solicitors then asked the defendants' solicitors to confirm whether they were instructed to accept service on behalf of the second and third defendants, in order to avoid the time and expense required in pursuing an application to serve out of the jurisdiction.

- The defendants' solicitors confirmed that they were not so instructed, and the claimants therefore issued an application for: (i) permission to serve out on the second and third defendants or, alternatively, permission to serve them by an alternative method, by email to their solicitors of record, under CPR rule 6.15, and (ii) an extension of time for service of the Claim Form under CPR rule 7.6. The Court made an order granting the claimants permission to serve the second and third defendants by email to their solicitors of record (the "**Service Order**") but did not grant permission to serve out of the jurisdiction or grant an extension of time for service. The claimants duly served the Claim Form by this method, on the last date of the four-month period for serving the Claim Form in the jurisdiction.

- The second and third defendants then applied for an order setting aside the service of the Claim Form on them, arguing that the claimants should not have been permitted to serve

by alternative means and that the Service Order allowing them to do so was obtained by material non-disclosure.

- In determining the application, the Court concluded that there were good reasons for permitting alternative service, both at the time of the Service Order and at the date of the present application. In brief:
  - The claim had plainly come to the attention of both defendants, who instructed the same solicitors as the other defendants and therefore had a legal team available to them which was fully up to speed on the litigation.
  - There was no dispute that the claimants would be granted permission to serve out of the jurisdiction if required, and so the defendants were not prejudiced by the loss of protections afforded by the requirements for permission to serve out.
  - The second and third defendants were not based in a jurisdiction party to the 1965 Hague Convention on Service or any bilateral service treaty with the UK. Evidence submitted in the proceedings suggested that service on the second defendant in Indonesia would take 2-4 months (though potentially nearer six months when taking into account the impact of COVID-19) and, in relation to the third defendant, the process for serving out in Thailand was estimated to take 12 months or longer. Such a delay was clearly not in the interests of justice when it was plainly more desirable for the claims against all five defendants, which gave rise to similar issues, to proceed in tandem.
- As to whether the Service Order was invalid for material non-disclosure, the Court noted that, as an *ex parte* application, the claimants had a duty of "*full and frank disclosure*". The claimants had failed to inform the court of prior litigation in France which had prompted the bringing of the present proceedings in the High Court. The Court agreed that it would have been desirable for this information to be placed before it, but considered that, in the circumstances, the non-disclosure was insufficient to set aside the Service Order.
- However, the defendant also raised an argument that the Service Order was invalid because the judge was first required to make an order giving permission to serve out before any order providing for alternative service could be given. As prior authorities supported this view, the Court agreed that it was necessary to grant permission to serve out first, before granting permission to serve by alternate means, and therefore the Service Order was invalid and had to be set aside.
- In light of this conclusion, the Court took the provisional view that it should grant permission to serve the Claim Form out of the jurisdiction and make an additional order that the steps previously taken to effect service pursuant to the Service Order constituted good service (noting that CPR 6.37(5)(b)(i) confers the power to retrospectively validate alternative service in such a case). However, the parties were invited to make further submissions at a later date as to appropriate relief in light of the Court's findings.

PH*lit* comment:

This decision provides helpful guidance as to the various factors the court will take into consideration when weighing up what amounts to a "good reason" to allow for alternative service. In the present case, it was in the interests of justice to advance the claims against all five defendants in tandem and avoid delay in progressing claims against two of those defendants due to prolonged service requirements outside of the jurisdiction.

However, although this case gives us some indication of the range of circumstances that might constitute a "good reason", all decisions of this type are highly dependent on their own facts.

The decision also highlights the fact that where the permission of the Court would ordinarily be required in order to serve out of the jurisdiction, seeking and obtaining an order for alternative service will not circumvent the need to obtain such permission. However, it is noteworthy that the Court took a pragmatic approach in this case, deciding that permission should be granted and giving an order that the steps already taken to effect service constituted good service. That being said, we await confirmation as to whether this is the end of the matter given the Court's request for further post-hearing submissions.

High Court holds Damages Based Agreement to be unenforceable where success was contingent upon a retained benefit

Tonstate Group Ltd and others v Wojakovski and others **[2021] EWHC 1122 (Ch) (judgment available here)**

30 April 2021

- The High Court has ruled that a Damages Based Agreement ("**DBA**") will not be enforceable if it provides for the legal representatives to be paid a percentage of a benefit (in this case shares) retained by the defendant to litigation, as opposed to a sum recovered from the opponent in the litigation.

- This case principally arose out of two sets of previously decided proceedings between Mr Wojakovski, who was the beneficial owner of 50% of the Tonstate Group, and Mr Matyas (Mr Wojakovski's former father-in-law) who was beneficial owner of the other 50%. In the first claim, a derivative action, Tonstate Group Limited claimed that Mr Wojakovski had wrongfully extracted money from it. In the second claim, Mr Matyas sought the rescission of a transfer of shares in Tonstate Group Limited that he had made to Mr Wojakovski. Judgment was granted against Mr Wojakovski in the first claim, and the second claim was settled on terms requiring him to transfer the relevant shares back to the Mr Matyas, save for 22,500 shares which he was permitted to keep (the "**Retained Shares**"). Tonstate Group Limited obtained a charging order over the Retained Shares as security for the judgment debt granted in the first claim.

- Throughout the underlying proceedings Mr Wojakovski had been represented by Candey Ltd ("**Candey**"), a firm of solicitors, under a DBA which provided that Candey was entitled to recover 25% (later increased to 29%) of any "proceeds" that Mr Wojakovski recovered in the proceedings. Candey applied for an equitable charge over the Retained Shares, by way of security for the fees that it claimed to be owed under the DBA. Candey contended that the Retained Shares represented assets preserved for Mr Wojakovski as a result of its work. The Tonstate Group resisted Candey's application, arguing that the DBA was unenforceable, or that no payment had accrued under it.

- The High Court held that Candey's application failed as a matter of both: (i) contractual construction; and (ii) enforceability in accordance with the Damages Based Agreement Regulations 2013 (the "**Regulations**"). Taking each point in turn:

  - **Construction** – the High Court considered that it was not possible to construe the meaning of the DBA so as to encompass the Retained Shares. The DBA allowed for recovery of any benefits derived from the proceedings, and the retention of shares already owned by Mr Wojakovski could not properly be characterised as a benefit deriving from the proceedings. Therefore, the fact that Mr Wojakovski simply kept the Retained Shares did not entitle Candey to payment.

  - **Enforceability** – in any event, to the extent that the above construction was wrong, that element of the DBA would be unenforceable. Under the Regulations, payment

under a DBA must be calculated as a proportion of the sum "recovered" in respect of the relevant claim. As such, payment under a DBA can only be made to the extent that the client makes a recovery from the other side in the litigation. The Court considered that this position was clear from the Regulations, their explanatory notes, the memorandum to the Regulations and statements made in Hansard. The latter went so far as to express the view that the Regulations were intended to be limited to agreements made by claimants, meaning that a DBA could not be validly entered into by a defendant to proceedings.

- Accordingly, Candey's application for a charging order over the Retained Shares was dismissed.

PH*lit* comment:

This decision is not altogether surprising given that the Regulations governing the operation of DBAs have generally been understood to preclude the use of DBAs by defendants.

However, and noting that much will depend on the precise wording of the individual agreement, what is most interesting is that this case demonstrates that a "retention" of rights, or avoidance of a detriment, is insufficient to constitute 'success' for the purposes of a DBA; there must be some actual recovery from the other side.

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