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

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

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In this edition…

- We consider a recent decision of the High Court which demonstrated that, although the automatic cost consequences of Part 36 do not apply to withdrawn offers, there is nothing to prevent the court from making a costs order which is very similar to the provisions of Part 36 where the offeree has acted unreasonably;
- We review a landmark Supreme Court ruling which has clarified the proper approach to assessing the weight of evidence where the court finds that there is a serious possibility (albeit not shown on the balance of probabilities) that it was obtained by torture;
- We note an interesting High Court decision which emphasises the strict test for bringing a representative action under CPR 19.6.;
- We analyse a helpful High Court decision on Data Subject Access Requests ("**DSARs**") which demonstrates that the courts are willing to take a robust approach where DSARs are being deployed tactically by individuals engaged in parallel proceedings against institutions; and
- Finally, we reflect on a Court of Appeal judgment in which the application of the SAAMCO principle was considered in the context of an auditor's negligence.

Costs consequences of withdrawn Part 36 offers

***Blackpool Borough Council v Volkerfitzpatrick Ltd* [2020] EWHC 2128 (TCC) (judgment available here)**

3 August 2020

- The High Court has demonstrated that, although the automatic cost consequences of failing to beat an offer issued under Part 36 do not apply to withdrawn offers, there is nothing to prevent the court from making a costs order which reflects the cost consequences of Part 36 where the offeree had acted unreasonably in rejecting the offer whilst it was available.

- The claimant council had contracted with the defendant contractor to construct a new tram depot. The council later brought proceedings claiming over £6 million in damages on the basis that the tram depot was defective in significant respects and unsuitable for the coastal location. In August 2019, the defendant issued a Part 36 offer for £750,000 in respect of certain parts of the claim (known as the Cold Formed Components Claim). The offer was withdrawn shortly before trial.

- At trial, the claimant was awarded £1.1 million in damages, of which £631,510 related to the elements of the claim that the defendant had sought to settle as part of its Part 36 offer. Accordingly, the claimant had recovered less than the amount of the offer.

- When considering whether the claimant had acted reasonably in rejecting the defendant's offer, the Court said that the focus must be on the facts and matters relevant to the merits of the claim as they ought reasonably to have appeared to the claimant at the time of the offer, not the wider commercial factors. Further, the Court should not simply decide the case with the benefit of hindsight. In this case, the claimant knew that its case had been significantly weakened by the evidence of the defendant, but nevertheless chose not to accept the offer. Accordingly, the Court gave an order for costs whereby the defendant paid 80% of the claimant's costs up to 5 September 2019 (representing 21 days after service of the Part 36 offer) with the reduction reflecting the claimant's unreasonable conduct in the claim. From 6 September onwards the claimant had to pay 80% of the defendant's costs in respect of the Cold Formed Components Claim which had been the subject of the Part 36 offer.

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Although this case shows that the Court can use its discretion to make a costs order that reflects the cost consequences of Part 36 where the applicable Part 36 offer has been withdrawn, this is far from guaranteed and is considerably less predictable than instances where the Part 36 offer has remained on the table. Whether or not to withdraw a Part 36 offer is a decision that should be considered carefully.

Supreme Court considers weight of evidence where there was a serious possibility it had been obtained by torture

***Shagang Shipping Company Ltd v HNA Group* [2020] UKSC 34 (judgment available here)**

5 August 2020

- The Supreme Court has clarified the proper approach to assessing the weight of evidence where the court finds that there is a serious possibility (albeit not shown on the balance of probabilities) that it was obtained by torture.

- The underlying claim was made under a guarantee of a contract to charter a vessel. The defendant alleged that the contract was procured by bribery and therefore the guarantee was unenforceable. The claimant responded that the allegation of bribery was supported by confessions made by the bribe-maker and bribe-recipient and that these confessions were obtained by torture. At first instance, the trial judge concluded (having been faced with a paucity of evidence) that torture could not be ruled out as a reason for the confessions and, in any case, the allegations of bribery had not been proven. As a result, the Court found that the contract was enforceable.

- The Court of Appeal allowed an appeal from that decision and remitted the case on the grounds that the judge failed to ask the correct legal question as to the weight that should be given to the confession evidence. In particular, when considering whether a bribe had been paid, the judge should have disregarded the possibility of torture as it had not been proven on the balance of probabilities.

- The Supreme Court concluded that the approach taken by the Court of Appeal was wrong. As a matter of principle and authority, the fact that torture could not be ruled out as a reason for confessions of bribery was a factor that the trial judge was entitled to take into account in his assessment. The Court said that it does not follow that where torture is not proven on the balance of probabilities, evidence of torture must be ignored. Such a position would be irrational and ignore the moral principles which underpin the rule.

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This decision provides a rare example of the Supreme Court ruling on the approach to assessing evidence. The judgment underlines the distinction between the court's approach to (A) the facts in issue in the case (i.e. those the claimant or defendant must prove to establish their respective arguments) and (B) the facts which tend to support or undermine the facts in issue. The former must be proven on the balance of probabilities, but the latter are not required to meet this threshold.

Appropriate use of representative actions under CPR 19.6

***Jalla v Shell International Trading and Shipping Company Ltd* [2020] EWHC 2211 (TCC) (judgment available here)**

14 August 2020

- The High Court has recently struck out the representative element of an action purportedly brought on behalf of 27,500 Nigerian individuals and 457 communities seeking redress for damage allegedly caused to their land, water supply and fishing stocks by an oil spill in 2011.

- The Court found that the claimants failed to demonstrate that they had the *"same interest"* in the claim: a requirement for bringing a representative action under CPR 19.6. Although the claims demonstrated common issues of fact and law, each claimant would have needed to demonstrate that the oil spill caused them damage which was highly individualised (at least at community level) as opposed to common across the whole group.

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The decision emphasises the strict test for bringing a representative action under CPR 19.6. It is insufficient for the cases to raise common issues of fact or law – in such cases the action would be more properly brought using the mechanism provided by the procedures for Group Litigation Orders.

The scope of representative actions under CPR 19.6 is due to be considered by the Supreme Court in the Lloyd v Google LLC litigation (a claim for damages arising out of loss of control of personal data), where permission to appeal the decision of the Court of Appeal has been granted. Accordingly, further guidance on appropriate use of CPR 19.6 can be expected in due course.

High Court holds that a bank did not need to comply with numerous and repetitive DSARs

***Lees v Lloyds Bank Plc* [2020] EWHC 2249 (Ch) (judgment available here)**

24 August 2020

- The High Court has dismissed a Part 8 claim against a bank for allegedly failing to provide an adequate response to the claimant's data subject access requests ("**DSARs**") on the basis that the DSARs issued were numerous and repetitive and their real purpose was to obtain documents not personal data.

- The claimant had entered into buy-to-let mortgages with the defendant bank between 2010 and 2015. The claimant was in proceedings against the bank in the County Court concerning the securitisation of the mortgages in an attempt to prevent possession proceedings. It was against this background that the claimant submitted a number of DSARs to the bank. In these proceedings, the claimant alleged that the bank had failed to provide adequate responses to various of his DSARs contrary to the Data Protection Act 2018 and the General Data Protection Regulation (EU) 2016/679 ("**GDPR**").

- The Court found that the bank had adequately responded in accordance with its obligations under GDPR, but commented *obiter* that, even if the bank had failed to provide data in compliance with the legislation, there may be good reasons for the court to decline to exercise its discretion to force compliance with the GDPR in situations where: (i) the DSARs issued are numerous and repetitive (and are therefore abusive); (ii) the real purpose of the DSAR is to obtain documents rather than personal data; (iii) there is a collateral purpose to the requests (for example, to use the documents obtained in furtherance of separate litigation with the entity to which the DSARs are made); and (iv) the data sought is of no real benefit to the claimant.

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This decision represents a positive development for financial institutions with large retail customer bases, as it demonstrates that the courts are willing to take a robust approach where DSARs are being deployed tactically by individuals against such institutions. It is not uncommon for individuals seeking to bring proceedings against banks and other financial institutions to deploy DSARs to obtain information that may not be available pre-action or, once proceedings have been brought, by traditional disclosure routes. It will be of some comfort to financial institutions that they may be able to refuse compliance in light of this decision. However, it remains unclear how this decision will fit with guidance issued by the regulator (the Information Commissioner's Office) in this regard and so financial institutions should proceed with caution for now.

Court of Appeal considers application of SAAMCO Principle

***Assetco Plc v Grant Thornton UK LLP* [2020] EWCA Civ 1151 (judgment available here)**

28 August 2020

- The Court of Appeal has considered the application of the SAAMCO principle in the context of an auditor's negligence. The Court held that where the auditor failed to detect management's dishonest concealment of the company's insolvency, the auditor was liable for the losses suffered by the claimant in continuing to conduct a loss-making business.

- The claimant company was the holding company of a group carrying on businesses relating to fire and rescue services. The defendant audited the group in 2009 and 2010.

- The audited accounts showed that the group was profitable, whereas it was in fact insolvent. The true financial status of the group came to light in 2011 and a scheme of arrangement was concluded with the group's creditors to avoid liquidation. The claimant company brought a claim for the losses it had suffered, in particular the sums paid to its loss-making subsidiaries. The claimant argued that the negligence of the auditors had prevented it from restructuring in 2009.

- The defendant auditors admitted negligence and in particular the failure to detect the prior management's dishonest representations. However, the defendant denied that it was the cause of the alleged losses. It argued that the losses arose from the claimant continuing with a loss-making business and this was outside the scope of the auditors' duty.

- In reaching its decision, the Court of Appeal considered the decision in SAAMCO (*South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191). This decision established that a claimant alleging professional negligence must establish that its loss falls within the scope of the duty owed by the defendant. In this regard the courts distinguish between two scenarios: (i) advice cases, where the defendant has advised on the transaction overall and so has a duty to protect against the full range of risks associated with it; and (ii) information cases, where the defendant has supplied only part of the material on which the claimant decided to enter into the transaction and so it is only liable for the consequences of any inaccurate information it has provided.

- The Court considered that the SAAMCO principle is capable of being effectively applied to most types of loss that may be claimed in respect of a negligent audit, stating that *"it is not a rigid rule of law but…simply a tool for determining the loss flowing from the negligently wrong information as opposed to the loss flowing from entering into the transaction at all"*. In the present case, the Court concluded that the defendant's failure to detect the dishonest representations of the management deprived the claimant of an opportunity to call the management to account and ensure that the errors were corrected. Accordingly, the losses suffered from continuing the business were the result of the information regarding the group's solvency being inaccurate and fell within the scope of the defendant's duty.

- Regarding the claimant's argument that it had suffered a *"loss of a chance"* to restructure in 2009, the Court held that, in this case, it was appropriate to treat the loss of a chance as a certainty, where a distinction between certain and almost certain was meaningless. As such, the ruling of the trial judge that the damages awarded to the claimant should not be discounted to take account of any chance that the restructuring might have failed was upheld.

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Application of the SAAMCO principle remains a complex area of the law and, as this latest decision demonstrates, one that is regularly refined and restated. Interestingly, the present case suggests that the SAAMCO principle may not need to be addressed in all cases and is not to be applied mechanistically. However, it will likely be necessary for practitioners to at least consider the application of the doctrine in any case where the provision of negligent information or advice is alleged.

The SAAMCO principle has recently been subject to argument before the Supreme Court in the appeal of Manchester Building Society v Grant Thornton UK LLP [2019] EWCA Civ 40. We await the Supreme Court's judgment with interest.

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

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