SHEARMAN & STERLING

UK Litigation Review 2020

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INTRODUCTION

Welcome to the inaugural Shearman & Sterling UK litigation review.

Our aim in producing this review is to highlight important and interesting English commercial cases from the last year: those that have brought about a development in the law or are notable examples of the way in which the law is applied to particular facts.

We cover the usual topics that any litigator or litigant in the English courts should know about (e.g., contract, procedure) but also a number of more specialist areas that are particularly topical at present e.g., competition, insolvency, data protection. Finally, we could not discuss UK litigation over the past year without mentioning the impact of COVID-19 and, of course, there is always something to say about Brexit.

Most of the judgments that are covered were handed down within the past 12 months. We have, however, taken some licence by including slightly older cases from 2019 where they are of particular importance, or relevance to other cases from within the last 12 months.

We hope you find the review interesting and welcome any feedback, comments or questions that you may have (details of your key Shearman & Sterling UK litigation contacts are on the preceding page).

S&S London Litigation Team

October 2020

THE YEAR IN REVIEW

The past year has seen some important judgments and hearings (with judgment awaited at the time of writing) on several subjects, some of which may shape the future of UK litigation for years to come. Litigants and litigators have also spent a good part of the year getting used to a new way of conducting litigation—remotely and fully electronically.

Starting with **contract law**, while there has been little by way of Supreme Court guidance on the subject, the lower courts continue to issue interesting judgments. Perhaps one of the 'hottest' topics is the implication of a duty of good faith into relational contracts. There have been a series of cases on this recently and it remains an unsettled area of law—some cases have confirmed the importance of relational contracts and implied a duty of good faith into them, while others have doubted both of those things. This is an area in need of appellate review (see **pages 7 to 11**).

There have been important developments in **company law** cases, most notably, the Supreme Court's determination that the rule against reflective loss does not apply to a company's creditors. There have also been some interesting cases on directors' duties (see **pages 12 to 14**).

Turning to **banking and finance litigation**, one notable issue that has received attention is the *Quincecare* duty—a well-known but not commonly litigated duty requiring banks not to act on fraudulent payment instructions. It has been the subject of two high-profile cases recently, one reaching the Supreme Court and the other due to go to trial in the coming months (see **pages 15 to 18**).

It has been a big year for **competition litigation**, a real potential growth area and one to watch. The Mastercard interchange fee litigation finally reached the Supreme Court, which confirmed Mastercard's liability to Sainsburys and other supermarkets and that Mastercard will now face a quantum trial (absent settlement). Perhaps of even wider significance is the ***Merricks v Mastercard*** follow-on damages class action, concerning the same interchange fee. A backlog of class actions are awaiting the Supreme Court's decision on certification of the ***Merricks*** claim. If it goes Mr Merricks' way, that will not only be of some significance to the millions of people Mr Merricks represents, but it is likely to pave the way for a spate of other competition class actions (see **pages 19 to 22**).

Another growth area is **data protection litigation**. The ***Lloyd v Google*** class action was given the green light in the Autumn of 2019. It is expected to be heard by the Supreme Court in late 2020 or early 2021 and, much like ***Merricks***, if the Supreme Court sides with Mr Lloyd, the scope for data protection class actions may open up considerably. In a major recent decision, the Court of Justice of the European Union (the CJEU) struck down the US/EU data privacy shield, complicating data transfers between the jurisdictions. And the upward trend in high-profile data breaches continues, laying the groundwork for future litigation. The dramatic changes to working habits during the COVID-19 lockdown may accelerate this trend (see **pages 27 to 29**).

The retail sector continues to provide many of the interesting and high-profile cases in **insolvency litigation**, some of which have concerned the impact of the UK Government's furlough scheme on administrations. Perhaps the most notable aspect of insolvency litigation over the last year is that there could have been a lot more of it, given the economic impact of COVID-19. This is widely considered to result from the wide-ranging COVID-19 protection measures introduced by the Corporate Governance and Insolvency Act 2020 ("CGIA"). But some key measures are stated to be coming to an end very soon. So watch this space—the world of insolvency litigation may look very different this time next year (see **pages 23 to 26**).

The topic of **private international law** has seen several interesting cases on jurisdiction in relation to the Brussels and Lugano regimes, albeit the relevance of many of these cases is receding as we approach the end of the Brexit transition period. Anti-suit relief in connection with arbitrations has also been a 'hot topic,' with an important decision on this issue (in a case in which we represent the party that was granted an anti-suit injunction) being handed by the Supreme Court less than a year after the first instance decision (see **pages 30 to 36**).

On the topic of **privilege**, amongst several cases on the issue this past year, the most important decision was the confirmation by the Court of Appeal of a dominant purpose test for legal advice privilege (see **pages 37 to 39**).

In matters of **procedure**, disclosure has received considerable attention both in the form of much welcome guidance on the Disclosure Pilot Scheme in the Business and Property Courts (which has been extended) and consideration of other interesting aspects of disclosure outside the scheme (see **pages 40 to 45**).

Beyond the case law, COVID-19 has wrought enormous change to UK litigation (as it has in other jurisdictions

around the world). The speed and relative ease with which the English commercial courts transitioned to remote hearings during the lockdown was impressive. It remains to be seen whether remote hearings are here to stay (at least in some shape or form) and whether an expected surge in litigation to resolve the many disputes and disruptions arising from COVID-19 materialises over the coming months and years (see **pages 47 to 48**). A preliminary issues decision in one such case—***Travelport Limited v Wex Inc.***[1] was recently handed down. It concerns Wex's reliance on a "material adverse effects" clause in a share purchase agreement in order to escape the contractual consequences of the pandemic. In determining the scope of the relevant market against which to assess the relevant companies' financial condition (to enable the determination in due course of the applicability of the MAE clause), the judgment will likely serve as useful guidance on an issue that has to date received very limited judicial attention in England.

Finally, Brexit remains an area of focus for potential litigants in the English courts, particularly as the expected end of the transition period in December 2020 looms large. At the time of writing there continues to be uncertainty over the important issue of jurisdiction and enforcement in relation to matters with an EU connection and whether an alternative regime can be agreed in time that will provide certainty for those who currently rely on the certainty and reciprocity of the existing Brussels regime (see **pages 49 to 50**).

[1] [2020] EWHC 2670.

REVIEW BY SUBJECT AREA

CONTRACT

Many commercial disputes involve contractual obligations. The past 12 months or so have seen judgments on a range of contract issues, including the effect of email signatures, third party rights to enforce, oral contracts, rectification, severance and relational contracts and the implied duty of good faith. This last topic has perhaps been the most active issue in contract law over the past year. However, a clear and consistent approach to determining when a duty will be implied has not yet emerged.

Email signatures

Neocleous v Rees[2] concerned whether an automatically generated email signature—which included a person's name, occupation, role and contact details—was a 'signature' that was capable of evidencing a concluded contract. The potential contract was a settlement agreement involving a disposition of land (and therefore was required to be in writing under the Law of Property (Miscellaneous Provisions) Act 1989). It was constituted by emails exchanged between solicitors.

The County Court held that there was no reason to distinguish between an email signature automatically set up on an electronic device and one that is manually entered—in both cases the recipient would know that the sender consciously decided to identify his name with the email. Looked at objectively, therefore, the presence of the name in the signature indicates the sender's clear intention to associate himself with the email—that is, to authenticate or sign it. There was thus a valid contract.

Third-party rights to enforce

Two recent cases have concerned who has rights and obligations under a contract. ***Chudley v Clydesdale Bank***[3] concerned a letter of instruction (LOI) for the opening of an "*ARCK LLP Segregated Client Account*" in connection with an investment made by the appellants. The appellants were not party to or named in the LOI, or even aware of it at the time it was executed.

The Court of Appeal confirmed that their lack of awareness of the LOI did not prevent the appellants from being able to enforce it as third parties under the Contract (Rights of Third Parties) Act 1999 ("CRTPA"). The Court held that the words "*Segregated Client Account*" were sufficient to entitle the appellants to enforce the LOI under the CRTPA. The words both expressly identified a class of which the appellants were members (clients of Arck) and purported to confer a benefit on a third party (the opening of an account that would hold clients' money separately). The Court clarified that the same words in a contract could satisfy both of those requirements.

Taking matters one step further, the issue for the Court of Appeal in ***Filatona Trading v Navigator Equities***,[4] was whether a contract that did not purport to confer a benefit on, or even refer in any way to, a third person could be enforced by that person as a disclosed principal.

It is uncontroversial that a person who enters a contract as principal and whose interest in the contract is known to the counterparty (even if his identity is not) is a disclosed principal who can sue or be sued on the contract made on his behalf by an agent acting within the scope of his authority.

In this case, Vladimir Chernukhin was Oleg Deripaska's joint venture partner. Mr Deripaska, Mr Chernukhin's girlfriend (Ms Danilina) and two companies entered, as named parties, a shareholders' agreement in connection with the joint venture. It was not in dispute (before the Court of Appeal) that Mr Chernukhin, although not mentioned anywhere in the document, was a party to the agreement as a disclosed principal, Ms Danilina having entered the agreement as his agent.

Therefore, the issue (which had not previously been considered in the case law) was whether the terms of the agreement and/or the surrounding circumstances excluded Mr Chernukhin's right to enforce it.

The Court of Appeal held that there is a heavy burden to show that the terms of a contract and/or surrounding circumstances exclude a disclosed principal from exercising rights under the contract. The Court concluded that there was nothing in the agreement (or surrounding circumstances) that did exclude Mr Chernukhin's right to sue under it.

Both ***Chudley*** and ***Filatona*** are salutary reminders of the need to consider the potential relevance of third

[2] [2019] EWHC 2462.

[3] [2019] EWCA Civ 344.

[4] [2020] EWCA Civ 109.

parties for contractual relationships and the desirability of either including them as named parties (where possible) or expressly providing for the consequences of the CRTPA and any agency relationship.

Interpretation

In ***Lehman Brothers International (Europe) (In Administration) v Exotix Partners LLP***,[5] the High Court had to determine the terms of an oral contract in circumstances where the parties took very different views as to its terms. LBIE mistakenly delivered 22,955 depository notes worth $7.7 million to Exotix, believing at the time that it only had a much smaller proportion of "*scraps*" of notes to deliver. Exotix paid only $7.7K for them. Neither party was aware of the mistake at the time of sale. The key issue was what the parties had agreed the subject matter of the contract was, and its price.

The Court found that the parties had objectively agreed to sell the number of notes whose total price (at an agreed percentage of their face value) was $7,700, i.e., 22.955 notes. However, as it was impossible to deliver a fraction of a note, to make the contract workable, the Court also found that it was necessary to imply a term that the fraction of a note was to be settled in cash. Consequently, Exotix was ordered to give monetary restitution in respect of the over-delivered notes. While the Court hesitated to imply a term in relation to cash settlement (because if asked at the time of the contract, the parties would likely have not agreed to it), ***Exotix*** shows the Court's preparedness to apply business common sense to give effect to the parties' overall objective intent, notwithstanding any mistake or unworkability affecting the contract the parties appear to have agreed.

The case of ***Hancock v Promontoria (Chestnut) Ltd***[6] raised an "*important point of principle*" as to whether a party is entitled to redact a document that a court has been asked to construe based on a solicitor's statement that the redacted sections are irrelevant. A deed of assignment had been reviewed by a solicitor who had left unredacted the parts of the deed establishing the existence of an effective assignment and redacted all other parts as irrelevant. The Court of Appeal held that, where the court is asked to construe a contractual document, the whole document should be provided. Irrelevance will not ordinarily justify redactions unless "*convincingly justified and kept to an absolute minimum*." Confidentiality alone would not justify the redaction of relevant provisions.

Finally, ***FCA v Arch Insurance (UK) Ltd***[7] was a high-profile test case brought by the FCA in the context of COVID-19. In this recent case, the Commercial Court broadly favoured a wider interpretation advocated by the FCA in respect of certain clauses under a sample of business interruption insurance policies. The Court held that most of the disease clauses in the sample of policies before it would extend to the COVID pandemic, and that cover would not be limited to losses arising solely from local outbreaks. The Court also found that denial of access clauses could also cover the consequences of the outbreak, though these would be interpreted more narrowly than disease clauses and would be dependent on the wording of the clause itself and the relevant factual circumstances.

As to the applicability of trend clauses, which allow adjustments to be made to the compensation paid under the policy to reflect trends which were present notwithstanding the insured event, the pandemic and the government's response constituted a single cause of loss, so no adjustment could be made in respect of the wider effects of the coronavirus.

The FCA and some of the insurers have been granted "leapfrog" certificates by the High Court to apply for permission to appeal directly to the Supreme Court. and no determination has been made of the amounts payable under each individual policy.

Rectification for common mistake

On the subject of mistake, in the important judgment of ***FSHC Group Holdings Limited v Glas Trust Corporation Limited***,[8] the Court of Appeal considered whether there is a subjective element to the test for rectification of a document for common mistake. In general terms, rectification for common mistake is available where, at the time a contract is executed, the parties had a common intention (even if not amounting to a binding agreement) which, as a result of a mistake on the part of both parties, the document fails accurately to record.

The parties in this case entered two deeds with the common intention that they would provide (and only provide) security that was missing from a prior transaction. The parties subsequently realised that the mechanism chosen to achieve this—their accession to pre-existing security agreements—imposed additional,

[5] [2019] EWHC 2380.

[6] [2020] EWCA Civ 907.

[7] [2020] EWHC 2448.

[8] [2019] EWCA Civ 1361.

onerous obligations on one of them that neither party had intended.

The Court of Appeal held that rectification is available in two scenarios where a document does not accurately reflect the parties' agreement on the basis of a common mistake: (1) where the document fails to give effect to a prior concluded contract or (2) where, when they executed the document, the parties had an actual (i.e., subjective) common intention in respect of a particular matter which, by mistake, the document does not accurately record and the parties understood each other to share that intention on the basis of "*an outward expression of accord*." Therefore, the Court of Appeal confirmed that the test for common mistake is objective in relation to the first scenario, but subjective in relation to the second. In doing so, the Court declined to follow Lord Hoffman's *obiter* comments in *Chartbrook Ltd v Persimmon Homes Ltd*[9] that the test in the second scenario is an objective one.

In departing from an objective approach in relation to cases falling within the second scenario—objectivity being a fundamental and ubiquitous principle in English contract law—the Court of Appeal recognised that a subjective test will be more difficult to satisfy and render successful rectification claims for common mistake rare (typically, objective consensus may be easier to demonstrate and more likely to arise in a commercial negotiation). But this is as it should be, otherwise the importance placed on concluded written agreements by commercial parties could be undermined.

The Court of Appeal therefore rectified the deeds in this case (which fell within the second scenario) because when they were executed, the parties intended (and had shared their intention) that the deeds would do no more than provide the missing security.

Severance

Another situation where the English court may alter the express terms of a contract is the severance of unenforceable terms. In ***Tillman v Egon Zehnder Ltd***[10] the Supreme Court clarified the circumstances in which severance is available.

Ms Tillman was a recruitment consultant who left the employ of Egon Zehnder to work for a competitor. One of several restraints of trade in her employment contract purported to restrict Ms Tillman from being "*interested in*" any competing business. On the basis this would prevent her from holding any shares in such a business, that part of the restraint was held by the Supreme Court to be unreasonable and therefore unenforceable. However, the Court considered whether it could be severed, so as to leave the remainder of the restraint enforceable.

The Court overruled the test laid down in the leading Court of Appeal authority on this issue (*Attwood v Lamont*[11])—it was arbitrary and of too limited scope in relation to post-employment restraints. The Court confirmed a three-stage test for severing an unenforceable part of a contract, that was first espoused in *Beckett Investment Management Group v Hall*:[12]

- the unenforceable provision must be capable of being removed without adding to or modifying the remaining words (i.e., the so-called "blue pencil test");
- the remaining terms must continue to be supported by adequate consideration; and
- the removal of the unenforceable provision must not so change the character of the contract that it becomes one that is "*not the sort of contract that the parties entered into*."

Applying those tests, the Court held that the words "*interested in*" were severable and the remainder of the restraint was enforceable. Interestingly, the Court also confirmed that the remaining provisions were to be construed as if the offending words had not been struck out.

Implied duty of good faith

There have been a series of recent cases on what is the somewhat vexed subject of the implied duty of good faith. They highlight the rapid development of this area of law and the significance, in this context, of "*relational contracts*"—longer-term contractual relationships falling short of a fiduciary relationship that are typically characterised by a high degree of cooperation, mutual trust, confidence and/or expectations of loyalty. The cases, however, do not all speak with one voice: there remains uncertainty as to what is a relational contract and whether the duty of good faith is to be implied as a matter of law (i.e., into all relational contracts) or fact (only where the duty is so obvious as to go without

[9] [2009] AC 1101.

[10] [2019] UKSC 32.

[11] [1920] 3 KB 571.

[12] [2007] EWCA Civ 613.

saying or necessary to give the contract business efficacy).

Bates v Post Office Limited[13] concerned the highly publicised dispute between 550 sub-postmasters and the Post Office over liability arising from accounting discrepancies appearing in an electronic accounting system the Post Office required sub-postmasters to use. The High Court held that the concept of the "*relational contract*" is firmly established in English law and apparently accepted that an implied duty of good faith will be implied into any such contract, once so found.

However, very specific characteristics are necessary to establish a relational contract and the Court laid down nine non-exhaustive indicia in this regard, including that there is no express term preventing the implication of the duty, the contract is long-term, the parties intend that the contract be performed with integrity, the parties are committed to collaborating and there is a high degree of communication. Only the first indicia—the absence of an inconsistent express term—can alone be determinative of whether the contract is relational. On that basis the Court implied a duty of good faith in the contract between the Post Office and the sub-postmasters.

By contrast, the High Court focused on the express terms of a long-term gas pipeline agreement in ***Teesside Gas Transportation Limited v CATS North Sea Limited***[14] and found there was no implied duty of good faith. Without deciding whether the contract was "*relational*," the Court pointed to certain clauses providing for good-faith performance in discrete respects (such as a right to dispute an invoice in good faith) and found that the agreement defined the extent of any good-faith obligations exhaustively, thereby excluding any wider implied duty. In so doing, it was applying the well-established rule that a contractual term will not be implied if it is inconsistent with an express term (i.e., the first of the ***Bates*** indicia).

More recently, in a complex shareholders' dispute—***UTB LLC v Sheffield United Ltd***[15]—the High Court downplayed the relevance of whether a contract is "*relational*," applying a more orthodox approach to the implication of a duty of good faith.

While accepting that the indicia in ***Bates*** may assist in identifying whether a contract in a particular case is relational, the Court said that the meaning of the term is elusive and liable to mislead, given the wide range of long-term contracts. Rather than seek to identify whether the contract was relational, it is preferable to start with the test for implying a term (in fact): was the obligation of good faith obviously intended or is it necessary for the proper working of the contract? That was the preferred approach also because the content of any implied duty is highly sensitive to the contractual context, which in large part is determined by the terms themselves. Implying a duty of good faith because a contract is found to be "*relational*" may give insufficient regard to the express terms, to which any implied term must be tailored.

On that basis, the Court declined to imply a duty of good faith: the shareholders' agreement was a sophisticated and complex mix of rights and obligations, which could work well, even if the parties were entitled to consider their own interests to a degree that would be prevented by an implied duty. A duty of good faith would also have been inconsistent with a contractual mechanism for resolving deadlocks, which intentionally favoured one party's interests at the expense of the other's.

Most recently, in ***Cathay Pacific Airways Ltd v Lufthansa***,[16] the High Court undertook a review of the authorities on relational contracts and the implied duty of good faith, noting that they "*had not yet reached a stage of settled clarity*." Expressing a preference for the approach in ***UTB***, the Court summarised the current state of the law by stating that:

- A duty of good faith may be implied as a matter of law (based on *Liverpool City Council v Irwin*[17]) in long-term contracts which require the parties to collaborate in ways that respect the spirit and the objectives of their joint venture, which the parties have not specified in detail.

- There is no special rule for implying in fact a duty of good faith into a relational contract. This depends on the usual test, i.e., obviousness or necessity. In this respect, the overall character of the contract is an important consideration, the ***Bates*** indicia may be helpful, and it is possible to imply a duty of good faith in long, complex and sophisticated written contracts.

[13] [2019] EWHC 606.

[14] [2019] EWHC 1220.

[15] [2019] EWHC 2322.

[16] [2020] EWHC 1789.

[17] [1976] AC 239.

So where does that leave the implied duty of good faith for now? First, the subject is plainly ripe for appellate review. In the meantime, given the differing approaches the High Court has recently taken, there remains some uncertainty (in the context of longer-term contracts at least) as to which contracts are "*relational*" and if they are, how relevant that fact is to implying a duty of good faith. However, that uncertainty may be ameliorated through express provision: either by excluding a duty of good faith, or if that is not acceptable in a particular case, expressly providing for the specific circumstances or obligations in respect of which a duty of good faith applies and that the duty does not arise in respect of any other.

Contractual estoppel

Contractual estoppel was considered in ***Wallis Trading Inc v Air Tanzania Co Ltd***.[18] An aircraft lease contained boilerplate representations by Air Tanzania that are found in many commercial contracts: that the lease was a valid and binding obligation on it, that the entry into and performance of the lease did not conflict with any laws binding on it and that it had obtained all required authorisations, consents, registrations and notifications in connection with the lease. The lease had been entered in breach of certain Tanzanian procurement legislation.

While the Court held that the legislation did not invalidate the lease for other reasons, in any event, the lease was valid because the airline's representations gave rise to a contractual estoppel, i.e., an agreed assumed state of affairs that is binding on the parties, whether or not it is in fact true. This was so even if (which was not the case here) both of the parties knew that the state of affairs is untrue.

This is both an interesting application of the slightly anomalous principle of contractual estoppel (unlike most other forms of estoppel, it does not require detrimental reliance) and provides reassurance that boilerplate provisions relating to contractual validity will be given effect to.

Material breach

It is common to find in commercial contracts a right to terminate for an unremedied "*material breach*." But whether there has been a material breach is a fact-specific issue, and there is limited guidance in the case law on what is required to establish a material breach. There is also limited guidance on what is required to remedy a material breach. That issue was considered in ***Bains v Arunvill Capital Ltd***.[19] It was not in dispute that Bains' refusal to provide services was a material breach of a consultancy agreement. He argued, however, that a letter stating his intention to perform his contractual obligations remedied the breach because it withdrew his refusal to work (within the required 21-day period). The Court of Appeal held that this was insufficient. The refusal to work was not just a threat of future conduct but a refusal which Bains was carrying out during the 21-day period. To remedy the breach, he had to start providing the services (which he had not done).

This is a useful reminder that the court will examine closely the factual basis of a material breach to determine what is required to remedy it; statements of intention may well not be enough.

[18] [2020] EWHC 339.

[19] [2020] EWCA Civ 545.

COMPANY LAW

There have been a few important company law decisions in the past year, including, in particular, on reflective loss and directors' duties.

The Supreme Court in ***Sevilleja v Marex Financial Limited***[20] confirmed that the rule against reflective loss does not extend to a company's creditors. Under that rule losses of an individual shareholder are generally not recoverable, to the extent they reflect the diminution in the value of the company's shares or dividends.

The defendant ("Sevilleja") owned and controlled two BVI companies, against which the claimant ("Marex") had been granted judgment in the amount of USD 5.5 million. The claimant alleged that, following circulation of the draft judgment, the defendant transferred funds out of the companies' accounts to offshore accounts under his personal control so that the judgment could not be satisfied. The claimant was unable to enforce the judgment as a result, and the defendant subsequently put the companies into liquidation. The liquidator did not take steps to locate the missing funds or issue any proceedings against the defendant.

The claimant brought fresh proceedings against the defendant in England, seeking damages for inducing or procuring the violation of its rights under the judgment and for intentionally causing it loss by unlawful means.

The defendant argued that the loss claimed by the claimant was reflective because of the claimant's status as a creditor of the BVI companies and that recovery was therefore prohibited by the rule against reflective loss. It said that the loss claimed was identical to the loss suffered by the BVI companies, which could be recovered by those companies directly.

Although the Court at first instance rejected this argument, the Court of Appeal overturned that decision and found that the rule against reflective loss applied to damages claims brought by a creditor of a company - the distinction between 'shareholder creditors' and 'non-shareholder creditors' in this context was artificial and the rule against reflective loss should apply to creditors of the company to the same extent as it applies to shareholders.

The Supreme Court overturned the Court of Appeal's decision. Its judgment clarifies and circumscribes the scope of the rule against reflective loss. In so doing, the Supreme Court disapproved of a number of the statements made by the House of Lords in *Johnson v Gore Wood*[21], previously the leading authority on reflective loss. It held that:

- The principle had been extended too much and would cause injustice in a situation such as the present one.
- The rule was properly a narrow one, which precludes claims by *shareholders* exclusively, in respect of losses suffered in that capacity (i.e. claims for losses in relation to share value or lost dividends).
- Where a shareholder or creditor has a loss which is separate and distinct from the company's loss, such losses should be dealt with in the ordinary way.
- As to the present case, the claimant was not a shareholder and should be entitled to proceed with its claim in full.

There have also been a series of important cases on directors' duties.

In ***Davis v Ford***[22] the Court considered, among other things, whether directors in office at the time a company is dissolved owe duties to the company throughout the period prior to its restoration to the register.

While the Court acknowledged that the Companies Act 2006 provides that a restored company "*continue[s] in existence as if it had not been dissolved*", the Court held that this provision does not extend to parties associated with the company, such as directors.

The Court found that directors in office at the time the company is dissolved do not owe duties to the company in the intervening period prior to its restoration to the register. The Court emphasised the importance of certainty when directors were considering the scope of their professional duties and noted that such duties are generally linked to the director's ability to exercise their statutory powers, which is no longer possible once the company has been dissolved.

[20] [2020] UKSC 31.

[21] [2002] 2 AC 1.

[22] [2020] EWHC 686.

This does not, however, preclude claims against directors for wrongs committed prior to the company's removal from the register, nor does it affect the ongoing statutory duties owed by former directors in respect of conflicts of interest and benefits from third parties.

Re System Building Services Group Ltd[23] considered a similar issue: whether the onset of insolvency operates to extinguish a director's duties under the Companies Act 2006. The Court decided that it does not. This was the first time the issue had been decided and has important implications for company directors in the context of insolvency (or near insolvency) situations.

The Court held that the fact that on an administration or voluntary liquidation, a director has specific duties and his managerial powers are limited to those authorised under the Insolvency Act, does not extinguish his duties under sections 171 to 177 of the Companies Act 2006. These duties continue to run concurrently with the duties owed by an administrator or liquidator, rather than being supplanted by them.

In this case, a director had breached a number of these duties. By making an off-market sale of residential property to himself at a significant undervalue, at a time when the company was undoubtedly insolvent, the director had failed to act in the interests of the company (which included the interests of the company's creditors in the context of insolvency). Similarly, the director, in making a number of payments to third parties after the company entered into administration, had failed to act with reasonable care, skill and diligence.

In ***Vald Nielsen Holding A/S v Baldorino***[24] the Court clarified the limited circumstances in which a director could owe fiduciary duties to company shareholders. The claim concerned the sale of shares in a company in the context of a management buy-out by the defendants, who were on the company's executive management team.

The claimants argued that they were misled by the defendant directors into selling their shares at an undervalue and that this was a breach of the directors' fiduciary duties.

Reviewing the relevant authorities, the Court reiterated that, as a general rule, a director does not owe a fiduciary duty to a company's shareholders by virtue of his office. The claimant would need to demonstrate that the specific circumstances gave rise to a fiduciary relationship. Such circumstances do not necessarily arise simply because the director has a greater knowledge of the company or could take steps which might affect the shareholders, even if those steps include the purchase of shares from the shareholders.

In cases involving shareholder/director transactions, fiduciary duties have most commonly arisen where there is a familial or other personal relationship, in the context of smaller companies. Those circumstances did not arise in respect of the present case, and the defendants were held to owe no fiduciary duty to the shareholders.

Sharp v Blank[25] was the first judgment in a shareholder class action in the English court. The case arose in the context of the acquisition of HBOS by Lloyds Banking Group in 2008.

The shareholders alleged, on the basis of tortious and fiduciary duties owed to them, that the Lloyds directors negligently recommended that shareholders should vote to approve the acquisition of HBOS, made negligent misstatements in respect of the transaction, and/or otherwise failed to provide the information necessary for shareholders to make an informed decision.

As in ***Vald Nielsen***, the Court stated that directors generally owe duties to the company, and not to shareholders. The Court found that no additional duty towards the shareholders arose in respect of the directors' stock exchange announcements or calls with analysts regarding the takeover, which were made for regulatory purposes. It could not be shown that the directors had assumed responsibility for what was said on the calls or in the announcements, or that they constituted advice to specific investors.

However, the defendants accepted that they owed the shareholders certain duties in respect of a circular sent to shareholders, seeking their approval of the takeover, because it included a statement of personal responsibility in respect of the contents of the circular.

In respect of the directors' recommendation to shareholders, the Court stated that it must ask whether a reasonable director of a large bank could reasonably have reached the view that the acquisition was beneficial. The shareholders in the present case had failed to show that the recommendation was outside the range of reasonable choices at the time.

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[23] [2020] EWHC 54.

[24] [2019] EWHC 1926.

[25] [2019] EWHC 3078.

As to the provision of information, the Court stated that directors must set out the relevant matters fairly and candidly, but are not required to disclose everything that went into the decision-making process.

In this regard, the Court found that the circular failed to note that HBOS was in receipt of emergency liquidity assistance from the Bank of England. However, the Court held that the shareholders had failed to establish that, had such disclosure been made, the directors would have declined to proceed with the takeover, that the shareholders would have voted against the takeover, or that the takeover would have otherwise collapsed. It was therefore not the cause of the shareholders' loss.

BANKING AND FINANCE

Banks' duties to customers

One of the significant cases for the financial industry in the past year was the decision in ***Barness v Ingenius Media Ltd***[26]. In this case, the Court granted summary judgment in favour of defendant banks Coutts and NatWest.

The case pertained to the "Ingenious" tax scheme, which operated from 2002 to 2007, when it was successfully challenged by HMRC, disallowing the claims for loss artificially generated by participation in the schemes. The claimants were a group of participants in the scheme, who had taken out loans with the respondent banks as part of the process organised by the independent financial adviser that advised them.

The bases of the claim brought against Coutts and NatWest were threefold: (1) that the banks had breached an implied term that the loan finance would not be provided unless suitable for the investor; (2) negligence, by way of breaching either a contractual duty of care or an assumption of responsibility in tort; and (3) that the banks were vicariously liable for the independent financial advisor's breach of duty in advising participation in the Ingenious scheme.

The Court's reasoning was as follows:

- The banks had contracted to provide standard banking services only, and no evidence had been presented to indicate any other services were provided (such as wealth management services). As such, the 'implied term' breach was rejected.
- Similarly, a duty to advise on the prudence of a transaction for which a loan is sought does not arise in the course of standard lending, and no evidence was provided to indicate that this transaction was outside the norm.
- The banks had not communicated anything that indicated an assumption of responsibility in relation to the wider transaction, defeating any possible negligence claim.
- On the facts, the banks had merely left the responsibility for advice to the independent financial advisor. This was not sufficient to establish vicarious liability; the banks had not assigned this responsibility and the parties carried out separate functions. A close contractual relationship alone cannot give rise to vicarious liability.

This judgment will be welcomed by lenders, providing clear affirmation of the limits to which banks assume duties to borrowers.

Morley (t/a Morley Estates) v Royal Bank of Scotland Plc[27], provides further welcome reassurance to lenders acting in restructuring situations.

A property developer claimed damages under a two-pronged argument against a lending bank: first, for breach of the bank's duty to exercise reasonable skill and care, and second, tortious intimidation or economic duress. This arose after the claimant's property portfolio, used to secure a £75m loan in 2006, lost value in the wake of the economic crisis of 2007. By the time that the loan fell due in 2009, the claimant was unable to repay the balance due and entered into subsequent negotiations with the bank. The result of these negotiations was a restructuring deal in which the bank transferred part of the portfolio to its subsidiary and the claimant payed the bank around £20m.

The claimant argued that he would not have entered into this agreement were it not for the bank aggressively leveraging its right to appoint a receiver over the secured portfolio, threatening to take ownership of the portfolio in its entirety by way of a pre-pack deal. The bank rejected alternative restructuring deals proposed by the claimant.

The Court ultimately held that on the facts, the bank had only exercised its existing contractual rights. It was not a failure to exercise reasonable skill and care to reject the counter offers of the claimant, but rather an action entirely within the bank's legal rights. It would be unreasonable to expect any commercial party to fail to remedy a deteriorating position, as was the case here. Lawful act duress could exist, but not in the absence of bad faith. There was no evidence of bad faith on the part of the bank, which had merely acted within the bounds of "*the rough and tumble of the pressures of normal commercial bargaining*", as recognised in existing case law.

The "Quincecare Duty"

The next two cases are of significance and pertain to two different aspects of the so-called *Quincecare* duty.

[26] [2019] EWHC 3299.

[27] [2020] EWHC 88.

The first case concerns whether the duty can be contractually excluded and the second case is the first instance of a successful claim for breach of the duty. It also confirmed that *Quincecare* Duty claims may be brought for the benefits of creditors, even where they were not direct beneficiaries of the duty originally. By way of background, the *Quincecare* duty was established in *Barclays Bank Plc v Quincecare Ltd*[28]. The case established that a bank has a duty to decline to execute a payment instruction where the bank is on notice that there may be reasonable grounds to believe that the order is an attempt to misappropriate funds from the account to which the order pertains.

The first of these decisions was ***JP Morgan Chase Bank NA v The Federal Republic of Nigeria***[29]. The Court of Appeal was asked to decide whether the judge had been wrong to refuse the bank's application for summary judgment on Nigeria's claim for a breach by the bank of the *Quincecare* duty.

The Court dismissed the bank's appeal, noting that assessing the actions that a bank should have taken once it is put on notice, such as to engage the *Quincecare* duty, would be a question for a trial judge, once the facts had been examined.

The Court also rejected an argument that an 'entire agreement' clause in the depository agreement between it and Nigeria (as the bank's customer) was sufficient to exclude the existence of a *Quincecare* duty.

While the Court of Appeal found that it was not technically impossible to exclude such a duty as a matter of contract, sufficiently clear words to the effect that the bank is entitled to execute a payment instruction even if it suspects that it is fraudulent would be required. That sets a very high bar for such an exclusion (e.g. it may well permit conduct that would breach other obligations the bank owes (such as regulatory requirements)). It appears therefore that banks are unlikely to be able contractually to exclude the *Quincecare* duty in the normal course of business.

In the landmark case of **Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd**[30], the first successful case concerning a breach of the *Quincecare* duty, the Supreme Court upheld the High Court and Court of Appeal decisions, which had found that the defendant bank had breached its *Quincecare* duty to the claimant company.

In 2009, the London branch of Daiwa executed approximately $200 million in fraudulent payments to third-party accounts, at the request of Singularis' sole shareholder and Chairman, Maan Al Sanea. The payments left Singularis unable to meet creditor demands and it subsequently entered insolvency. Singularis' liquidators commenced proceedings against Daiwa in 2014, alleging breach of the *Quincecare* duty which required Daiwa to make reasonable enquiries which would have identified and stopped the fraudulent transactions.

The bank argued that because Singularis was 100 percent owned and operated by Mr Al Sanea as Chairman it was effectively a one-man company. Therefore, his fraudulent actions were to be attributed to Singularis. Contingent on this argument, the bank raised a number of defences including that it had been subject to a fraudulent scheme perpetrated by Singularis (through Mr Al Sanea) and therefore the claim was circular.

The bank's arguments failed before the High Court and Court of Appeal, whose decisions were upheld by the Supreme Court.

While the Supreme Court considered (and rejected) an illegality defence raised by the bank, most relevant in the context of the *Quincecare* duty were certain important points it made concerning corporate attribution:

- There is no principle of law that the fraudulent conduct of a director is to be attributed to the company because it is a "*one-man company*". In any event, Singularis was not a one-man company as a matter of fact, as it had a legitimate and substantial business and a board of reputable directors who had no knowledge of Mr Al Sanea's fraud.

- The issue of attribution is to be looked at in light of the context and the purpose for which it is alleged to operate. Here, it was relevant that the context was the breach of a bank's *Quincecare* duty. To attribute Mr Al Sanea's fraud to the company would be to denude the *Quincecare* duty of any value in a case where it was most needed.

It is notable that the facts of ***Singularis*** were unusual (the fraud was relatively easy to spot and the bank's instructing client was a prominent, wealthy individual) and that this was the first successful claim for a breach of the *Quincecare* duty, i.e., a breach of the duty will not

[28] [1992] 4 All E.R. 363.

[29] [2019] EWCA Civ 1641.

[30] [2019] UKSC 50.

typically be easy to make out. Further, a bank may, in limited circumstances, be able to defeat a claim by arguing that the claimant should be treated as the wrongdoer; however, that will depend on the factual circumstances underlying any argument on attribution.

This decision does not fundamentally alter the law as regards the *Quincecare* duty and it is therefore unlikely to result in a flood of *Quincecare* claims.

Agency

Filatona Trading (see the Contract section at page 7) dealt with the circumstances in which a principal may be excluded from suing under a contract entered into on his behalf. ***National Bank of Kazakhstan v The Bank of New York Mellon SA/NV (London Branch)***[31] was another case concerning a contract affected by a potential agency relationship. The contract was a global custody agreement (GCA) between the National Bank of Kazakhstan (NBK) and The Bank of New York Mellon (BNYM) for the custody of $22 billion worth of assets comprising part of the sovereign wealth fund of the Republic of Kazakhstan ("Kazakhstan"). The case arose in the context of a Belgian garnishment order that was obtained by a third party in respect of the assets. The key issue was whether the NBK had entered into the GCA on behalf of Kazakhstan as its undisclosed principal – if it had, then Kazakhstan had a "*claim*" (as a party to the GCA) to the assets, to which the garnishment order could attach for the benefit of the third party.

In order for a party to enter into a contract as agent for another, it must have actual authority to do so, intend to contract on behalf of the principal and the principal needs to assent to the agent acting on its behalf to affect its legal relations with third parties. Whether that relationship was established did not depend on the label chosen by the parties to describe their relationship, but on what the parties had in substance objectively agreed.

Having had regard to a range of evidence, including on Kazakh law and the terms of a trust management agreement between the NBK and Kazakhstan, the Court found that the NBK did not have actual authority to enter into the GCA as agent for Kazakhstan, notwithstanding that some aspects of their relationship were consistent with an agency relationship.

Accordingly, the Court declared that the bank's obligations under the GCA were owed solely to the NBK and Kazakhstan did not have any claims against BNYM under the GCA.

US Sanctions and contractual non-default provisions

In ***Lamesa Investments Limited v. Cynergy Bank Limited***[32], the Court of Appeal upheld (albeit on somewhat different grounds) a High Court decision that US secondary sanctions constituted a "*mandatory provision of law*" under the terms of a facility agreement, and that therefore the borrower's (Cynergy Bank) compliance with the effect of potential secondary sanctions excused the bank's payment default under the agreement. The relevant clause of the facility agreement provided that Cynergy would not be in default if sums were not paid "*in order to comply with any mandatory provision of law, regulation or order of any court of competent jurisdiction*". The alleged mandatory provision of law was the US Ukraine Freedom Support Act (the UFSA), which directed the US President to impose secondary sanctions on non-US persons who knowingly facilitated a significant financial transaction with certain blocked persons (one of which was Lamesa).

The Court of Appeal emphasised that because the non-default clause was a standard clause in loan facility agreements (for the provision of Tier 2 Capital), it should be interpreted with more focus on its wording, and less focus on the commercial context of the particular case. It also held that it takes clear wording to abrogate a repayment obligation under a loan agreement and equal weight should be given to the commercial interests of each party (the judge at first instance had not appeared to give due regard to these matters).

While the Court noted that "*mandatory provision of law*" was open to multiple interpretations (e.g. it could mean binding statutes that directly require non-payment or provisions of law that the parties cannot disapply), its effect was clearly prohibitory. Further, whilst by not making payments, Cynergy had been complying with the policy of the US secondary sanctions legislation (rather than directly with the terms of the UFSA itself), that was a semantic difference.

The Court went on to identify three contextual factors relevant to the clause's general application:

1. The EU Blocking Regulation employs similar language to that used in the non-default clause and describes US secondary sanctions as imposing a "*requirement or prohibition*" with which EU entities

[31] [2020] EWHC 916.

[32] [2020] EWCA Civ 821.

are required to "*comply*". Those drafting the clause would have been aware of this.

2. The clause is a standard clause for the provision of Tier 2 Capital to international banks.

3. US secondary sanctions were at the relevant time a far more present potential problem for the contract's drafters than US primary sanctions, which only apply to US persons or activities with a US nexus.

It is therefore likely that those drafting the non-default clause also intended a borrower to be able to obtain relief from default for non-payment in order to comply with US secondary sanctions. While the US cannot strictly prohibit non-US persons from engaging in certain activities, US secondary sanctions are effectively prohibitions given the potential impact they can have on a non-US person's US assets or US Dollar correspondent bank account.

This is an example of the potential wide-reaching impact of US sanctions on financial transactions and the contractual mechanisms that can ameliorate that impact.

Limitation

In ***Boyse (International) Ltd v NatWest Markets plc and another***[33], the High Court handed down an interesting judgment in relation to the fraudulent concealment limitation defence (in section 32(1)(a) of the Limitation Act 1980). The claim, which was based on the defendant's allegedly fraudulent manipulation of LIBOR, was time barred because it was issued more than six years after the company could with reasonable diligence have discovered the alleged fraud. The publication of a Final Notice[34] by the Financial Services Authority was a trigger that put the claimant on notice in relation to potential LIBOR manipulation and marked the start of the limitation period relevant for its fraud claim. This case will provide welcome confirmation for financial institutions that, while on the one hand, Final Notices and other regulatory sanctions may provide a basis for claims against them, on the other, they may set the clock running and provide a degree of certainty as to when any threat of litigation relating to them will end.

In ***Canada Square Operations Ltd v Potter***[35] the High Court considered an important interaction between the Limitation Act 1980 and the Consumer Credit Act 1974 in the context of a Payment Protection Insurance mis-selling claim. The appellant had paid the respondent compensation in respect of the mis-sold policy, on grounds that the appellant had failed to disclose the commission it received in respect of the policy, rendering the relationship unfair under Section 140A(1) of the Consumer Credit Act. The compensation did not cover all of the respondent's loss and the claim was for the balance.

Upholding the decision below, the High Court agreed that the respondent's failure to disclose the commission in breach of the Consumer Credit Act also amounted to deliberate concealment for the purposes of section 32 of the Limitation Act. The Court did not accept that 'deliberate' concealment required something more than an omission, and it was sufficient that the lender had taken a conscious decision not to disclose the information. Accordingly, the relevant limitation period did not begin to run until the respondent learned of the commission and the claim was not time-barred.

It is worth noting that the appellant failed to adduce any evidence to refute the argument that it had consciously decided to conceal the commission, and so may be of limited relevance to other cases. Nonetheless, it may signal that historical claims for PPI mis-selling will not necessarily be time-barred under the Limitation Act, and may provide potential claimants with an important route for redress following the FCA's deadline for PPI complaints in August 2019.[36]

[33] [2020] EWHC 1264.

[34] This is a formal notice of action published by the FCA (formerly the FSA) following an enforcement process.

[35] [2020] EWHC 672.

[36] Permission has been granted to appeal the decision to the Court of Appeal and the hearing is listed for January 2021.

COMPETITION

Competition litigation - in particular, private damages actions in respect of breaches of competition law - is an area of growth in the English courts. This year has seen several important developments which may lay the foundations for further growth, particularly in relation to class actions in the Competition Appeal Tribunal.

The Competition landscape remains dominated by the body of litigation brought about in the wake of the European Commission's 2007 decision that Mastercard's setting of a "*multilateral interchange fee*" (MIF) was a restriction of competition (the "EC Decision").

By way of brief background, between 1992 and 2007, the payment service provider schemes run by Mastercard and Visa set the MIF in respect of credit and debit card transactions. This created a minimum fee that merchants' "*acquirer*" banks had to pay card "*issuer*" banks in relation to each card transaction. Acquirers passed on the fee to merchants and (although it is not yet clear to what extent) merchants passed it on to customers. It is alleged that merchants and their customers were therefore detrimentally impacted by the inflated transaction fees.

The Supreme Court has handed down judgment in ***Sainsbury's Supermarkets Ltd v Mastercard Inc***,[37] one of the most significant pieces of competition litigation in the English Courts in recent years. It heard appeals on four issues arising from a Court of Appeal judgment in three sets of damages proceedings brought by various UK supermarkets against Visa and Mastercard in respect of the EC Decision:

- Was there a restriction on competition contrary to Article 101(1) TFEU (the "restriction issue")?
- Were Visa and Mastercard required to satisfy a more onerous evidential standard than that applicable in civil litigation to establish that MIFs were exempt under 101(3) TFEU (the "standard of proof issue")?
- What is necessary in order to satisfy the 'fair share' requirement under Article 101(3) TFEU exemption (the "fair share issue")?
- Whether a defendant has to prove the exact amount of loss mitigated in order to reduce damages (the "broad axe issue")?

In dismissing the appeal in respect of all but the last of the four issues, the Supreme Court held that:

- The judgment of the European Court of Justice that upheld the EC Decision that the setting of the MIF was a restriction of competition was binding on the English Courts. Even if the judgment had not been binding, the Supreme Court would have followed it.
- A defendant seeking to rely on the exemption under Article 101(3) of the Treaty on the Functioning of the European Union would need to identify, substantiate and evaluate the efficiencies it claimed and to verify their causal link with the anti-competitive conduct. As such, while the standard of proof was still the usual balance of probabilities, the nature of the evidence required to engage the exemption was detailed, empirical evidence and analysis.
- When applying the condition in Article 101(3) that consumers must be allowed a fair share of the benefits resulting from the relevant restriction on competition to a "*two-sided market*":

  a) consumers are the direct or indirect consumers (in this case, merchants) of the relevant service; and

  b) those consumers must be compensated in full for the adverse effects of the restriction of competition.

  As the merchants were the relevant 'consumers' in this case, they could not be said to have received a fair share of the benefits where they had not been fully compensated for the harm caused by the MIF (i.e. the exemption did not apply).
- In the context of determining the amount of loss that was mitigated by merchants in passing on the MIF to consumers, an unreasonable degree of precision is not required and the quantification of the "*pass on*" did not require a greater degree of precision from the defendant than would be required of a claimant.

Quantum determinations will now follow (if that issue is not settled). ***Sainsbury's*** confirms the binding nature of European Commission decisions and CJEU judgments (at least for the time being, pending Brexit) and may give other companies that are subject to Commission infringement decisions pause before challenging liability through the English courts. More specifically,

[37] [2020] UKSC 24.

the case will be of significance for other litigation arising from the EC Decision that has been (or may yet be) brought by other retailers, and may to some extent be a harbinger of the outcome in ***Mastercard Incorporated v Walter Merricks***[38] in relation to the "*pass on*" issue.

Merricks was heard by the Supreme Court remotely in May of this year. Judgment remains pending as of the time of writing. The case is an important test of the certification process for 'collective proceedings' which were introduced by the Consumer Rights Act in 2015. It has been speculated that the introduction of collective proceedings, the first widely available "*opt out*" class action process to be introduced in the UK, would open the floodgates to 'US-style' class action litigation. This has not yet materialised, as the appeals in ***Merricks*** itself have led to something of a 'logjam' of other cases awaiting clarification on the threshold issue of certification.

This issue is important because collective proceedings must be certified by the CAT (by way of a Collective Proceedings Order (CPO)) at a preliminary stage in order to proceed to trial. The CAT must consider whether it is just and reasonable to certify the representative's claim (the "representative test"), whether the claims of the class raise "*the same, similar or related issues of fact or law*" (the "commonality test"), and whether such proceedings are a suitable means of hearing the proposed claim (the "suitability test").

The precise scope of the commonality and suitability tests remain uncertain, and the Supreme Court's judgment in these areas will therefore be significant. If the court takes a more expansive approach to these tests, they are likely to be easier to satisfy in practice, rendering the UK a more 'claimant-friendly' jurisdiction for Competition class actions.

Mr Merricks' claim, also brought on the basis of the EC Decision, is on behalf of a class of approximately 46.2 million UK consumers and seeks aggregate damages of £14 billion for losses allegedly suffered by consumers as a result of the imposition of the MIF between 1992 and 2008. Having been successful in resisting certification in the CAT, Mastercard appealed to the Supreme Court against a decision of the Court of Appeal to allow the claim to proceed.

The Supreme Court is considering two main issues in the appeal: 1) what is the test for certification of claims as eligible for inclusion in collective proceedings (which will involve considering in particular in this case whether there is sufficient evidence of the extent to which the inflated MIFs charged to merchants were passed on to consumers in each case); and 2) what is the correct approach to questions regarding the distribution of an aggregate award at the stage at which a party is applying for a CPO (particularly as in this case there may be no plausible way of calculating the distribution of any damages ultimately awarded to claimants that would ensure that claimants receive damages that reflect their actual losses)?

Another interesting feature of the Mastercard/MIF litigation is the historic nature of the EC Decision and conduct to which it relates. This can give rise to limitation issues. In ***DSG Retail v Mastercard***[39], for example, Mastercard appealed against a decision of the CAT dismissing its application for summary judgment in respect of parts of a claim brought by the claimant retailers.

Mastercard had argued that claims for damages arising from the period May 1992 to June 1997 were time-barred. Prior to the introduction of the Competition Appeal Tribunal Rules 2003 (CATRs 2003), claims for damages for breaches of competition law were generally subject to a six-year limitation period under the Limitation Act 1980.

Following the introduction of the CATRs 2003, which continue to apply to claims brought or arising prior to October 2015, a claim for follow-on damages could only be brought within two years of an infringement decision. However, a claim which was already time-barred prior to the introduction of the rules (20 June 2003) remained time-barred for the purpose of the CATRs 2003.

Considering Mastercard's application at first instance, the CAT held that, unless all the infringing conduct had come to an end more than six years before the introduction of the CATRs 2003, the claims would not be time-barred. Further still, the CAT held that, even if the claims had been time barred, the Limitation Act 1980 allowed for that limitation period to be extended.

The Court of Appeal found that the CAT had been wrong to use the more recent 2015 CAT Rules to inform its interpretation of the CATRs 2003 where the earlier rules were not ambiguous. The part of the claims relating to pre-1997 damages were thus time-barred.

However, as to whether the relevant limitation period could be extended on the basis that facts relevant to the claim had been deliberately concealed, the Court noted that the CAT had failed to identify the relevant 'trigger' event following which the claimant ought to have investigated with reasonable diligence the basis for a claim. This issue could not be fairly decided without

[38] Case ID UKSC 2019/0118.

[39] [2020] EWCA Civ 671.

disclosure or evidence, and therefore could not be dealt with summarily.

Accordingly, while Mastercard's appeal was successful in relation to the pre-1997 damages, its summary judgment application on the extension issue was not, and the case was remitted to the CAT for consideration of that issue.

As the case concerned infringing conduct that took place, in part, more than two decades ago and CAT rules that were replaced in 2015, it is unlikely to have much wider significance. Nonetheless, ***DSG Retail*** demonstrates the difficulties that can arise in respect of historic conduct spanning an extended period of time, as well as providing some helpful guidance on the circumstances in which limitation periods may be extended under the "deliberate concealment" exception in the Limitation Act.

An interesting side note to this case was the Court of Appeal's acceptance that the claimant retailers had not been put on notice by the mere existence of news articles that discussed complaints about Mastercard's MIF practices. Given the proliferation of information in the digital age, to hold otherwise might unfairly limit the scope of the deliberate concealment exception.

There are two prominent cases the course of which will be impacted by ***Merricks***. One is ***Royal Mail Group Limited v DAF Trucks Limited***[40] (the "trucks cartel" case). In this decision, the recitals to a European Commission settlement decision were found to be binding. Further, the CAT held that, save for in limited circumstances, it would be an abuse of process for a party who had admitted certain facts within those recitals to subsequently deny those facts in the context of a follow-on damages claim.

Being the first detailed consideration of these issues by a UK tribunal, this provides useful guidance for future follow-on claims. Certification in the case is expected to be dealt with later this year, following the decision in ***Merricks***.

The other case impacted by ***Merricks*** is ***Michael O'Higgins FX Class Representative Ltd v Barclays Bank plc and Others; Mr Phillip Evans v Barclays Bank plc and Others*** (known as "*the FX cartel*" case). Certification will be dealt with in March 2021.

Also of note during the past year was the decision of the Court of Appeal in ***BritNed Development Limited v ABB AB & ABB Ltd***[41], which modified a first instance judgment on cartel damages (the first award of damages in a UK follow-on case).

Following an EU Commission decision against 26 entities (including ABB) in the power cable industry for infringements of Article 101 TFEU, BritNed brought a claim for follow-on damages. The High Court awarded the claimant around EUR 8 million in damages for overcharges arising from the cartel. It found that, although there was no direct and deliberate overcharging of BritNed, an indirect overcharge nonetheless arose. This was because the cartel activity gave rise to increased inefficiencies and ABB had benefited from certain 'cartel savings', i.e., not having to incur the full costs of competition as a result of the reduction in competition from the cartel.

The Court of Appeal broadly upheld the High Court's assessment of the overcharge on appeal and gave detailed consideration to the correct approach to assessing follow-on damages. In particular:

- It rejected an argument that follow-on damages in the UK could be punitive, in light of the CJEU decision in *Vantaan Kaupunki v Skanska Industrial Solutions Oy*[42].

- Although the defendant had been found to have infringed competition law, the burden remained with the claimant to prove (on a balance of probabilities) that it had suffered loss, as well as the extent of any such loss.

- The claimant needed to demonstrate that the specific price it had paid was higher as a result of the cartel and could not merely refer to the cartel's broader effect on the relevant market.

However, the Court of Appeal did allow ABB's appeal in respect of the cartel savings. As a matter of principle, an award of damages based on savings made by the cartelist, rather than loss to the claimant, was based on an error of law. Further, there had been no evidence to show a correlation between such savings and the prices charged by ABB in order to translate the savings into an overpayment by BritNed. And in any event, any cartel saving had been "*competed away*" such as to have no effect on the prices charged.

Finally, the Court of Appeal in ***Competition and Markets Authority v Flynn Pharma Ltd***[43] has denied the Competition and Markets Authority's (CMA) attempt

[40] [2020] CAT 7.

[41] [2019] EWCA Civ 1840.

[42] (C-724/17) EU:C:2019:204.

[43] [2020] EWCA Civ 339.

to reinstate fines of £84.2m and £5.2m on Pfizer Limited and Flynn Pharma Limited respectively for excessive pricing on certain products between 2012 and 2016.

To establish unfair pricing, the CMA needed to show that the price charged was i) excessive, and ii) either unfair of itself or by comparison to competing products.

The CMA relied upon an approach referred to as 'Cost Plus'. First the CMA identified a reasonable return on sales (ROS) of 6 percent and then compared that with the significantly higher ROS achieved by Pfizer and Flynn, which the CMA felt was sufficient to demonstrate that the relevant pricing was both excessive and unfair of itself.

The Court of Appeal held that the 'Cost Plus' approach was sufficient to show that the pricing was excessive, and the CAT had been wrong to find that the CMA needed to establish a benchmark against which to compare the relevant prices.

However, the CAT was nonetheless correct that the case should be remitted to the CMA. While the CMA does not have to investigate all comparators raised by alleged infringers in defence of their pricing, the CMA is required to consider all the factors put forward during an investigation with an open mind, carefully and impartially. The CMA would then exercise a discretion in reconciling these various competing factors.

The CMA publicly welcomed the Court's clarification on the law on excessive pricing – in particular the element of the judgment relating to the 'Cost Plus' method for assessing excessive pricing.

INSOLVENCY

Perhaps the most prominent development affecting insolvency litigation over the last 12 months was the major COVID-19 protection measures and broader reforms introduced under the CGIA. While some of the changes provide only temporary assistance to businesses struggling with the economic impact of COVID-19, others are permanent and reflect reforms first canvassed by the Government in 2016-2018. The new measures include:

- A new standalone moratorium supervised by an insolvency practitioner "*monitor*", which gives businesses a period of 20 business days during which creditors will be unable to enforce security, commence insolvency or other proceedings, or forfeit leases. Directors will be able to extend the period for a further 20 days without consent, by filing certain documents with the court, or up to a year (and possibly more) in the context of a CVA, scheme of arrangement or restructuring plan, or with the consent of creditors or the court.

- A new restructuring "*plan*" aimed at addressing financial difficulties suffered by companies that impact their ability to carry on business as a going concern. The plan is modelled on schemes of arrangement (including the 75 percent in value of creditors in each class who need to approve it) and also allows for the "*cross-class cram down*" of classes of creditors in certain circumstances.

- A ban in certain circumstances on the use of 'ipso facto' clauses in all supply contracts, which entitle suppliers of goods and services to terminate, vary or exercise any right under a contract due to its counterparty entering into an insolvency or restructuring process. Previously only essential goods and services were covered by the ban.

- A statutory assumption that directors did not worsen the financial position of the company or its creditors in the period between 1 March 2020 and 30 September 2020. This will likely reduce, although not eliminate, the risk of directors being held liable for wrongful trading during the pandemic.

- A restriction on the presentation of winding up petitions based on statutory demands issued against companies in the period from 27 April 2020 until 30 September 2020. Petitions will not be permitted, regardless of whether COVID-19 is relevant to the issuance of the demand. Winding-up petitions based on a debtor's inability to pay debts as a result of COVID-19 during this same period will not be permitted either.

While those measures in the CGIA, which are aimed at ameliorating the impact of COVID-19, have provided welcome temporary relief for debtors, they do not provide a long-term solution for businesses in a precarious financial position (and their stakeholders).

More generally, the measures introduced to protect businesses from the effects of the COVID-19 pandemic (including under the CGIA, and the employee furlough and business loans schemes) have been widely seen as limiting what may otherwise have been a flood of insolvency litigation in 2020. It is, however, also expected that when the measures are withdrawn, that flood may still arrive.

There have, though, already been a few cases arising in connection with those measures. Some arose in the context of high prolife pre-COVID-19 administrations and others highlight the preparedness of the courts to apply statutory provisions that are not yet in force.

In ***Carluccio's Limited (In Administration)***[44], the Court was asked to determine whether and by what means a company in administration could access the UK Government's Coronavirus Job Retention Scheme (the "Furlough Scheme"). At the time of this decision in April 2020, no guidance beyond a webpage on the Government website was available, and whilst the guidance indicated that it would be possible for administrators to access the scheme, it did not provide detail as to the legal mechanisms in place to do this.

The case was heard on an urgent basis as, under the Insolvency Act 1986, administrators benefit from a 14-day grace period from the date of their appointment, during which they will not be taken to have adopted any contracts of employment through their actions. The administrators therefore sought to have several questions of law determined prior to the end of that deadline.

The first question was whether the Furlough Scheme was intended to extend to companies in administration. The Court held that it should, provided there was a reasonable likelihood of the employees resuming work. As there had been interest in acquiring some or all of

[44] [2020] EWHC 886.

the business from several third parties, it was accepted that this was the case.

The administrators also asked the Court to confirm if and how it could use the funds from the scheme to pay employees in priority to other creditors.

The administrators had written to all employees, indicating that they could consent to being placed on the Furlough Scheme, by way of a variation to the employees' contracts, or choose redundancy. The Court held that the effect of the letter was that the contracts of employees who consented to being placed on the Furlough Scheme had been adopted by the administrators.

Under the Insolvency Act, the payment of wages or salaries under adopted employment contracts takes priority over other creditors and the administrators could therefore apply the funds received under the Furlough Scheme for this purpose.

Shortly after the decision in ***Carluccio's Limited***, in ***Debenhams Retail Ltd (In Administration)***[45], the administrators of Debenhams sought to challenge the position that, by paying employees under the Furlough Scheme, they would adopt their employment contracts. However, both the first instance and Court of Appeal judgments dismissed the administrators' arguments.

The Court of Appeal noted that i) the administrators continued to pay wages and salaries to furloughed employees pursuant to their contracts of employment, ii) the furloughed employees accepted continuation of their employment on amended terms and were bound by their employment contract, and iii) the administrators had placed the employees onto the Furlough Scheme with a view to rescuing the business as a going concern.

There have also been a couple of decisions relating directly to the CGIA, even before it had come into force. ***Re: A Company (Injunction To Restrain Presentation of Petition)***[46] gave pre-emptive effect to the CGIA. The anonymised high street retailer had been unable to pay rent during the coronavirus lockdown, and the affected landlord had e-filed a winding up petition. The passage of the CGIA into law was imminent. As we note above, it contained a provision that would restrain the presentation of a winding up petition based on a failure to pay a debt that had been caused by COVID-19.

The previous month, and even before the publication of the CGIA as a bill, in ***Travelodge Ltd v Prime Aesthetics Ltd***,[47] the Court considered ministerial statements concerning the proposed legislation in deciding whether to grant an injunction to restrain the presentation of a winding up petition. What is perhaps most interesting about this case, and of more general relevance, is that the Court held that it could, in appropriate cases, take account of expected imminent changes in the law, and granted an injunction preventing the presentation of a winding-up petition. In light of the decision in ***Travelodge Ltd***, the Court in ***Re: A Company*** also decided to award an interim injunction restraining the presentation of a winding-up petition in that case.

Notably, however, the Court in ***Re: A Company*** criticised the judge's decision in ***Travelodge*** not to require of the company a cross-undertaking in damages on the basis that the injunction was unlikely to cause any harm. The judge cited the Court of Appeal decision of *JSC Mezhdunarodniy v Pugachev*[48] which held that it was "*fairness rather than likelihood of loss that leads to the requirement of a cross-undertaking*" and that "*the cross-undertaking is regarded as the price that must be paid for interim interference with the defendant's freedom*". Accordingly, an injunction was granted on terms that the usual cross-undertaking in damages was to be provided by the company.

The rule in Ex parte James

Earlier this year, in what may be one of the last of the many judgments arising from the collapse of Lehman Brothers, the Court of Appeal considered the scope of the seminal rule in *Ex parte James*[49] in ***Lehman Brothers Australia Ltd (In Liquidation) v MacNamara***[50].

As the result of a mutual mistake made by the liquidators of Lehman Brothers Australia (LBA) and the administrators of Lehman Brothers International (Europe) (LBIE), the parties had under-valued a claim of LBA by $1.67m that had been contractually agreed for the purposes of a Claims Determination Deed. Without any contractual mechanism to amend the figure (or the LBIE administrators' agreement to do so), LBA sought

[45] [2020] EWCA Civ 600.

[46] [2020] EWHC 1406.

[47] [2020] EWHC 1217.

[48] [2016] 1 WLR 160.

[49] *Condon Ex parte James, Re* (1873-74) L.R. 9 Ch. App. 609.

[50] [2020] EWCA Civ 321.

directions from the Court to have its proof of debt increased by the under-valued amount.

LBA relied on two bases to justify the Court's intervention. The first was the rule in *Ex parte James*: that the court will not permit its officers to act in a way which, although lawful and in accordance with enforceable rights, does not accord with the standards which society would think should govern the conduct of the court or its officers. The second was paragraph 74 of Schedule B1 to the Insolvency Act 1986, which permits an applicant to seek relief where an administrator unfairly harms the interests of an applicant with an action (proposed or carried out). At first instance, the application had been refused on both bases.

Having extensively considered the authorities, the Court of Appeal stated that the rule in *Ex parte James* could be invoked to vary contractual rights, and that the applicable test was not unconscionability, but one of fairness, "*to be judged by the standard of the right-thinking person, representing the current view of society*". Fairness provided an objective standard, to be applied to the facts in each case and was no more subjective than the standard of unconscionability.

Further, the application of paragraph 74 of Schedule B1 involved a similar test of fairness, and it was not necessary to demonstrate that the creditor had suffered discrimination. This was an objective test, and the court would consider whether a reasonable man would consider the actions of the administrator unfair in the circumstances.

Accordingly, the Court of Appeal held that the administrators' failure to amend the proof of debt was unfair on both grounds. LBA was simply trying to address an administrative error. Refusing to correct the mistake served no statutory purpose – indeed the administrators were under a duty to establish the value of claims, and the ordinary statutory process provides a mechanism for correcting such mistakes. It was irrelevant that the administrators could not have required that the mistake be rectified had the roles been reversed – administrators are held to a higher standard of conduct as officers of the court.

Adjudications

Another topic that has received significant judicial attention over the past year has been the interplay between construction adjudications and insolvency processes.

The Court of Appeal in ***Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd***[51] held that adjudications in construction disputes are an "*exercise in futility*" where one of the parties is in liquidation. Bresco sought to set aside an injunction that prevented the adjudication of claims and cross-claims between Bresco and Lonsdale.

Rejecting the first instance decision that the adjudicator lacked jurisdiction where the rules regarding insolvency set-off applied, the Court of Appeal nonetheless upheld the injunction against the adjudication, on the basis that it would have no practical utility. The Court of Appeal stated that the insolvency process made successful enforcement of the adjudicator's decision very unlikely, as such enforcement proceedings would almost certainly fail or be stayed in most cases. While it acknowledged that there may be exceptional circumstances where this was not the case, the Court did not expand on when such circumstances might arise.

The case then went to the Supreme Court[52] which reversed the Court of Appeal's decision. Key points in the judgment include:

- The legislation in respect of insolvency set-off does not cause underlying disputes relating to cross-claims that form the basis of insolvency set-off to "*melt away*". If the law did operate in this way, then this "*would be a triumph of technicality over substance*" to deprive a company of its statutory right to adjudication.
- Just as the right of a company in liquidation to issue arbitral or court proceedings to determine the value of a claim (or cross-claim) is preserved, so should the right of a company to determine the value of claims by adjudication.
- It was incorrect to assert that the sole purpose of construction adjudication was "*to enable a party to obtain summary enforcement of a right to interim payment for the protection of its cash flow*". Although this could be one of the purposes of adjudication, the process also served as a mainstream method of alternative dispute resolution, enabling speedy, cost effective and final resolution of disputes. In the context of construction disputes, adjudication by a professional construction expert may assist liquidators in their determination of the net position between the creditor and the company.
- The court will not be obliged to grant summary enforcement of an adjudicator's decision, and may

[51] [2019] EWCA Civ 27.

[52] [2020] UKSC 25.

decline to do so due to an ongoing insolvency process. This was an issue better left to the enforcement stage, rather than restraining the process of adjudication entirely.

The law in this respect has therefore seen a reversal over the course of the past year, and the clarification provided by the Supreme Court will be welcomed by insolvency practitioners appointed over construction companies. Being able to use adjudication may be of benefit to creditors generally, as it may be a more cost-effective use of the funds of an insolvent estate (than, say, arbitration or court proceedings) to, where necessary, determine creditor claims.

It did not take long to see this play out. In apparently the first case to apply ***Bresco***, the Technology and Construction Court in ***John Doyle Construction Ltd v Erith Contractors Ltd***[53] set out a series of principles that the Court would apply when considering whether to grant summary judgment to a company in liquidation seeking to enforce an adjudicator's decision. In particular, the Court stated that it would not enforce a decision in which the adjudicator dealt with only a narrow aspect of the overall dispute, rather than considering the entire financial dealings between the parties. The Court would also take into account (if the adjudicator had not) any additional dealings beyond the construction contract in question, and any additional points in defence. Finally, there would need to be no real risk that summary enforcement would deprive the paying party of security for any cross-claims that it has against the company in liquidation.

Appointment of administrators

Turning to matters of procedure, ***Symm & Company Limited***[54] was the culmination of a line of cases concerning the out-of-hours appointment of administrators. It followed on from the decisions in ***Re HMV Ecommerce Ltd***[55], ***Re Skeggs Beef Limited***[56], ***Re SJ Henderson & Company Limited***[57], ***Re Keyworker Homes***[58], and ***Re All Star Leisure***[59] , and related to the Practice Direction on Insolvency Proceedings[60] that came into force in 2018. This practice direction covers electronic filings under the Electronic Working Pilot Scheme to appoint administrators.

Following the successive first instance decisions above, the position regarding the out of hours appointment of administrators had become uncertain. The Insolvency (England and Wales) Rules 2016 provide for the out of hours appointment of administrators by qualifying floating charge holders, and the Courts in ***Skeggs Beef*** and ***All Star Leisure*** had held that defects in the filing of such notices could be cured by the courts such that they were valid from the time they were filed.

By contrast, there were no comparable rules regarding the out of hours appointment of administrators by directors of the company. Further still, the Courts had given conflicting judgments as to the validity of such appointments – the Court in ***Keyworker Homes*** had held that out of hours appointments by directors were valid, while the decision in ***SJ Henderson*** had found that such appointments would not take effect until the court next opened.

In ***Symm & Company Limited***, the Court, citing with approval the judgment in ***SJ Henderson***, held that directors cannot appoint administrators out of hours. The rules reflected the deliberate policy that out of hours appointments should be limited to the holders of a qualifying floating charge.

Such out of hours appointments by directors are therefore defective, but rule 12.64 of the Insolvency Rules 2016 gives the court the power to cure such defects, provided it does not give rise to any "*substantial injustice*".

In this case, the defective appointment was an irregularity which caused no substantial injustice and could therefore be cured by the Court. In light of the above policy considerations, it was appropriate that such appointments should only be treated as filed once the court opened on the next business day.

As this was only a first instance decision coming after a series of conflicting cases, it does not necessarily put the issue to rest and the Insolvency Rules may need to be clarified.

[53] [2020] EWHC 2451.

[54] [2020] EWHC 317.

[55] [2019] EWHC 903.

[56] [2019] EWHC 2607.

[57] [2019] EWHC 2742.

[58] [2019] EWHC 3499.

[59] [2019] EWHC 3231.

[60] [2018] BCC 241.

DATA PROTECTION

Data protection litigation is another growth area in English litigation and has the potential for significant further growth over the coming years. This is largely due to a) the introduction of robust and wide-reaching data protection laws (such as the General Data Protection Regulation (GDPR)), b) data protection becoming an increasingly important political issue as the processing of personal data becomes ever more widespread, and c) the development of the class action landscape in the UK (thereby facilitating claims that might otherwise be uneconomic to pursue).

The Court of Appeal's judgment in ***Lloyd v Google LLC***[61] is particularly significant for the following reasons[62]:

- the wide reading the Court gave to the applicable test establishing Mr Lloyd as the representative of the claimant class, which in effect lowers the threshold for certifying representative class actions under the Civil Procedure Rules (CPR); and

- the confirmation it provided that damages may be claimed for "loss of control" of an individual's personal data, even if the individual does not suffer pecuniary loss or distress.

By way of background, Mr Lloyd is the representative of a class of around 4 million iPhone users claiming "*per capita*" damages on the basis of breach of statutory duty by Google. He alleges that Google's development of the "*Safari Workaround*" allowed Google to track and collect individuals' "*browser generated information*" (BGI), without their knowledge or consent between August 2011 and February 2012. The case therefore concerns the EU's Data Protection Directive (the predecessor to the GDPR) and the UK's Data Protection Act 1998 ("DPA"), the predecessor to the Data Protection Act 2018.

Reversing the first instance decision, the Court of Appeal held that:

- The High Court had taken too narrow an approach in applying the test for representative class actions in CPR 19.6 – whether those in the class have the "same interest". All members of the class of 4 million affected iPhone users had suffered the same loss – the loss of control of their personal data for the same time period in the same circumstances. The Court held that Google could not raise a defence to one claimant that did not apply to all the others. That was sufficient to establish the "same interest" under CPR 19.6.

- While English law requires actual damage to be caused by a tortious breach and in this case, individuals affected by the Safari Workaround did not suffer any pecuniary loss or distress, the relevant data protection principles had to be interpreted under the Data Protection Directive as a matter of "*autonomous*" EU law. The fundamental right to data protection is contained in Article 8 of the EU Rights Charter, and that article confirms the protections in the Data Protection Directive. Therefore, as the data was protected under EU law and had economic value (Google could sell the BGI to advertisers) – the control of the data has value and so does the loss of that control.

Representative actions have rarely been pursued because of the restrictive interpretation the courts have hitherto given to "*the same interest*" test. The decision may therefore embolden litigation funders and others to pursue claims in the future (of which data protection breaches are just one example) which would not have previously been viable.

The second major data protection judgment this past year was that given by the Supreme Court in ***WM Morrison Supermarkets Plc v Various Claimants***[63]. Another high profile class action, this case concerned the vicarious liability of an employer for a data breach by one of its employees (a Mr Skelton). The decision is therefore also of broader importance to the law on vicarious liability.

Mr Skelton was a disgruntled employee in Morrison's IT team, who made copies of Morrison's payroll data relating to almost 100,000 employees and uploaded them to a public filesharing platform.

An affected class of employees brought the present claim against Morrison under a Group Litigation Order (a mechanism for case managing and making common findings of fact in multiple proceedings concerning

[61] [2019] EWCA Civ 1599.

[62] Although the case is currently on appeal to the Supreme Court and is expected to be heard in late 2020 or early 2021.

[63] [2020] UKSC 12.

similar issues), for compensation for breach of statutory duty, misuse of private information and breach of confidence.

The Supreme Court considered two key issues: whether Morrison was in fact vicariously liable for Mr Skelton's actions and, relatedly, whether the Data Protection Act 1998 (DPA 1998) impliedly excluded an employer's vicarious liability for statutory torts committed by their employee under the DPA 1998 or the misuse of private information or breach of confidence, by specifying precisely the duties of data controllers and when they are to be liable (the "DPA exclusion issue"):

- The correct test for vicarious liability is that the connection between the tortfeasor's wrongdoing and the acts the employee was authorised to do (i.e. the employer-employee relationship) must be "*sufficiently close*" such that the tort may fairly and properly be regarded as having been committed in the course or within the scope of the tortfeasor's employment.

- That was not satisfied in this case because, in particular, the Court of Appeal had taken too broad an approach in defining the "*field of activities*" assigned to Mr Skelton; Mr Skeltons' criminal motive was relevant to the analysis; he was pursuing his own "*personal vendetta*" against Morrison and engaging in a "*frolic of his own*", which was not so closely connected with his authorised field of activities to justify the imposition of vicarious liability.

- Although not strictly necessary in light of its findings on vicarious liability, but still of interest in the context of data protection, the Supreme Court found Morrison's argument on the DPA exclusion issue unpersuasive. It held that, if Morrison had been vicariously liable for Mr Skelton's actions, the DPA would not have excluded such liability. In particular, the imposition of statutory liability under the DPA was not inconsistent with the concurrent imposition of a common law vicarious liability, in particular because the DPA neither expressly nor impliedly indicated otherwise.

The decision will be welcome for employers and data controllers generally. If the Supreme Court had not rejected the Court of Appeal's finding that Morrison was vicariously liable on the facts in this case, it would have expanded in a significant way the scope for claims in relation to data protection breaches (and possibly others) committed by rogue employees.

The High Court gave an interesting judgment in ***Aven v Orbis Business Intelligence Ltd***[64], concerning a claim for correction of the record and other remedies for breach of statutory duties imposed by the DPA 1998.

Orbis, a London-based private intelligence firm established by a former British intelligence officer, had produced what became known as the Trump-Russia dossier in 2016. Buzzfeed News published an online article and made accessible sixteen memoranda from the dossier. The claimants alleged that one of the memoranda contained personal data relating to them, which was inaccurate, and had been presented by Orbis contrary to the fundamental data protection principle under the DPA 1998 that data should be processed fairly and lawfully.

The Court found that insufficient action had been taken by the defendant to verify the factual accuracy of the information about the claimants, which was untrue. The Court made a rectification order that the dossier should contain some notation as to the Court's findings of inaccuracy, and awarded damages to the claimants of £18,000 each, for loss of autonomy, distress and reputational damage caused by the statutory breach.

Aside from its high-profile subject matter, the case is interesting in that the Court adopted a similar approach in assessing damages to that used in defamation cases, i.e., damages should vindicate the claimant's 'good name' and compensate him or her for any reputational damage and any distress caused.

The CJEU gave a significant judgment in July 2020 in the long-running "***Schrems II litigation***". It held that the EU-US Privacy Shield, until now an approved means by which personal data could lawfully be transferred from the EU to the US, is not valid under EU law. Around 5,300 organisations relied on the shield.

The GDPR provides a number of mechanisms by which data may be lawfully transferred out of the EU to a third country. One such mechanism is an "*adequacy decision*" under Article 45 of the GDPR which may be made by the European Commission where a third country's laws provide an "*adequate level of protection*" to the EU data subject. There is no adequacy decision in respect of the US. The CJEU found that the Privacy Shield agreed between the EU and US effectively amounted to an adequacy decision without applying the Article 45 test. In examining whether US laws required an "*adequate level of protection*", the CJEU considered a number of factors including US legislation which permitted certain US intelligence agencies to

[64] [2020] EWHC 1812.

access personal data transferred to the US and that US legislation does not afford actionable rights to data subjects in the US courts. For these reasons, among others, the CJEU found that the US data privacy law does not provide subjects the same level of protection as under EU law and that therefore the Privacy Shield was incompatible with Article 45, and invalid.

The CJEU did however note that, in principle, standard contractual clauses (SCCs) remain a valid method under GDPR for transferring personal data from the EU to the US. SCCs are commonly used by large companies and create important contractual obligations to third parties such as data subjects and regulators. The CJEU noted that SCCs cannot, having regard to their nature, provide guarantees beyond a contractual obligation to ensure compliance with the level of protection required under EU law, and so they may require the adoption of supplementary measures to ensure compliance with that level of protection outside the EU.

US recipients of personal data from the EU should consider how they will comply with SCCs, in order to prepare for increased scrutiny from EU data exporters. There is wide recognition of the commercial importance of EU to US personal data transfers and therefore we expect to see further developments in this area, in particular in updated and potentially more developed SCCs.

That being said, it is important to note that the CJEU's decision does not impact many day-to-day transfers of personal data where such transfer is "*necessary*" for the conclusion or performance of certain contracts with, or concluded in the interests of, a data subject (*e.g.*, the transfer of information provided for holiday bookings or various business transactions). Such transfers have always relied on the exemptions under Article 49 of GDPR.

In response to ***Schrems II***, in September 2020, the US Government published a white paper that outlines the limits and safeguards in the United States on government access to data and is intended to assist companies in assessing whether their data transfers offer appropriate data protection in accordance with ***Schrems II***.[65]

Looking to the future, the determination of the ***Lloyd v Google*** case in the Supreme Court will be significant for future representative actions which seek to rely on a broadly drawn "*same interest*" requirement. For example, a representative action has recently been issued against YouTube's owner, Google Ireland Ltd, in the High Court on behalf of every child under the age of 13 in England and Wales who has used YouTube since 25 May 2018, and their parents or guardians. Privacy activist Duncan McCann brought the action alleging that YouTube has breached the DPA 2018 and GDPR by collecting and processing children's personal data without obtaining the requisite parental consent. The claim seeks more than £2.5 billion in damages.

A representative action has also recently been filed against the hotel group Marriott over a data breach relating to a database containing records of up to 500 million hotel guests around the world, including up to 7 million in England and Wales, between July 2014 and September 2018.

There are also other high-profile future cases involving Group Litigation Orders. The High Court made an order allowing an action against British Airways in October 2019, with a cut-off date of January 2021 for further claimants to join. More recently, following a data breach in relation to consumer information held by EasyJet in May 2020, intention to file a Group Litigation Order has been published publicly by the group litigation law firm PGMBM.

[65] https://www.commerce.gov/sites/default/files/2020-09/SCCsWhitePaperFORMATTEDFINAL508COMPLIANT.PDF.

PRIVATE INTERNATIONAL LAW

The courts this year have given a number of important judgments on issues of jurisdiction and enforcement, the Court's power to grant anti-suit relief and applicable law.

Brussels Recast and the Lugano Convention

The first two cases concern Article 31(2) of Regulation 1215/2012 ("Brussels Recast"), which provides an exception to the general rule that the court first seised of a dispute must first determine whether it has jurisdiction, where the parties have entered into an exclusive jurisdiction agreement.

Etihad Airways PJSC v Prof Dr Lucas Flother[66], (in which we represent Etihad) concerns the effect of a comfort letter given by Etihad Airways to Air Berlin, which later became insolvent. Air Berlin's German insolvency administrator launched proceedings in Berlin for breach of the letter which it said created binding obligations. Etihad brought an application in England seeking negative declaratory relief and a stay of the German proceedings under Article 31(2), on the basis of an asymmetric exclusive jurisdiction clause in favour of the English courts and contained in a closely related loan agreement.

The Court held that the jurisdiction clause, properly construed, extended to disputes arising in relation to the comfort letter. The question then arose whether Article 31(2) of Brussels Recast applied to asymmetric exclusive jurisdiction clauses.

The Court confirmed that asymmetric jurisdiction clauses fall within the scope of Article 31(2). The Court found that the purpose of Article 31(2) was to put an end to the use of the 'Italian Torpedo' (the commencement of a claim in one EU jurisdiction, forcing the stay of a related claim in another, in order to stymie its progress). If the provisions did not apply to such asymmetric jurisdiction clauses, the purpose of Article 31(2) would be undermined, for which there was no logical justification.

In reaching this decision, the Court rejected arguments by Air Berlin that the approach under Brussels Recast should reflect the position under the Hague Convention on Choice of Courts 2005, which, it alleged, did not recognise asymmetric jurisdiction clauses as exclusive jurisdiction clauses. The Court found that there were good reasons to think that such clauses are recognised under the Hague Convention, and even if they are not, this was not relevant to the interpretation of Brussels Recast.

The Court granted permission to appeal on the Article 31(2) issue, and the appeal is scheduled to be heard in November 2020.

In another case concerning the effect of Article 31(2), ***Mastermelt Ltd v Siegfried Evionnaz SA***[67], the High Court considered the impact of the provision on Article 27 of the Lugano Convention, which deals with related actions in multiple member states. The Lugano Convention governs jurisdiction as between EU member states and Iceland, Switzerland and Norway, and mirrors the predecessor regulation to Brussels Recast.

The applicant sought a stay of proceedings in the English court (which had been first seised), on the basis of an exclusive jurisdiction clause in favour of the Swiss courts.

The Court rejected the argument that the provisions of the Lugano Convention had to be read in light of the new provisions of Brussels Recast – in particular the exception regarding exclusive jurisdiction clauses under Article 31(2). The general objective of a "*harmonised regime*" did not justify reading such an exception into the application of Article 27 of the Lugano Convention. The Court ultimately held, however, that there were other grounds under the Lugano Convention for staying the proceedings.

The English court has also clarified some of the rules on jurisdiction under Brussels Recast in the absence of a jurisdiction clause. Two such decisions, concerning the application of Article 29 of Brussels Recast, arise in the case of ***Federal Republic of Nigeria v Royal Dutch Shell plc***[68], relating to allegations of bribery in the procurement of oil prospecting licenses. Article 29 requires that, where proceedings involving the same cause of action and the same parties are brought in the courts of different member states, any court other than the court first seised shall of its own motion stay its proceedings until the jurisdiction of the court first seised is established.

In the first decision, the claimant sought to vacate a hearing of the defendants' challenge to the jurisdiction

[66] [2019] EWHC 3107.

[67] [2020] EWHC 927.

[68] [2020] EWHC 766; [2020] EWHC 1315.

of the English court, pending the outcome of prior criminal proceedings in Italy in which the claimant had also pursued a civil claim against some of the same defendants.

The Court refused the application to vacate on the basis that it would, in effect, allow the claimant to maintain two sets of proceedings, on the same essential facts, in two different jurisdictions, until it was able to decide which of the proceedings were in its interests to pursue. This would clearly contradict the purpose of Article 29 of Brussels Recast. The judgment provides guidance on the factors relevant to the adjournment of a jurisdiction challenge, such as:

- The efficient use of court time and resources.
- The potential benefits of waiting for the outcome of tangential proceedings.
- The desirability of avoiding unreasonable cost and delay in resolving jurisdictional challenges.
- The impact on other parties of any adjournment.

The second decision concerned the defendant's jurisdiction challenge itself, which was brought on the grounds that:

- Jurisdiction over the 'anchor defendant' should be refused under Article 29 on the basis that it was already party to parallel proceedings in Italy (Article 8 allows for multiple defendants from different member states to be sued in a single set of proceedings, provided at least one of them – the 'anchor defendant' – is domiciled in that state. If the court had no jurisdiction over the anchor defendant, the entire English claim should be dismissed.
- Alternatively, the court should stay the English claim pending the outcome of the Italian proceedings, under either Article 30 of Brussels Recast, or under its case management powers.

The Court found that Article 29 applied, such that jurisdiction should be declined. In reaching this conclusion, it held that:

- Article 29 applied even where one of the claims was brought as an adjunct to related criminal proceedings, as the Italian claim was.
- The parties to the claims did not need to be identical; Article 29 would apply in respect of those defendants that were party to both sets of proceedings.
- Two proceedings involved the same *cause* if, and to the extent that, the basic facts and legal rights claimed were the same, irrespective of the precise causes of action in each.
- Proceedings had the same *object* to the extent they had the "*same end in view*". The Court would consider the extent to which any additional claims in one set of proceedings raised "*sufficiently different issues of sufficient importance in the overall litigation*".

The Court further held that, had Article 29 not applied, it would have in any event been appropriate for the Court to grant a stay.

On the subject of anchor defendants, in ***Senior Taxi Aereo Executivo LTDA v Agusta Westland SpA***[69], the High Court clarified that anchor defendants are subject to a merits test under Brussels Recast.

The claimants brought proceedings for various losses in relation to a helicopter crash that occurred in Brazil in 2011 against several entities in the Leonardo group of companies. One of the three defendants, AW Ltd, was an English company, which served as the anchor defendant for proceedings against all three defendants in England under Article 8(1) of Brussels Recast. The defendants applied to set aside the proceedings on the basis that the English court did not have jurisdiction under Brussels Recast against the non-anchor defendants, because the claim against the anchor defendant was not at least sustainable (i.e. the 'merits test'),

The Court confirmed that a claim against an anchor defendant must be sustainable as against that defendant for there to be jurisdiction over a co-defendant. This merits test could be satisfied by demonstrating that the claim against the anchor defendant was viable, or had or involved a "*real prospect of success*", "*serious issue to be tried*" or "*good arguable case*". As there was no real prospect of success against the anchor defendant on the facts, the proceedings were dismissed.

Two recent cases from the Supreme Court and the CJEU have clarified the application of Sections 3 and 4 of Brussels Recast, concerning insurance matters and consumer contracts respectively.

[69] [2020] EWHC 1348.

In ***Aspen Underwriting Ltd v Credit Europe Bank NV***[70] the claimant insurer entered into an insurance policy with the owners of a maritime vessel. The policy contained an exclusive English jurisdiction clause. The defendant later funded the re-financing of the vessel, taking an assignment of the insurance policy. After the vessel sank, the claimant reached a settlement with the owners of the vessel, for the ultimate benefit of the defendant, and the settlement agreement also contained an exclusive English jurisdiction clause. When it subsequently transpired that the owners had intentionally sunk the vessel, the claimants brought proceedings in England seeking restitution of the sums paid under the settlement.

The defendant challenged the jurisdiction of the English court on the basis that the exclusive jurisdiction clauses within the policy and settlement agreement did not bind it as a third party, and that the claim fell within the special insurance provisions in Section 3 of Brussels Recast, under which a defendant must ordinarily be sued in the member state where it is domiciled.

The Supreme Court found that the rules in Section 3 not only covered the rights of contractual parties, but also those of insurance beneficiaries and injured parties. Reversing the decision of the Court of Appeal, the Supreme Court also held that there is no requirement (as had in some quarters hitherto thought to be the case) that the policyholder, insured or beneficiary must be in a weaker position, relative to the insurer, for the protections under Section 3 to apply.

Further still, the defendant was not bound by the exclusive jurisdiction clauses contained within the agreements. The Court noted that in the *Jay Bola*[71] and *Youell v Kara Mara Shipping Co Ltd*[72], an assignee cannot enforce its rights without accepting the conditions or qualifications that go with them, such as an arbitration or exclusive jurisdiction agreement. However, in this case the defendant challenging jurisdiction was not party to the agreements and had not sought to enforce or even assert any claims thereunder. The *Jay Bola* and *Youell* therefore were not applicable, and the defendant could not be said to be bound by the exclusive jurisdiction clauses. As a result, the claimant was only entitled to sue in the defendant's domicile – the Netherlands.

The Supreme Court's decision is of relevance beyond the insurance industry, insofar as it also confirms that an assignee of contractual rights is not bound by a jurisdiction clause contained in the assigned contract, unless the assignee has sought to enforce those rights by commencing legal proceedings. The case is also an example of the possibility that different parties in relation to the same underlying dispute may need to be sued in different jurisdictions, resulting in parallel proceedings, despite the rules on jurisdiction generally seeking to avoid that outcome.

In the second case, ***AU v Reliantco Investments Ltd,***[73] the claimant (an individual) had opened a trading account with an online platform owned by the first defendant, on which he subsequently incurred significant losses.

The CJEU was asked to decide whether the definition of "*consumer*" under Brussels Recast extended to such individuals, and if so, whether the claimant's tort claim fell within the scope of the consumer provisions under Section 4 of Brussels Recast.

Ordinarily, under Article 7 Brussels Recast, claims in tort should be brought in the courts of the place where the harmful event occurred. However, where a claim falls within the scope of Section 4, the claimant may also bring a claim in the courts where it is domiciled.

The Court held that an individual is to be treated as a consumer unless the contract fell within the scope of that person's professional activity. Section 4 would apply to a consumer's tort claim provided it was "*indissociably linked*" to a contract between them and a seller or supplier, as the Court found was the case between the claimant and the first defendant.

The decision clarifies that high net worth and sophisticated investors may also benefit from the consumer protections under Section 4 when they are acting in a private capacity. It also appears to be the first case in which the CJEU has ruled that a tort claim falls within the scope of Section 4.

The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain[74] provides guidance on state immunity and the applicability of the "*arbitration exception*" in Brussels Recast. The case related to oil pollution damage caused when a vessel broke up off the coast of Spain and France in 2002. Various proceedings ensued, including arbitration by the vessel's insurers in which they successfully sought

[70] [2020] UKSC 11.

[71] [1997] 2 Lloyd's Rep 279.

[72] [2000] 2 Lloyd's Rep 102.

[73] (Case C-500/18) EU:C:2020:264.

[74] [2020] EWHC 1920.

declarations that Spain and France were in breach of obligations not to pursue direct civil claims other than by arbitration in London.

Following the arbitral award, the insurers brought proceedings in the English court against Spain and France in respect of their failure to honour arbitral awards (the "Award Claims") and the failure to abide by English court judgments finding that Spain and France were obliged to pursue any claims by way of London arbitration (the "Judgment Claims"). Spain and France made four related applications disputing the English court's jurisdiction to hear these claims. The main grounds relied upon by the two states included that they had state immunity, and that the court lacked territorial or personal jurisdiction over them.

The Court found that state immunity did not apply in respect of the Award Claims or Judgment Claims. In reaching this conclusion, the Court relied on two exceptions to state immunity set out in the State Immunity Act 1978 ("SIA"). First, the Award Claims related to an arbitration, and therefore fell within the exception to state immunity under s. 9(1) of the SIA. Second, on an ordinary construction of s. 3(1)(a) SIA, which provides that states are not immune in respect of proceedings related to commercial transactions entered into by a state, both the Award Claims and the Judgment Claims related to commercial activities, and did not represent an exercise of sovereign authority.

Having addressed the issue of state immunity, the Court held that it had jurisdiction over the Award Claims, which fell within the arbitration exception to Brussels Recast and were therefore governed by common law rules, pursuant to which the Court had jurisdiction. The Judgment Claims, by contrast, were held to be too far removed from the arbitrations to fall within the exception and therefore jurisdiction in relation to them was to be determined under Brussels Recast. The claims were further found to be governed by the rules pertaining to insurance matters under Section 3 Brussels Recast. Applying the relevant provisions of Brussels Recast, the Court found that it did not have jurisdiction to hear the Judgment Claims.

Common law jurisdiction

There have also been a number of significant decisions regarding the common law rules on jurisdiction and enforcement i.e. which apply where the Brussels/Lugano regimes do not.

In ***Mousavi-Khalkali v Abrishamchi***[75], the High Court was asked to set aside an order granting permission to serve proceedings on defendants outside the jurisdiction, in Iran, on the basis that England was not the *forum conveniens*. This was because, *inter alia*, a large proportion of the relevant evidence was in a foreign language.

The Court held that although English judges were qualified to consider translations of evidence in a foreign language, the nature and extent of such material would be a very significant factor in deciding whether the English court is an appropriate forum. In this case, England was not the natural forum for the dispute because witness evidence, key documents and correspondence were predominately in Farsi.[76]

The Court has also given judgment for what appears to be the first time on the enforceability of judgments of the Dubai International Finance Centre Courts ("DIFC Court"). In ***GFH Capital Ltd v Haigh***[77], the High Court granted summary judgment to a Dubai-based claimant on the basis of a DIFC Court judgment.

The defendant had attempted to resist enforcement on several grounds, including that his human rights had been violated by the circumstances of his detention and prosecution in Dubai and that the DIFC Court was not impartial.

The Court found that any allegations as to the defendant's detainment in the UAE had no bearing on the judgment of the DIFC Court, and that the defendant had failed to demonstrate that the DIFC Court lacked impartiality.[78]

Jurisdiction to grant anti-suit relief

There have also been a number of significant judgments over the last year regarding the jurisdiction to grant anti-suit relief. ***Times Trading Corp v National Bank of Fajairah (Dubai Branch)***[79] concerned an application to restrain proceedings in Singapore in favour of London arbitration. The Court in this case gave some helpful guidance on the applicable test for "*quasi-contractual*"

[75] [2019]7 EWHC 2364.

[76] Permission to appeal to the Court of Appeal was granted and judgement is reserved.

[77] [2020] EWHC 1269.

[78] Permission to appeal is pending awaiting a judicial decision on the papers.

[79] [2020] EWHC 1078.

cases, i.e. where there is no undisputedly applicable arbitration agreement.

The Court considered whether the relevant approach in such cases was to treat them "as if" they are contractual anti-suit cases in which case it needed to be satisfied that there is a high degree of probability that there is a relevant arbitration clause i.e. that the claimant has a negative right not to be sued (the "contractual approach"). If the contractual approach was to be taken then the well-known test laid down in *Angelic Grace*[80] - that the Court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of an arbitration clause unless the defendant can show strong reasons to refuse the relief – would apply. If not, the Court would have to consider whether to adopt the test that applies in non-contractual anti-suit cases i.e. whether the litigation frivolous or vexatious (the "non-contractual approach").

The application was brought on the basis of the contractual approach, and it was unlikely that anti-suit relief would be granted on the basis of the non-contractual approach, if applicable.

The Court acknowledged that the existing authorities tended to deal with two categories of quasi-contractual cases:

- those where the existence of the arbitration agreement was not in doubt, but the party who brought the proceedings potentially in breach of the agreement was not a party to it; and

- those where the party seeking the anti-suit injunction denies the existence or validity of the contract under which he is sued but the defendant to the anti-suit claims under the contract, while not complying with the forum clause which forms part of it.

The present case, however, did not fall neatly into either of these existing categories. The applicant did not challenge the existence or validity of the contract (it positively asserted one against the respondent as a direct party, which the respondent had denied but nevertheless sued under, on a "belts and braces" basis in Singapore), so the case was not in the second category. The respondent was a party to a contract (rather than deriving its rights through another) so the case was also not in the first category. The issue was whether the respondent was party to the relevant contract.

Nonetheless, the Court held that the common theme underpinning both categories of quasi-contractual cases was the principle that parties seeking to enforce a contractual right must accept the conditions or qualifications which accompany such rights. As such, the authorities showed a common and consistent practice of taking the contractual approach in quasi-contractual cases, at least by analogy. There was no distinction to be drawn between different categories of quasi-contractual cases in this respect.

As such, though the facts of the case did not fit neatly into one of the two existing categories of quasi-contractual case, the Court granted anti-suit relief by reference to the contractual approach.

In ***SAS Institute Inc v World Programming LTD***[81], the Court of Appeal considered an appeal against a decision to discontinue anti-suit relief in respect of US enforcement proceedings. The Court reiterated that clear justification was necessary for the granting of any injunction that interfered, even indirectly, with proceedings in a foreign court. However, in deciding to grant anti-suit relief to restrain the US proceedings in this case, the Court emphasised that the enforcement of judgments is territorial, and foreign enforcement orders affecting UK-based assets would ordinarily be considered exorbitant and an infringement of UK sovereignty. To the extent that anti-suit relief sought to address such exorbitant elements of foreign enforcement proceedings (i.e. those affecting UK-based assets), comity did not prevent the grant of anti-suit relief.

Although the Court did not reinstate the injunction in full, it did reinstate those elements restraining the US enforcement proceedings in respect of UK-based assets.

The most closely watched decision this year relating to the Court's anti-suit jurisdiction was given by the Supreme Court in ***ENKA Insaat ve Sanayi A.S. v OOO "Insurance Company Chubb"***[82], in which Shearman & Sterling represented the respondent ("ENKA").

The appellant ("Chubb") commenced proceedings for damages against ENKA and others in Russia. ENKA issued arbitration proceedings in the English court seeking to stop the continuation of the Russian claim against it, on the basis of an arbitration agreement by which Chubb, as a subrogated insurer, was bound (the AA).

[80] [1995] 1 Lloyd's Rep 87.

[81] [2020] EWCA Civ 599.

[82] [2020] UKSC 38

The contract containing the AA provided for all disputes to be resolved by ICC arbitration seated in London. There was no express choice of governing law for the AA. There was also no governing law clause for the main contract; only a defined term, "*Applicable Law*", that was used in respect of specific provisions in the contract and referred to Russian laws and regulations.

ENKA's position was that there was no choice of law in the main contract and that the law of the arbitration agreement should therefore follow the law of the chosen seat, which in this case was London (i.e. English law). Chubb argued that the law of the arbitration agreement should follow the law of the main contract, which it said was Russian law by way of either express or implied choice.

On this issue, the Court of Appeal concluded that, where there is an express choice of law in the main contract, it is a matter of construction whether such choice can be said to extend to the arbitration agreement as well. The Court stated that, if it does not so extend or there is no express choice, the law of the arbitration agreement would ordinarily follow the choice of seat, unless the circumstances of the case provided powerful reasons to the contrary. Granting ENKA's appeal, the Court held that there were no such reasons and the arbitration agreement was therefore governed by English law[83].

Granting ENKA's appeal, the Court of Appeal also noted that the English court (where it is the court of the seat) is necessarily the appropriate court to grant an anti-suit injunction, and that "*...ceding the decision to the court seised of the allegedly abusive proceedings cannot be justified on grounds of comity, whether as a matter of forum conveniens or as a relevant factor in the exercise of discretionary relief*. "

On appeal to the Supreme Court, the expansive view taken by Court of Appeal as to the significance to be attributed to the parties' choice of seat was unanimously rejected. Although the majority also found that the AA was governed by English law, it did so on the basis that that the law of the seat was the law with which the AA had its closest and most real connection, in the absence of a choice of law for the main contract.

In reaching its conclusion, the Supreme Court addressed a number of important points:

- Where parties have made a choice (express or implied) of the law to govern the main contract, this will generally extend to an arbitration agreement within that contract.
- Factors that may negate this outcome are (a) a provision of the law of the seat that applies that law to the arbitration agreement; and (b) a serious risk that, under the law of the main contract, the arbitration agreement would be ineffective (an endorsement of the "validation principle").
- An arbitration agreement stipulating, for example, that arbitrators should be selected from an English institution might also affect this general rule.
- Where parties have made no choice of law for the main contract, the arbitration agreement will be governed by the law with which it is most closely connected—generally this will be the law of the seat.
- Where the arbitration agreement forms part of a broader dispute resolution clause, (e.g., one providing for negotiation of a dispute prior to any arbitral proceedings) the law of the arbitration agreement will also apply to the wider dispute resolution clause.
- As the Court of Appeal had held, *forum conveniens* considerations are irrelevant, and comity has little if any role to play where anti-suit relief is sought for breach of an arbitration agreement. It is irrelevant whether the arbitration agreement is governed by English law—the principle arises from the fact of the promise made, not the law by which it was governed. If the arbitration agreement is not governed by English law, the English courts are more than capable of taking evidence on and deciding any issues of foreign law which arise.

This important decision provides clarity to what had been an area of considerable uncertainty. Although the judgment rolls back the expansive view taken by the Court of Appeal as to the significance of a choice of seat, it nonetheless provides a useful framework for identifying the law applicable to arbitration agreements and confirms the availability of injunctive relief to protect English seated arbitrations.

The Supreme Court's judgment also gives new significance to the distinction between the governing law for a contract which arises from an implied choice, and one identified by reference to the test of closest and most real connection. This may therefore lead to increased litigation by parties regarding the basis for the law governing their contracts and, therefore, their arbitration agreements.

[83] [2020] EWCA Civ 574.

Governing law

KMG International NV v Chen[84] related to the enforcement by a creditor of an arbitral award against DPH Holding SA ("DPH"). The proceedings concerned claims in tort arising from allegations of asset stripping by the defendants, being a director and a subsidiary of DPH.

The defendants noted that, under English law, creditors and shareholders in a company could not claim for losses which merely reflected loss suffered by the company.[85] The defendants applied to have the claims struck out on the basis that, notwithstanding that the substantive dispute was governed by Dutch law, the rule still applied in this case, because:

- the rule was procedural rather than substantive (within Article 1(3) of Rome II[86]) and was therefore governed by the *lex fori*;
- the rule was an overriding mandatory provision of English Law (within Article 16); or
- it would be incompatible with English public policy (under Article 26) to allow the claims to proceed.

The High Court rejected all three arguments and dismissed the defendant's application to strike out the relevant claims.

First, and in particular, the Court found that the rule against reflective loss was a substantive rule and therefore fell within Rome II and was not applicable to the claim (because the claim was governed by Dutch law).

On the second issue, whether a rule is considered an overriding mandatory provision depends on (a) whether it is regarded as crucial by a country for safeguarding its public interests, and (b) the extent to which it is applicable to any situation falling within its scope, irrespective of the law otherwise applicable under the regulation. The judge held that the rule against reflective loss did not satisfy such requirements—the fact that a rule was merely not discretionary was not sufficient.

Further, although the rule is part of English substantive law, it was not so fundamental that it should be equated with a fundamental right, such as a right arising under the European Convention of Human Rights, and the public policy provisions under Article 26 were therefore not engaged.

The Court in ***GDE LLC v Anglia Autoflow Ltd***[87] has helped to clarify the relationship between a "*choice of law*" under the Rome Convention[88], and the "*closest connection*" test applicable in the absence of such choice. Under Article 3 of the Convention, the governing law of a contract may be identified by the choice of the parties, where such choice is either expressly stated or otherwise clearly demonstrated. In the absence of such choice, Article 4 provides that the governing law of the contract will be the law of the state with which the contract is most closely connected.

Clarifying what factors might point towards a choice of law, as opposed merely to a closest connection, the Court held that Article 3 sets a high hurdle and will only be engaged where the parties had clearly demonstrated a positive choice of law. A jurisdiction agreement in favour of the English courts, of itself, did not reach this threshold. This was the case even when taken together with other factors, including the language of the contract, place where the contract was entered into and the place where equipment sold under the contract was to be manufactured.

Therefore, in this case, the Court decided that, taking into account all the surrounding circumstances, the contract (an agency agreement) was most closely connected with Ontario and therefore was governed by Ontario law. The "*centre of gravity*" of the contract was Ontario, mainly because both parties contemplated that the agency would focus primarily on eastern Canada and the domestic base of the Claimant's only shareholder was in Ontario. The most powerful factor in favour of any other jurisdiction was the English jurisdiction clause in the agency agreement, but this was an ancillary provision, unrelated to the substance of the contract.

[84] [2019] EWHC 2389.

[85] The scope of the rule has been narrowed significantly since judgment was given in this case, as it no longer applies to claims by creditors. ***Sevilleja v Marex Financial Limited*** [2020] UKSC 31 [see Company section page 12]. However, the case remains noteworthy for what it says about governing law.

[86] The Regulation on the law applicable to non-contractual obligations ((EC) 864/2007).

[87] [2020] EWHC 105.

[88] 1980 Rome Convention on the law applicable to contractual obligations.

PRIVILEGE

The past year has seen a number of important decisions in respect of legal professional privilege. The most significant development is the clarification that the 'dominant purpose' test applies to legal advice privilege (LAP) (as well as litigation privilege). The courts have also provided clarification on a number of other significant issues, including in respect of the assessment of privilege over emails and their attachments, multi-party correspondence, collateral waiver, and the exceptions to privilege. There have also been a couple of interesting cases on without prejudice privilege.

The most important development on privilege in the past year was the Court of Appeal's decision in ***Civil Aviation Authority v Jet2.com Ltd***[89]—a dispute over whether materials held by the CAA were protected from disclosure by LAP.

The dispute arose in judicial review proceedings brought by Jet2 against the CAA concerning the CAA's decision to publish various documents critical of Jet2's decision not to participate in an industry-wide ADR scheme for consumers. Jet2 made an application for specific disclosure of documents relating to a letter it received from the CAA, and challenged the CAA's claim of LAP over some of the drafts of the letter and all records of discussions of those drafts.

The most significant finding in the Court's judgment was that "*the proponent of the privilege must show that the dominant purpose of that communication or document was to obtain or give legal advice*".

Prior to this case, there had been significant uncertainty in the authorities as to whether the dominant purpose test applied to LAP, as well as litigation privilege (e.g. most recently, *obiter* comments in the high profile ENRC litigation had cast doubt on the applicability of the dominant purpose test in the context of LAP)[90].

The Court in ***Jet2*** also provided guidance concerning LAP and communications addressed to a mixture of lawyer and non-lawyer recipients, stating that:

- The dominant purpose test in such cases will be key—was the email sent for the dominant purpose of obtaining or giving legal advice?
- Consideration will also be given to whether an individual communication should be viewed as part of a broader continuum of communications, with an overall purpose of "*keeping the parties informed so that advice might be sought and given as required*". Such communications would be protected by LAP even if they did not expressly seek or contain legal advice.
- Even if not sent with the requisite dominant purpose, a document may nonetheless be privileged (at least in part) where there is a realistic possibility it will disclose the nature of legal advice being sought or given.
- Emails and any attachments must be considered separately for the purposes of privilege.

The judgment also clarified the scope of collateral waiver, by which the voluntary waiver of privilege over a document may be deemed to extend to all documents in the same "'transaction"(being the specific issue in relation to which the disclosed material had been deployed). The Court emphasised that "transaction" is not the same as 'subject matter' and any waiver will not extend to additional materials simply because they might be described as relevant to the same issue, in the ordinary sense that that word is used in the context of disclosure.

The issue of privilege in the context of regulatory investigations was considered in ***A v B and The Financial Reporting Council***[91]. The Financial Reporting Council (FRC) (the UK regulator for auditors) requested documents from an auditor's client. The client argued that certain documents were privileged and sought declaratory relief to the effect that it was entitled to withhold production of the documents from the FRC, while the status of the documents was resolved in related proceedings.

The High Court found that the duty to disclose documents is on the auditor, which must determine for itself whether a document is privileged. Disclosure could only be refused on the basis that a document is privileged - the mere assertion of privilege by the client is insufficient. The client's rights could be protected by bringing proceedings for an injunction against the auditor on the basis of the relationship between the two

[89] [2020] EWCA Civ 35.

[90] ***SFO v Eurasian Natural Resources Corporation*** [2018] EWCA Civ 2006.

[91] [2020] EWHC 1491.

parties. The Court therefore did not consider it appropriate to grant declaratory relief.[92]

In a further judgment in the same proceedings,[93] the Court had occasion to apply some of the principles regarding lawyer/non-lawyer communications in ***Jet2***. The Court made the following findings that reinforce the point that the involvement of a lawyer in the preparation of a document does not *ipso facto* cloak it in privilege:

- Minutes of A's executive corporate committee did not attract LAP simply because the company's general counsel had helped to prepare them.
- Board minutes did not attract LAP simply because the initial draft was prepared by external legal counsel. It was merely a record of the meeting and recorded no legal advice.
- A risk register did not attract LAP simply because legal advice may have been taken in the course of its preparation—it was necessary to show that the document communicated or disclosed legal advice.
- A draft chairman's script did not attract LAP simply because a single track change comment from external lawyers remained visible. Provided the comment was redacted, there was no other indication that the document communicated legal advice in any form.

In ***Sports Direct International v The Financial Reporting Council***[94] the Court of Appeal provided clarification on the scope of the limited exceptions to legal professional privilege, confirming that there are only two circumstances in which an otherwise privileged document can be subject to disclosure: the 'iniquity' exception and statutory abrogation by express statement or necessary implication.

The FRC had unsuccessfully argued that a third exception to privilege arose where a regulator requested documents under a statutory power and it was under a duty to keep any information therein confidential, and adverse findings could not be made against the holder of the documents as a result of the regulator's use of the documents.

In addition, the case reaffirmed the finding in ***Jet2*** that emails and their attachments must be considered separately. The Court noted that, while an attachment may be subject to disclosure where it is attached to a disclosable email, the application of privilege to the email and the attachment must be considered separately.

There have also been two notable decisions in the last year which considered the application of the iniquity exception. ***Curless v Shell International Ltd***[95] illustrates the high bar that must be overcome to engage the exception. The Court of Appeal found no *prima facie* case that the exception applied to the email sent by the appellant's in-house lawyers discussing the possibility of making the respondent redundant and the risk that this may give rise to further claims of discrimination. In rejecting the findings of the Employment Appeal Tribunal, the Court held that the email did not show that a genuine redundancy programme was being used to cloak the appellant's plan to dismiss the respondent in response to his previous disability discrimination complaints. The email was therefore privileged and not admissible in evidence.

However, in ***Addlesee v Dentons Europe LLP***[96] the high bar was overcome. Dentons were required to disclose documents held on behalf of a former client who had operated an allegedly fraudulent scheme in which Addlesee had invested. Addlesee alleged that Dentons had recklessly or negligently enabled the scheme. The Court held that it would be very slow to deprive a party of privilege at an interlocutory stage, but that Addlesee had demonstrated the necessary strong prima facie case that the scheme had been fraudulent, and that Dentons had been instructed in order to further that scheme.

This decision follows on from an earlier notable decision in the same proceedings regarding the status of the privilege attaching to the same documents.[97] In that instance, Addlesee had argued that, because Dentons Europe LLP had been dissolved, and the residual *'bona vacantia'* property interest in the documents in question had been disclaimed by the Crown, they were no longer subject to privilege. The Court of Appeal rejected that argument, reiterating that LAP remains in existence until actively waived, regardless of whether there remained anyone entitled

[92] Permission to appeal the decision is pending.

[93] ***A v B and The Financial Reporting Council*** [2020] EWHC 1492.

[94] [2020] EWCA Civ 177.

[95] [2019] EWCA Civ 1710.

[96] [2020] EWHC 238.

[97] ***Addlesee v Dentons Europe LLP*** [2019] EWCA Civ 1600.

to waive it. Both decisions in this case are yet further exemplars (albeit arising in somewhat unusual circumstances) of the fundamental importance and permanence of privilege and the limited circumstances in which it can be circumvented.

The courts have clarified the circumstances in which privilege over client instructions may be waived in several cases in the past year. ***Raiffeisen Bank v Ashurst***[98] concerned requests for disclosure of instructions sent to Ashurst by their client about funds paid into Ashurst's client account.

Raiffeisen argued that privilege was waived when Ashurst's client authorised them to communicate the information within those instructions to Raiffeisen. Rejecting this argument, the Court of Appeal held that privilege over client instructions would only be waived where the client itself puts the content of those instructions in issue in the proceedings (e.g. by disputing that any such instruction was given). The confidentiality of the documents containing such instructions was not lost merely because a solicitor had made a statement to a third party about the instructions they had received.

In ***PCP Capital Partners LLP v Barclays Bank plc***[99], PCP was successful in seeking disclosure of various privileged documents concerning a series of allegedly fraudulent transactions. Through repeated references to the involvement of its lawyers and the comfort taken from their advice, Barclays had in effect relied upon the documents to establish its legitimate belief that the transactions had been legitimate.

While, in doing so, Barclays had not set out the actual substance of the documents, the High Court found this nonetheless amounted to collateral waiver of privilege over all correspondence with Barclays' lawyers relating to the transactions in question. This is a powerful reminder that parties should be extremely careful about referring to their reliance on specific legal advice in written evidence.

A similar risk may also arise where the underlying confidentiality of a privileged document is put in question. In ***SL Claimants v Tesco plc***[100], the claimants sought to establish that a document over which privilege was asserted was no longer confidential (and therefore no longer privileged), having been summarised, partly read out and discussed extensively in legal arguments during prior criminal proceedings. The High Court held that there was a distinction between the information in the document and the document itself and whether confidentiality had been lost as a result of the references would be a matter of degree. In this case, such references did not, either in terms of their detail or their extent, result in a loss of confidentiality. The document therefore remained privileged.

Turning, finally, to without prejudice (WP) privilege, the recent decision of the Court of Appeal in ***BGC Brokers LP v Traditions (UK) Ltd***[101] has highlighted the need for caution when preparing settlement agreements and the distinction between a concluded agreement and all the settlement correspondence and documentation leading up to it. As part of a settlement with some of the five defendants to a claim, references to certain WP correspondence had been incorporated within the body of the settlement agreement. The Court held that, as settlement agreements are not protected by WP privilege, and the correspondence had become incorporated into such an agreement, any WP privilege over the correspondence had been lost.

In a further case regarding the scope of WP privilege, ***Berkeley Square Holdings v Lancer Property Asset Management Ltd***[102], the High Court held that statements made within a WP mediation paper were admissible in defence of allegations of fraud made by the claimants. The Court noted it was well established that WP material could be relied upon to show that an agreement had been entered into on the basis of misrepresentation, fraud or undue influence. It followed that a party facing allegations of fraud ought equally to be able to rely on such material in order to rebut the case made against them.

[98] [2020] EWCA Civ 11.

[99] [2020] EWHC 1393.

[100] [2019] EWHC 3315.

[101] [2019] EWCA Civ 1937.

[102] [2020] EWHC 1015.

PROCEDURE

The courts have considered a range of procedural issues over the last year. There has been welcome guidance on the not so new Disclosure Pilot Scheme (DPS), as well as some interesting cases in other areas of disclosure, such as, *Norwich Pharmacal* relief, pre-action disclosure more generally and collateral use. There has also been a noticeable focus on what constitutes good practice in drafting written evidence, perhaps in response to certain 'bad habits' that over time have become rather commonplace. We also note some cases giving helpful guidance on issue estoppel, limitation and costs.

Disclosure

The DPS, that was introduced as a new Practice Direction 51U in the CPR in January 2019 (and has been extended until December 2021), should now be familiar to most High Court litigators. The DPS seeks to simplify and streamline the disclosure process in the Business and Property Courts with a view to limiting the increasing costs and complexity associated with disclosure in commercial cases. As with any significant reform of court procedure, however, it has raised questions for many practitioners over precisely how the scheme was intended to work and differ from the pre-existing disclosure regime. A series of recent cases has provided welcome clarity on various aspects of the DPS, including Known Adverse Documents, Initial Disclosure and Extended Disclosure.

- Under the DPS, non-privileged 'Known Adverse Documents' (KADs) must be disclosed (on a continuing basis) once a claim is commenced, regardless of any order for disclosure. The High Court in ***Castle Water Ltd v Thames Water Utilities Ltd***[103] has clarified what that obligation entails. While a KAD is a document of which a party is aware without having to undertake further searches, this does not obviate any need to look for KADs of which the party is aware. This means a party must undertake reasonable and proportionate checks to see if it has (or has had) KADs and, if it has them, reasonable and proportionate steps to locate them. What is reasonable is fact-specific, but in a case of any complexity or an organisation of any size, "*reasonable steps*" require more than a generalised question addressed only to the leaders/"controlling mind" that fails to identify the issues to which the question and any adverse documents relate. The continuing nature of the KAD obligation does not require renewed checks continually, only that if a party subsequently becomes aware of a KAD it must disclose it or if there is a change of circumstance (such as a material change to a party's case), it must review whether it has any further KADs.

- In ***Breitenbach v Canaccord Genuity Financial Planning Ltd***[104] the issue was the scope of Initial Disclosure. Initial Disclosure requires each party to provide at the same time as their statement of case: 1) the key documents on which it has relied in support of the claims or defences in the statement of case and 2) the key documents necessary to understand the claim or defence. The High Court refused the claimants' request for documents on the latter ground. The claim was pleaded clearly and generically, and no documents were necessary to understand it. Documents "*relating*" to a pleaded defence, which were in effect a request for evidence, may have gone to the prospects of success of the defence or fall within Extended Disclosure, but that goes beyond what Initial Disclosure requires.

- A leading judgment on the DPS, ***McParland & Partners Ltd v Whitehead***[105] considered three important aspects of it following a disclosure guidance hearing (which allows parties to seek the Court's guidance on the scope of Extended Disclosure prior to or after a CMC). The Chancellor clarified that:

  - The identification of Issues for Disclosure is different to the creation of a list of issues for trial. Issues for Disclosure are those that require further disclosure beyond what has been provided on Initial Disclosure to enable them to be fairly and proportionately tried - unduly granular or complex lists of Issues for Disclosure should be avoided.

  - Choosing disclosure models should simplify rather than complicate. This means avoiding unnecessarily complex combinations of models for different issues: e.g. Model C will typically be used for an issue associated with a lot of irrelevant material and model D can be used for central issues, particularly in relation to which

[103] [2020] EWHC 1374.

[104] [2020] EWHC 1355.

[105] [2020] EWHC 298.

there is mistrust between the parties. In addition, the parties can, but need not, agree different models for different parties on the same issue (unless that would be unfair to a party).

- A high degree of co-operation between legal advisers is important in agreeing the Issues for Disclosure and the Disclosure Review Document. Parties must not use the DPS as a "*stick*" with which to beat their opponents; those that use the DPS for litigation advantage will face serious adverse costs consequences.

- Finally, in ***The State of Qatar v Banque Havilland SA***[106] the Court considered the differences between various Models of disclosure, in particular Model E versus Model D. Model E (described as "*wide search-based disclosure*") provides for disclosure of documents which are likely to support or adversely affect the disclosing party's claim or defence or that of another party in relation to one or more of the Issues for Disclosure or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure. The Court observed that Model E should only be used exceptionally. Further, the DPS is designed to produce something more limited than might have been available under the previous disclosure regime so use of Model E was not guaranteed merely because this was a serious case involving claims of conspiracy. The judge stated that under the DPS, the Court should be "*in a position to determine the scope of the search using the information provided in the disclosure review document*" when ordering Model E, which was not the case here. The judge therefore directed the parties to apply Model D.

Turning to disclosure cases beyond the DPS, in ***Burford Capital Ltd v London Stock Exchange Group Plc***,[107] the Commercial Court rejected a ***Norwich Pharmacal*** application by Burford seeking details of the identity of every market participant that made a buy or sell order for Burford shares on two days in August 2019. Buford alleged that it had been the victim of unlawful market manipulation associated with a dramatic fall in its share price on those days and the information would assist in determining who was responsible for the alleged manipulation in order to bring a claim in tort against them and/or to persuade the FCA to change its mind that no further action was required.

A ***Norwich Pharmacal*** order requires a third party to provide information to aid the commencement of a claim (typically, this will be the name of a wrongdoer, but it can also be other information about the alleged wrongdoing or to aid asset tracing) if: 1) there is a good arguable case that the third party was mixed up in so as to have facilitated the alleged wrongdoing; and 2) justice requires that the third party provide the requested assistance, to further the end of righting a facilitated wrong. The Court found that there was no good arguable case that market manipulation had occurred. The evidence was speculative and Burford's own expert accepted that the very information Burford sought was necessary to determine whether manipulation had occurred. Further, the Court emphasised the need also to consider the merits as part of the factors relevant to the 'justice' limb of the test. Even if there was a good arguable case of wrongdoing, there was no such case for an actionable civil claim and justice did not require disclosure because Burford could (if it wished) seek judicial review of the FCA's decision not to take further action. The Court also recognised the importance of not interfering with the workings of a regulated market.

As the first case of its kind to be brought against a trading venue in the UK, ***Burford*** is both an important reminder of the exceptional nature of *Norwich Pharmacal* relief and perhaps an indicator that the Court will seek to avoid undermining confidence in the UK's financial regulators and capital markets.

The stark consequences for litigants who are placed in the potentially difficult position where their disclosure obligations are in conflict with a risk of prosecution under a foreign law was highlighted in ***Byers v Samba Financial Group***.[108] Samba sought an extension of time for (or in the alternative, dispensation from) a disclosure order, on the basis that the Saudi Arabian Monetary Authority's consent was required for its disclosure, which had not yet been given. Without the consent, Samba claimed disclosure would expose it and its officers to regulatory or criminal penalties (including imprisonment).

Noting that its discretion to vary or revoke an order under the CPR is usually limited to material changes in circumstances, and while recognising there is a balance to be struck between the importance of disclosure for a fair trial and the risk of prosecution for the disclosing party, the High Court refused the extension (and dispensation). The documents in question were highly relevant, Samba applied late and was at a distinct

[106] [2020] EWHC 1248.

[107] [2020] EWHC 1183.

[108] [2020] EWHC 853.

advantage having had access to the claimant's disclosure, the risk of regulatory or criminal sanction was not as great as Samba claimed and was due to Samba's insufficient engagement with the Saudi Arabian Monetary Authority. Accordingly, as the failures were deliberate, serious and culpable, the Court took the exceptional step of striking out Samba's defence and debarring it from defending the claim (except as to certain limited issues that could fairly be tried without the disclosure).

Pre-action disclosure is often contemplated by potential litigants as one of the tools they might use to help them decide whether to bring a claim. The Technology and Construction Court has given some guidance on the issue in ***Taylor Wimpey UK Ltd v Harron Homes Ltd***,[109] in the context of expert determination. Taylor Wimpey (TW) (a putative defendant) applied for pre-action disclosure against Harron Homes (HH) after the latter had served a notice for expert determination and indicated that it did not intend to commence a claim.

There was no question that the threshold tests for pre-action disclosure had been met: TW and HH would be parties in subsequent proceedings and the relevant documents would be disclosable in those proceedings (the fact the applicant, TW, would be the defendant made no difference in this respect). The Court also concluded that the low 'jurisdictional' threshold of there being a reasonable prospect that the disclosure would dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings or save costs, had been met.

It therefore focused on the discretionary element of the test: whether disclosure would be desirable, in achieving one of the above three objectives. In concluding that it would not be and dismissing the application, the key basis for the Court's decision was that it was "*astute*" to prevent pre-action disclosure from being used to impede or frustrate a contractually agreed ADR mechanism, particularly where, as here, the documents sought would be available through that process. It was also relevant that HH had said it would not commence a claim (i.e. the disclosure stage was unlikely to be reached) and that TW had not sought the documents in a pre-action protocol process that had concluded some time earlier.

Further guidance on pre-action disclosure (this time in the context of a professional negligence claim) was provided by the Commercial Court in ***Carillion plc (in liquidation) v KPMG LLP***[110]. Carillion requested pre-action disclosure of documents relating to certain audits and construction contracts in relation to KPMG's alleged negligent auditing. Carillion argued that disclosure was necessary given the essential nature of the documents to proper pre-action consideration and to the pleading of its claim.

The Commercial Court did not consider it appropriate to order pre-action disclosure, confirming that such disclosure remains unusual in the Commercial Court, including in respect of professional negligence cases. Key reasons for the Court's dismissal of Carillion's application were:

- Carillion could plead its case without the materials sought, given its ability to articulate its claims up to that point.
- Pre-action disclosure was not considered "*the norm*", even in audit cases, in order to enable experts and others to give concluded or "*fully informed*" views – the norm was to allow disclosure once a claim has been commenced. Carillion's request sought an inappropriate level of assurance and certainty on the issue of negligence which did not justify the application.
- Amendments to the pleadings would be inevitable after disclosure, requiring KPMG to repeat the exercise to identify relevant documents, and raising the risk of "*serial applications for pre-action disclosure*".

CPR 31.22 (which concerns the collateral use of disclosure) allows the use of documents obtained on disclosure for purposes beyond the proceedings in which the disclosure is given only where the documents have been read or referred to in open court, the court gives permission or the disclosing party (and owner of the document) consents. In ***Notting Hill Genesis v Ali***[111] the claimant sought retrospective permission to rely on documents disclosed by the defendant in prior Employment Tribunal (ET) proceedings in support of an application brought (at the same time as the permission application) for an interim injunction to restrain breaches of the GDPR and confidentiality by the defendant.

The High Court held that while the ET was not a "*court*", the CPR 31.22 restriction applied to disclosure in the ET and the High Court has the power to give permission to use documents disclosed in ET proceedings. It also noted that permission should ordinarily be sought

[109] [2020] EWHC 1190.

[110] [2020] EWHC 1416.

[111] [2020] EWHC 1194.

prospectively, but it can, on rare occasions, be granted retrospectively. An important (but not sufficient) consideration in this regard is whether permission would have been granted had the application been made prospectively. In this case, the Court held that it would have been (and granted permission) because a refusal of permission would prevent the claimant from seeking to protect its confidential information and that of its tenants and the documents were either the claimant's property or copies of them.

Finally, a reminder of the important role played by solicitors in the disclosure process. ***Square Global Ltd v Leonard***[112] was an employment dispute in which the claimant complained "*strongly*" that the defendant had not complied with his disclosure obligations by disclosing very limited emails, leaving out attachments and reviewing – and selecting for relevance – the documents himself. While not finding any breach of professional obligations by the defendant's solicitors, the Court made clear that a solicitor's duties in relation to disclosure go beyond ensuring the maker of the disclosure statement understands the duty of disclosure (CPR PD 31A, para 4.4), to ensuring that the solicitor, and not the client, selects which documents are relevant.

Evidence

The collateral use of evidence was in issue in ***Official Receiver v Skeene***[113]. In the context of ongoing criminal proceedings brought by the SFO against Skeene, the Official Receiver applied for permission to provide to the SFO a copy of an affidavit Skeene had served in earlier directors' disqualification proceedings.

Similar to the restrictions on collateral use of disclosure under CPR 31.22 (see ***Notting Hill Genesis*** above), CPR 32.12 limits the use of witness statements to the purpose of the proceedings in which they are served, unless the witness gives consent, the court gives permission or the statement is put in evidence at a public hearing. However, the CPR provision governing affidavits (CPR 32.15) has no such limitations. The High Court therefore considered the pre-CPR implied undertaking given by parties to proceedings to use discovery and evidence only for the purpose of the proceedings in which they were served, noting that the undertaking only applied where the documents and evidence had been produced under compulsion.

The Court held that the CPR codifications on collateral use (i.e. in relation to witness statements, CPR 32.12 and, in relation to disclosure, CPR 31.22) had not been intended to extinguish the implied undertaking in relation to affidavits. Skeene's affidavit had not been produced under compulsion – evidence had to be given by affidavit in the disqualification proceedings, but it was Skeene's choice to serve the evidence – therefore the undertaking did not apply and the affidavit could be disclosed to the SFO. This is an important practical difference between affidavit and witness statement evidence that is worth bearing in mind.

It is also noteworthy that while it was accepted that an exhibit to the affidavit was subject to the CPR 31.22 restriction, the Court gave permission for the disclosure of the exhibit to the SFO too, as (amongst other things) there was a public interest in the proper conduct of the criminal proceedings, particularly given their seriousness, the exhibit was highly likely to be relevant and it was produced voluntarily.

There have been a couple of recent notable judgments and notices from the Court exhorting parties to observe better witness statement 'hygiene'.

Waksman J in ***PCP Capital Partners LLP v Barclays Bank plc***[114] highlighted some well-established (if often overlooked) 'rights' and 'wrongs' when it comes to drafting a witness statement: it should not contain argument or comment, or merely recite the content of documents to which the maker of the statement was not a party. A case involving allegations of fraud does not afford the maker "*increased latitude*". Waksman J said that the purpose of the witness statements before him were "*to say, so far as the witness can say what happened, what the witness says he or she did, what he or she knew or thought or believed or intended, or, the meaning or content of documents to which they were a party where they can comment properly about them and where the meaning or content of that document has been called into question. Beyond that, they should not go.*"

In ***Punjab National Bank (International) Ltd v Techtrek India Ltd***[115], while recognising the benefit of solicitors being able to provide hearsay evidence for pre-trial hearings, Master Marsh said that it was important for interlocutory witness statements properly to state the source of hearsay evidence (in compliance with CPR PD 32.18). This means that where the maker of the statement is relying on evidence provided by a witness who is employed by a company (as opposed to the source being documents) the person must be identified and named. Simply stating that the source is the corporate entity or its officers, is not enough. A failure to

[112] [2020] EWHC 1008.

[113] [2020] EWHC 1252.

[114] [2020] EWHC 646.

[115] [2020] EWHC 53.

identify the source in compliance with PD 32.18 will affect the weight given to the evidence.

In a ***Notice to Users of the Commercial Court*** issued in March 2020, the Judge in Charge of the Commercial Court, Teare J, has confirmed that applications for permission to rely on witness statements longer than the 30 pages prescribed by the Commercial Court Guide will be heard retrospectively at the PTR (or on paper, after the statement is served, if there is no PTR) to allow the judge properly to scrutinise the statement's contents. On such an application, parties found to have served statements longer than 30 pages (and/or which otherwise do not comply with the Guide or CPR PD 32) may be refused permission to rely on the statement, directed to shorten the statement at the serving party's cost, have parts of the statement excluded or may not be allowed to call evidence from the witness.

Jet 2 Holidays Ltd v Hughes[116] is a reminder of the consequences of making a witness statement and the solemnity of signing a statement of truth. The Court of Appeal confirmed the well-established rule that an act occurring before proceedings have commenced may be a contempt of court. It held that the court has inherent jurisdiction (although not also jurisdiction under the CPR) to commit for contempt the maker of an alleged false witness statement signed prior to the commencement of proceedings, if the false statement interferes with the due administration of justice. In this case, the jurisdiction was engaged even though proceedings were not even imminent, because there was a close connection between the statements made and the administration of justice: they had been made in purported compliance with a pre-action protocol, which are now an integral and highly important part of litigation architecture.

The duties owed by experts to their instructing party were in issue in the important decision of ***A Company v X***.[117] The Technology and Construction Court considered whether to continue restraining (by interim injunction) an expert from providing services to a third party in one of two related arbitrations. The expert was engaged to provide a report and advise the claimant extensively in one arbitration, giving rise to a fiduciary duty to the claimant. The expert also accepted instructions to act for the third party, against the claimant, in the second arbitration in which there was a significant overlap of issues with the first arbitration.

The Court restrained the expert from acting in the second arbitration on the basis he had a clear conflict between his duty to the claimant and his own interest, that was in breach of duty. The Court made clear that while the notion that there is 'no property in a witness' applies to experts and they can in principle provide evidence for one party after giving an opinion to another, a) their paramount duty is to the court and that takes precedence over their duties to the client, b) the circumstances may give rise to a fiduciary duty owed to their instructing client, c) the fiduciary duty is owed by the expert's whole firm, and potentially the whole of any group within which the firm sits, if there is a common financial interest and/or common marketing and management across the group, d) even if he does not owe a fiduciary duty, the expert may still owe duties of confidentiality to a former instructing party (similar to the way that solicitors do) which, depending on the circumstances, may preclude him from acting for another party.

This decision will be of interest to all those who instruct experts not just in arbitrations, but court proceedings as well.

Res judicata

How if at all does issue estoppel apply in an interlocutory context? That was the question in ***Kea Investments Ltd v Watson***.[118] The case concerned a discretionary decision made by a judge at an interlocutory stage of the action before any of the facts had been found and whether the parties were bound by that decision later in the same action. Such a decision does not give rise to an issue estoppel (which would prevent the issue being re-litigated) because it does not satisfy the relevant test i.e. either a decision on an issue that has been finally determined in earlier, separate proceedings or that finally determines within the same proceedings the legal consequences of particular facts, as a necessary step in determining the parties' rights.

But the Court confirmed that, as an aspect of abuse of process, the "*Chanel principle*" prevents a party from re-litigating within the same proceedings a previous interlocutory matter unless there has been a significant and material change of circumstances or the party has become aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing.

Costs

The Court of Appeal held in ***King v City of London Corporation***[119] that for a settlement offer to be a valid

[116] [2019] EWCA Civ 1858.

[117] [2020] EWHC 809.

[118] [2020] EWHC 472.

[119] [2019] EWCA Civ 2266.

CPR Part 36 offer, it cannot generally exclude interest. So e.g. an offer of "*£x exclusive of interest*" is not a Part 36 offer. Under Part 36, interest is ancillary to a claim, not a severable part of it. Although not expressed clearly as such, on its proper interpretation, CPR 36.5(4) requires that any offer to pay or accept a sum of money must be inclusive of all interest. While there may be scope for dispute about interest, which could be substantial, the same is true of costs, which cannot separately be provided for in a Part 36 offer. The Court of Appeal also held that a Part 36 offer made in respect of detailed assessment proceedings could not exclude interest.

It is not uncommon for contractual indemnities to include provision for the payment of legal costs in connection with the enforcement of rights under the contract. In ***Alafco Irish Aircraft Leasing Sixteen Ltd v Hong Kong Airlines Ltd***[120], the High Court has held that wording in a lease providing for the payment of "*all reasonable costs and expenses (including reasonable legal expenses)... in connection with the preservation of any rights of the Lessor*..." required the payment of costs on the indemnity basis. The "*reasonable*" qualification did not alter that conclusion because under the CPR, unreasonably incurred costs or costs of an unreasonable amount are not allowed on the standard or indemnity basis.

Lastly on the issue of costs, ***Chapelgate Credit Opportunity Master Fund Ltd v Money***[121] was an interesting decision concerning the fast growing area of litigation funding and the "*Arkin cap*". The latter (being a principle based on the well-known 2005 Court of Appeal decision of the same name) is a rule that commercial funders are only liable for costs to the extent of their funding for the claim. The Court of Appeal held that as the "*Arkin cap*" was not expressed as a binding rule and the litigation funding market had developed in the intervening years, judges retain a discretion in this context and, depending on the facts, may take into account matters other than the extent of the funder's funding, and the funder's liability may not be limited to the amount of that funding. Accordingly, the commercial funder in this case was liable for all of the respondents' costs from the date of entry into its funding agreement with the claimant.

[120] [2019] EWHC 3668.

[121] [2020] EWCA Civ 246.

OTHER MATTERS OF INTEREST

- COVID-19
- BREXIT

COVID-19

Like much else, the COVID-19 pandemic has had and will continue to have a big impact on commercial litigation in the UK in a variety of ways. It has dramatically changed the how court hearings are conducted, in a way which has never been seen before. In its early stages, the pandemic temporarily reduced the number of commercial claims in the English courts - as the brakes were applied in almost every aspect of life, initiating expensive legal proceedings was no exception. Yet the economic damage wrought by the pandemic is also expected in the coming months and years to lead to an increase in claims in a range of areas.

Remote justice

The English civil courts continued to serve court users, by transitioning quickly and relatively smoothly to remote hearings and electronic filings (where previously it was not used). In our experience, remote hearings have by and large worked well. Having sight of a judge's sitting room would have been almost unthinkable just eight months ago; now it is simply part of the litigation 'woodwork' in the UK.

The courts have updated their protocol for remote hearings, that applies to all hearings, including trials and applications in the County Court, High Court (including the Business and Property Courts) and the Court of Appeal (Civil Division)[122]. It provides for much greater flexibility in holding remote hearings and for greater cooperation between the parties and the court in order to make arrangements that best suit the nature of the hearing in question (e.g. interlocutory and other non-witness hearings can be accommodated effectively remotely; however, lengthy trials involving significant witness evidence are more likely to be adjourned).

Parties should note that the courts use a range of different platforms for remote hearings. While HMCTS recommends that Skype for Business or the court's cloud video platforms be used, other alternative services can and have been used at the discretion of the court, such as Zoom, BlueJeans, Lifesize, GoToMeeting and Microsoft Teams, among others. The Supreme Court has also recently begun using WebEx as its platform of choice.

As such, parties may need to become familiar with a range of platforms and be conscious of the fact that not all platforms provide the same functionality – not all provide support for professional video conferencing systems. Where the parties request that an alternative platform be used (for example, because it includes such functionality), they should be prepared to administer and record the remote hearing, should the court so direct.

Procedural measures

The CPR has been augmented and amended in various ways over the past few months to deal with measures implemented in response to COVID-19. In particular:

- The rules concerning extensions of time were temporarily amended, with effect from 2 April 2020 to 30 October 2020. The length of extensions of time under the CPR which parties can agree without formal notice to the court has been increased from 28 days to 56 days, and the court is now also required to take the impact of the pandemic into account when considering applications for extensions in excess of 56 days, the adjournment of hearings and relief from sanctions (Practice Direction 51ZA).

- Access to recordings of hearings was clarified, and persons may do so on request, without needing to make a formal application under Part 23.

- CPR Practice Direction 51Z imposes a stay on most proceedings for possession brought under CPR 55 and most proceedings seeking to enforce an order for possession by a warrant or writ of possession, until 30 October 2020. Following that date, new CPR Practice Direction 55C will be in force, until 28 March 2021. It sets out the steps required for the reactivation of stayed possession claims, as well as procedural changes applying both to existing possession claims and the issue of new claims.

[122] Judiciary of England and Wales, "*Civil Justice in England and Wales: Protocol Regarding Remote Hearings*" (26 March 2020).

Looking ahead

We expect a marked increase in a range of disputes to come before the courts over the coming months and years as disputes and financial distress arising in connection with the impact of COVID-19 develop into litigation and insolvency processes.

While an expected surge in caseloads was a cause for concern in the early stages of the pandemic,[123] it does not appear that any surge has (yet) arrived at the time of writing.

"*Nightingale Courts*" are due to open at the end of September and in October 2020 (additional to others that were set up over the summer) to deal with the backlog in a range of civil and criminal cases in the lower courts. HMCTS states that this will free up capacity in existing courts to hear other cases. It is not clear how much if any impact this will have on commercial cases in the Higher Courts, although the Nightingale Courts may serve as a template for any similar increase in judicial capacity in the Higher Courts that may be needed. However, the potential for delay due to the expected increased caseload remains and may encourage would-be litigants to focus more on alternative dispute resolution processes, such as mediation.

Finally, the need for remote hearings is far from over. Much like remote working more generally, it may well become a permanent part of the litigation architecture, at least in some shape or form.

[123] Former senior judges had called for contracting parties to afford each other "breathing space" (British Institute of International and Comparative Law, Breathing space – a Concept Note on the effect of the pandemic on commercial contracts, 27 April 2020).

BREXIT

The UK left the European Union on 31 January 2020 and is now well into the Brexit transition period, which is due to expire on 31 December 2020.

The impact of Brexit on English litigation has, to date, been very limited, due principally to the Withdrawal Agreement between the UK and the EU, which has by and large maintained the status quo as regards the existing domestic UK and EU legal regimes during the transition period. In particular, the Withdrawal Agreement provides:

- For a default position of EU law continuing to apply to and in the UK during the transition period (unless otherwise specified in the Withdrawal Agreement) (Article 127).

- The EU private law regimes in relation to jurisdiction, recognition and enforcement and insolvency continue to apply to and in the UK during the transition period and then will continue to apply in respect of proceedings commenced before the end of the transition period (Article 67).

- The CJEU continues to have jurisdiction over the UK in accordance with EU law during the transition period and the UK courts may continue to make preliminary references to the CJEU on matters of EU law (Articles 86 and 131).

At the time of writing, what the post-transition period relationship between the EU and the UK will be remains unclear, including in relation to civil litigation. The latest formal position from the EU was set out in the European Commission's "*Notice to Stakeholders: Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law*" on 27 August 2020. We consider certain aspects of the Notice and issues arising in connection with it (albeit the Notice appears largely to summarise the pre-existing position).

Jurisdiction

For proceedings instituted after the end of the transition period, the courts in EU Member States will continue to determine their international jurisdiction according to the EU instruments on jurisdiction (where matters fall within the scope of those instruments) and where they do not (and another private international law instrument does not apply), according to the national rules of the Member State in which a court has been seised.

The extent to which the UK will continue to be bound by or otherwise a party to the EU instruments will depend on what agreement (if any) is eventually reached between the UK and EU on those matters. In the absence of specific agreement with the EU, the UK's national rules will, together with any applicable private international law agreement or convention, apply. There are two notable developments in that regard:

- the UK has confirmed its intention to accede to the 2005 Hague Convention in its own right (it is currently a signatory by virtue of its membership of the EU).[124] If it does, the Convention should, at a minimum, apply to EU Member State courts (including to situations involving the UK) and UK courts in respect of exclusive choice of court agreements concluded after the Convention enters into force in the UK as a party in its own right.

- in early September 2020, Parliament expressed concern that while the EFTA members of the Lugano Convention support the UK's accession to that convention, the European Commission recommends against it. The Lord Chancellor confirmed that the government places "*a very high premium*" on the importance of accession to the Convention, albeit as a discrete matter, separate from negotiations regarding a future free trade agreement with the EU.[125]

Recognition and enforcement

Absent any specific agreement between the UK and EU, proceedings instituted in UK courts after the end of the transition period will no longer benefit from the EU rules on recognition and enforcement in EU Member States. Local laws and any relevant international conventions/instruments would apply.

Contractual and non-contractual matters

The determination of governing law in the EU is set by the Rome Regulations (I and II), which are blind as to whether the governing law is that of an EU Member State or not.

[124] Convention of 30 June 2005 on Choice of Court Agreements.

[125] HC Deb 2 September 2020, vol 679, col 215.

Insolvency

Following the transition period, absent any specific agreement to the contrary, the EU Insolvency Regulation will (except for a few minor exceptions) no longer apply to insolvency proceedings commenced in the UK which means insolvency proceedings commenced in the UK will not be recognised in EU Member States under the Insolvency Regulation.

Procedures for judicial cooperation between Member States

After the end of the transition period, EU Member States will no longer be able to launch new judicial cooperation procedures (i.e. for the service of documents, taking of evidence and requests for judicial cooperation) involving the UK on the basis of EU law. Rather, such procedures will have to be initiated according to the applicable national law on judicial cooperation with third countries. In some instances, relevant international conventions may apply.

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