HERBERT SMITH FREEHILLS

LITIGATION QUARTERLY UPDATE E-BULLETIN

England and Wales | MARCH 2024

Welcome to our latest quarterly e-bulletin which contains updates on commercial litigation developments over the past three months, largely by reference to articles posted to our Litigation Notes blog in that period. Other posts are available on the blog, which you can visit any time, or subscribe to be notified of the latest updates: http://hsfnotes.com/litigation/

In this period we have published two episodes of our Commercial Litigation Update podcast, in January and March, which discuss some of the developments covered in this e-bulletin.

Our Corporate team has also published their annual contract law update briefing, which includes cases on contractual formation, interpretation and implied terms, exclusion and limitation clauses, good faith and contractual discretion, force majeure and novation.

CLASS ACTIONS AND LITIGATION FUNDING

As a further development regarding the boundaries of the CPR 19.8 representative action procedure, in January the Court of Appeal upheld last year's High Court decision to allow a claim in respect of secret commissions to proceed as a representative action, despite significant differences in class members' individual circumstances. It seems, however, that the CPR 19.8 procedure will be used to determine only a limited number of issues that are truly common to the class, with individual issues left to be determined at a later stage: Representative actions: Court of Appeal decision gives go ahead for secret commissions claim, but suggests only limited issues may be dealt with on "opt-out" basis.

The fallout from the Supreme Court's decision on litigation funding in the *Paccar* case last summer has also continued. In a number of cases, the Competition Appeal Tribunal (CAT) has held that funding agreements were not damages-based agreements (DBAs) where the funder's fee was based on a multiple of the funding provided, rather than a share of damages recovered: see for instance: Competition Appeal Tribunal finds funding agreement based on multiple not a DBA, despite express cap by reference to proceeds.

The CAT has granted permission to appeal these decisions, but the whole issue seems likely to be rendered academic in light of the government's recent introduction of legislation to restore the pre-*Paccar* position so that it is clear that litigation funding agreements are not DBAs, whether or not they provide for the funder to receive a percentage share of damages. The government has also invited the Civil Justice Council to conduct a wider review of the litigation funding sector, which will include consideration of the need for increased regulation or safeguards for claimants: Litigation funding: Bill introduced to reverse effect of Paccar and Civil Justice Council invited to review the sector.

PRIVILEGE

A Court of Appeal decision in January clarified a number of important points relating to legal professional privilege, including that: litigation privilege is not confined to parties to litigation but can sometimes apply to non-parties; and legal advice privilege will apply where lawyers are engaged to conduct an investigation, so long as they are instructed for their legal expertise and in a legal context. It also clarifies the test for applying the iniquity exception to privilege: Court of Appeal decision on litigation privilege for non-parties, legal advice privilege for investigations, and the iniquity exception.

A High Court decision in March highlights that: the burden is on the party seeking to establish that an exception to the without prejudice rule applies; and establishing that an exception applies to some part of negotiations will not necessarily mean that protection is lost for the whole of the negotiations. It also emphasises the narrow scope of the exceptions to the without prejudice rule, including the exception relating to "unambiguous impropriety": Without prejudice rule: High Court emphasises narrow scope of exceptions.

JURISDICTION AND ENFORCEMENT

In January the UK signed the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, following on from the government's announcement in November that it intended to join. The government is putting in place the necessary implementing legislation and court rules with a view to ratifying as soon as possible, if feasible by the end of June this year: UK signs Hague Judgments Convention 2019: a further step toward facilitating the international enforcement of English judgments.

A High Court decision in February acts as a reminder that the procedure for challenging the court's jurisdiction under CPR Part 11 is not just for challenges based on the court's international jurisdiction. It should be used whenever a party wants to challenge the court's jurisdiction to hear a claim, including on grounds of improper service – though in an appropriate case, if the wrong procedure has been used, the court may be prepared to correct a defendant's procedural error under CPR 3.10: Procedure for challenging jurisdiction includes challenges based on validity of service, not just international jurisdiction.

Another decision in February sheds light on the court's approach to an application for an anti-suit injunction where there is a dispute of fact that affects the question of whether there is an exclusive English jurisdiction clause (or relevant arbitration clause, where the injunction is sought in support of arbitration): Anti-suit injunctions: High Court considers proper approach where facts relevant to jurisdiction disputed.

A decision that we reported on in March illustrates another potential route for policing the English court's jurisdiction over an English law governed contract, namely the grant of a declaration confirming that it has exclusive jurisdiction: High Court grants declaration confirming exclusive jurisdiction of the English courts in order to assist Indian court to determine it did not have jurisdiction.

COSTS

A decision in February illustrates the court's willingness to order parties to disclose funding information where there is reason to believe the litigation may have been supported by funders against whom a non-party costs application might properly be made – similar to the court's approach to ordering the disclosure of such information so that defendants can consider whether to apply for security for costs against funders: High Court grants broad disclosure in support of non-party costs application against director/funders.

Another decision that we reported on in February acts as a reminder that, while the court has a discretion as to how security for costs may be provided, the "baseline" is a payment into court. Other forms of security will be ordered only if either: (i) they are acceptable to the secured party; or (ii) the court is satisfied that they are equivalent to a payment into court: Security for costs: High Court rejects parent company guarantee in favour of payment into court.

ACCESS TO COURT DOCUMENTS

In February the Civil Procedure Rule Committee launched a consultation on a revised rule 5.4C which, as currently drafted, would lead to parties' witness statements, expert reports and skeleton arguments becoming public at a much earlier stage of proceedings than is currently the case – in most cases, as soon as the documents are filed with the court, before any relevant hearing or trial. Responses to the consultation are due on 8 April: Proposed new rule would radically expand public access to court documents.

RELIEF FROM SANCTIONS

A Court of Appeal decision in January found that an application for relief from sanctions was not required for a late application for permission to rely on additional expert evidence. The decision suggests that the courts will be hesitant to imply sanctions for breaches of court rules, where there is no express sanction, beyond the established examples of a failure to file a notice of appeal or a respondent's notice in time: Court of Appeal clarifies when a party in breach of a court rule or order must apply for relief from sanctions.

ADR

In a decision in January, the High Court exercised its discretion against ordering a stay of proceedings commenced in breach of an ADR clause which was not only mandatory but was expressed as a pre-condition to commencing litigation. Because the litigation involved other parties and wider issues regarding the project, the court considered that an adjudication involving only two parties would be of little utility and that a stay would unjustifiably disrupt the proceedings: High Court refuses to stay proceedings commenced in breach of valid ADR clause.

CONTRACT

A High Court decision in January held that a limitation clause was effective to limit liability for a dishonest breach of contract, highlighting the distinction between a party's own fraud inducing a counterparty to enter into a contract, which cannot be excluded, and the fraudulent performance of a contract, where it is a matter of construction. The decision illustrates that a clause will not necessarily be found to be unreasonable merely because it excludes liability for deliberate breaches of contract: High Court finds limitation clause effective to limit liability for dishonest breaches of contract.

TORT

A Supreme Court decision in February clarifies a number of issues relating to the requirements for establishing that a loss is too remote to be recoverable as damages for the tort of negligence, including that the defendant to a tort claim has the burden of proving remoteness: Supreme Court considers principles relating to remoteness in the tort of negligence.

Key contacts

Alan Watts
Partner
T +44 20 7466 2076
E alan.watts@hsf.com

Maura McIntosh
Professional support consultant
T +44 20 7466 2608
E maura.mcintosh@hsf.com

Jan O'Neill
Professional support lawyer
T +44 20 7466 2202
E jan.oneill@hsf.com

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