HERBERT SMITH FREEHILLS

LITIGATION QUARTERLY BULLETIN

England and Wales | JUNE 2023

Welcome to our new look quarterly e-bulletin which contains updates on 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 for the latest updates on commercial litigation topics: https://hsfnotes.com/litigation/

We also published our bi-monthly Commercial Litigation Update podcast at the end of May, discussing some of the developments covered in this e-bulletin.

ENVIRONMENTAL LITIGATION

In a significant decision in May, the High Court refused permission for ClientEarth to continue a derivative action in relation to Shell PLC's directors' handling of the company's strategy in relation to climate risk. The decision is due to be reconsidered at an oral hearing, so this may not be the last word, but as things stand the decision illustrates the difficulties facing environmental and other campaign groups who wish to challenge directors' strategy and decision making using the derivative action mechanism: High Court refuses permission for climate-change activist shareholder to bring derivative action on behalf of Shell plc against its directors.

In another case involving Shell, the Supreme Court held that there was no "continuing nuisance" in a claim by Nigerian residents relating to an oil spill off the coast of Nigeria in 2011. The decision clarifies when there will be a continuing nuisance, so that the cause of action is renewed from day to day, allowing a claimant to overcome limitation issues it would otherwise face: Supreme Court finds no continuing nuisance simply because polluting substance remains on claimants' land.

CLASS ACTIONS

The past few months have also seen significant developments relating to the ability to bring a claim as an "opt-out" representative action.

In *Prismall v Google*, the High Court dismissed an attempt to bring a claim for misuse of private information as an "opt-out" representative action under CPR 19, where the representative claimant was seeking damages based on a "lowest common denominator" of the claimant class. The court declined to distinguish the Supreme Court's decision in *Lloyd v Google* on the basis that, unlike a claim under the Data Protection Act 1998, damages for MPI can be awarded for the loss of control of data, without proof of separate damage: Data class actions: claim for misuse of private information could not be brought as "opt-out" representative action.

The *Prismall* decision illustrates a more orthodox approach than the High Court's decision in *Commission Recovery v Marks & Clerk* back in February, which allowed a claim in respect of secret commissions for IP renewal referrals to proceed as a representative action, despite significant differences in class members' individual circumstances (see our previous blog post here). The Court of Appeal has now granted permission to appeal in that case and the appeal has been listed for 21 November this year. The appeal may have significant implications for claims reportedly

being lined up in respect of alleged secret commissions in other contexts, including claims against energy companies.

In a separate development, changes proposed to the UK's listing and prospectus regime in May, which are aimed at attracting and retaining more listed companies in London, may have an impact on securities litigation in the UK: UK listing and prospectus regime reform: potential impact on securities litigation.

We have also published three further episodes of our podcast series on Class Actions in England and Wales, discussing shareholder class actions, product liability group actions, and insurance.

PRIVILEGE

In the past few months there have been two High Court decisions of particular interest on privilege issues.

The first shows that litigation privilege can, in some circumstances, be asserted by non-parties to litigation – contrary to some previous statements in the case law. The decision also suggests, helpfully, that legal advice privilege is likely to apply in most cases where lawyers are engaged to conduct an investigation: Litigation privilege not restricted to parties to litigation, and other helpful points regarding privilege.

The second case addresses the rather vexed question of whether an employer is entitled to use an employee's privileged material where that material is found on the employer's systems or a device belonging to the employer – in this case a work laptop that was handed over to the employer in the context of an investigation: Privilege not lost where email containing legal advice found on employee's work laptop.

The Scottish Court of Session has also recently dismissed an appeal against an Employment Appeal Tribunal decision we reported on last autumn, which found that the original version of an investigation report was not covered by legal advice privilege simply because the disclosed version of the report had been amended in accordance with legal advice and a comparison of the versions might allow the content of the advice to be inferred: see our post on the EAT's decision here.

For more guidance on how privilege applies in practice, see our Handy Client Guide to Privilege, which can be accessed either as an interactive PDF or as a web based app.

CONTRACT

The past few months have seen a few interesting decisions on issues of contract law, both from the High Court and the Court of Appeal.

The Court of Appeal applied a recent Supreme Court decision to find that a party was not entitled to payment of a success fee, or any lesser payment, where the trigger event set out in the contract had not occurred. The decisions suggest that, where parties have agreed the circumstances in which a payment will be made, it may be difficult to persuade the court that payment is due in other circumstances: Court of Appeal rejects claim for success fee where contractual trigger for payment had not happened.

Force majeure cases continue to work their way through the courts, following the increased focus on such issues in light of Brexit and the Covid-19 pandemic. A recent High Court decision shows that, while such events may fall within the definition of force majeure in a particular case, whether the clause is triggered will depend on close analysis of the wording of the clause, and specific evidence as to the impact of the relevant events may be needed: Force majeure: general assertions as to impact of Covid-19 and Brexit not sufficient to defeat summary judgment application.

Cases on contractual interpretation are of perennial interest, and we have recently reported on a decision which considers the current status of the *Canada Steamship* line of authority in determining whether contractual indemnities should be construed so as to cover acts of negligence: Commercial Court finds indemnities covered negligence where no express reference.

CRYPTO ASSETS

Claims by the owners of cryptocurrency and other crypto assets seeking to recover their property, or compensation, following an alleged fraud continue to occupy the courts.

In recent months there has been a significant decision discharging an interim proprietary injunction against cryptocurrency exchange Binance, represented by HSF. The decision shows the need for victims of crypto frauds to think carefully as to whether it is appropriate to seek an injunction directly against a cryptocurrency exchange, rather than obtaining an injunction against the account owner and serving it on the exchange as a third party: High Court sets aside interim proprietary injunction against cryptocurrency exchange Binance.

In another decision, the court ordered a cryptocurrency exchange (who neither consented to nor opposed the order) to transfer a defendant's cryptocurrency into the jurisdiction to facilitate the claimant's efforts to enforce its judgment against those assets: English court orders crypto exchange to transfer assets into England and Wales to facilitate enforcement of judgment.

ADR

In May, just over two months from announcing that the UK would join the Singapore Convention, the UK government signed the Convention, which establishes a global framework for the direct enforcement of mediated settlements of cross-border commercial disputes. The domestic implementing legislation and court rules now need to be put in place before the UK ratifies the Convention, and it will come into force in the UK six months later: The UK has signed the Singapore Convention.

Recent months have also seen an important Court of Appeal decision regarding the enforceability and effect of contractual dispute resolution provisions that oblige parties to engage in an ADR process before commencing proceedings, including the appropriate remedy for breach: Contractual clauses requiring ADR before litigation – what happens when they are breached?

JURISDICTION

In April, the French court referred to the CJEU various questions relating to the validity of asymmetric, or unilateral, jurisdiction clauses, which give one party greater flexibility than the other as to the forum in which they can bring proceedings. Such clauses are commonly used in finance transactions, but in recent decades the courts of some countries, including some EU member states, have questioned their validity or refused to give effect to them, and therefore the recent CJEU refence is significant – although the English courts have consistently found that they are valid: Asymmetric jurisdiction clauses: French court refers questions of validity to CJEU.

STATEMENTS OF CASE

A Court of Appeal decision in May has clarified how the court should exercise its discretion in considering an application to amend that is brought late, but not so late that it would cause loss of the trial date. The decision emphasises that, so long as the proposed amended case has a real prospect of success, the perceived strength or weakness of the case should not be taken into account: Late amendments to statements of case: helpful guidance from the Court of Appeal.

COSTS

In May, the Civil Justice Council published the Final Report in its Costs Review. Key recommendations include: a pilot of a "lighter touch" approach to costs budgeting for cases in the Business and Property Courts and cases up to £1 million in other courts; a new band of guideline hourly rates for complex, high value, commercial work, and including counsel's fees within the guideline hourly rates regime; and potential new powers for the courts to make costs orders where matters settle pre-issue but the parties have not agreed costs: Costs reforms: proposed changes to costs budgeting, guideline hourly rates and pre-action costs.

These recommendations are separate to the planned extension of fixed recoverable costs to cases up to £100,000 from 1 October this year.

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