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2023 Half-year in review M&A legal and market developments

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We set out below a number of interesting English court decisions and market developments which have taken place and their impact on M&A transactions. This review looks at these developments and gives practical guidance on their implications. Summaries feature below, and you can click where indicated to access more detailed analysis.

Company law

There have been particular cases of interest on a number of company law issues.

Conversion of preferred shares ineffective as variation or abrogation of class rights without class consent

The Court of Appeal has upheld the earlier High Court decision that a purported conversion of preferred shares into ordinary shares, under a provision in a company's articles of association that provided for this to happen on an automatic basis on certain trigger events, was invalid for lack of class consent. This was because you had to interpret the share conversion article as subject to the separate article on consents required for variation or abrogation of class rights or imply a term to that effect.

Preferred shareholders (P) in company C challenged a purported automatic conversion of their preferred shares into ordinary shares. Article 9.2 of the articles stated that the preferred shares would *"automatically convert into Ordinary Shares: (a) upon notice in writing from an Investor Majority…"*, which in practice could be constituted by the ordinary shareholders alone. Article 10.1 on variation of class rights stated that *"… the special rights attached to any … class [of shares] may only be varied or abrogated… with*

Key lessons

- **Rules of interpretation where a class of shares has a specific, express right under articles:** Where a class of shares has a specific right (here, as to no variation or abrogation of their class rights without consent), express language would be needed to disapply that right. The court will interpret the articles as a whole, and a generic provision that could be read as conflicting with it will likely be interpreted as implicitly subject to that right rather than overriding it.
- **Clear and express drafting needed:** The judgment demonstrates the need for clear and express drafting of articles of association and clarity on interaction between related provisions.
- **Avoid conflicting articles:** It is important to avoid having articles which conflict, as this can invite challenge. The court's decision was driven by its interpretation that there were conflicting articles and that this had been a drafting error.

the consent in writing of the holders of more than 75 per cent. in nominal value of the issued shares of that class.". P argued that the majority ordinary shareholders had sought to benefit personally by reneging on the bargain they had struck with P when the preferred shares were issued. The Court of Appeal dismissed the appeal. It decided that the judge at first instance had been justified in concluding that there had been a drafting error in not stating expressly that the share conversion article was subject to class consent. It followed that either the automatic conversion article should be interpreted as subject to the variation of class rights article or a term should be implied to that effect. Any other interpretation would lead to an incoherent scheme and irrational results. It would give the ordinary shareholders an unrestricted power to deprive P of their special distribution rights on a liquidation or exit at any time at will, including at precisely the time when those rights were designed to benefit P. This made no commercial sense. It was accepted that P's special rights themselves constituted class rights. It followed that there would be a variation requiring class consent if C proposed to reduce the amount of the preferred return on P's shares. It was illogical to say that if, instead, these special rights were extinguished altogether as a result of conversion no class consent was needed. There was *"no rational or logical justification for such a bizarre regime"*, which demonstrated that something had plainly gone wrong with the drafting. On construing the full articles in the round, the word "automatic" in article 9.2(a) did not exclude the possibility that other conditions might have to be satisfied for conversion to happen. Conversion was only automatic in the sense of not requiring anything more to be done to authorise C to give effect to the conversion after receiving notice from an investor majority. The Court of Appeal did say that the judge should not have put weight on the fact that P had paid a premium for their shares, because you could not assume that the full premium was attributable to the special rights. However, this did not undermine the judge's overall reasoning. Past case law where cancellation of preference shares carrying preferential rights on a winding up was allowed as part of a reduction of capital, on the basis that capital was repaid on those shares at the rate due on a winding up, was not relevant. The share rights there were performed. By contrast here, P's special rights were wholly abrogated and not satisfied. (*DnaNudge Limited v Ventura Capital GP Ltd (acting for and on behalf of Ventura Capital LP Fund IV and Ventura Capital MG1 LP Fund)* [2023] EWCA Civ 1142)

- **Express provision on automatic share conversion without class consent:** The implication is that an express and clear provision for automatic share conversion without class consent would have been enforceable. Where desired, express language to this effect in articles is advisable.

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Trigger of creditors' interests duty where solvency depends on successfully challenging a claim

Where a company's solvency depended on a successful challenge to a claim against a tax avoidance scheme, the High Court decided that the creditors' interests duty arose if the directors knew or ought to have known that there was at least a real prospect of the company's challenge to HMRC's claim failing.

Company C entered into a "conditional share scheme" in 2002 designed to pay staff non-contractual bonuses without C's incurring liability to His Majesty's Revenue & Customs (HMRC) for pay as you earn (PAYE) income tax or national insurance contributions (NIC). HMRC stated in 2004 that, if such payments were in fact earnings, PAYE and NIC would be payable with interest. HMRC offered a deal to participants in such schemes in 2005 if they paid NIC with interest, on the basis certain corporation tax relief would then be available. C rejected that. Whilst C's then accountants advised that the tax scheme was robust, HMRC subsequently issued formal determinations in respect of PAYE and NIC and brought

Key lessons

- **Real prospect of the challenge failing:** Once the directors know or ought to know that there is at least a real risk of the challenge to a disputed liability failing, the liability should be included in the company's balance sheet and, if the company is insolvent at that stage, the creditors' interests duty is triggered.
- **Nuanced approach:** Directors need to adopt a nuanced approach and consider a range of factors. Here the High Court said that the economic effect of the directors continuing the scheme was materially the same as if salaries had been paid, giving rise to an arguable tax liability, but all remaining assets were routinely distributed to shareholders by way of dividend, leaving nothing with which to pay that liability in the event it was later established to exist.

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a claim in respect of NIC liability. The scheme operated until 2010 and liability to HMRC throughout the period of its operation was £36 million. A Court of Appeal decision in 2011 found in HMRC's favour on another company's tax scheme that was materially similar. This followed earlier First Tier and Upper Tax Tribunal decisions in HMRC's favour in 2009 – 2010. C was advised by counsel that its own position was not distinguishable. Taking into account C's total tax liabilities, it was clearly substantially insolvent. C went into liquidation in 2013 and L was appointed liquidator in 2017. L claimed against director D for breach of fiduciary duty. In particular, L alleged breach of the creditors' interests duty, which is the duty to consider the interests of creditors when a company is insolvent or bordering on insolvency. In *BTI 2014 LLC v Sequana SA & Ors* [2022] UKSC 25 the majority of the Supreme Court had held that the creditors' interests duty is triggered when the directors know or ought to know that the company is insolvent or bordering on insolvency or that an insolvent liquidation or administration is probable. The issue in this case was how to apply this test where the company's solvency depended on successful challenge to HMRC's claim against the tax avoidance scheme. Assuming that some sort of knowledge of insolvency was required, the High Court decided that the test was whether the directors knew or ought to have known that there was at least a real prospect of the challenge failing. Applying this test, the High Court decided that the creditors' interests duty had arisen here in September 2005, with C's financial situation then worsening each year as the amounts owing increased. The High Court decided there was no doubt that C was insolvent throughout the relevant period. The court remitted the case back to the insolvency court to consider the scope of the duty. On the basis of NIC alone, by September 2005 C owed HMRC more than £3.65 million, without the means to pay it. It made no difference that C disputed HMRC's claim. A disputed liability is not a contingent liability. The High Court noted that the Supreme Court in the *Sequana* case had rejected that the creditors' interests duty arises where a company is solvent but there is a real rather than remote risk of insolvency at some point in the future. However, the *Sequana* case was distinguishable because the company there was solvent when the alleged duty arose and the underlying issue was a long-term contingent liability. What was rejected in *Sequana* was a test of a real risk of future insolvency in that context. By contrast here, the issue was when the duty arose in the case of a disputed liability where the company's entire solvency depended on a successful challenge to a claim. (*Stephen John Hunt v Jagtar Singh* [2023] EWHC 1784 (Ch))

Members' written resolutions not validly passed

The High Court decided that proposed written resolutions requisitioned by two members under the UK Companies Act 2006 (the CA) and circulated themselves had not been validly passed in accordance with the statutory mechanism, because there had been no valid board decision to circulate the proposed written resolutions on the company's behalf.

K had been sole director of company C since its incorporation and was a shareholder. The main defendants (D) were shareholders in C but had never been directors. There had been a dispute over future funding, where K had invited shareholders to subscribe for new ordinary shares with a deadline of 20 January 2021 for accepting the offer. On 19 January D1 emailed K, copied to all members, attaching a letter requiring C to circulate proposed written resolutions appointing individuals S1 and S2 as additional directors (the original resolutions). One minute later D2 also sent K pdf versions signed by each of D1 and D2 respectively. S1 and S2 then purported to pass various written resolutions as directors, including changing C's authentication code at UK Companies House without K's consent, which meant that K could not access web filings. On 1 February 2021 K circulated revised proposed written resolutions proposing S1 and S2's board appointments and stating a circulation date of 1 February (the revised resolutions). None of the shareholders

Key lesson

- **Statutory process for members' requisitioning written resolutions:** The judgment gives useful guidance on: the requisite statutory process for members of a private company to propose a written resolution; the need to follow the precise requirements of the Companies Act; and members' options if the company fails to follow the requisite procedure.

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signed these. The High Court decided that S1 and S2 had not been validly appointed and their actions from 19 January were ineffective. The court noted that, under sections 292 and 293 of the CA, members holding at least 5% of the total voting rights may require a private company to circulate proposed written resolutions, whereupon the company must send or submit copies of the resolutions to every eligible member within 21 days. That requisite circulation had not happened in relation to the original resolutions, whilst the revised resolutions had lapsed without being signed by any members. The court gave useful guidance on how the CA rules on written resolutions proposed by members work. Significantly, there is no "self-help" procedure allowing

members to circulate proposed written resolutions under the CA themselves. The statutory requirement is for circulation by the company, which means that you need a valid board decision to circulate on the company's behalf. It would be contrary to principle for members to purport to circulate before the board has considered for itself whether to do so within the requisite 21-day period. This would include satisfying itself, for example, that a proposed resolution was not frivolous or vexatious. Members' remedy if the company fails to do so is to requisition and convene a general meeting or seek shareholders' unanimous consent. Any practice of "pre-agreeing" written resolutions was not relevant here, as that could at most only extend to "pre-signing" an actual resolution with a correct date on it, which had not happened. (*Kamenetskiy and Ors v Zolotarev and Ors* [2023] EWHC 2619 (Ch))

Auditors' duty of care to buyer on share acquisition

The High Court refused to strike out a claim by buyers for professional negligence against auditors in relation to the issue of a completion certificate under a share sale and purchase agreement (SPA) on which a price adjustment was based and over the target company's statutory accounts. The buyers had a realistic prospect of demonstrating at trial that the auditors had assumed responsibility to them in relation to these documents.

Before completion of the SPA, buyers B engaged auditors EA to perform due diligence. After completion, EA prepared completion accounts and issued a completion certificate addressed to both B and seller S on which a purchase price adjustment would be based. EA also prepared statutory accounts for target company C. B subsequently alleged that they had discovered an accounting fraud on C which had inflated C's net assets at completion. B alleged it had overpaid up to £480,000. As EA's engagement letter in relation to the statutory accounts was not available, there was some confusion over whether it was with C or B. However, a schedule to it which was available contained a disclaimer from EA assuming any responsibility for its audit work to anyone other than C and its members as a body. There was also an equivalent disclaimer on C's statutory accounts. Despite the disclaimers, B alleged that EA had assumed a duty of care towards them on the basis of various factors, including that: there was an existing business relationship between B and EA and EA had actively participated in negotiating the SPA; C's accounts were prepared in accordance with the SPA and the period covered by them was set by the SPA and was not its usual accounting period; EA knew the final purchase price would be based on the completion certificate; and the completion certificate had been addressed to S as well as B (but not C), whilst being passed to B separately from C's accounts. The High Court found in favour of B that there was a triable case that EA had assumed a duty of care to B. One key factor was that there had been continuing communications between the parties after the date of the audit engagement. Another was that direct communications had taken place just with B's lawyers over the completion accounts. This suggested a continuing and direct commercial relationship and that EA had assumed responsibility to B but not S, knowing that B was using EA to obtain the correct figure in the completion certificate and that EA had intended that reliance. The continuing communications and relationship distinguished this case from past case law where auditors have successfully relied on disclaimers on reports. (*Amathus Drinks Plc & Ors v EAGK LLP & Anor* [2023] EWHC 2312 (Ch))

Key lesson

- **Efficacy of disclaimers of liability:** The judgment demonstrates that in some nuanced circumstances auditors could potentially assume a duty of care irrespective of a disclaimer of liability, albeit that this was driven by the facts of this particular case. It was significant that the auditors had acted for the buyers before and knew that they would rely on the completion certificate for the purposes of the price adjustment.

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Contractual provisions

A number of cases have looked at common contractual provisions in M&A deals.

Contractual interpretation of service charge provision in leases

The Supreme Court decided that a service charge clause in two commercial leases that landlord L's certificate as to the total cost and sum payable by tenant T was conclusive, subject to standard exceptions, was conclusive merely as to what T had to pay following certification, but did not preclude T from later disputing liability.

The issue in this case was the calculation of T's service charge. T covenanted to pay a fair and reasonable proportion of the total service cost. The relevant clause stated: *"[L] shall on each occasion furnish to [T] as soon as practicable after such total cost and the sum payable by [T] shall have been ascertained a certificate as to the amount of the total cost and the sum payable by [T] and in the absence of manifest or mathematical error or fraud such certificate shall be conclusive."*. Under another provision T could inspect L's receipts and invoices relating to the service charge for up to 12 months after receiving the certificate. L brought proceedings for outstanding service charge on the basis of its certificates. L argued its certificate was conclusive of T's service charge liability, only subject to the specified defences. T argued that L's certificate was only conclusive of L's costs and not what T had to pay. The Supreme Court instead imposed its own interpretation and decided that L's certificate was conclusive of the sum payable by T when the certificate was issued, but not of T's underlying liability for the service charge. The Supreme Court's approach commercially protected L's cashflow position without preventing T from subsequently challenging the amount. It was a "pay now, argue later" approach. The Supreme Court gave various reasons for this interpretation. Whilst L's approach reflected the natural meaning of the words, it contradicted other provisions in the lease, such as those linking the amount of service charge with the proportion of overall premises that T rented, with a detailed dispute resolution mechanism for assessing that (meaning that L's certificate could not in practice be fully conclusive). Other reasons that the Supreme Court gave for this interpretation were that L's interpretation was at odds with T's right to inspect receipts and invoices, whilst T's interpretation contradicted the natural and ordinary meaning of the words used. In his dissenting judgment Lord Briggs rejected this "pay now, argue later" approach, saying the parties could have documented that if they so wished, and the court did not have a "carte blanche" to just make up a solution of its own. Lord Briggs believed that the natural meaning of the words should not yield to a more commercial approach unless there was some peg in the contract on which to hang that, and that T's inspection rights were to identify any permitted defences of manifest error or fraud. (*Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2)

Key lesson

- **Issues of contractual interpretation:** The judgment highlights the tension between applying the natural meaning of the words used as against a commercial interpretation, and that the court must consider the contract as a whole.

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Generic indemnity under business purchase agreement caught liability for negligence

The High Court decided that a generic, wide indemnity in a business purchase agreement (BPA) caught liabilities relating to negligent mis-selling of PPI insurance policies except where they arose from fraud or dishonesty on the agent's part.

Seller S sold various insurance operations to buyer B under a business purchase agreement (BPA) in 2003. B indemnified S and members of its group in the BPA with effect from completion from all liabilities of the transferring business (with specific exceptions) and all *"actions, costs, claims, losses, liabilities…in respect thereof"*. In 2004 a subsidiary of S (PA) was sold out of S's group. PA subsequently had to make good mis-selling complaints in relation to PPI policies

Key lessons

- **Importance of clear and express drafting:** The judgment serves as a reminder of the need for clear and express, specific drafting on the scope of indemnities, any exclusions from liability and contractual defined terms.
- **Supremacy of express words used:** This is an example of the court giving primacy to the natural meaning of the words used and the express contractual terms in a freely negotiated contract between sophisticated parties and drafted by professional advisers.

sold by a retailer as its agent between 1991 and 2004. PA then claimed against B under the indemnity in the BPA. The High Court decided that the generic indemnity in the BPA covered negligent mis-selling, without needing expressly to specify negligence in the language, and that PA could enforce the indemnity under the UK Contracts (Rights of Third Parties) Act 1999. It was only liability for fraudulent or dishonest mis-selling that was not covered. The court accepted that the starting point was that a party would unlikely be treated as having given up a right without clear words. However, that was not a set principle and did not mean you needed express words in an indemnity to catch negligence. Factors supporting this were that: the BPA had been professionally drafted; evidence showed the parties knew there was a risk of mis-selling claims (for example, there was an express warranty in the BPA on no complaints of unsuitable advice or misrepresentations in respect of products); and, whilst some other transaction documents had express exclusions over mis-selling and/or negligence, the BPA did not. A separate issue was whether PA was a valid beneficiary to bring a claim under the indemnity, given that it had been sold out of S's group by the time of the claim. The High Court decided that it was, interpreting the definition and the BPA in the round. Whilst the definition of S's group in the BPA caught S's "subsidiary undertakings" without a time delineation, by contrast the term "holding companies" within that group definition was expressly limited to those at the date of the BPA and only subsidiary undertakings "from time to time" of holding companies were included. Given the absence of the words "from time to time" in relation to subsidiary undertakings of S itself, the court found that the more natural interpretation was that PA was included irrespective of whether it remained a subsidiary of S at the time of the claim or loss. To hold otherwise would be contrary to commercial common sense, as it was those undertakings at the time of the sale that needed the indemnity against past liabilities of the business. (*PA (GI) Limited v Cigna Insurance Services (Europe) Limited* [2023] EWHC 1360 (Comm))

- **Date limitations in terms used within group definitions:** It is strongly advisable to specify expressly in the drafting of group definitions whether, in order to fall within a group definition, entities must meet particular descriptions as at the date of the agreement or from time to time.

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Effect of sanctions on contractual payment obligations

The High Court considered the effect of sanctions on a payment obligation under a contract, where the contract expressly required the parties to co-operate to "take all necessary steps in order for payments to be resumed" if the intended payee became subject to sanctions.

There were two bareboat charterparties. The owners of the two ships in question (O) were ultimately Russian-controlled by an entity that, together with its associates, was sanctioned and subsequently designated a blocked person for the purpose of accessing funds. Charterer C wanted to exercise its option to acquire the two ships. Under the contract, to effect the purchase C had to pay US dollars into O's Russian bank account, or such other account as O notified to C. Clause 8.10 said that *"Where a payment ... is incapable of being processed by the relevant banking institution and has not been received by [O] on the due date by virtue of [O] becoming a Sanctions Target, [O] and [C] shall co-operate and promptly take all necessary steps in order for the payments to be resumed. Any delay in payments resulting solely from the circumstances referred to in the immediately preceding sentence shall not be deemed an Event of Default…"*. C offered to pay euros into a frozen account with the Malta Sanctions Operating Board. O refused and terminated the contract for default. The High Court decided that the contractual requirement to *"take all necessary steps"* meant that O had to nominate an alternative bank account into which payment could be made and to accept a currency other than the contractual one of US dollars. It made no difference that it would be hard for O to withdraw funds from the alternative bank account. That was a completely external limitation

Key lesson

- **Consistent with other recent case law in a sanctions context:** The decision is consistent with the Court of Appeal decision in *MUR Shipping BV v RTI Ltd* [2022] EWCA Civ 1406 that a provision that an event would not amount to force majeure if it could be overcome by a party's reasonable endeavours did require a party to accept payment in euros rather than US dollars.

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arising from a perceived characteristic of the payee. Payment in euros into an account of a bank complying with the EU and US sanctions regimes would meet the requirements of clause 8.10. The court denied that clause 8.10 only applied when the receiving rather than the paying bank could not process payment due to sanctions. It also noted from the wording that the parties had specifically contemplated that O might become the subject of sanctions. Further, clause 8.10 caught a bank's inability to process a payment even if it might be shown subsequently after full enquiry that O no longer fell within the sanctions regime. Whilst O argued that the shares in its parent company had now been transferred to a party outside sanctions restrictions, it was understandable for banks to proceed cautiously with such assertions in the first instance. (*Gravelor Shipping Limited v GTLK Asia M5 Limited & Anor* [2023] EWHC 131 (Comm))

No breach of warranty as to no MAC in target's prospects since last accounts date

Overturning the previous High Court decision, the Court of Appeal decided that there had been no breach of a warranty in a share SPA as to no material adverse change (MAC) in the target company's prospects since the last accounts date.

Buyer B entered into a share SPA with sellers S to buy all the issued shares in IT consultancy C. A warranty in the SPA said that, since the last accounts date of 31 December 2017, there had been no MAC in C's *"turnover, financial position or prospects"*. Before entering into the SPA, S provided B with monthly forecasts and sales pipelines. These included draft pipelines showing an expectation that C would win substantial mandates for four projects and a detailed profit forecast for the 2018 financial year. C's management accounts for the two months prior to completion were available after the effective date and showed that C had made significant losses. B brought a claim against S for breach of the prospects warranty, including on the basis that the prospects of the four projects were not properly reflected in the pipelines. The Court of Appeal decided that the prospects warranty had not been breached. To establish a breach you would have had to show that C's prospects had worsened since 31 December 2017. So you had to evaluate the prospects at that date and on 8 October 2018 when the SPA was signed and the first completion date occurred. Instead, the judge had contrasted the actual position in October 2018 with the expectation that a reasonable buyer would have had. The judge had wrongly equated "prospects" with Ebitda, when the parties had not used that term in the context of C's prospects and the word "prospects" connoted "chances or opportunities for success" in a more general way. He had also erred in comparing Ebitda for 2018 with the Ebitda a reasonable buyer might have expected for that year, even though more than nine months of the year had passed by the time the SPA had concluded. The Court of Appeal also overturned the High Court decision that B had served a valid notice of claim even though it had only given an omnibus figure for the amount claimed. The requirement in the SPA for a notice of claim to specify *"as far as is reasonably practicable, the amount claimed"* required an "amount claimed" to be included as far as practicable in respect of each alleged breach of warranty, not just a conglomerate figure. B had not done so in this warranty notice and so any warranty claim was barred. Common sense suggested that it was not impossible to work out how much was claimed in respect of individual claims. There was no need to remit the case for retrial, given that the warranty notice was defective and the claim barred. In any event, the claim for breach of the prospects warranty could not proceed on the basis of the existing particulars of claim, where the basis of the judge's finding of a warranty breach at first instance differed substantially from how B had put its case. (*Decision Inc Holdings Proprietary Limited v Garbett & Anor* [2023] EWCA Civ 1284)

Key lessons

- **Mandatory nature of requirements in SPA for valid notice of claim:** The judgment serves as a reminder again on the importance of following the strict requirements of the SPA in relation to notices of claim. These are treated as mandatory rather than permissive, and the claim will otherwise be barred.
- **Post-accounts date warranties on financial position:** The judgment gives useful guidance on interpretation of post-accounts date warranties as to a target's financial position.

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Novation by conduct

The High Court decided that a claimant had validly exercised a call option because it had become a party to the underlying put and call option agreement by virtue of novation by conduct.

RHCo was holding company of the R Group and entered into a joint venture agreement (JVA) with G to set up a company (JVCo) to make and sell engine control equipment. In various circumstances set out in the JVA G could require RHCo to acquire its shares in JVCo or RHCo could exercise a call option to acquire them, including on a change of control of G. In these scenarios RHCo had rights under a related put and call option agreement (PCOA) to exercise a call option to acquire G's aftermarket maintenance business. In 2011 NewHCo replaced RHCo as holding company of the R Group by a scheme of arrangement and the JVA and PCOA were amended to reflect this. Also in that year, G was taken over by T. NewHCo and T entered into various agreements relating to the PCOA to give NewHCo an express right to acquire the aftermarket maintenance business. However, when NewHCo served a call option notice on G in 2018 to acquire the aftermarket maintenance business, G alleged that only RHCo was entitled to do so. The High Court decided that NewHCo had validly served the call option notice as the PCOA had been novated by conduct. The test for this was whether an inference of novation by conduct was necessary to provide a lawful explanation or basis for the parties' conduct. This is an objective test and does not depend on parties' subjective intention. The High Court decided that it was clear that NewHCo and G had conducted themselves on the basis it was NewHCo that was now party to the PCOA and their dealings could not otherwise be explained. In particular, they had entered into various agreements from June 2012 onwards describing the PCOA as an agreement between NewHCo and G and had amended the terms of the PCOA, albeit under agreements to which RHCo was not a party. That met any requirement for written consent from G. As far as RHCo was concerned, its consent to novation of the PCOA to NewHCo could be inferred. NewHCo was its sole shareholder and, with just one exception, they had identical directors. RHCo had in any event already given written consent to NewHCo becoming the party entitled to exercise the call notice under the JVA (which triggered the option period) by a deed of adherence. Alternatively, G and RHCo had retrospectively waived any need to give prior written consent. The High Court also commented that both NewHCo and G had repeatedly contracted on the assumption that NewHCo was a party to the PCOA and NewHCo had been entitled to rely on that. (*Rolls-Royce Holdings Plc v Goodrich Corporation* [2023] EWHC 1637 (Comm))

Key lessons

- **Novation by conduct:** The judgment is another example of the court finding an effective novation by conduct.
- **Retrospective waiver of the need to consent:** On the facts, the court also followed recent case law to uphold the concept of retrospective waiver of the need to give prior written consent to novate.

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Exclusion of liability for "anticipated profits" caught lost charges

The High Court granted summary judgment to strike out a claim for lost charges arising from alleged breach of an exclusivity clause in a supply agreement on the basis that they fell within an exclusion clause covering "anticipated profits".

Virtual mobile network operator VM entered into a telecommunications supply agreement with mobile network operator EE. EE agreed to provide services to VM to enable 2G, 3G and 4G services for VM's customers via EE's radio access network under the agreement, which contained an exclusivity clause. The arrangement was later extended in principle to 5G, on the basis there would be potential agreement or, failing that, to allow VM to provide 5G services from a competitor's network. VM put some of its customers onto competitors' networks, allegedly on the basis of the 5G exception. EE argued that they were non-5G customers, meaning that the exception did not apply and that the exclusivity clause was breached. EE claimed around

Key lessons

- **Explicit drafting advisable:** The case demonstrates again the merits of clear, express and specific wording on the intended scope of an exclusion clause and the risks in wide, generic exclusions.
- **Interpretation of exclusion clauses:** The judgment provides a good summary of the court's current approach to interpreting exclusion clauses and the primacy given to sophisticated commercial parties' freedom of contract.

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£24.6 million in damages for lost revenue. VM applied to strike out that claim on the basis that it fell within an express exclusion clause in the supply agreement excluding liability of either party in respect of *"anticipated profits"* (with limited exceptions). The High Court found in VM's favour and struck out EE's claim. This was not a claim in debt for charges due under the supply agreement but, instead, for damages for diverting away customers to whom no services had been provided. Any liability on the part of VM for damages for unlawfully diverting customers to alternative networks fell within the terms of the exclusion. The exclusion clause was clear and unambiguous and EE's claim came within the natural meaning of "anticipated profits" and was barred. The High Court refused to construe the term "anticipated profits" narrowly. Where, as here, sophisticated parties had used clear and unambiguous words in a bespoke, lengthy and detailed agreement which were plainly part of their risk allocation the court would apply those words unless "repugnant" to the contract in some way. EE could in any event seek injunctive relief and would have the benefit of the substantial minimum revenue commitment that applied under the agreement anyway. Permission has been granted to appeal the decision. (*EE Limited v Virgin Mobile Telecoms Limited* [2023] EWHC 1989 (TCC))

Exclusion of liability for loss of profit caught non-performance or repudiatory breach

The High Court decided that a contractual exclusion of liability for loss of profit applied to preclude various claims for breach of two reseller agreements.

A UK PLC (PU) developed and supplied a dealer management system (PDMS) for the motor vehicle industry. Under one reseller agreement PA was appointed exclusive reseller of the PDMS in countries including Hong Kong, the Philippines and Vietnam. Under the other reseller agreement PA was appointed exclusive reseller in Japan. The two agreements were materially identical. Under clause 16 there was an exclusion of liability for, among other things, *"(1) special, indirect or consequential loss; (2) loss of profit, bargain, use, expectation, anticipated savings…"*. PA claimed that PU had breached various development obligations under the agreements and claimed around US$ 312.7 million in damages for lost profits, alleging: significant disruption to customer contracts; that the dealership in Japan could not go live; and inability to onboard customers causing loss of accounts and, ultimately, loss of profits. PU counterclaimed for payment of outstanding invoices plus interest. PA denied these were payable, relying on equitable set-off despite a clear "no set-off" provision in both agreements. The High Court rejected PA's claim, agreeing with PU that it was caught by the exclusion clause. The court rejected that there was a presumption that exclusion clauses do not apply to non-performance or repudiatory breaches of contract. It depends on the construction of the particular clause in question. The language of the exclusion clause here was on its face clear and unambiguous. "Loss of profit" meant just that. The court categorically denied that the clause was only intended to catch indirect or consequential loss. To avoid applying the exclusion clause the court would have had to read into the contract words that were not there, and the court was not prepared to do that. The court also rejected argument from PA that the reseller agreements were part of PU's standard terms and were unreasonable under the UK Unfair Contract Terms Act. On the contrary, they had been amended in negotiation while both parties had professional advice. The court also granted PU summary judgment on its counterclaim, because there was no reason to construe the "no set-off" clause as only applying to legal set-off and not equitable set-off. Permission to appeal the decision has been declined. (*Pinewood Technologies Asia Pacific Limited v Pinewood Technologies PLC* [2023] EWHC 2506 (TCC))

Key lessons

- **Interaction between exclusion clauses and repudiatory breach:** The judgment confirms that there is no presumption against exclusion clauses applying in cases of repudiatory breach.
- **Further guidance on interpretation of exclusion clauses:** The judgment confirms again that the courts will not strain their interpretation of the language of an exclusion clause where the wording is clear and unambiguous.

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Good Faith

Two recent cases have looked again at contractual duties of good faith and the relationship between contracting parties.

No different rules of interpretation for relational agreements

The Court of Appeal upheld an earlier High Court decision that a 99-year relational agreement did not extend to tendering for new or repeat business, while discussing broader issues around contractual interpretation of relational agreements.

A 99-year services agreement had been entered into following a group reorganisation. Under this agreement, a newly-formed LLP agreed to service the clients of a pre-existing actuarial business (Q) for a fee. The question was whether the services agreement covered tendering and re-tendering on behalf of Q. "Services" was defined in the agreement as "*Provision of consulting, actuarial, administrative and investment services…*", with itemised examples, and "*… provision of such other administrative support as [Q] may reasonably require from time.*". The Court of Appeal decided that tendering and re-tendering was not covered. One reason was that this was a professionally drafted agreement. If the parties had wanted to cover tendering they could have done so expressly. Instead, the express definition of "Services" in the agreement related to work for clients, not work obtaining clients. Another reason was that the expression "administrative support" within the definition of "Services" did not import tendering, which is a form of business development. Most interestingly, the Court of Appeal rejected argument that, because this was a relational agreement, obligations of good faith were imported into the services agreement and that the court should interpret the agreement with a purposive approach, focusing less on the black letter and more on ensuring the parties' arrangement worked for a long-term working relationship. First, there are no special rules for interpreting relational agreements. Secondly, even if you could imply a duty of good faith into the relational agreement, you could not use that to extend the express services that it covered. The Court of Appeal applied past case law that any invocation of the "spirit of the contract" which a duty of good faith might be said to encompass was not an open invitation to read into the contract additional substantive obligations, particularly in a professionally drafted contract with an entire agreement clause. At most, an obligation of good faith would apply to the way the parties acted within the confines of what the services agreement expressly provided. (*Quantum Advisory Limited v Quantum Actuarial LLP* [2023] EWCA Civ 12)

Key lesson

- **Court's approach to concept of good faith:** The judgment is interesting as another example of the court setting checks and balances on the concept of good faith in the context of English law relational agreements.

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No umbrella agreement in respect of services not contained in written agreements

The Court of Appeal decided that there was no implied "umbrella" relational agreement, nor any intention to create legal relations, in relation to additional services that were not included in a series of written agreements between the parties.

M was an authorised distributor under six written car dealership agreements with RE and N to sell their vehicles within its exclusive territory. RC was a subsidiary of RE providing financing and administrative services to M under a separate agreement with M and was not a party to the dealership agreements. The six dealership agreements between M, N and RE could be terminated on 24 months' notice. M's contract with RC could be terminated on seven days' notice. RC was concerned that M was involved in money laundering and terminated its contract with M on seven days' notice. M challenged this, alleging that there

Key lessons

- **Termination provisions not susceptible to good faith obligations:** The judgment demonstrates that termination rights are not treated as susceptible to importing good faith obligations, as established in previous authorities.
- **Primacy of express terms of written agreements:** The judgment shows that the court will give primacy to the express terms that the parties have agreed and be reticent to import contradictory terms.

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was an implied "umbrella" relational agreement between all four parties, with implied terms of good faith, that RC would not terminate without reasonable cause and that the notice period was 24 months, both to streamline the overall arrangements and as a reasonable period. M also alleged that RC was estopped from relying on the seven-day notice period, for example, by representing that M and RC were long-term partners. Underlying this was a claim from M that there had been an implied intention to create legal relations over additional services from RC that were not reflected in any of the written agreements and that you should imply an umbrella agreement from the fact that the extra services had been provided. The Court of Appeal decided that there was no umbrella agreement nor any intention to create legal relations in respect of extra services that were not included in the written agreements. Again, the Court of Appeal said that you could not use a purported good faith obligation alleged to arise from a relational agreement to imply terms that contradicted the express terms of the written agreements. Indeed, RC's provision of finance was intended to be discretionary from time to time. There was no room for alleged implication. The nature of the discretion did not contain any commitment to lend at any particular level or at all. The Court of Appeal also pointed out that a lot of the conduct alleged to have given rise to the umbrella agreement post-dated the alleged date of the umbrella agreement itself and so you could not infer an intention to create legal relations for additional services from it. RC's database, customer finance and platform services were not only explicable on the basis that they had a contractual foundation. M could not use the doctrine of estoppel as a cause of action rather than a defence. In any event, a clear and unequivocal representation would have been needed from RC that it would not rely on the seven-day notice period, which had not happened. (*Mackie Motors (Brechin) Limited v RCI Financial Services Limited* [2023] EWCA Civ 476)

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