SHEARMAN & STERLING

UK Litigation Review 2021

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Introduction

Welcome to this year's edition of the Shearman & Sterling UK litigation review.

As with our previous edition, we have aimed to highlight important and interesting English commercial cases from the last year. We have again covered a range of topics that should be of interest to anyone who follows English litigation or arbitration. We finish off the review with our thoughts on what we can expect for English disputes in the year ahead.

The review focuses on judgments handed down since the publication of our last review in the Autumn of 2020.

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 disputes contacts are on the preceding page).

S&S London Disputes Team

November 2021

The Year in Review

Last year saw big changes in UK litigation or portended more that were on the way: pandemic-induced remote hearings, up and down caseloads in the Courts, and pending judgments from the Supreme Court in a couple of major cases concerning competition, data protection and the developing area of class actions. This year, we have the awaited judgments, the courts seem to be as consistently busy as ever, and remote hearings have become commonplace (and in some cases appear to be with us for the foreseeable future).

Brexit and EU law continues to have an impact on UK litigation. There remains a significant tail of cases, and therefore judgments, under the old "Brussels/Lugano" regime, although the relevance of EU law for practitioners and their clients will continue to diminish over time. More widely, it now appears that the UK will likely not re-join the Lugano Convention, which has raised concerns for many over how much respect the EU courts will afford the English courts' jurisdiction and the enforceability of their judgments. That being said, it remains to be seen exactly what impact a "no-Lugano" future would have, as by and large, the attributes of the English Courts that for many years have made it an attractive venue for international dispute resolution have not changed.

Turning now to an overview of the past year across the subject areas covered in this year's review:

In **contract law**, there was guidance from the Supreme Court on liquidated damages clauses and restraint of trade. The lower courts grappled with a wide range of topics from contract formation and misrepresentation to various issues of interpretation, to reflective loss (see **pages 7 to 15**).

In our **tort and equity** section, we cover decisions from the Supreme Court on the illegality defence and the SAAMCO damages principles, as well as an interesting case on estoppel that anyone who pays tax may wish to read (see **pages 16 to 20**).

Turning to **banking and finance litigation**, the *Quincecare* duty (that requires banks not to act on fraudulent payment instructions in certain circumstances) continues to garner attention in the courts. Cryptoassets raise a range of novel legal issues; not surprisingly, we are starting to see a small but growing body of case law in this area, particularly in relation to interim relief and asset preservation in the context of fraud. We report on a couple of cases exemplifying this growing trend (see **pages 21 to 25**).

It has been another big year for **competition litigation**. Most notably, the Supreme Court handed down judgment in the ***Merricks v Mastercard*** follow-on damages class action, overturning the Court of Appeal and in effect setting the bar lower for the certification of collective proceedings in the Competition Appeal Tribunal (CAT). We may see more competition class actions in the CAT as a result (see **pages 26 to 28**).

While the pandemic moratorium on windings up continued, the focus of **company and insolvency law** cases has been on schemes and Part 26A plans. One of the interesting themes this year has been the impact of schemes on consumer creditors and the resulting intervention of the Financial Conduct Authority. More generally, there is a growing expectation that restructuring and insolvency-related cases will be a bigger feature of 2022 (see **pages 29 to 32**). *For further expert commentary on the key court decisions affecting restructuring and insolvency this year, see the posts from our Financial Restructuring & Insolvency team here.*

Coming late in an otherwise quieter year for **data protection litigation** was the much-anticipated ***Lloyd v Google*** Supreme Court judgment. While generally supportive of the English "representative action" as a vehicle for "opt-out" class actions, the court ruled that Mr Lloyd's claim, representing 4 million iPhone users for the alleged historic misuse of their personal data, did not have a reasonable prospect of success and therefore could not proceed. In so doing (and in contrast with the position in competition cases following ***Merricks v Mastercard***), the court upheld the applicability in representative actions of important damages principles that may prove to limit (once and for all) the utility of the representative action as a vehicle for class actions in the English courts (see **pages 33 to 35**).

Private international law has been an interesting area to watch since the end of the Brexit transition period. There are some (but fewer) cases on jurisdiction under Brussels/ Lugano, and in their stead, a growing focus on jurisdiction issues under the common law, particularly the service out gateways, *forum non conveniens* and anti-suit injunctions. We also cover some interesting cases on foreign judgment and arbitral award enforcement, including a recent follow-up from the Supreme Court on the applicable law of arbitration agreements, one of the big issues from 2020 (see **pages 36 to 43**).

There were a range of notable cases on **procedure** this year. Disclosure (including the continuing Disclosure

Piot Scheme), arbitrator impartiality and limitation are just some of the areas of interest that we cover (see **pages 44 to 51**).

Finally, there are almost always developments on **privilege**—this year, the issues were the scope of litigation privilege, collateral waiver and without prejudice privilege (see **pages 52 to 54**).

Review by Subject Area

Contract

Pre-Contractual Negotiations

The Court of Appeal in ***Joanne Properties v Moneything***[1] reiterated the significance of the "subject to contract" label in contractual negotiations. The parties had used the label early in the course of negotiations and intended that any formal agreement (if reached) would be recorded in a consent order, but no order was made.

The Court of Appeal held that the High Court, in finding that a binding contract had nonetheless arisen, had placed too much emphasis on whether the purported terms were sufficiently certain and failed to give proper consideration to whether the parties had intended to enter into a legally binding arrangement at all.

Allowing the appeal, the Court reiterated that, where parties used the "subject to contract" label in negotiations, it would generally be assumed that (a) neither party intends to be bound unless and until a formal contract is entered; and (b) each party reserves the right to withdraw until such time as a binding contract is made.

The cases cited by the court included instances where parties had been found to have waived the protections afforded by the subject to contract label (where, for example, the putative contract had already been partly performed). Even those authorities made clear that the court will not lightly hold that such protections had been waived.

If negotiations are initiated "subject to contract," the qualification will apply throughout negotiations until expressly or implicitly waived by the parties.

Identifying the Parties

In ***Bell v Ivy Technology Ltd***,[2] the Court of Appeal considered the circumstances in which a third party could be bound by a contract where a named party to the agreement had contracted as the named party's disclosed principal. This follows a line of recent cases on this topic, as we noted in last year's review.[3]

The case concerned the claimant's application to amend its particulars of claim in a claim for breach of warranty under a share purchase agreement.

The parties had sought to transfer shares from the first and second defendant to the claimant which were known by all persons concerned to be beneficially owned by the first and second defendant in equal proportions. However, the second defendant was not a named party to the SPA, and the recitals to the SPA stated that beneficial ownership rested only with the first defendant.

The court held that the first defendant had contracted not only as principal, but also as agent for the second defendant as its disclosed principal.

The second defendant further relied on an exclusion clause in the SPA (which sought to exclude third-party rights, remedies, obligations and liabilities) to argue that its liability was excluded.

The court considered that there was a heavy burden on a party seeking to exclude the liability of a known and identified principal under a contract.

As the SPA did not clearly and unequivocally exclude the second defendant's liability, when it could easily have done so, there was a real prospect that the trial court would conclude that the second defendant's liability was not excluded, in light of the admissible factual matrix.

The court also noted that, while evidence of what was said during precontractual negotiations or of the subjective intentions of the parties was inadmissible to show what a particular contractual provision means, evidence as to the "genesis and aim of the transaction" was admissible.

In ***Gregor Fisken Limited v Bernard Carl***[4] the court gave a salutary reminder that a person signing a contract in their own name, without qualifying the capacity in which they sign, will be treated as a principal party to that contract.

The agreement recorded that the claimant was party to the contract "as agent for an undisclosed principle." However, the claimant had signed the contract in their own name, without any qualification.

[1] [2020] EWCA Civ 1541

[2] [2020] EWCA Civ 1563

[3] Shearman & Sterling, Litigation Review 2020, page 7

[4] [2021] EWCA Civ 792

The court referred to the signature principle in *Internaut Shipping GmbH v Fercometal Sarl*[5] under which a person who signs a contract as a party and without qualification, but is described as an agent in the body of the agreement, is bound to the contract as principal, not as agent, i.e., the signature takes precedence (unless the contract provides another means of resolving the inconsistency). The claimant was therefore held to be a principal contracting party to the contract.

Online Signatures

In ***Green v Petfre (Gibraltar) Ltd***[6] the High Court considered the incorporation of terms the context of an online casino. The claimant had won a large sum in a game on the defendant's website. The defendant, in refusing to pay out, relied upon a clause in its terms and conditions which stated that payment would not be made in the event of a glitch or malfunction in the software. The claimant had ticked a box upon registering his account, indicating that he accepted these terms and conditions.

The court found that the clause did not apply on several grounds. Of particular interest, however, was the court's finding that the relevant clause had not been properly incorporated.

Often, the terms of an agreement will be set out in full in a single document which is then signed by the relevant parties. Where a document has been signed, the courts generally accept that the clauses therein have been effectively incorporated, even where they are onerous and unusual.

However, terms can also be incorporated by providing the other party reasonable notice of them (as when a party provides a copy of its standard terms and conditions). Where this is the case, it must be shown that the counterparty was given reasonable notice of those terms. In relatively rare circumstances, the courts have also found that where specific terms are particularly "onerous of unusual," it would need to be shown that sufficient steps were taken to bring these terms to the other party's attention in order for them to be effectively incorporated.

On the facts of this case, the court found that the term, allowing for the voiding of bets and non-payment of winnings, was particularly onerous, and that the claimant had not been given sufficient notice for it to have been properly incorporated into the agreement.

While the judge does not express an explicit view as to whether the defendant's ticking of the relevant box amounted to a signature, their conclusion indicates it does not.

This case will be of interest to parties that rely on similar methods to bring their terms and conditions to the attention of clients or customers. It suggests that exclusion clauses, limitations of liability and any other clause at risk of being "onerous or unusual" and purportedly incorporated in this way may be ineffective if sufficient steps were not taken to bring them to the other party's attention.

Misrepresentation

In ***Leeds CC v Barclays Bank Plc***[7] the Commercial Court considered the correct legal test for reliance in misrepresentation claims and, in particular, to what extent a claimant needed to be "aware" of the representation being made in order to show reliance.

The claimants sought to rescind LIBOR-referenced loan agreements entered into with the defendant bank, which they alleged had made implied fraudulent misrepresentations linked to manipulation of LIBOR.

The defendant sought to strike out the claims on the basis that the claimants could not show they had been aware of the representations (and therefore could not show sufficient reliance), or in the alternative, that the claimants had affirmed the loan contracts.

In striking out the claims, the court found that a mere "assumption" as to the matters alleged to have been represented is not sufficient—a claimant must demonstrate they were aware of the relevant representations.

The degree of awareness required will depend on the circumstances, although the line between awareness and assumption may become difficult to distinguish in some cases. This would be particularly so where representations were implied by conduct, for example, a bidder raising their paddle during an auction would be understood to be representing that he/she was both willing and able to pay for the item. The court noted that it would be particularly important to demonstrate awareness where the representations complained of were implied, or where a party could be said to have entered into an agreement on the basis of both a putative representation and a separate assumption.

[5] [2003] EWCA Civ 812

[6] [2021] EWHC 842 (QB)

[7] [2021] EWHC 363 (Comm)

The High Court has also given further consideration to the scope for warranties to amount to a contractual representation, such that the contract may be said to be repudiated in the event of a breach of those warranties.

In ***Arani v Cordic Group Ltd***,[8] the buyer of a business sought to bring a claim for misrepresentation on the basis that the seller had made certain representations regarding licencing requirements in respect of data required by the relevant business, in respect of which the seller had offered various warranties.

In general, a warranty under an SPA will not also form the basis of a claim for misrepresentation—where a party warrants something, it is intended as a contractual promise for which they will be held accountable in contract. Without more, it will not also be taken to be a representation of fact or law. The court has also previously suggested that there is a fundamental conceptual difficulty in arguing that a party was induced into entering a contract by a warranty that was not formally given until the agreement was executed.[9]

The buyer in *Arani* argued that the relevant warranties included in earlier drafts of the documents were capable of constituting a representation for this purpose and, as such, gave rise to a claim for fraudulent misrepresentation (which was not captured by the non-reliance language in the SPA).

In addition, the buyers asserted that further statements made in other transaction documents, in particular the disclosure letter, amounted to representations, in respect of which the sellers sought to bring a claim for misrepresentation or negligent misstatement.

The court rejected both arguments. Drawing on prior authorities, the court held that warranties included in draft documents indicated only what a party was prepared to warrant if the agreement were executed and did not constitute representations.

In respect of statements in the transaction documents more broadly, the disclosure letter contained its own non-reliance clause to the effect that no matters disclosed would constitute a representation.

The court also held that the same principles applied to statements found in the wider transaction documents as to warranties under the SPA, in that it was "hard to see how they [could] contain pre-contractual representations which induced the Defendant to enter into the transaction of which they formed a part."

In ***MDW Holdings v Norvill***,[10] the buyers under an SPA also sought to assert that statements of fact which were incorporated into warranties within the agreement gave rise to representations on which the buyer could base a claim for misrepresentation.

While the judge similarly found that statements of fact contained within warranties could not also form the basis of a misrepresentation, in contrast to *Arani* he found that the buyer could rely on representations which had been made separately from the transaction documents but which addressed the same matters as the relevant warranties. This included, in particular, statements made in the Due Diligence Index and Responses. Although the SPA included an entire agreement clause, it did not include any language to the effect that no representations had been made or relied upon by the parties.

There is therefore a tension between these two cases. However, *MDW Holdings* appears to suggest (at least for the time being) that, where a seller has breached a warranty, provided that a buyer can find a distinct statement to the same effect outside of the transaction documents (and drafts thereof), such statements may also be capable of founding a claim in misrepresentation (provided that this is not excluded by the provisions of the agreement). Permission to appeal this judgment to the Court of Appeal has been sought and is outstanding.

Interpretation

In ***Primus International Holding Co v Triumph Controls – UK Ltd***,[11] the Court of Appeal considered the meaning of "goodwill" in an SPA exclusion clause.

The appeal concerned breach of a warranty that financial forecasts had been "honestly and carefully prepared."

The defendant argued that the breach had only caused loss of "goodwill" and that, under the SPA, claims "in respect of lost goodwill" were excluded.

The defendant argued for a broad "accounting definition" of goodwill, i.e., the difference between the net book value of the identifiable assets and the acquisition price. Conversely, the claimant argued for a

[8] [2021] EWHC 829 (Comm)

[9] *Idemitsu Kosan Co Ltd v Sumitomo Corporation* [2016] EWHC 1909 (Comm)

[10] [2021] EWHC 1135

[11] [2020] EWCA Civ 1228

narrower definition, namely the value attributable specifically to the brand or good reputation of the business.

In dismissing the appeal, the Court agreed with the claimant's narrower definition, principally because:

- The narrower definition was consistent with the "ordinary legal meaning of goodwill" in a commercial context.
- This was consistent with authorities on the meaning of "goodwill," as well as other clauses of the SPA which were "plainly designed to protect the companies' goodwill, in the sense of their good name, reputation and business connection."
- If the parties had intended to apply a definition that deviated from the ordinary commercial and legal meaning of a term, the court would expect them to use clear language to that effect.

In ***Mott MacDonald Ltd v Trant Engineering Ltd***,[12] the High Court considered whether there are special rules for the construction of exclusion clauses.

The question arose in the context of the defendant's counterclaim for alleged deliberate breaches of a settlement and services agreement. The claimant denied the breaches, and in any event, applied for summary judgment on the basis that the breaches fell within the scope of certain exclusion clauses.

The defendant relied upon the decision in *Internet Broadcasting Corporation Ltd & others v MAR LLC*[13] in arguing that there is a presumption against an exclusion clause operating to preclude liability for a deliberate repudiatory breach, which could only be rebutted by strong language.

Rejecting the argument (and choosing not to follow *Internet Broadcasting*), the court held that no special rule exists for the construction of exclusion clauses—the purpose of construction is to give effect to the parties' intention as disclosed by the language read in context.

An exclusion clause precludes a liability which would otherwise and ordinarily arise. Reference must be had to the language used by the parties in considering whether the departure from this norm was intended. In the absence of clear words to this effect, a court will find it difficult to conclude that such an effect was intended.

There was nothing to suggest that the parties in this case had intended the clause should not extend to breaches which were fundamental, deliberate, or wilful.

There is now a series of conflicting authorities on this issue which will need to be reconciled at the appellate level in due course.

Reflective Loss

The Court of Appeal in ***Broadcasting Investment Group Ltd v Smith***[14] provided guidance as to the relationship between the Contract (Rights of Third Parties) Act 1999 (CRTPA) and the rule against reflective loss (i.e., the rule that a shareholder cannot claim for a fall in the value of their shares which reflects a loss suffered by the relevant company) established in *Prudential Insurance Co Limited v Newman Industries Limited.*[15]

The parties entered into an agreement for the transfer of shares in two companies (controlled by the defendant) to a joint venture vehicle (JV) in which the parties became shareholders. However, the defendant failed to transfer its shares in the companies to the JV.

The claimant sought damages for the resultant reduction in the value of its interest in the JV, as well as a loss of dividends. The JV, which was not incorporated as at the date of the agreement, had acquired a right to enforce it as a third party under the CRTPA.

However, because the claim concerned a fall in share value reflecting losses the JV was otherwise entitled to claim for under the CRTPA, the claim was initially struck out as being a claim for reflective loss. While s4 of the CRTPA provides that a third party's entitlement to enforce a contract does not affect the promisee's right to enforce the contract, the third party's entitlement remained subject to the rule against reflective loss.

Allowing the claimant's appeal, the Court of Appeal held, among other things, that the natural meaning of the words in s4 of the CRTPA made clear that the right conferred upon a third party under the CRTPA was additional to any rights accruing to the promisee under the contract.

Therefore, the JV's right to enforce under the CRTPA did not affect the claimants' right as a party to the contract. The claim did not contravene the rule against reflective loss.

Implied Duty of Good Faith

[12] [2021] EWHC 754 (TCC)

[13] [2009] EWHC 844 (Ch)

[14] [2021] EWCA Civ 912

[15] (No 2) [1982] 1 Ch 204

In the High Court decision of ***Dwyer (UK Franchising) Ltd v Fredbar Ltd***[16] the High Court, for the first time, held that a breach of the "Braganza duty" constituted a repudiatory breach of contract entitling the innocent party to terminate the agreement.

The Braganza duty provides that where an agreement gives a contractual discretion to one party which impacts other parties to the agreement (for example, as to the value of certain assets, or as to whether a certain insured event has arisen) that discretion must be exercised rationally and not capriciously.

The franchise agreement in question contained a force majeure clause which bestowed on the franchisor discretion as to whether to declare a force majeure event.

The court found that the franchisor's refusal to declare such an event following the outbreak of the pandemic and the franchisee's need to self-isolate for a 12-week period constituted a breach of the Braganza duty. As the force majeure clause was a fundamental term of the contract, the franchisor had committed a repudiatory breach of the agreement.

In addition to demonstrating that the Braganza duty will apply when parties exercise a discretion as to whether to declare a force majeure event, the case appears to be the first example of such a breach constituting a repudiatory breach. An appeal is scheduled to be heard next year.

Restraint of Trade

The Supreme Court in ***Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd***[17] recently overruled a House of Lords decision on the scope of the restraint of trade doctrine (the "doctrine").

The case concerned a restrictive covenant given by a developer of a shopping centre to an anchor tenant which prevented the developer from allowing any substantial shop to be built on the site in competition with the tenant. The developer later assigned the freehold interest in the centre to a company which, being a party covered by the covenant, contended that it was an unenforceable restraint of trade.

The Supreme Court allowed the anchor tenant's appeal, departing from the much criticised "pre-existing freedom" test set down in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*.[18] That test provides that a covenant will not amount to a restraint of trade unless the promisor has surrendered a right or freedom they previously enjoyed. Instead, the Court followed the "trading society" test espoused by Lord Wilberforce in his dissenting judgment in *Esso*, based on accepted practice in the market.

This means that a covenant which has passed into the accepted and normal currency of commercial, contractual or conveyancing relations will generally be assumed to be consistent with public policy and therefore enforceable.

The court stressed that such a test should be applied flexibly on the facts of each case (something further reiterated by the Court of Appeal in *Quantum* below). As such, the Court noted that societal changes over time may precipitate a change in public policy, leading to subsequent re-examination of whether certain types of covenant continued to engage (or not engage) the doctrine.

On the facts the doctrine was not engaged, it was well accepted market practice that a lease for part of a shopping centre would include a restrictive covenant in relation to the use of other parts of the centre, particularly where a premium is paid for the benefit.

In the subsequent case of ***Quantum Actuarial LLP v Quantum Advisory Ltd***,[19] the Court of Appeal had occasion to consider *Peninsula Securities*.

The case arose from the restructuring of three related pension consultancy businesses (Legacy Companies). Following the restructuring, a new LLP was established with the aim of diversifying the business. The LLP and Legacy Companies entered into an arrangement under which the Legacy Companies' clients would formally remain customers of the Legacy Companies but would be serviced on their behalf by the LLP at cost. In return, the LLP would take over the staff, premises, equipment and Quantum brand name of the Legacy Companies, which it could use to build its new diversified business.

The parties formalised the new arrangement under a services agreement which included covenants preventing the LLP from soliciting or enticing away clients of the Legacy Companies during the 99-year term of the agreement. The Legacy Companies subsequently restructured again into a single entity (NewCo) to whom the Service Agreement was novated.

[16] [2021] EWHC 1218 (Ch)

[17] [2020] UKSC 36

[18] [1968] AC 269

[19] [2021] EWCA Civ 227

After several years observing the covenants, LLP asserted that they constituted an unreasonable restraint of trade. NewCo sought declaratory relief that the agreement was enforceable.

Upholding the High Court's decision, the Court of Appeal held that the restraint of trade doctrine was not engaged in this case. The Court considered that, while the Supreme Court in *Peninsula Securities* had rejected the "pre-existing freedom" test, it had had not laid down the "trading society" test as a single, universal test and nothing it its decision interfered with the long-established position that there was no such universal test.

Referring to Lord Wilberforce's dissenting judgment in *Esso Petroleum*, the court held that there was no single test which applied in cases of restraint of trade, which instead required "a broad and flexible rule of reason."

The court noted that to impose the "trading society" test as a blanket rule would remove such flexibility and mean that any clause which did not satisfy it (because it was entirely novel, for instance) would automatically engage the restraint of trade doctrine, irrespective of its substance.

While the trading society test will be suitable for many more generic contracts, in cases such as this (concerning a "bespoke agreement created in very specific circumstances") the relevant clauses cannot be neatly categorised by reference to the accepted and normal currency of commercial or contractual dealings. In those circumstances, the relevant clause must be considered "on its own terms and in its own circumstances" against the competing public policies of upholding freedom of contract and discouraging undue restraint of trade.

On the facts, the court held that the doctrine was not engaged, on the basis that:

- There was no inequality of bargaining power that might justify requiring the promisee to show the covenant was reasonable.
- Taking account of the commercial context, the services agreement was an essential condition of the LLPs ability to carry on busines at all—to describe it as a restraint of trade in this case was therefore nonsensical. This was not a case where the LLP could ever have come into free-standing competition with NewCo as "between two independent competitors constrained only by the rules of the market."
- The covenants were fairly and properly ancillary to the appointment of the LLP under the terms of the agreement.
- The service agreement had no adverse impact on the public interest.

Although the court therefore found that the restraint of trade doctrine did not apply, it also held that, even if it had applied, it would have endorsed the judge's finding that the 99-year covenants were reasonable, on the bases that:

- they only applied during the subsistence of the Service Agreement (plus a year);
- it was entirely justified for NewCo to seek to protect the relevant business;
- the term was not arbitrarily long, as clients included blue chip companies that could realistically exist for a century or more; and
- the obligation to service the NewCo Clients did not stifle the LLP's business, but facilitated it (given it relied upon the resources it acquired under the agreement in the course of its business).

While the previous "pre-existing freedom" test was the subject of much criticism, the greater flexibility of the "Trading Society" test has also brought greater ambiguity in the application of the doctrine, and still does not provide a one-stop-shop for the purposes of assessing whether or not the restraint of trade doctrine applies. Such uncertainty will also be exacerbated further in cases where the "Trading Society" test is not suitable, such as in the case of truly novel and/or bespoke clauses or contracts.

Duress

In ***Pakistan International Airline Corp v Times Travel (UK) Ltd***,[20] the Supreme Court confirmed that a contract could be avoided for duress on the basis of a lawful act.

The case concerned a disputed commission between the claimant travel agent and the defendant airline. The defendant had terminated the contract between the parties and reduced the claimant's ticket allowance, as it was permitted to do, and offered the claimant a new contract on the condition that the claimant waive any entitlement to the disputed commission. The claimant

[20] [2021] UKSC 40

subsequently claimed that the new contract was voidable for duress.

While the court accepted that a contract could be voidable for lawful act duress, it defined the doctrine narrowly, requiring illegitimate conduct beyond mere bad faith exploitation of unequal bargaining power. For those purposes, illegitimate would generally be synonymous with unconscionable.

The court identified two existing examples of such illegitimate conduct, being:

1. where a defendant exploits their knowledge of criminal activity by the claimant or claimant's close family to obtain a personal benefit by an explicit or implicit threat that they would report the crime; and

2. where a defendant, having exposed themselves to a civil claim by the claimant, deliberately manoeuvres the claimant into a vulnerable position by illegitimate means in order to force the claimant to waive their claim.

However, the court took the view that there was no such duress in this case, the defendant not having used illegitimate means to pressure the claimant into entering the new contract.

Restitution and Unjust Enrichment

In the recent Court of Appeal decision in ***School Facility Management Ltd v Governing Body of Christ The King College***,[21] the Court dismissed an appeal on the issue of counter-restitution.

The claimant had brought a claim for, among other things, restitution in respect of the expenses incurred as a result of the defendant's use of the claimant's building. The defendant sought to bring a counterclaim in restitution for sums paid under the relevant contracts, which it said should be offset against the value attributed to its use of the building. The contract was subsequently found to be void under the Education Act 2002.

In reaching the conclusion that the defendant was not entitled to setoff sums paid under the contract by way of restitution, the court clarified the nature and basis of the counter-restitution principle (i.e., that certain benefits received by a claimant who seeks restitution had to be taken into account in its claim against a defendant).

The court held that the principle did not require that the court take account of all benefits provided in each direction under a void contract. Rather, there needed to be a sufficiently close connection between the benefits received by the claimant and those provided to the defendant. This is consistent with the analogous test for equitable setoff.

In another Court of Appeal decision, ***Dargamo Holdings Ltd v Avonwick Holdings Ltd***,[22] the court considered the interaction between contract law and unjust enrichment.

By the terms of an SPA agreed between the parties, the buyer and a third-party purchaser agreed to pay the seller $950m for the seller's shares in a certain English holding company (the "HoldCo Shares"). However, it was informally understood (and was accepted by the defendant at trial) that the parties had envisaged that a portion of this money was attributable to the acquisition of shares held by the seller in further companies (the "Additional Shares"). The SPA recorded only that the purchase price was paid in consideration for the sale of the HoldCo Shares.

When the buyer did not receive the Additional Shares, it sought to recover the portion of the sum it had paid which was attributable to these assets (i.e., $82.5m) on the grounds of unjust enrichment, asserting that there had been a total failure of consideration with regard to such sums.

While the buyer accepted that unjust enrichment could not override the express terms of a contract in all cases where there is a separate understanding as to the basis of payment, which had failed, it argued that the doctrine should have that effect in this case, primarily because both sides accepted that the $82.5 million was preferable to the Additional Shares and that position was clear. The Court of Appeal rejected this argument and dismissed the appeal.

The court focused on whether the seller's enrichment had been "unjust" and held that this had to be assessed in light of the terms agreed under the SPA. It also could not be determined by reference to general (and subjective) notions of "fairness" or "justice," but rather, was based on relevant recognised principles that point to an "unjust" factor.

In this case, the parties had deliberately omitted reference to the Additional Shares from the consideration under the SPA (and indeed, the contract generally). The bargain that was struck was simply the

[21] [2021] EWCA Civ 1053 (CoA)

[22] [2021] EWCA Civ 1149

transfer of the HoldCo Shares (and nothing else) in exchange for the payment of $950 million.

In those circumstances, unjust enrichment could not be relied upon to circumvent the express terms of the contract, particularly where to do so would actually contradict those terms.

The Court of Appeal reaffirmed the position that only in rare cases will unjust enrichment arise on a total failure of consideration where there is a valid contract that has been performed.

The case is a salutary reminder to those involved in the negotiation of SPAs (and other commercial contracts): wherever possible, parties should expressly reflect the full terms of their agreement, including any associated common expectations or understandings about what the contract provides for, in an executed written document. In relation to SPAs in particular, that means ensuring that all of the assets (and any other consideration) that a party expects to receive in exchange for the price paid should be clearly set out in the contract.

Penalty Clauses

In ***Permavent Ltd v Makin***,[23] the High Court considered whether certain terms in a settlement agreement constituted unenforceable penalty clauses.

The defendant had acted as managing director for the claimant, a roofing product company. During this time, the defendant developed and patented a number of roofing products, and subsequently granted a licence to the claimant for the use of such products, in return for a royalty, to begin accruing after five years from the date of the agreement.

A dispute subsequently arose as to the beneficial ownership of the patents, which was eventually settled under a settlement agreement, which included an assignment of all relevant intellectual property rights, in return for royalties.

The clauses in question prevented the defendant from subsequently claiming any entitlement to, or challenging, the IP rights. In the event of a breach of the clauses, the defendant would be liable to repay sums already paid and forfeit future payments due to him under the settlement.

The claimants obtained summary judgment against the defendant for breach of the clause and subsequently sought to enforce the repayment obligations. The defendant contested the obligations on the basis that they constituted unenforceable penalty clauses.

The court considered the applicable test for assessing whether a contractual provision is a penalty in *Cavendish Square Holding BV v Talal El Makdessi*[24] and confirmed that it required a two-stage analysis: (1) identifying what if any legitimate business interest the clause sought to protect; and (2) considering whether the detriment imposed for breach of the relevant clause is unconscionable, exorbitant, extravagant or out of all proportion to that interest.

Allowing the claim, the court considered the IP rights to be of vital importance to the claimants' business, such that very significant harm, including indirect harm to the wider business, might be suffered if the defendant took the action the relevant clause sought to prevent.

While the Court accepted that the detriment imposed on the defendant was "extremely harsh," this was not the relevant standard. In the circumstances, the terms were not out of all proportion to the protected interest. It was relevant that the defendant had received independent legal advice before agreeing to the terms and was undoubtedly alive to the full consequences of breach. The fact that the clauses in question were in a settlement agreement did not appear to make a difference to the court's reasoning.

Damages

The Court of Appeal in ***Glossop Cartons and Print Ltd v Contact (Print & Packaging) Ltd***[25] clarified the approach to assessing damages for fraudulent misrepresentation in a business sales contract.

The case involved a sale of business assets which had been induced by the seller's fraudulent misrepresentations. In assessing the market value of the assets, the High Court had applied a "deduction method" by considering what the buyers had subjectively "factored in" to their calculation of the purchase price in reliance on the misrepresentation, in order to deduct any expenses not so "factored in" from the purchase price.

Rejecting the deduction method, the Court of Appeal held that the correct approach to calculating direct loss in normal cases of fraudulent misrepresentation merely

[23] [2021] EWHC 467 (Ch)

[24] [2015] UKSC 67

[25] [2021] EWCA Civ 639

required the court to ascertain the actual value of the purchased assets on the date of the sale and to deduct that figure from the price paid. In such cases it is not necessary to consider what the parties would have agreed had there been no misrepresentation. Therefore, a buyer's commercial judgements or misjudgements (i.e., any subjective calculation) as to the purchase price are not relevant to the calculation of direct loss.

In ***Triple Point Technology v PTT Public Company Ltd***,[26] a case considering the interpretation of liquidated damages clauses in a software supply contract, the Supreme Court confirmed the general approach when calculating the period when such damages accrue.

The contract in question provided that liquidated damages for delay would accrue at a daily rate up to the date on which the claimant accepted the relevant part of the works. In this case, the claimant had terminated the agreement following such delay, so parts of the works were never accepted. The question therefore arose as to what period the liquidated damages accrued.

The Supreme Court rejected the finding of the Court of Appeal that liquidated damages arose only in respect of works which had been completed and accepted prior to termination. The court held that, despite the literal wording of the clause, it made much more commercial sense that liquidated damages accrued up to the date on which the contract was terminated (whether or not the works were accepted), stating that clear words would be required to depart from this "orthodox" position.

The court also considered the interpretation of an exclusion clause, under which the defendant's liability was limited but was stated not to apply in cases where the contractor had been negligent. The Supreme Court held that the carve out had to be given its ordinary meaning, such that it applied both to breaches of the express duty of care included in the contract and claims under the law of negligence more generally.

In a recent case before the High Court, ***Equitix EEEF Biomass 2 Ltd v Fox***,[27] the court considered, among other things, whether "liability" for the purposes of a clause limiting the liability of a seller in an SPA concerned only damages, or if interest and costs were also included in the cap.

The claim arose in respect of certain warranties in an SPA, which the seller was found to have breached. The SPA included a provision which limited the seller's liability in respect of any claim for breach of a warranty under the SPA. The parties then disputed whether this was a total cap on the sums recoverable by the buyer or simply the limit on the damages which could be awarded, in addition to which interest, costs and other amounts might separately be payable to the buyer.

The court, preferring the latter view, held that an award of interest, costs and other ancillary amounts did not constitute a liability "in respect of" the SPA, but was an award pursuant to its own jurisdiction to award such ancillary amounts. They therefore did not fall within the scope of the liability cap. Had the parties intended to waive these important procedural rights, the court indicated that it would expect them to be expressly mentioned in the relevant provision.

[26] [2021] UKSC 29

[27] [2021] EWHC 2781 (TCC)

Tort and Equity

Illegality

In ***Stoffel and Co v Grondona***,[28] the Supreme Court provided further guidance on the application of the illegality defence as set out in the Supreme Court's seminal decision of *Patel v Mirza*.[29]

The claimant mortgagor had fraudulently secured a mortgage from the mortgagee in respect of a property, but the defendant solicitors had negligently failed to register the transfer of title. This meant that the legal title to the property remained with the seller, the existing lender's charge was not been removed, and the mortgagee's charge was not registered.

When the claimant defaulted on her repayments, the mortgagee, unable to take possession of the property, sought a money judgment against the claimant for the outstanding amount.

The claimant in turn commenced proceedings under Part 20 of the CPR (Counterclaims and other Additional Claims) against the defendant on the grounds of professional negligence, seeking an indemnity and/or contribution in respect of any judgment in favour of the mortgagee.

The defendant admitted negligence and breach of contract but raised an illegality defence on the basis that claimant had participated in mortgage fraud by making fraudulent misrepresentations to her mortgage provider.

While the traditional rationale for the illegality defence is that a person should not be allowed to profit from their own wrongdoing, it was accepted by the parties that in this case the claimant was not strictly seeking to profit from her own wrongdoing, but to avoid losses or liabilities which she would otherwise face as a result of the defendant's negligence. The defendant submitted, however, that the same principles should apply whether the claimant seeks to avoid a loss or make a gain.

The court held that the indemnity sought by the claimant did not amount to an attempt to profit from her own wrongdoing. Further, the court noted that, following the Supreme Court's decision in *Patel v Mirza*, this is no longer the applicable principle in the defence of illegality.

Rather, when considering a defence of illegality, the court must now have regard more generally to: (1) the underlying purpose of the prohibition that has been breached; (2) any other relevant public policy which may be impacted by the denial of the claim; and (3) whether denial of the claim would be proportionate.

In dismissing the defendant's appeal, the Supreme Court unanimously reaffirmed these principles.

In respect of the first factor, the court did not consider that denying the claimant's claim would enhance the underlying purpose of the prohibition on mortgage fraud—the risk that fraudsters may not be able to bring civil claims against their solicitors is not likely to be a significant deterrent. Allowing the claimant to bring a claim against her negligent solicitors, by contrast, would enhance the legal protections enjoyed by mortgagors, which is itself one of the underlying purposes of the prohibition against mortgage fraud.

As to the second factor, denying the claim would run counter to the general principle that solicitors should perform their duties to their clients diligently and without negligence. It would also run counter to the principle that an equitable interest can pass under an illegal contract.

As to the third factor of proportionality, the court held that this limb was necessary only if the illegality defence remained an issue after considering the first two factors, which in this case, was unnecessary. Nonetheless, the court considered that denial of the claim would not have been a proportionate response to the illegality—the claimant's fraud—as the fraud was not central to the breach committed by the defendant.

Prior to *Patel v Mirza*, in order for the illegality defence to arise, it was necessary to show that a claimant had to rely on the relevant illegal conduct to establish their claim. While this is no longer the case, the court's analysis as to proportionality suggests that such reliance is still, in effect, likely to be a relevant factor when considering the proportionality of denying a claim on the grounds of illegality. The court also noted that the notion that someone should not profit from their own wrongdoing no longer properly reflects the rationale of the illegality defence following *Patel*.

[28] [2020] UKSC 42

[29] [2016] UKSC 42

Breach of Confidence and Unlawful Means Conspiracy

In ***The Racing Partnership Ltd v Sports Information Services Ltd***,[30] the Court of Appeal considered, among other things, the tort of conspiracy by unlawful means in the context of a dispute regarding the supply of betting and race-day information in horse racing.

The first claimant had purchased the exclusive right to collate and distribute live betting and horseracing data from racecourses owned by the second and third claimants, for the purposes of fixed-odds betting.

The defendant, Sports Information Services ("SIS"), had previously held those rights, and following termination of SIS's licences, it continued to collate and distribute the betting data which it was still able to access via a third party ("Tote"). The claimants brought claims against the defendant for unlawful means, conspiracy and breach of confidence.

The court dismissed the claim for breach of confidence, finding that the defendant owed no duty of confidence to the claimant. In reaching its conclusion, the court confirmed that the commercial value of information is ordinarily not itself sufficient to render the information confidential. The court also held that, where a party had received a warranty, receipt and use of the data did not breach any third-party rights, they would not ordinarily be expected to make further inquiries or reach an alternative conclusion.

Finding, however, that Tote and the defendant had arranged for the information to be provided to the defendant in breach of an agreement between the Tote and the claimant regarding the use of such data, and that the defendant was therefore liable for unlawful means conspiracy, the court confirmed that a defendant's knowledge of the unlawfulness was not a necessary element of the tort.

Public Interest Defence in Breach of Confidence and Privacy Claims

In ***Brake v Guy***,[31] the High Court has confirmed that the public interest defence is available as a matter of law in respect of tortious privacy and equitable breach of confidence claims, even where the information has been accessed unlawfully.

The question arose as a preliminary issue in a claim for a final injunction and damages in respect of the alleged accessing and distribution of emails said to be private and confidential to the claimants. The defendants argued that there was a public interest in accessing, retaining and sharing the information, on the basis that they evidenced serious contempt of court arising from intentional breaches of freezing orders and prohibitory injunctions, as well as additional breaches of fiduciary duties on the part of the claimants (referred to as the "iniquity defence"). A public interest defence provides that public policy or the public interest can override any duty of confidentiality that may otherwise be owed, for example, where such a duty is relied upon to conceal criminal activity.

The court dismissed the claimants' submission that there was no public interest defence to a privacy claim following the introduction of Article 8 of the European Convention on Human Rights (i.e., the right to privacy). Rather, the Court considered that Article 8(2) (permitting interference with a person's right to privacy for certain public policy reasons) and Article 10 (the right to freedom of expression) of the Convention, were wide enough to incorporate a public interest defence and it would be overly formalistic to require an express reference (which the Articles do not contain) to the term "public interest defence."

In a breach of confidence claim, the claimants also submitted that parties accused of a breach of confidence should not be able to rely on a public interest defence where they had acquired the confidential information unlawfully. Rejecting that argument, the court held that there was no distinction between the lawful and unlawful acquisition of confidential information for the purposes of a public interest defence. An appeal is scheduled to be heard in this case in February 2022.

Loss and Causation – SAAMCO Principle

In two cases over the past year, the Supreme Court has reconsidered the scope and application of the principle in *South Australia Asset Management v York Montague*[32] (the "SAAMCO" principle), which is that a claimant in a professional negligence claim must not only establish causation between the breach and the alleged loss, but also show that the loss falls within the scope of the duty owed.

In 2020, the Court of Appeal considered the role of the SAAMCO principle in claims against professional

[30] [2020] EWCA Civ 1300

[31] [2021] EWHC 670 (Ch)

[32] [1997] AC 191

advisors.[33] The court confirmed that the principle was a general tool to be used by the courts when determining the scope of recoverable losses in professional negligence claims. In cases against professional advisors, it was important to distinguish between those giving advice, and those who only provide information.

Those *advising* their clients on the merits of entering into a given transaction owe a broad duty to advise their client against risks arising in the context of the transaction. Where the professional's role was limited to providing only *information* and materials which the client could use in deciding whether to enter into a transaction, the professional was responsible only for the consequences of such information being wrong (i.e., they will not be liable for losses which would have accrued anyway whether or not the information was incorrect).

In the first of the Supreme Court's recent cases on this topic, ***Khan v Meadows***,[34] the Court rejected arguments that the SAAMCO principle was limited to cases of pure economic loss arising in a commercial context (*Khan* concerned clinical negligence) and provided guidance on the application of the SAAMCO principle more generally.

The Court set out a six-stage model for addressing a tort claim, and identified the two stages—two and five—at which the SAAMCO principle may be relevant:

1. Is the harm actionable in negligence?

2. To what risks does the defendant's duty of care extend? ("Stage 2")

3. Has the defendant breached their duty?

4. Is the alleged loss a consequence of the defendant's breach?

5. Is there a sufficient nexus between the harm and the defendant's duty? ("Stage 5")

6. Was the harm too remote, or otherwise not recoverable (e.g., because of a failure to mitigate)?

Although the order and content of this model was not fixed, the court simply used it in this case to highlight the stages at which the SAAMCO principle is relevant. The question had to be addressed first in respect of Stage 2. Importantly, the court held that the prior accepted distinction between advice and information cases was too rigid, as there was, in reality, a spectrum of possible scenarios.

When addressing Stage 2, the court had to identify the purpose for which the advice or information was being sought by reference to the circumstances of each case.

If the relevant risk is found to fall wholly outside the scope of a defendant's duty of care, as determined at Stage 2, then it may be unnecessary to consider the nexus between specific elements of the alleged loss and the defendant's duty, i.e., Stage 5. If the risk potentially falls within the scope of the duty, however, it is necessary to examine the extent to which it does, as was the case in the SAAMCO case itself.

In many cases, this question would be answered by reference to the "SAAMCO counterfactual" (i.e., what would the loss have been if not for the breach?) However, the court noted that in cases where the court had already identified a clear allocation of risk between the parties at Stage 2 of the analysis, the utility of such a counterfactual would be much more limited.

The facts in *Khan* provide a helpful illustration of the distinction between these exercises. The claimant sought to recover additional care costs associated with her child's medical conditions (haemophilia and autism). The mother had sought the defendant doctor's medical advice prior to the child's birth as to whether any child she might have could suffer from haemophilia and was led to believe they would not.

The claimant argued that, had she been properly advised, she would have discovered that her child did in fact suffer from haemophilia while still in utero, and would have then terminated the pregnancy. The claimant therefore sought damages for the costs associated with her child's medical treatment and care, which she would not have incurred but for the negligent advice.

On the facts of the case, the claimant had approached the defendant seeking advice as to her risk of giving birth to a child with haemophilia, and the defendant owed a duty of care to the claimant to ensure that she provided accurate information or advice in respect of that risk (Stage 2). However, the defendant's liability extended only to those losses sufficiently connected with that duty (Stage 5).

The claimant had only sought the defendant's advice as to her child's risk of haemophilia, and the fact that the claimant's child suffered from autism was entirely

[33] *Assetco Plc v Grant Thornton UK LLP* [2020] EWCA Civ 1151

[34] [2021] UKSC 21

unrelated to that purpose. The defendant's liability was therefore limited to only those losses arising from the child's haemophilia notwithstanding that, had the mother been given accurate information about the haemophilia and terminated the pregnancy, the losses in connection with the child's autism would also not have occurred.

The Supreme Court's other recent judgment on SAAMCO—***Manchester Building Society v Grant Thornton UK LLP***[35]—reiterated these principles and provided an example of their application in the context of a negligence claim against auditors.

The claimant brought a claim against its auditors, who had advised that it could use "hedge accounting" to offset certain mortgages against interest rate swaps the claimant had entered into, which would reduce the regulatory capital it was required to maintain.

The advice was incorrect, as a result of which the claimant was forced to terminate the swaps, incurring significant losses. The High Court and Court of Appeal held that the defendant was not liable for these losses.

Allowing the claimant's appeal, the Supreme Court reiterated that the scope of the duty of care assumed by a professional advisor had to be judged objectively, having regard to the reason for which the advice was being sought.

The claimant had sought advice as to whether it could rely on certain accounting treatments for a proposed purpose, in light of the applicable capital requirements. Having been given incorrect advice, the subsequent loss fell within the scope of the defendant's duty of care. The court stated that there was nothing inherently unlikely or surprising in finding that an accountant advising a client on such matters was legally responsible for the financial consequences of such advice.

These decisions are notable for their departure from the more rigid distinction of characterising claims either as information or advice cases, and may have made the task of identifying recoverable loss in professional negligence claims less straightforward.

Estoppel

In ***Tinkler v HMRC***,[36] the Supreme Court for the first time considered the principles governing estoppel by convention, which prevents parties from resiling from a common assumption as to a certain state of affairs (whether as to facts or law). Such estoppel more commonly arises in connection with contractual relationships but, as this case shows, is not limited to such scenarios.

The case concerned an investigation by the defendant, HMRC, into the affairs of Tinkler, the claimant. The defendant initially sent the relevant statutory notice of the investigation to the wrong address, but also sent a letter to the claimant's accountants and tax advisors raising various questions in respect of the investigation. When the defendant subsequently purported to disallow certain losses claimed by the claimant in his tax return, he argued that the investigation was invalid given the lack of proper statutory notice, particularly as the time for serving a compliant notice had since passed.

The Court affirmed the principles in *HMRC v Benchdollar Ltd*[37] with regards to the law on estoppel by convention in non-contractual cases, which stated that:

- the common assumption must have been expressly or impliedly communicated between the parties;
- the party alleged to be estopped must be shown to have conveyed to the other party the estopped party's understanding that the other party would rely on the assumption;
- the party asserting the estoppel must have relied upon the assumption;
- the reliance in question must have arisen in connection with subsequent mutual dealings between the parties; and
- the party asserting the estoppel must show that it suffered some detriment, or that the party subject to the estoppel gained some benefit, as a result of the asserting party's reliance on the assumption, such that it would be unconscionable to allow the party subject to the estoppel to resile from the common assumption.

The Supreme Court noted that, following the notice error, the claimant had written to the defendant indicating that he believed that a valid enquiry had been opened, notwithstanding the deficient notice. Applying the *Benchdollar* principles to the facts, the court found that, in reliance on the common

[35] [2021] UKSC 20

[36] [2021] UKSC 39

[37] [2009] EWHC 1310 (Ch)

understanding that a valid enquiry had been opened, the defendant subsequently pursued its investigation into the claimant's tax affairs and did not seek to send a further, compliant notice before the time limit for doing so had expired. The claimant was therefore estopped from resiling from the common understanding that the defendant had opened a valid investigation into his tax affairs.

The court also confirmed that the mutual dealings between the parties, being their correspondence in relation to the defendant's investigation and the claimant's tax affairs were sufficient to give rise to an estoppel by convention—it was not necessary to establish an actual transaction between the parties.

Banking and Finance

Cryptocurrency

The courts have recently grappled with a number of cases concerning the rapidly growing area of crypto assets.

Of particular note amongst these cases, the Commercial Court in ***Ion Science Ltd v Persons Unknown***,[38] considered a number of issues pertaining to a cryptocurrency fraud claim. The dispute arose after the claimants transferred to the defendants over £550,000 in Bitcoin for what it believed to be an investment in certain initial coin offerings. However, the claimant subsequently received none of the promised profit and did not recover any part of its initial investment.

The court granted a series of interim injunctions, including freezing orders and orders for ancillary disclosure against persons unknown, as well as a *Bankers Trust* order against companies in the Binance cryptocurrency exchange group. *Bankers Trust* orders oblige banks to disclose information relating to third parties where there is a real prospect that such information could lead to the location or preservation of assets belonging to the claimant.

Points of note in the judgment include:

- There was a serious issue to be tried as to whether cryptoassets, such as Bitcoin, constituted property, affirming similar views expressed in previous interim application judgments concerning that issue.
- There was also a serious issue to be tried as to whether the *lex situs* (the law of the place where the property is treated as being located) with regard to cryptocurrencies was that of the domicile of the owner.
- A worldwide freezing order was appropriate, notwithstanding that it could not yet be shown whether there were assets which might actually be caught by the order—the judge noted this was a typical feature of a "persons unknown" case.

The court's provisional support for the proposition that cryptocurrency is a form of property is consistent with recent decisions on this topic in England and other common law jurisdictions.[39] A definitive conclusion will likely need to await an English appellate judgment on the subject.

In ***Ramona Ang v Reliantco***,[40] the High Court considered a claim arising from the termination of the claimant's cryptocurrency trading account by an online trading platform registered in Cyprus.

Following a successful period of trading, the exchange terminated the account and retained the claimant's funds, purportedly on the grounds of money laundering and market manipulation concerns.

Having considered the terms and conditions incorporated into the agreement between the parties, the court found that the defendant had been entitled to terminate the account based on breaches by the claimant, but had not been entitled to withhold the claimant's funds.

Although there was some dispute as to whether the law of Cyprus would recognise the concept of a *Quistclose* trust, the court held that sums deposited in the account gave rise to such a trust (or equivalent), on the basis of which the defendant was obliged to return them.

As to unrealised gains on open positions, the court held that the defendant had been obliged by the contract to close out those positions, realise any gain and pay the balance to the claimant. The defendants could not simply "cancel" or annul the positions.

Had the contract purported to give the defendant such a right, the court held it would be unenforceable under the Consumer Rights Act 2015 as an unfair term, because, e.g., it potentially allowed the defendant to withhold significant gains from the claimant for trivial breaches.

The "Quincecare Duty"

In ***Philipp v Barclays Bank UK plc***,[41] the High Court provided further clarification of the limits of the *Quincecare* duty—a common law duty requiring banks not to act on fraudulent payment instructions.

[38] Unreported (Commercial Court) (21 December 2020)

[39] *Vorotyntseva v Money-4 Ltd* [2018] EWHC 2596 (Ch), *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 2 (Singapore), *Ruscoe v Cryptopia Limited (in liquidation)* (New Zealand) [2020] NZHC 728

[40] [2020] EWHC 3242 (Comm)

[41] [2021] EWHC 10 (Comm)

The claimant was an alleged victim of a sophisticated authorised push payment fraud and contended that the bank had failed to fulfil its duty to protect it from the consequences of the fraud. The claimant's payments to accounts in the United Arab Emirates, amounting to a total of £700,000, were made willingly, albeit allegedly induced by fraud.

The court held that the *Quincecare* duty does not require banks to second guess instructions or "assume the role of an amateur detective" in circumstances where the customer's instructions are outwardly genuine. Such an obligation would be commercially unrealistic and undermine the bank's primary duty to act on the customer's instructions to process payments. The rules which would govern such an extended duty were also unclear.

Further, where, as here, instructions are given by a customer who is an individual (as opposed to a company), a bank is entitled to assume the customer's authority to make the payment to be real and genuine. This was because extending the *Quincecare* duty to such circumstances could not easily be reconciled with the purpose of the *Quincecare* duty, as set out, in particular, in *Singularis Holdings Ltd (In Official Liquidation) v Daiwa Capital Markets Europe Ltd*,[42] i.e., to protect a company against misappropriation carried out by a trusted agent of the company who is authorised to withdraw its money from the account.

As a result, "the *Quincecare* duty should be confined to cases where the suspicion which has been raised (or objectively ought to have been raised) is one of attempted misappropriation of the customer's funds by an agent of the customer." For now, therefore, the duty remains limited to cases where suspicion has been raised regarding potential misappropriation of a customer's funds by a trusted agent who has authorisation to withdraw money from its accounts (such as a director of a company).

An appeal of the decision is currently scheduled to be heard in February 2022.

In ***Stanford International Bank Ltd v HSBC Bank plc***,[43] the Court of Appeal considered *Quincecare* claims by the liquidators of Stanford International Bank (SIB), which had been used as a vehicle for one of the largest Ponzi schemes in history, against a correspondent bank (HSBC) with which the claimant, SIB, held various accounts.

The claimant alleged that the defendant had breached its *Quincecare* duty by failing to freeze the claimant's accounts earlier. An earlier freeze would have saved significant sums, leaving the claimant's estate with an estimated £80 million in additional funds.

However, the Court of Appeal struck out the claimant's *Quincecare* claim, finding that it had not sustained the loss it claimed. The claimant's net position at the end of the relevant period was the same as at the start—the payments to the claimant's depositors out of the claimant's accounts with the defendant bank reduced its assets but also correspondingly reduced its liabilities.

Further, while the claimant's directors owed a duty to the claimant to consider its creditors' interests during the relevant period, the defendant did not. The court therefore confirmed that the scope of the *Quincecare* duty is owed only to a bank's customers and does not extend directly to the customer's creditors (who, in this case, had suffered loss as a class because the premature payments to some creditor customers meant there was a deficiency of assets with which to satisfy other creditors' claims). This is a significant further clarification of the *Quincecare* duty, this time in an insolvency context (SIB's liquidators have been granted permission to appeal to the Supreme Court.)

Financial Services Compensation Scheme

In the recent decision of ***R (Donegan and others) v FSCS***,[44] the High Court considered a judicial review claim brought by certain investors in the failed London Capital & Finance plc (LC&F) in respect of the Financial Services Compensation Scheme's (FSCS) decision that most of the c. 11,000 investors who had purchased bonds from LC&F were not eligible for compensation under the scheme.

It was common ground that the investors would be entitled to compensation if the bonds were "transferable securities" under the Markets in Financial Instruments Directive (2004/39/EC) (MiFID II). The key issue was whether they were.

The court noted that the bond documents provided that the securities were non-transferable. It also considered that where the securities were not negotiable on the capital market, they could not be "transferable securities" for the purpose of MiFID II.

[42] [2019] UKSC 50

[43] [2021] EWCA Civ 535

[44] [2021] EWHC 760 (Admin)

The court accepted the investors' argument that the non-transferability provision was an unfair term and unenforceable under the Consumer Rights Act 2015 (CRA). Amongst other things, the provision effectively deprived investors of various regulatory protections (including the very protection under the FSCS scheme in issue in the case), and they would not have agreed to such a provision if they had been made aware of its consequences at the time they purchased their bonds.

Nonetheless, the court concluded that the unenforceability of the non-transfer provision under the CRA did not mean that the bonds were "transferable securities" under MiFID II, on the basis that although the CRA would result in the unenforceability of the non-transfer clauses, it would not give rise to a change in the regulatory characterisation of the bonds, The Court therefore declined to quash the FSCS's decision.

The case is novel and of note, in particular, for the conclusion that a non-transfer provision in bond documentation can be an unfair term under the CRA, this being one of the first times, as far as we are aware, that the contractual terms of a financial instrument have been held unenforceable under the CRA. (Shearman & Sterling LLP acted for the claimants).

Fraud and Collateral Use

In ***IFT SAL Offshore v Barclays Bank plc***,[45] the Commercial Court gave permission for the claimant to use documents obtained under a *Norwich Pharmacal* order in subsequent proceedings against the bank.

The claimant was an alleged victim of online fraud in respect of funds transferred to an account at Barclays. The claimant was previously granted a *Norwich Pharmacal* order against the defendant for the purpose of identifying documents evidencing the receipt and payment of funds out of the relevant account.

The claimant had given an undertaking that it would not, without the court's permission, use the information other than for specified purposes, which did not include bringing a claim against the defendant to recover the funds. However, having reviewed the documents, the claimant decided it had a case against the defendant and sought to have the undertaking discharged.

The claimant argued that it had no reason to believe that there was a case against the defendant until it had reviewed the documents. Further, as there was no realistic prospect of recovery against the fraudster, or of tracing the funds, Barclays was the only available defendant to a claim in respect of the alleged fraud. In this regard, the claimant relied on the public interest in a just resolution of civil proceedings, as well as the interest in the prevention and detection of fraud.

The defendant, by contrast, relied upon the public interest in protecting confidentiality as between a bank and its customers, and argued that allowing *Norwich Pharmacal* applications to be used in this way could encourage speculative claims by victims of fraud who are unsuccessful in their pursuit of the fraudster.

The Court was not persuaded by the defendant's reasoning and granted the claimant permission to use all the documents obtained under the order to pursue claims against the defendant. The case may set a precedent that, where a *Norwich Pharmacal* application is not successful in facilitating a claim against a fraudster, documents that are obtained as a result might be used to bring claims against a disclosing bank. The judge took the view that it was not appropriate to use the permission application as a filter for speculative claims, which were better dealt with by way of strike-out and/or summary judgment.

As a result, banks may see an increase in applications and claims being brought against them by victims of fraud both by way of *Norwich Pharmacal* orders and based on information obtained from such orders

Mis-selling Claims

In ***Fine Care Homes Ltd v National Westminster Bank plc***,[46] the High Court dismissed a claim against a bank for the mis-selling of a structured collar derivative.

The claimant contended that the defendant bank had negligently advised it as to the suitability of the derivative, and/or negligently (or in breach of its contractual duties) misstated or misrepresented the effect of the derivative in various respects.

Citing observations made by the Court of Appeal in *Property Alliance Group v Royal Bank of Scotland*,[47] the court noted that, other than in exceptional cases, a bank will not owe a duty to its customer to explain the nature and effect of its products. Considering the transaction as a whole, the court held that the defendant had not assumed a duty to advise the claimant on the suitability of the product.

[45] [2020] EWHC 3125 (Comm)

[46] [2020] EWHC 3233 (Ch)

[47] [2018] EWCA Civ 355

The defendant's salesperson had not steered the claimant to a specific product, and it was clear from the defendant's terms of business, provided to the claimant on two occasions, that the defendant was providing general dealing services on an execution-only basis rather than providing advice on the merits of a particular transaction.

Further, the court rejected the claimant's argument that the relevant terms were excluded by the requirement of reasonableness under the Unfair Contract Terms Act 1977 and the FCA's then-current Conduct of Business rules. The relevant clauses did not constitute non-reliance clauses—they merely defined the party's primary rights and obligations, and therefore were not subject to a test of reasonableness (though they were, in any case, reasonable).

Undisclosed Commissions

In ***Wood v Commercial First Business Ltd***,[48] the Court of Appeal considered two appeals concerning the rescission of loan agreements by borrowers where the arranging broker had received an undisclosed commission from the lender.

In both cases both the broker and the broker's terms of business were the same. The terms stated that the broker could receive fees from lenders, and it would confirm in writing the exact amount of the fee if it were £250 or more. The borrowers defaulted on loans arranged by the broker and sought rescission of the loan agreements on the basis that the broker had received commissions without their knowledge or consent.

The court held that a fiduciary relationship between a client (in this case, the defendant) and broker was not a pre-condition for civil liability in respect of bribery or secret commissions. Instead, the question was whether the payee was under a duty to provide information, advice or recommendations on an impartial and disinterested basis. Rescission of the relevant loan agreements would be available where such a duty was owed and the broker had failed to declare a commission.

The court also rejected the argument that the payments were only "half-secret," given that the terms of business disclosed that the broker might receive fees from lenders. The payments constituted secret commissions as the terms imposed an unqualified obligation on the broker to disclose the amount of the fee, and that disclosure had not occurred.

Prior to this judgment, both the scope of a broker's duty to disclose any commissions and the consequences of failing to do so had been unclear. It makes clear that borrowers may be entitled to rescind agreements entered into via a broker who fails to disclose a commission.

Limitation and Regulatory Decisions

In ***Boyse (International) Ltd v NatWest Markets plc***,[49] the Court considered the application of the Limitation Act 1980 in the context of regulatory decisions, in respect of LIBOR manipulation.

The claimant brought a fraudulent misrepresentation claim against the defendant bank in respect of consequential losses allegedly suffered after it was mis-sold two LIBOR-referenced interest rate hedging products (IRHPs) in August 2007 and November 2008. The claimant brought the claim in connection with the Financial Services Authority's announcement in 2012 regarding such mis-selling and subsequent final notice on 6 February 2013.

The claimant did not actually issue proceedings until 19 February 2019, more than six years after the publication of the FSA's final notice (the limitation period for misrepresentation claims being six years).

However, in cases of fraud (or deliberate concealment or mistake) time does not start running for the purposes of limitation until the claimant discovered or could with reasonable diligence have discovered the fraud (s 32(1)(a) Limitation Act 1980).

The High Court upheld the Master's decision that the six-year period had expired and the claim was out of time. The court noted that the burden was on the claimant to show that it could not have discovered the fraud sooner, i.e., in this case, prior to 20 February 2013. Where there had been widespread publicity of the manipulation of LIBOR, it was reasonable to infer that the claimants should have been aware of the FCA's final notice (the relevant "trigger" for the purposes of s32(1)(a)) on the date it was published. Time therefore began to run on the date of publication, and the claim was therefore out of time.

Default Interest Rates

The terms of the bridging loan in question provided that interest would accrue on the principal at a rate of 3%, compounded monthly, with a term of four months. If the loan was not repaid at the end of the term, interest

[48] [2021] EWCA Civ 471

[49] [2021] EWHC 1387 (Ch)

would accrue on the outstanding sum at a rate of 12%, compounded monthly.

As we note above, the rule against penalty clauses provides that a clause will be unenforceable if the provision imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the relevant primary obligation.

The court accepted that a defaulting creditor represented a greater credit risk, and the lender therefore had a legitimate commercial interest in applying a higher rate of interest on default. However, a fourfold rise in the applicable interest rate, where that rate was also compounded monthly, was "so obviously extravagant, exorbitant and oppressive as to constitute a penalty."

The Court considered that, as a rule of thumb, a borrower would be expected to establish why a doubling of the rate was extortionate, but that the burden would typically shift to the lender to justify any increased rate beyond that level.

As such, the judge held that the default interest rate was not enforceable, but the clause setting out the contractual interest rate was capable of applying to sums outstanding after the term of the loan had expired. The court held that the original interest rate of 3%, compounded monthly, continued to accrue on the outstanding sums.[50]

Compulsory Disclosure in a Banking Context

The UK Bankers' Books Evidence Act ("BBEA") provides for certain procedural rules that are specifically applicable to banks, including for the inspection of banking records.

In ***Wangzhou Meng v HSBC Bank Plc***,[51] the claimant sought disclosure under section 7 of the BBEA of certain documents held by the defendant, said to be relevant to high-profile Canadian proceedings for her extradition to the US. Under the BBEA, the court has a discretion to permit inspection of entries in "ledgers, day books, cash books, account books and other records used in the ordinary business of a bank" by "any party to a legal proceeding."

Dismissing the claimant's application for inspection of the relevant materials, the High Court took a narrow approach to the types of material that may be obtained, and the parties who may obtain them, under the BBEA.

The Court held that section 7 is limited to applications by parties to UK legal proceedings. It cannot be used by parties to foreign proceedings to obtain documents from banks based in the UK.

Further, having considered the authorities, the court found that section 7 was concerned only with transactional records, not everything recorded by a bank in the course of its business. Accordingly, records kept by the bank for regulatory purposes were not within the scope of the BBEA. Where appropriate, materials falling outside the BBEA's scope could be sought by way of third-party disclosure.

[50] [2021] EWHC 2729 (Ch)

[51] [2021] EWHC 342 (QB)

Competition

Since last year's review, the Supreme Court has handed down its judgment in ***Mastercard Inc. v Walter Hugh Merricks***[52] (in December 2020) clarifying the correct test for the certification of collective (i.e., class action) proceedings for follow-on damages claims in the Competition Appeal Tribunal (CAT). The CAT has also more recently (in August 2021) certified the class in ***Merricks***, thus allowing the action to proceed to trial.

We consider these two important decisions below, which elucidate the correct test for certification of collective opt out proceedings in the CAT.

Mr. Merricks commenced collective proceedings in the CAT in 2017 seeking an aggregate award of damages for the class, estimated at around £14 billion, including compound interest. The proceedings are a follow-on damages claim under the Competition Act 1998 (the "1998 Act") relating to a European Commission decision concerning the "multilateral interchange fee" (MIF) charged by Mastercard and Visa between 1992 and 2007 in respect of credit and debit card transactions. The MIF 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 it is alleged merchants passed it on to customers. The claim is for the amounts by which card users—estimated to be around 46 million people during the relevant period—allegedly overpaid for goods and services as a result of inflated transaction fees. The CAT initially refused to grant a collective proceedings order ("CPO") to certify the class.

Mr Merricks successfully appealed that decision to the Court of Appeal following which the Supreme Court dismissed Mastercard's appeal against the Court of Appeal decision and clarified the correct test for certifying collective proceedings. In doing so it confirmed that the "bar" for bringing collective proceedings is materially lower than the CAT had decided.

There are two requirements under the 1998 Act for certifying collective proceedings (i.e., granting a CPO):

- it must be just and reasonable for the claimant to act as class representative; and
- the claims must raise common issues of fact or law, such that they are suitable for inclusion in collective proceedings.

The overall approach to certification required the relevant tests to be applied within the context and purpose of collective proceedings, which were a "special form of civil procedure for the vindication of private rights, designed to provide access to justice…where the ordinary forms of individual claim have proved inadequate…." As claims under collective proceedings could, in theory, be pursued individually under the Civil Procedure Rules 1998 (CPR), "it should not lightly be assumed that the collective process imposes restrictions upon claimants as a class which the law and rules of procedure for individual claims would not impose." Rather, the correct approach was to ask whether collective proceedings were suitable relative to the alternative of bringing individual claims. In this case individual proceedings were not a viable alternative, given the modest amount each individual would be able to claim.

It was relevant that the claimants would in this case face the same difficulties in quantifying their claims individually, as which arose in the collective claim. A claimant cannot be deprived a trial of their claim merely because of "forensic difficulties" in quantifying damages—doing so would likely ensure that the rights of consumers could never be vindicated in cases such as this where individuals claims are likely to be a "practical impossibility."

The court also highlighted that certification does not involve a merits test, as required under a strike-out or summary judgment application (unless it is also considering the choice between "opt-in" and "opt-out" proceedings).

Further, the CAT is expected to conduct a "value judgment" about whether the claims are suitable to be brought in collective proceedings, taking into account the non-exhaustive list of factors in the 1998 Act. The listed factors "are not separate suitability hurdles, each of which the applicant for a CPO must surmount." In particular, it is not a condition that the claims are suitable for an award of aggregate damages; this is merely one factor to be taken into account.

The Court also found that the CAT was wrong in finding that the compensatory principle is an essential element in the distribution of aggregate damages. A central purpose of aggregate damages is to avoid the need for individual assessment of loss. The 1998 Act radically

[52] [2020] UKSC 51

alters the established common law compensatory principle, by removing any requirement that individual loss should be assessed in an aggregate damages case on a person-by-person basis.

It is also notable that, contrary to the Court of Appeal's approach, the Supreme Court did not find that cross-examination of Mr. Merricks' experts at the certification stage was inappropriate, stating instead that such cross-examination had helped to improve and clarify the quantification methodology proposed. The Court of Appeal was also wrong in finding that consideration at the certification stage of proposals for the distribution of any damages award would inevitably be premature and was premature in this case—while this would generally be true, there may be cases, such as this one, where suitability of the CPO would be better assessed by looking at the whole of the representative's proposals in the round, including their method for distributing damages.

Following the Supreme Court decision, the case was remitted to the CAT for it to reconsider the issue of certification. **The CAT has recently delivered its judgment**,[53] this time granting the CPO and allowing the claim to proceed to trial. Mastercard did not oppose certification the second time around; however, there remained two technical issues between the parties, on which the CAT decided in favour of Mastercard:

- Deceased individuals could not be part of the class, only their personal representatives could be. As it was too late to add the representatives as claimants, deceased persons' interests were excluded from the claim.

- Claimants could only claim simple, rather than compound, interest in respect of the claim.

The CAT's certification of the class action reflects the Supreme Court's "lowering of the bar" and marks the first certification in the CAT of collective opt-out proceedings. Some commentators consider that the UK collective action regime had been held back by uncertainty as to the correct approach to certification—that would appear now to have been resolved by the Supreme Court, and in turn the CAT, in their respective judgments.

The CAT followed soon after with its certification of its second collective opt-out proceedings, in the case of ***Justin Le Patourel v BT Group PLC***.[54]

The case arose out of a review carried out by Ofcom, the UK communications regulator, of the market for Standalone Fixed Voice services (SFVs). Ofcom found that BT dominated the SFV market and had been setting its prices above competitive levels. Ofcom accepted commitments from BT to cut its prices and provide further cost information to its customers.

The claimant in this case, Mr Le Patourel, argued on behalf of approximately 2.3 million purchasers of SFVs from BT, that BT had abused its dominant position in the market and imposed unfair prices contrary to section 18 of the 1998 Act.

BT cross-applied to strike out the claim. BT also opposed certification of Mr Le Patourel's class on an opt-out rather than opt-in basis.

The CAT granted the claimant's application for an opt-out CPO and dismissed the strike-out cross-application.

The opt-out basis was "clearly more appropriate and suitable than the opt-in basis," and Mr Le Patourel had a real prospect of proving that (i) BT had occupied and abused a dominant position; and (ii) such abuse applied to the entire class.

The CAT referred to the two specific factors in the CAT's "Guide to Proceedings 2015" pointing in favour of the opt-out mechanism, namely:

1. the strength of the claims (Rule 79(3)(a)); and

2. whether it is practicable for the proceedings to be brought as opt-in proceedings (Rule 79(3)(b)).

The burden was on the claimant to prove that his claim was more suitable for an opt-out claim than an opt-in claim. As to that:

- there was little prospect that the 2.3 million customers who would be within the scope of the action would be sufficiently proactive to opt-in, particularly given their demographics;

- the claim was a technical one and customers would be unlikely to be able to conduct their own assessment of the case before opting in; and

- if too few customers opted in, the required third-party funding would not be attracted and the claim would never get off the ground.

[53] *Walter Hugh Merricks CBE v Mastercard Incorporated* [2021] CAT 28

[54] [2021] CAT 30

The CAT's decision in this case underlines the lowered bar to certification of class opt-out proceedings and may further mark a sense of growing momentum in this area following *Merricks*.

The ongoing MIF litigation has not been the only competition litigation of note in the UK Courts. The Court of Appeal in ***AB Volvo v Ryder Ltd***[55] gave an important clarification with respect to the ability of parties to UK proceedings not to accept a fact accepted by them in a settlement with the European Commission.

The question arose in the "trucks cartel" litigation, which follow on from a European Commission settlement decision against a number of trucks manufacturers.

The CAT held that:

- under EU law, facts which form the essential basis of, or necessary support for, the settlement decision were binding on the CAT in the context of follow on damages claims; and

- as a matter of English law, it would be an abuse of process for settling parties to deny non-essential facts of the settlement decision in all but a limited set of circumstances (for example where the defendant relies on new evidence which it could not reasonably have had access to beforehand).

On appeal, the Court of Appeal upheld the CAT's judgment. The Court rejected the argument that EU law prevented the application of the abuse of process doctrine to non-essential facts. The Court held that the CAT was therefore correct to conclude that non-essential facts in the settlement decision were final and binding under English law on that basis.

The judgment contains a number of important findings:

- the distinction in EU law between essential, appealable facts and non-essential, non-appealable facts was not relevant to the doctrine of abuse of process;

- a European Commission decision should be considered as a single final decision rather than, as the appellants contended, a series of factual decisions, only some of which are final;

- the CAT had also, rightly, applied the high threshold required to determine whether there was an abuse of process and was justified in concluding that allowing the appellants to contest admissions made to the European Commission in settlement proceedings would create manifest unfairness and bring the administration of justice into disrepute; and

- it is likely that these principles would also apply to factual admissions made in settlements with the UK's Competition and Markets Authority.

The decision is a reminder that institutions looking to settle cases with the competition authorities will need to consider the wider and subsequent implications of the settlement, particularly following the "lowering of the bar" in *Merricks* for certification of collective proceedings in the CAT.

On a related note, the Supreme Court, in ***Secretary of State for Health v Servier Laboratories Ltd***,[56] has clarified the scope of the EU principle of "absolute *res judicata*" in circumstances where parties do not accept matters contained in Commission decisions.

The appellants, Servier Laboratories, successfully challenged parts of a European Commission decision before the General Court of the European Union. They then sought to rely on the General Court's findings of fact in the English follow-on proceedings brought by the respondents in connection with what they allege was the appellants' anti-competitive behaviour, delaying the introduction of a cheaper generic substitute for the drug perindopril (a type of medication for high blood pressure).

The Supreme Court held that the EU principle of absolute *res judicata*, which means a judicial decision is binding not only on the parties, but the whole world, applies only to judicial decisions that are final in the sense that all appeals have been dismissed or the time for doing so has expired.

As an appeal against the General Court's judgment was pending to the Court of Justice, the decision was not yet final in the required sense and the General Court's factual findings were not binding in the English proceedings.

[55] [2020] EWCA Civ 1475

[56] [2020] UKSC 44

Company and Insolvency

Schemes of Arrangement/Restructuring Plans

Re Virgin Active Holdings Ltd[57] concerned a Part 26A Plan. Virgin Active's landlords argued that the explanatory statement provided to the Court ahead of the convening hearing should have contained more financial analysis which would have allowed them to challenge the valuation of their leases and make an informed judgment on the merits (or otherwise) of the proposed Plans. While the Court refused to order an amendment to the explanatory statement, it indicated that the Plan companies should disclose certain financial material voluntarily, subject to confidentiality undertakings. Such financial material included, among other things, their business plans, cashflow forecasts, and certain other financial analysis relevant to the Plans. At the sanction hearing, the secured creditors and the Class A landlords voted in favour of the Plans but the remaining classes did not, so the court was asked to sanction the Plans using the new cross-class cram down provisions under the Companies Act.

Cross-class cram down may be sanctioned by the Court where the following two conditions are met, subject to the Court's discretion:

1. Condition A: none of the members of the dissenting class(es) would be worse off under the proposed plan than in the event of the relevant alternative; and

2. Condition B: at least 75% (by value) of one of the classes of creditors who have an economic interest in the company, or who would receive a payment in the event of the relevant alternative, has approved the plan.

In this case it was not in dispute whether Condition B was satisfied, as the Plans had been approved by the secured creditors and the Class A landlords.

The Court held that Condition A was also satisfied, having found that the relevant alternative was administration under which the dissenting classes would be worse off.

In exercising its discretion, the Court held that the scheme must be fair and one that an intelligent and honest person might reasonably approve. As the dissenting classes would be out of the in the alternative of an administration, their objections carried little to no weight. Therefore, noting the strong level of support for the Plans more generally, the Court sanctioned the cram down.

Re All Scheme Ltd[58] was a scheme of arrangement in respect of an operating company within the Amigo loans group. The company provides "guarantor loans," offering credit to those who are unable to borrow from mainstream lenders. The company proposed a scheme that sought to compromise consumer redress claims in respect of certain unsuitable loans by setting up an "earmarked" fund to pay part of their claims, as a result of which it was estimated that creditors would receive approximately 10% of the value of their claims. While the scheme was approved by over 95% of voting scheme creditors, only 10% (by number and value) of scheme creditors turned out to vote. In addition, the Financial Conduct Authority had issued two letters voicing concerns in relation to the scheme prior to the sanction hearing and opposed it at the hearing.

While the FCA voiced a number of objections to the proposed scheme, the thrust of them was that the scheme was not fair to the creditors and not the best scheme the Amigo Group was capable of putting forward.

It is particularly notable that the Court refused to sanction the scheme notwithstanding that the requisite voting threshold had been meet. The Court agreed with most of the FCA's objections and found that there had been inadequate explanation in the Explanatory Statement of alternatives and why the proposed scheme would leave shareholders whole, while forcing some consumer creditors to recover only 10% of their claims.

Along similar lines to the Amigo scheme, the scheme in ***Re Provident SPV Limited***[59] sought to compromise consumer redress claims for unsuitable loans such that it resulted in the net liabilities of two Provident group companies to their creditors recovering only 5 – 10% of the value of their debts. Although the FCA filed an initial letter of objection to the scheme, it was ultimately sanctioned by the Court. In contrast to the Amigo scheme, the FCA did not participate and oppose the scheme at the sanction hearing. While the reasons for this are unclear, it appears that the FCA may have concluded that the scheme was the least worst outcome in all the circumstances and that, having extracted

[57] [2021] EWHC 814 (Ch) and [2021] EWHC 1246 (Ch)

[58] [2021] EWHC 1401 (Ch)

[59] [2021] EWHC 2217 (Ch)

certain modifications to the scheme from Provident at the convening hearing, it had achieved as much as it could.

Another distinguishing factor from the Amigo scheme was that, as mentioned above, in that case the Court found the Explanatory Statement to be lacking in certain material respects. The same issues did not arise in the Provident scheme because the court concluded, on the basis of the (uncontested) evidence provided by Provident, that there was no likelihood of a viable alternative scheme or plan (the relevant group companies were being wound down regardless of whether the scheme was sanctioned).

Assignment of a Liquidator's Claim

In ***Cage Consultants Ltd v Iqbal (Re Totalbrand Ltd)***,[60] the High Court examined the effect of Section 246ZD of the Insolvency Act 1986 (IA 1986), which permits liquidators or administrators to assign certain rights of action including, as in this case, claims for fraudulent trading, transactions at an undervalue and preferences.

The liquidator had assigned claims to a third party, who then brought the claims against a former director of the company and another person, who may have benefitted from the transactions. Those individuals applied to the High Court for the claims to be stayed or dismissed, on the basis that section 246ZD allowed the transfer of a claim but did not amend the identity of the only person in whose favour judgment could be granted under IA 1986 (i.e., the company, which had been dissolved and therefore could not benefit from any relief the court might grant).

The Court dismissed those arguments, finding that the intention of Section 246ZD would be frustrated were the assignee prevented from acquiring the entire right of action and all proceeds arising from it, where a company has been dissolved. Moreover, any other interpretation would unnecessarily prolong the life of the relevant company and likely increase costs, to the detriment of creditors.

Section 236 Examinations: Immunity from Suit

In ***Al Jaber v Mitchell***,[61] the Court of Appeal has given an important judgment on the doctrine of immunity from suit (which provides that no witness, party, counsel or judge in a civil trial may be liable in civil proceedings for words spoken or evidence given in court proceedings) in respect of statements given by former directors during an examination under section 236 of IA 1986. (Section 236 gives the Court powers to compel any officer of the company and certain other classes of person, by way of private examination, to give an account of his/her dealings with the company and/or to provide disclosure of information in relation to the company).

At first instance, the High Court held that because the private examinations were not a "judicial proceeding" in which the examinee was a "witness giving evidence," the doctrine of immunity from suit did not apply.

The Court of Appeal disagreed. In determining whether a statement made in proceedings, other than a civil trial, is subject to immunity from suit, it is necessary to consider the context in which the immunity is said to arise, including the nature of the proceedings and how "judicial" those proceedings might be said to be.

It was clear that an examination under section 236 of the IA 1986 was part of a wider, judicial, compulsory insolvency proceeding, which commences with an order of the court and is supervised by the court thereafter.

Therefore, whether or not an examinee had the status of a witness, there was no reason not to extend the doctrine of immunity to examinees in proceedings under section 236 of the IA 1986.

This is an interesting judgment. It should bolster the already powerful section 236 examination as an information-gathering tool for liquidators and administrators, by encouraging full and frank responses from directors and other officers who are subject to such examinations.

The Duomatic Principle

In ***Satyam Enterprises Ltd v Burton***,[62] the Court of Appeal allowed an appeal seeking to revive a claim for damages against a company's former sole director and shareholder. The claim concerned an alleged breach of the director's fiduciary duties, by transferring away assets at an undervalue. The Court commented on the application of the Duomatic Principle, which allows the shareholders of a company to informally approve a director's actions without the need for a general meeting.
The defendant director argued that he held his shares in the company on trust for the claimant, who was the

[60] [2020] EWHC 2917 (Ch)

[61] [2021] EWCA Civ 1190

[62] [2021] EWCA Civ 287

sole beneficial owner of the company, and had transferred the relevant property in accordance with the claimant's instructions. Therefore, he had a defence on the grounds that the transfer had been ratified and authorised by the claimant.

The Court noted that the Duomatic Principle applied to decisions made by registered shareholders and (where applicable) decisions by the beneficial owners of shares, although the Court did not actually decide whether the principle applied on the facts of this case. It was therefore open to the defendant to rely on the transfer having been authorised or ratified by the claimant as the sole beneficial owner of the company. The appeal was ultimately allowed and remitted back to the Court on other, more technical, grounds.

Therefore, while the case was not decided on the basis of the Duomatic Principle, it goes some way to extending the principle in a context where the company's shares are held on trust.

Setting Aside CVAs

Finally, ***Young v Nero Holdings Limited***[63] recently concerned an attempt to challenge the Company Voluntary Arrangement (CVA) of the well-known Caffè Nero cafe chain.

Mr. Young, one of Nero's landlords, challenged the CVA on the grounds of unfair prejudice and material irregularity, thereby engaging both grounds of challenge under section 6 of IA 1986. The court rejected the challenge on both grounds.

On the day before the deadline for the creditors' vote on the CVA, a third party made an offer to purchase the shares of the company's parent (the "Offer"), on the condition that the CVA was approved but modified to provide that landlords would be paid their rent arrears in full by the third party offeror. The CVA as otherwise proposed would have offered landlords only a 30% repayment on their rent arrears.

The vote on the CVA was due to take place via an electronic voting procedure on an online platform. Having rejected the Offer, the directors posted an announcement on the online platform informing creditors of the Offer two hours before the voting deadline, and noting that the CVA vote would not be postponed. Around the same time, they also modified the CVA, providing that, if the company was sold to the third-party offeror within six months, the company would use its "best endeavours" to include the payment of outstanding arrears in the terms of sale.

However, by the time the modification was made, enough votes had already been procured for the CVA to be approved.

The claimant challenged the CVA on the basis of both unfair prejudice and material irregularity, arguing in respect of unfair prejudice that the CVA was unfairly prejudicial as the alternative to the CVA was a sale of the company to the third-party offeror who would have paid their rent arrears in full.

On the basis of material irregularity, the Claimant argued that:

- the CVA nominees and directors of the company breached their duties to creditors by refusing to postpone the vote so that the Offer could be properly considered; and

- the CVA was invalid and ineffective as the company had counted the votes cast in favour of the original CVA as if they were votes cast in favour of the modified CVA. Therefore, the threshold for creditor approval had not been properly met.

In dismissing the challenge on both grounds, the Court held that:

- the CVA nominees and company directors acted in good faith and in what they considered to be the best interests of creditors by not postponing the CVA vote and by making the modification. In coming to this conclusion, the court concluded that the Offer did not represent commercial reality and that the relevant alternative to the CVA was in fact, therefore, administration, which was a worse outcome than that under the CVA;

- the late modification to the CVA was effective because the company could make non-material variations without the consent of the creditors and the modification was non-material. It improved the terms of the CVA for the creditors and was not misleading. The court also held that even if the modification was a material irregularity, that would not result in the whole CVA being set aside;

- the directors have a discretion to propose modifications during the course of an electronic voting procedure. As the modification was for the benefit of the creditors, the votes cast prior to the

[63] [2021] EWHC 2600 (Ch)

modification therefore counted towards approving the CVA as modified.

For further expert commentary on the key court decisions affecting restructuring and insolvency this year, see the posts from our Financial Restructuring & Insolvency team here.

Data Protection

In by far the most notable data protection case this year, Google has succeeded in overturning the Court of Appeal's judgment (covered in last year's review) by the recent Supreme Court judgment handed down just last week in ***Lloyd v Google***.[64]

The case was brought by Mr Lloyd, under Rule 19.6 of the CPR which allows a person to bring a claim as a representative on behalf of others, as the putative representative of around 4 million iPhone users claiming "*per capita*" damages for alleged data protection breaches by Google for collecting the data of those individuals without their knowledge or consent, between August 2011 and February 2012.

It was alleged that this gave rise to a right to seek damages for breach of the Data Protection Act 1998 (the "1998 Act")—the predecessor to the current Data Protection Act 2018 (the "2018 Act")—by Mr Lloyd as representative on behalf of the class of affected iPhone users.

The case was initially dismissed in the High Court, which held that it did not have a reasonable prospect of success for the purposes of serving Google outside of the jurisdiction. That decision was overturned by the Court of Appeal, which gave a wide interpretation to the "same interest" requirement of CPR 19.6, in effect lowering the threshold for establishing representative class actions in a data protection context, and it found that generic *per capita* damages may be claimed on behalf of the class, merely for each individual's loss of control of data, without needing to show financial loss or distress in each case.

The issue at the heart of the Supreme Court's decision was whether damages could be awarded under section 13 of the 1998 Act without proof in each individual case that financial damage or distress had been suffered.

While the Supreme Court found that the class could have the requisite "same interest" for the purpose of CPR 19.6, key to the Supreme Court's decision was its finding that, on the ordinary application of the compensatory principle (i.e., that damages should put the claimant in the position s/he would have been in had the wrongdoing not occurred), each individual in the class would be required to prove damage as a result of Google's alleged breach of the 1998 Act. The mere, and generic, "loss of control" of personal data across the class was not sufficient.

The Supreme Court therefore rejected Mr Lloyd's argument that the damages did not need to be proved individually because there was an "irreducible minimum harm" that had been allegedly suffered by each member of the class. Specifically:

- Section 13 of the 1998 Act did not permit compensation without proof of material damage or distress whenever a data controller commits a non-trivial breach of any requirement of the 1998 Act. The 1998 Act draws a distinction between "damage," on the one hand, and a contravention of the Act which causes it, on the other. In other words, the alleged contravention on itself and the attendant "loss of control" was not "damage" under the Act.

- The effect of the breach was not uniform across the class as each person's internet use and the type and extent of personal data extracted was different for each user.

- Contrary to the Court of Appeal's premise, EU law did not alter the position in relation to domestic law. Any incompatibility between the 1998 Act and applicable EU law (being the Data Protection Directive, the predecessor to GDPR) could only be removed by amending the legislation, which could only be done by Parliament.

- The court also rejected Mr Lloyd's argument that the approach to damages for the purposes of the 1998 Act should be the same as the approach for damages in a claim under the tort for misuse of private information—as the two had a "common source." However, there was no reason why an English domestic tort should be regarded as relevant to the proper interpretation of the term "damage" in a statutory provision intended to implement a European Directive.

Accordingly, Mr Lloyd did not have a reasonable prospect of success because he was not proposing to establish a breach of the 1998 Act or any resulting damage in each individual case and the High Court's dismissal of the case was restored.

While this outcome will no doubt be seen as a setback for prospective data protection claimants and litigation funders, it is notable that the Supreme Court gave in-principle support to the representative action as a mechanism for bringing data protection and other mass tort claims, but that it importantly also upheld

[64] [2021] UKSC 50

fundamental tort law principles that, in practice, have a chilling effect on the use of the representative action as a vehicle for mass tort class actions.

How this tension may be resolved is unclear, but what is now clear is that the introduction of any broad-based, opt-out class action regime—beyond the "collective proceeding" currently available in competition cases in the Competition Appeal Tribunal—is a matter for Parliament, should that be considered a desirable step for the UK to take.

In the recent case of ***Rolfe v Veale Wasbrough Vizards***,[65] the High Court provided welcome guidance for data controllers on the approach the High Court will take in claims concerning a one-off data breach and what the threshold is for "non-trivial" data breaches.

In this case, the first two claimants owed a sum of school fees, and the school had instructed the defendants, their lawyers, to write to the claimants with a demand for payment. The email was sent to the wrong recipient who promptly responded indicating that they thought the email was not intended for them and confirming that they had deleted it. The claimants (the intended recipients) brought a claim for damages alleging misuse of confidential information, breach of confidence, negligence and damages under Article 82 of the GDPR and s169 of the 2018 Act[66] plus a declaration and an injunction, interest and further or other relief. The defendants sought a summary judgment dismissing the claim.

The High Court applied the approach taken by the Court of Appeal in *Lloyd v Google*[67] finding in requiring a minimum threshold of damage for a breach of the Data Protection Act to be established, above a *de minimis* level. The Court granted the summary judgment dismissing the claim and had no issue in finding that the breach was trivial and did not meet the required threshold. The Court said that the claim was "plainly exaggerated" and the suggestion that any distress or worry was caused was a "frankly inherently implausible suggestion." In that regard, it was relevant the breach was quickly remedied.

The judgment ought to be welcome relief to data controllers and processors faced with minor and isolated data breach claims. Although, as discussed above, the Supreme Court has recently overturned the Court of Appeal's judgment in *Lloyd v Google*, its findings in relation to the threshold of seriousness required for claims appear to be consistent with those in this case.

Earlier this year, the High Court handed down a notable judgment in relation to the consequences of data breaches in ***Warren v DSG Retail Ltd***.[68] The case related to a cyber-attack against DSG, resulting in an unauthorised third party accessing its systems. The claimant submitted that its personal data was potentially accessed and brought a claim for £5,000 in damages for distress as a result of breaches of the Data Protection Act 1998, breach of confidence, negligence and misuse of private information.

The Court dismissed all but one of the claimant's claims, which was for breach of the duty to take "appropriate technical and organisational measures [...] against unauthorised or unlawful processing of data" under the Data Protection Act. On the other claims, DSG's duties of confidence, and duty not to misuse private information, did not impose an additional data security duty on DSG of the kind found in the Data Protection Act.

In particular, the court found that the claims for breach of confidence and misuse of private information required positive wrongful conduct—finding that "a 'misuse' may include unintentional use, but it still requires a 'use': that is, a positive action." A data security omission did not necessarily breach these duties.

The court also found that there is no need to impose a separate duty of care in tort where statutory duties exist, so no duty of care in negligence arose for that reason (and in any event, the claimant's claim for distress was not a relevant loss to constitute a tort).

This decision may come as welcome news to many UK companies. It appears to draw a line between the relatively new laws covering data protection and the established categories of wrongdoing in breach of confidence and misuse of private information which have developed by reference to different principles, and in different contexts.

We previewed a number of upcoming class actions in last year's review. Although none has resulted in a trial or reported judgment yet, there have been some notable developments.

[65] [2021] EWHC 2809 (QB)

[66] The judgment contains an apparent typographical reference to the Data Protection Act 2013

[67] [2019] EWCA Civ 1599

[68] [2021] EWHC 2168

The Group Litigation brought in respect of a 2018 data breach by British Airways has been confidentially settled. We also reported on a similar data security claim against EasyJet and the claimants' intention to seek a Group Litigation Order in relation to a recent data breach. That claim still remains open for prospective claimants to join.

Finally, in last year's review, we reported on the European Court of Justice (CJEU) decision in ***Schrems II***, in particular the finding in that case that the EU-US Privacy Shield was not valid under EU law. There have been a number of developments in this area during the past year:

- On 27 May 2021, the European Data Protection Supervisor (EDPS) announced that it had launched two investigations into compliance with the Schrems II judgment. One investigation concerns the use of cloud services provided by Amazon Web Services and Microsoft under Cloud II contracts by European Union institutions, bodies and agencies, and the other investigation concerns the use of Microsoft Office 365 by the European Commission. These investigations have been mandated in line with the EDPS' strategy for EU institutions' compliance with Schrems II.

- On 4 June 2021, the Commission announced that it had adopted two sets of new standard contractual clauses (SCCs), which take into account the Schrems II judgment. The SCCs provide contractual safeguards for personal data to which exporters and importers will need to agree if the SCCs are relied upon for transfers to countries (such as the US) without adequacy status, alongside the obligations on data importers to comply with the EU's General Data Protection Regulation (GDPR).

In related developments, on 28 June 2021, the Commission adopted two adequacy decisions for the United Kingdom, meaning that personal data can flow freely between the EU to the UK where it benefits from an equivalent level of protection to the level guaranteed under EU law (the UK's main data protection legislation, the Data Protection Act 2018 in large part implements and mirrors the EU's GDPR). The adequacy decisions were adopted under the EU's General Data Protection Regulation and largely maintain the status quo before Brexit to allow the continued free flow of personal data between the two regions.

Private International Law

Jurisdiction

There have been a number of judgments concerning issues of jurisdiction arising under the common law and under EU law. While the latter will have a diminishing relevance in the English courts as Brexit recedes further into the past, there will be a pipeline of cases commenced before the transition period to which it remains relevant.

Common Law

In ***Satfinance Investment Ltd v Athena Art Finance Corp***,[69] the High Court provided guidance on the operation of the "necessary or proper party" gateway for service out of the jurisdiction in the Civil Procedure Rules 1998 (CPR).

The gateway requires that "there is between the claimant and the defendant a real issue which it is reasonable for the court to try" and "the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

The claimant sought a declaration as to the title of a valuable painting and brought proceedings against four defendants, including Athena Art Finance. The claimant was granted permission to serve Athena out of the jurisdiction on the basis that it was a necessary or proper party to the claim against the first two "anchor" defendants which were domiciled within the jurisdiction. That permission was subsequently set aside on the ground that there was no real issue to be tried between the parties, as by then it was clear that the anchor defendants did not intend to defend the claim.

On appeal, the High Court held that the jurisdictional issue was to be assessed on the date of the application for permission to serve out. Even where the anchor defendants do not participate, there was a real issue to be tried by the Court in order to make a declaration and that process would still require evidence and argument. Therefore, the relevant CPR gateway was established.

However, on the facts of the case, there were "appreciably stronger" arguments in favour of the New York courts being the appropriate forum, and the claimant had not established that England was clearly the most appropriate forum. The court therefore dismissed the appeal.

The High Court handed down another judgment on the application of the "necessary or proper party" gateway, with a somewhat different result, in ***ID v LU***.[70] Determining a jurisdiction challenge brought by the second defendant, the court found that, for the purposes of the "necessary or proper party" gateway, the claimant could not rely on a party as the anchor defendant in circumstances where that defendant voluntarily submitted to the English court's jurisdiction.

In this case, the claimant had obtained permission to serve the claim form outside the jurisdiction on the second defendant on the ground that it was a necessary or proper party to the claim against the first defendant, who, despite being outside the jurisdiction, had voluntarily submitted to the English court's jurisdiction following service of the claim form. The second defendant brought a jurisdictional challenge, requesting that the court to set aside the permission to serve jurisdiction on the second defendant.

The second defendant successfully contended that the claimant was not entitled to rely on the first defendant as the anchor defendant for the purposes of its claim against the second, in circumstances where the English court only had jurisdiction over the first defendant due to his voluntary submission to the jurisdiction. House of Lords and Court of Appeal authority made clear that a defendant's submission to jurisdiction cannot affect the rights of third parties.

The application of this reasoning to the necessary or proper party gateway meant that it does not apply in situations where, when a claim is issued, there is no-one on which the claim form could be served.

In the case of ***FS Cairo (Nile Plaza) LLC v Lady Brownlie***,[71] the Supreme Court confirmed that the CPR tort gateway for service out of the jurisdiction is a potentially very broad gateway for establishing the English court's jurisdiction. In particular, the relevant "damage" for the purposes of the gateway may be direct or indirect and may occur in more than one place (i.e., not necessarily in (or only in) the jurisdiction where the tortious act occurred).

[69] [2020] EWHC 3527 (Ch)

[70] [2021] EWHC 1851 (Comm)

[71] [2021] UKSC 45

The claimant, Lady Brownlie, and her family were on holiday in Cairo during which a chauffeur-driven car organised by the claimant's hotel crashed, killing the claimant's husband and leaving the remaining passengers seriously injured. Lady Brownlie pursued a tortious damages claim against the Egyptian hotel in the English courts.

The Supreme Court dismissed the defendant's appeal and confirmed the English court's jurisdiction, finding that:

- The requirement of the CPR tort gateway was for "damage" to be sustained within the jurisdiction (i.e., England). For these purposes damage meant any actionable harm, direct or indirect, caused by the relevant tortious act. In this case, although the tortious act itself had occurred in Egypt, the damage was the pain, disability and financial losses the claimant suffered, in large part in England, as a result of the car crash in Egypt.

- Responding to the contention that EU law distinguished between direct and indirect damage, supporting a narrower interpretation of the scope of the tort gateway, the Court held, among other things, that the distinction between direct and indirect damage for the purposes of the gateway was "obscure and likely to give rise to difficulty in its application" and that the distinction under EU law did not affect the definition of the scope of the tort gateway as a matter of domestic law.

- Although *forum conveniens* issues were not technically in issue before the court, the court noted that its well-established discretionary power to permit or not permit service out of the jurisdiction provided a safety-valve not found in EU law, which militated against a narrow reading of damage and in favour of the more natural, broader, meaning in domestic law.

The case also raised issues of applicable foreign law, in this case Egyptian law. Where there were certain gaps in the claimant's evidence as to foreign law, she relied on the presumption that the applicable foreign law was materially the same as English law. The defendant argued that in a case where foreign law applies pursuant to mandatory choice of law rules, it is wrong in principle to apply English law or any presumption that the applicable foreign law is similar to English law, particularly where that is only being relied on because there are gaps in the evidence of the foreign law which the claimant has already pleaded.

In deciding the point, the court found it helpful to distinguish between the rule known as the default rule, which applies English law *in its own right* where foreign law is not pleaded, and the presumption of similarity rule, which is a rule of evidence by which, absent evidence to the contrary, the applicable foreign law is presumed to be the same as English law.

It was clear that, because the claimant's case was pleaded under Egyptian law, the default rule could not apply. However, the court was entitled to rely on the presumption of similarity rule where the relevant foreign law was not known—in the context of the threshold reasonable prospect of success test for service out under the gateway, it was "reasonable to presume [...] that under any system of law a hotel operator who enters into a contract with a customer to take the customer and members of her family on an excursion in a chauffeur-driven car provided by the hotel will owe obligations under the contract and/or under the law of tort to ensure the safety of those concerned."

In ***Samsung Electronics Co Ltd v LG Display Co Ltd***,[72] the High Court ruled that a contribution claim by one addressee of a European Commission cartel decision (Samsung) against another (LG), should be dealt with in courts in Taiwan and South Korea rather than the English courts.

Samsung reached a settlement in related litigation with 47 English local authorities which had claimed for damages based on the European Commission's "LCD panels" cartel decision. Samsung brought a claim for contribution towards the damages paid under the settlement agreement against LG, which was also an addressee of the cartel decision. Samsung was granted permission to serve LG out of the jurisdiction, but LG applied to have this set aside.

Granting LG's application, the High Court found that Samsung's claim for contribution was a "claim in tort" for the purposes of the tort CPR gateway.

However, the court nonetheless considered that certain courts in Taiwan and South Korea were more appropriate fora to resolve the contribution claim, as there would be a complex factual dispute involving disclosure and cross examination, which was more appropriately conducted in the Taiwanese or South Korean courts (both parties being South Korean companies). An appeal is scheduled to be heard in March 2022.

[72] [2021] EWHC 1429 (Comm)

Brussels and Lugano

The Brussels Recast Regulation was the instrument governing jurisdiction and the recognition and enforcement of judgments at an EU level in cases issued prior to the Brexit transition period and remains relevant in relation to those cases.

In last year's review, we covered a High Court judgment in relation to the application of a particular aspect of the Brussels Recast Regulation in ***Etihad Airways PJSC v Flöther***[73] (in which Shearman & Sterling acted for Etihad in England and Germany). The Court of Appeal has since confirmed that, on its correct construction, Article 31(2) of Brussels Recast applies to asymmetric jurisdiction agreements, which are commonly used in financial contracts. In the meantime, the highest German civil court (BGH) rejected the administrator's appeal and decided in line with the Court of Appeal. A final decision by the German Supreme Court is pending.

The dispute arose in respect of a comfort letter given by Etihad Airways to Air Berlin, the latter later entering insolvency proceedings in Germany. Etihad commenced a claim in England seeking certain negative declaratory relief in relation to the non-binding nature of the comfort letter. In response to a jurisdiction challenge by the Insolvency Administrator of Air Berlin, Etihad argued, amongst other things, that the English courts had jurisdiction and that parallel German proceedings should be stayed under Article 31(2) of Brussels Recast, on the basis of an asymmetric jurisdiction clause in favour of the English courts, contained in a closely related loan agreement, which fell within Article 31(2) and bound Air Berlin to bring disputes in the English courts only.

In upholding the High Court's confirmation of the English court's jurisdiction, the Court of Appeal acknowledged the fundamental contractual principle of party autonomy—that commercial parties have the right to agree the forum where their disputes will be resolved. That principle has consistently been upheld by the Court of Justice of the European Union (CJEU) and the English courts. Therefore, the correct approach, contrary to the Administrator's submissions which advocated a narrow meaning of "exclusive" for the purposes of Article 31(2), was to identify the relevant obligation (i.e., reflecting the parties' autonomous legal intentions) to which Article 31(2) (and Article 25, which concerns jurisdiction agreements) applied. Drawing on CJEU case law, the court held that it was possible to divide the disputes covered by a jurisdiction clause into separate groups. The asymmetric clause divided into one group, consisting of claims brought on behalf of Air Berlin, and the other consisting of claims brought by Etihad. Therefore, considered in that way, Air Berlin's obligation to bring proceedings in the English courts was an exclusive jurisdiction agreement for the purposes of Article 31(2).

It is also notable that the court rejected the Insolvency Administrator's further argument that its narrow reading of Article 31(2) was supported by the 2005 Hague Convention on choice of court agreements. The Insolvency Administrator argued that the Hague Convention and Brussels Recast required "maximum alignment" between the two instruments—i.e., that the two instruments were within the same sphere, and therefore the same definition of the exclusive jurisdiction clause should apply in each instrument. The court rejected the Insolvency Administrator's arguments in this regard, drawing some important distinctions between the two regimes. In particular, it noted that the Brussels Recast regime goes further and is more comprehensive than the Hague 2005 Convention. In another judgment concerning the application of Brussels Recast, the High Court in ***Galapagos Bidco S.A.R.L. v Kebekus***[74] considered Article 8(1). That article allows a claimant to sue a defendant, where s/he is one of a number of defendants, in the courts of the place where any one of them is domiciled, provided the claims against the defendants are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments, resulting from separate proceedings.

The claimant sought declarations that its restructuring complied with the terms of an intercreditor agreement and submitted that the second to sixth defendants, who were domiciled in the UK, were the "anchor" defendants for the purpose of establishing jurisdiction against the first and seventh defendants, domiciled in Germany and Luxemburg, respectively.

The first and seventh defendants challenged jurisdiction on the basis that there was no jurisdictional nexus with them because the relevant anchor defendants were not opposing the declarations, and as such were not properly participating in the proceedings.

Dismissing the challenge, the court held that, in proceedings for declaratory relief concerning the interpretation of a contract, the proper parties to the proceedings were the parties to the contract, which included, in this case, at least one of the anchor defendants (which was sufficient). The fact that the anchor defendants were not contesting the declarations

[73] [2020] EWCA Civ 1707

[74] [2021] EWHC 68 (Ch)

did not matter for these purposes. The declarations sought affected them, and all but one of them was represented at the hearing.

In ***ING Bank NV v Banco Santander SA***,[75] the High Court delivered judgment on the application of the insolvency carve out to Brussels Recast. The claim was brought by a syndicate of lenders on the basis of loan and swap agreements entered into with a company which had gone into liquidation in Spain, and whose obligations had been assumed by a third party (Santander).

The agreements were governed by English law and had English jurisdiction clauses under which, if binding on Santander, the English courts would have jurisdiction pursuant to Article 25 of Brussels Recast.

In addition to finding that the jurisdiction clauses were not binding the Court held that, in any case, the dispute was an insolvency claim within the ambit of the EU Insolvency Regulation and therefore fell within the insolvency carve out to Brussels Recast, which meant that the member state where the insolvency proceedings were commenced had jurisdiction, not the English courts.

Interestingly, the court rejected the claimant's assertion that where the sum claimed was an entitlement to interest, the claim was purely a contractual one. On the facts, which were complex, the court found that but for the insolvency, the issue would not have arisen and the case was therefore directly derived from the insolvency proceedings and fell within the Brussel Recast carve-out, even though the insolvent counterparty was not a party to the litigation.

Recognition and Enforcement of Judgments and Arbitral Awards

In a complex case concerning the enforcement of arbitral awards against states, the UK Supreme Court in ***General Dynamics United Kingdom Ltd v State of Libya***[76] upheld Libya's challenge to an order dispensing with the need for service through the Foreign, Commonwealth and Development Office (FCDO). The case concerned the enforcement of an arbitration award against Libya and section 12(1) of the State Immunity Act 1978 (SIA). That section requires service of any document required to be served in order to institute proceedings against a state to be carried out through the FCDO and the corresponding service in the foreign country. The issue was whether such requirement was mandatory and exclusive.

The case's procedural history involved a series of conflicting judicial decisions. The claimant initially obtained an order from the High Court dispensing with formal service of the enforcement order on Libya through the FCDO because of the ongoing internal conflict in Libya and the resultant difficulty of effecting service through diplomatic channels. On appeal a single Lord Justice set aside that order, finding that the enforcement order must be served through the FCDO as was required by section 12(1) of SIA. A full panel of the Court of Appeal disagreed and held that enforcement orders were to be served under CPR 62.18(8)(b) and CPR 6.44 (which in turn reference the SIA), but in appropriate cases, the court could dispense with these service requirements.

In a majority decision, the Supreme Court concluded that:

- in cases to which section 12(1) of the SIA applies, service on a state through the FCDO is mandatory and exclusive;
- section 12(1) is generally wide enough to apply to all documents by which notice of proceedings in England is given to a defendant state;
- where section 12(1) applies, the court cannot dispense with service of the enforcement order under CPR 6.16 or CPR 6.28 (which allow for dispensation of service of the claim form in exceptional circumstances), even if there are exceptional circumstances; and
- the procedural privilege afforded to states by section 12(1) is a proportionate means of pursuing the legitimate objective of having a workable means of effecting service, and does not impair the right to a fair trial under the European Convention on Human Rights (i.e., in cases where service through diplomatic channels is impossible or unduly difficult), so as to justify the court making an order for alternative service.

In ***Strategic Technologies v Procurement Bureau of the Republic of China Ministry of National Defence***,[77] the Court of Appeal ruled apparently for the first time on whether it is possible to register a default judgment given by a court in one state by way of enforcement of

[75] [2020] EWHC 3561 (Comm)

[76] [2021] UKSC 22

[77] [2020] EWCA Civ 1604

another default judgment given by a court in a third state.

The claimant had obtained a default judgment for damages and costs against the defendant in Singapore (the "Singapore Judgment"). The claimant later obtained default judgment in the Cayman Islands on the basis of the Singapore Judgment (the "Cayman Judgment").

Subsequently, the claimant was granted an order by the English High Court that the Cayman Judgment be registered pursuant to Section 9(1) of the Administration of Justice Act 1920 ("AJA"). The defendant appealed that registration.

In line with a purposive construction of the AJA and academic commentary on the issue, the Court of Appeal held that the correct interpretation of the AJA did not permit the enforcement of a judgment on a judgment and that the AJA contemplates only a two-stage process, namely a judgment on the merits of the underlying dispute and the proceedings in England for the registration of that judgment. The AJA did not contemplate an intermediate stage, i.e., the Cayman Islands judgment and its enforcement. This was also consistent with the other enforcement mechanisms under the common law and the Foreign Judgment (Reciprocal Enforcement) Act 1933. The fact the case concerned a default judgment on another default judgment (as opposed, e.g., to a default judgment enforcing an ordinary judgment) did not appear to affect the outcome. As a result, the court allowed the appeal and set aside the order for registration of the Cayman judgment.

Interestingly, it is not clear whether the Singapore Judgment itself would have been enforceable directly anyway, given that it was also a default judgment (i.e., not on the merits).

Anti-Suit Relief

In ***Specialised Vessel Services Ltd v Mop Marine Nigeria Ltd***,[78] the High Court considered an application by a claimant shipowner against a defendant charterer for anti-suit relief, despite the claimant's delay of over a year in seeking it.

The defendant had commenced claims in Nigeria in breach of an arbitration agreement. Initially, the claimant sought a stay of the claim in the Nigerian courts, in favour of the contractually prescribed London-seated arbitration. The claimant later sought anti-suit relief from the English court, due to the lack of progress of its stay application in the Nigerian courts.

The High Court noted that anti-suit relief should be sought promptly and before the foreign proceedings are too far advanced. However, while acknowledging that there had been a substantial delay, much of this delay could be attributed to the Nigerian court process and the impact of the COVID-19 pandemic. The claimant was not seeking a second bite of the cherry, as the stay application in Nigeria had not yet been determined.

It was particularly relevant to the court's decision that (1) the Nigerian proceedings had not progressed on the merits, (2) the English court was not being asked to second-guess any decision of the Nigerian court, and (3) the defendant had not argued, nor had the Nigerian court determined, that the arbitration clause was invalid.

The court therefore granted an anti-suit injunction requiring the defendant to discontinue the Nigerian proceedings.

Axis Corporate Capital UK II Ltd v ABSA Group Ltd,[79] was a case that considered anti-suit relief in the context of rights arising under exclusive jurisdiction clauses, and parallel proceedings in England and South Africa, all of which were in connection with different layers of a reinsurance policy.

The claimant reinsurers sought to continue an interim anti-suit injunction, restraining the defendants from continuing proceedings in South Africa. The claimants contended that those proceedings were in breach of exclusive jurisdiction clauses in favour of the English courts.

The court considered whether the relevant jurisdiction clauses in a primary layer reinsurance contract and an excess layer reinsurance contract constituted exclusive jurisdiction agreements.

The excess layer jurisdiction clause was in the following terms: "[e]ach party agrees to submit to the jurisdiction of England and Wales to comply with all requirements necessary to give such court jurisdiction."

In finding that the excess layer clause was an agreement conferring exclusive jurisdiction on the English courts (rather than merely an obligation not to object to English jurisdiction), relevant factors in the court's determination included: (1) the parties' choice of

[78] [2021] EWHC 333 (Comm)

[79] [2021] EWHC 861 (Comm)

English governing law in the contract, which favoured an interpretation of the clause as an exclusive jurisdiction clause; and (2) the location of the choice of law clause within the contract, as it immediately preceded the jurisdiction clause which expressly referred to disputes.

In contrast, the primary layer jurisdiction clause stated that the parties agreed to submit to a worldwide jurisdiction and the choice of law was also "worldwide." It was clearly not an express exclusive jurisdiction clause. The court also rejected the claimants' contention that the primary layer clause should be subject to a proviso, either on its proper construction or as a matter of implication, that where a claim impacts the excess layer reinsurances, the parties are obliged to submit to the exclusive jurisdiction of the English courts.

While acknowledging the desirability of proceedings taking place in only one jurisdiction, the claimants had not demonstrated that the South African proceedings relating to the primary layer reinsurances were vexatious, oppressive or unconscionable. Therefore, the anti-suit injunction restraining the South African proceedings was granted, but only in respect of the excess layer reinsurances.

Declaratory Relief for Use in Foreign Proceedings

The High Court's judgment in ***Elinoil Hellenic Petroleum Co SA v Biotechnika SRO***[80] provides a very clear reminder as to the factors that go to the court's discretion in granting declaratory relief.

In this case, the High Court exercised its discretion not to grant a declaration as to ownership of certain cargoes, which were stored in Italy. The cargoes had been supplied to the defendant pursuant to a commercial contract and were subsequently seized by the Italian tax authorities. The claimant acknowledged that the purpose of the declaration was to assist the claimant in recovering the relevant cargoes in Italy.

The matter had already been the subject of litigation in Italy, and therefore the court had to exercise caution in exercising its discretion to grant relief, where the true purpose of such relief was not to resolve a dispute between the parties before the English courts, but to influence the deliberations of a foreign court. The English courts would usually refuse such declaratory relief, absent any special circumstances (e.g., if the foreign court had sought assistance from the English court regarding an issue of English law). The court applied the principles in *Rolls-Royce plc v Unite the Union*,[81] finding that:

- there was no real or present dispute between the parties before the court in relation to the existence or extent of a legal right between them. The defendant had not participated in the proceedings and never asserted title to the cargoes;

- the Italian tax authorities were the real counterparty to the dispute, and they would possibly be adversely affected by the requested declarations. As the Italian tax authorities were not a party to the proceedings, they would not have the chance to plead their case on a matter which may adversely affect them; and

- the relief sought was not the most effective way of resolving the issues raised, given that the claimant sought declarations in relation to matters that had already been resolved against it in Italy. Obtaining contradictory declaratory relief in England would not be an efficient way of managing the proceedings.

Applicable Law

The recent judgment in ***Westover Group Limited v Mastercard Inc***[82] brought to light a three-step test for the interpretation of Article 6(3)(b) of Rome II (the EU Regulation on the law applicable to non-contractual obligations, which remains effective in the UK following Brexit as part of retained EU law).

In June 2021, the Competition Appeal Tribunal (CAT) handed down a judgment on a preliminary issue in damages actions brought by the Westover Group Ltd and Alan Howard (Stockport) Ltd and several other claimants against Visa and Mastercard companies in respect of both domestic and cross-border multilateral interchange fees ("MIFs"). Thirty-four of the Westover claimants and four of the Alan Howard claimants were Italian companies.

The preliminary issue concerned which law governs the claims by the Italian claimants and raised the issue of the correct approach to the identification of the "restriction of competition" for the purpose of Article 6(3)(b) of Rome II, which provides that where the market in more than one country is (or is likely to be) affected by a restriction of competition, a claimant who sues in

[80] [2020] EWHC 3592 (Comm)

[81] [2009] EWCA Civ 387

[82] [2021] CAT 12

the courts of the domicile of the defendant may choose to base his/her claim on the law of that country, provided that market is among those directly and substantially affected by the restriction of competition on which the non-contractual obligation giving rise to the claim is based.

The CAT noted that Article 6(3)(a) of Rome II (which provides that the applicable law is the law of the country where the market is affected by the relevant restriction of competition) is a particular application of the general approach contained in Article 4 (i.e., that the governing law is the law of the country where the damage occurs). On that basis, it is logical, within the scheme of Rome II, that the primary rule is that the applicable law in competition claims should be the law of the country where the relevant market is located.

However, as to the proper interpretation and application of Article 6(3)(b), the CAT recognised that it is a modification of the primary rule set out in Article 6(3)(a), and in applying Article 6(3)(b), it is necessary to address three questions:

1. What is the non-contractual obligation on which the claim is based?
2. What is the restriction of competition out of which that obligation arises?
3. Does that restriction of competition directly and substantially affect the market in the country of the forum?

Applying these principles, the CAT ruled that:

- the non-contractual obligation on which the claim is based is the liability for damage caused by the breach of competition law, which is the restriction of competition. In this case the restriction arose out of the alleged collusive arrangements in relation to the setting of the MIFs;
- because the Italian MIFs directly and substantially affected the market in Italy, but did not affect the market in the UK, the claims by the Italian claimants in respect of Italian domestic MIFs must be governed by Italian law, pursuant to Article 6(3)(a) of Rome II; and
- the claims by the Italian claimants in respect of cross-border MIFs fall within Article 6(3)(b) of Rome II because the relevant MIFs directly and substantially affected the relevant markets in Italy and in the UK, and the claims were, therefore, capable of being based on English law in light of the choice inherent in Article 6(3)(b) of Rome II.

The Supreme Court has recently handed down judgment in ***Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)***[83] which affirms and applies the principles concerning the law governing an arbitration agreement that were established last year in *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb*.[84] This judgment confirms that the governing law of a contract is generally a sufficient indication of the law governing the arbitration clause contained therein. (Shearman & Sterling successfully acted for Enka in that case, which was covered in last year's review and was named the "Most Important Decision of the Year" by the Global Arbitration Review in 2021.)

The case arose from an ICC arbitration in relation to a Franchise Development Agreement ("FDA") to which Kabab-Ji and Al Homaizi Foodstuff Company ("AHFC") were parties. The latter, following a corporate restructuring, became a subsidiary of Kout Food Group ("KFG"). Kabab-Ji commenced arbitration in relation to alleged breaches of the FDA against Kout Food Company ("KFG"), relying on the arbitration agreement contained in the FDA.

KFG objected to the jurisdiction of the ICC tribunal, arguing that it was not a party to the FDA and therefore had not submitted to the tribunal's jurisdiction in relation to the dispute. The tribunal dismissed this objection, finding that the arbitration agreement was governed by French law, as the law of the seat and that, as a matter of French law, KFG was a party to the FDA and therefore within its jurisdiction. The tribunal ultimately found in Kabab-Ji's favour in the dispute, issuing an award for $6.7 million in damages.

KFG challenged Kabab-Ji's enforcement of the award in the High Court in London on the basis that it was not a party to the FDA and therefore the arbitration agreement within it. It brought this claim under Article 5(1) of the New York Convention, which provides exclusive grounds for refusing to recognise or enforce foreign arbitral awards.

The Commercial Court declined to enforce the award pending a final decision from a parallel proceeding in the Paris Court of Appeal. By way of summary judgment, the Court of Appeal set aside the arbitral award on the basis that the law governing the arbitration agreement was English law as the law of the underlying contract, and as a matter of English law KFG

[83] UKSC 2020/0036

[84] [2020] UKSC 38

was not in fact a party to the FDA and had not submitted to the tribunal's jurisdiction under the arbitration agreement.

On appeal by Kabab-Ji, the Supreme Court had three issues to consider:

- What was the law governing the validity of the arbitration agreement (the "choice of law issue")?

- Is there any real prospect that KFG could be a party to the arbitration agreement (the "party issue")?

- Was the Court of Appeal justified in giving summary judgment refusing recognition and enforcement of the award (the "procedural issue")? Kabab-Ji argued that a full evidential hearing was required to make a decision on enforcement and that a summary judgment would be insufficient.

The Supreme Court unanimously dismissed the appeal on all three issues, finding:

- *In re* the choice of law issue: the validity of the arbitration agreement is governed by the law chosen by the parties or where no law is chosen, the law of the arbitration seat. Citing Enka, the court found that the law chosen generally to govern a contract containing an arbitration agreement will normally be a sufficient "indication of the law to which the parties subjected the arbitration agreement for the purposes of Article 5(1)(a) of the Convention." As the FDA was governed by English law, so too was the arbitration agreement contained in it.

- *In re* the party issue: the FDA contained an explicit requirement that it may not be amended save for consent in writing signed on behalf of both AHFC and Kabab-Ji. Therefore, as the FDA could not have been amended to include KFG as a party, KFG could not have been a party to the FDA or to the arbitration agreement contained therein.

- *In re* the procedural issue: the court found that the summary judgment was appropriate and proportionate in this case. There is no requirement that a full evidential hearing be held in order to determine the enforceability of a foreign judgment.

This case provides further certainty as to the approach of the English courts, following the principle first set out in *Enka* that a general choice of law clause in a contract containing an arbitration clause will normally be a sufficient indication of the law applicable to the arbitration agreement.

Procedure

Evidence

On 6 April 2021, significant changes to trial witness statements in the B&PCs were introduced under PD 57AC (witness statements from lawyers and clients in support of applications remain unaffected).

The changes are geared at making the process by which witness statements are prepared more transparent. While the changes make the process more onerous in certain respects, they are intended to result in the paring back of witness statements to exclude extraneous and irrelevant material and to focus on the personal recollections of a particular witness.

The changes include a new certificate to be provided by the legal representative stating that the practice direction has been complied with, and the witness must provide a similar certificate in addition to the existing statement of truth.

A clear theme of the reforms is that trial witness statements should not be used to take the court through narrative documents which, instead, should be covered by way of a joint factual narrative.

Disclosure

In ***Phones 4U v Deutsche Telekom AG***,[85] some of the defendants challenged an order under CPR 31 requiring them to request voluntary access to the personal mobile telephones and emails of some of their current and former employees for the purpose of disclosure.

The Court of Appeal confirmed that it had no power under CPR 31 to order that a defendant disclose documents not within their control. A document is in a party's control if it has possession of the document or it has a right to inspect, take possession of or take copies of the document.

However, the court held that there was no such restriction on its power to require that parties to the proceedings make voluntary requests of third parties.

The court dismissed arguments relating to the proportionality of the order in respect of the privacy rights of the employees and their personal contacts under Article 8 of the European Convention on Human Rights. The order had been designed with Article 8 in mind and the employees were at liberty to refuse the disclosure request.

Further, in ***Lakatamia Shipping Company v Su***,[86] the Commercial Court retrospectively granted the first claimant's application under CPR 31.22 for collateral use in separate related proceedings of documents obtained via a search order.

Collateral use—the use of documents for a purpose other than the proceedings in which they are disclosed—is not permitted without the permission of the court or consent of the disclosing party and owner of the document, unless it has been read in open court. The burden is on the applicant to demonstrate cogent and persuasive reasons for allowing collateral use. The court reiterated that best practice is to first seek permission to review such documents for a collateral purpose and subsequently to apply for permission to deploy the documents if the review indicates such collateral use is required.

In limited circumstances, a court may grant retrospective permission where a party fails to take these steps. Relevant factors include the application's prospects had it been made timeously, the proportionality of refusing the application, and whether the breach was inadvertent.

By reviewing documents for a collateral purpose without first making such an application, the first claimant had breached an undertaking under the relevant search order preventing the use of the documents obtained in related proceedings without the court's permission. The first claimant subsequently brought a retrospective application under CPR 31.22(b).

As the documents were plainly relevant, and the breach did not give rise to any prejudice, refusal of the application would be disproportionate. However, the court still sanctioned the first claimant for "serious breaches" of the undertaking in the search order, including an order for indemnity costs.

One area which has received further attention this year is the Disclosure Pilot Scheme (DPS) under PD 51U, which was recently extended until 31 December 2022.[87]

[85] [2021] EWCA Civ 116

[86] [2020] EWHC 3201 (Comm)

[87] https://www.judiciary.uk/announcements/update-on-the-operation-of-the-disclosure-pilot-scheme-disclosure-pilot-july-2021/

In ***Kelly v Baker***,[88] the High Court was asked to determine a number of issues regarding the DPS, including the appropriate period for disclosure and the claimant's application for Model E extended disclosure.

In respect of the latter issue specifically, the judge held that Model E would only be ordered in exceptional cases and needed to be linked to the specific issues to which the disclosure relates, with an explanation as to the nature of the enquiry envisaged. The court stated that it is not enough to say that this is a relatively high-value case, that it is important to the claimants or that it involves allegations of fraud. Likewise, the fact that the parties can afford to carry out such an exercise does not mean that such an order is proportionate.

In ***Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd***,[89] the High Court considered an application under PD 51U.17 which allows the court to make any order it considers reasonable and proportionate where a party has (or may have) failed to adequately comply with an order for extended disclosure.

When giving such disclosure, parties are only required to disclose documents within their control, as outlined above. In this regard, the court observed that:

- as with orders for specific disclosure, sworn statements that documents are not under a party's control will not prevent the court from making an order under PD 51U.17 if it nonetheless considers disclosure to be inadequate; and
- where documents are in the control of a third party, and there is no legally enforceable right of access, the relationship between the parties is irrelevant in determining whether the court should require disclosure of such documents. In such circumstances, it must be shown that there is an arrangement or understanding by which the third party will search or provide access to such documents. In this case, the judge found that there had always been, and continued to be, an arrangement or understanding that the claimants would be able to access documents held by the third parties in question, and ordered that the claimant collate and review all potentially relevant materials.

In ***Eurasian Natural Resources Corporation Ltd v Qajygeldin***,[90] the High Court considered whether a claimant could seek disclosure of documents in relation to the disclosing party's compliance with their disclosure duties under the DPS.

The defendant had stated that two email accounts were no longer accessible and that three electronic devices had been stolen. The claimant sought disclosure of documents relating to the defendant's attempts to gain access to the email accounts and the investigation by law enforcement agencies into the theft.

The court held that a disclosing party is not required to provide evidence as to the steps taken to access the documents or why they cannot be retrieved, and it was not within the power of the courts to order disclosure of such evidence under the DPS. Although the court accepted that it had an inherent jurisdiction to order disclosure in relation to interlocutory issues, which extends to issues that do not arise on the statements of case, that jurisdiction would be used sparingly and in exceptional circumstances (of which this was not one).

In ***Curtiss v Zurich Insurance plc***,[91] a claim for exemplary damages before the Technology and Construction Court, the court heard a dispute as to whether a set of ten issues identified by the claimant in the disclosure review document should properly be considered issues for disclosure.

In the course of its judgment, the court considered conflicting authorities as to whether an issue for disclosure must be a pleaded issue. While there was authority that suggested it was not a requirement, the court held that such authority was limited to the specific facts of that case.

The court held that the issues for disclosure must appear on the statements of case.

However, the court reiterated that simply because an issue appeared in a party's statement of case did not mean it should automatically be included as an issue for disclosure. The parties must still identify the undisclosed documentation that is likely to be available and assess whether it is likely to be relevant and important for the fair resolution of the claim.

Expert Determinations

The courts have provided some helpful guidance over the past year as regards the court's jurisdiction over expert determinations. In ***Flowgroup plc v Co-***

[88] [2021] EWHC 964 (Comm)

[89] [2021] EWHC 849 (Ch)

[90] [2021] EWHC 462 (Ch)

[91] [2021] EWHC 1999 (TCC)

operative Energy Ltd,[92] the Commercial Court considered the meaning of "manifest error" in challenges to expert determinations, manifest error being a common basis on which parties agree that an expert's determination can be reviewed by the court.

The parties' dispute was over the application of the established test that a manifest error only arises where the error is "obvious or easily demonstrable without extensive investigation."

Dismissing the claim, the court held that the error did not simply have to be visible on the face of the record but also needed to be an oversight or blunder "so obvious and obviously capable of affecting the determination as to admit no difference of opinion."

This test would apply equally to matters of contractual interpretation, unless such question could be said to be outside the limits of the expert's decision-making authority.

Conflicts of Interest under the Arbitration Act

In its much-anticipated judgment *in* ***Halliburton Company v Chubb Bermuda Insurance Ltd***,[93] the Supreme Court considered the courts' power to remove arbitrators where there are doubts about their impartiality.

The claimant sought to remove an arbitrator under s24(1)(a) of the Arbitration Act 1996 on the basis that he had failed to disclose his role as a party-appointed arbitrator in a separate (but related) set of arbitrations, giving rise to justifiable doubts as to his impartiality.

The Supreme Court upheld the lower courts' decisions not to remove the arbitrator. With regards to an arbitrator's duty of impartiality and the test of apparent bias, the Supreme Court held that:

- arbitrators are bound by a duty of impartiality under English law;
- the objective test for determining apparent bias is whether the "fair-minded and informed observer", having considered the facts, would conclude that there was a real possibility of bias;
- the test applies equally to party-appointed arbitrators and those appointed by an arbitral institution, a court or by other arbitrators;
- whether there is a real possibility of bias is to be judged by reference to the facts and circumstances known at the time of the hearing to challenge the arbitrator;
- factors specific to arbitration should be considered, such as the confidentiality of arbitration, the more limited scope for review and appeal of arbitral awards and the direct financial interest of arbitrators in their appointment; and
- breach of the duty of disclosure (see below) would be an important, though not determinative, factor in assessing whether the arbitrator has breached the duty of impartiality.

As to whether an arbitrator is obliged to disclose a particular matter to the parties, the court held that:

- unless otherwise agreed, arbitrators are bound by a legal duty to disclose any facts or circumstances that would or might lead the "fair-minded and informed observer" to conclude that there was a real possibility that the arbitrator was biased;
- whether an arbitrator has breached the duty to disclose is to be assessed by reference to the facts and circumstances as at and from the date when the duty arose (i.e., when the arbitrator first learned of circumstances which might lead to a conclusion of apparent bias); and
- accepting appointments in multiple arbitrations regarding the same or overlapping subject matter with only one common party might give rise to a real possibility of bias. However, whether that was so, and whether such appointments were therefore disclosable, would depend on the facts, the custom and practice of the relevant field, and the rules of any designated arbitral institution.

The arbitrator had been under a legal obligation to disclose his appointment in the other arbitration, and his failure to do so constituted a breach of his duty to disclose.

Nonetheless, having regard to all the circumstances of the case, the court concluded that the fair-minded and informed observer at the date of the challenge hearing would not infer a real possibility of bias, particularly because:

- there had been uncertainty as to the arbitrator's duty to disclose at the time;
- the arbitrator had submitted that the other arbitrations were expected to be disposed of by way

[92] [2021] EWHC 344 (Comm)

[93] [2020] UKSC 48

of preliminary issue, avoiding any overlap, and offered to resign if this turned out not to be the case; and

- the arbitrator had not received any "secret financial benefit".

Res Judicata / Abuse of Process

In ***Allsop v Banner Jones Ltd***,[94] the Court of Appeal overturned a decision to strike out a professional negligence claim arising from a lawyer's handling of matrimonial proceedings as an abuse of process under CPR 3.4(2)(b). In doing so, the court clarified the applicable test for such applications and emphasised the distinction between *res judicata* and abuse of process.

The Court of Appeal found that the judge had been wrong to apply principles relevant to *res judicata* estoppel. Such estoppel arose only where the parties to the two sets of proceedings were the same, which they were not in this case. In such circumstances, the allegations of abuse of process were best characterised as a collateral attack on the prior matrimonial proceedings.

The distinction was important because where *res judicata* estoppel arises a party will only be able to proceed if it can show that it falls within an established exception (i.e., where new evidence fundamentally changes the complexion of the case).

By contrast, the court will only exercise its jurisdiction to strike out a claim for abuse of process in exceptional circumstances, and in the case of a collateral attack on issues decided in prior proceedings, where (a) it would be manifestly unfair to a party to the later proceedings that the same issues are re-litigated, or (b) permitting such re-litigation would bring the administration of justice into disrepute.

Whether this power should be exercised must be considered on the specific facts of each case but, in general, sets a much higher bar for the party claiming abuse of process than would be applicable in establishing *res judicata*.

The court held that, had the claimant sought to relitigate the same issues on the same evidence, this may have been abusive. In this case, however, the point was that certain material was not placed before the trial judge, and that had it been, the outcome would or might have been different. There was nothing abusive in this.

In ***Ward v Savill***,[95] the Court of Appeal considered whether certain declarations regarding proprietary rights took effect as judgments *in rem* (i.e., binding the whole world) and confirmed the scope of the rule in *Hollington v Hewthorn*[96] (broadly, A's judgment against B "ought not to be evidence against C").

The Court of Appeal held that, ordinarily, judgments would not take effect *in rem*, as third parties should not generally be bound by judgments without an opportunity to be heard. That a judgment addressed particular proprietary rights or beneficial interests was not itself sufficient for the judgment to take effect *in rem*.

As regards the rule in *Hollington v Hewthorn*, the court held that the rule extended beyond findings of fact to the legal consequences of those facts as well. It was generally inconsistent with the principles of natural justice for such consequences to be binding on third parties.

The Court of Appeal in ***Zavarco plc v Nasir***[97] also gave consideration to the application of the doctrine of merger in cases where a claimant seeks only declaratory relief.

The doctrine of merger provides that where a judgment has been given in respect of a cause of action, the parties cannot rely on the same cause of action to bring a new claim for additional relief.

In what appears to be the first authority on this point in both England and the Commonwealth more broadly, the Court of Appeal held that the doctrine had no application at all to declarations.

Where a party had previously brought a claim for declaratory relief, there was no basis in merger to prevent that party from subsequently seeking to enforce its claim in damages arising from the same cause of action.

The court emphasised, however, that this did not preclude, in appropriate circumstances, the application of other principles designed to prevent abusive claims for declaratory relief.

In a rare full panel oral hearing for permission to appeal, the Court of Appeal in ***Município de Mariana v BHP***

[94] [2021] EWCA Civ 7

[95] [2021] EWCA Civ 1378

[96] [1943] KB 587

[97] [2021] EWCA Civ 1217

Group plc[98] overturned its own decision (by a single Lord Justice of Appeal) to deny the claimants permission to appeal on the papers. The full panel gave the claimants permission to appeal in connection with compensation claims made against the English and Australian holding companies of BHP in relation to the 2015 Fundão dam disaster in Brazil. The claim had been struck out as an abuse of process in the courts below. In doing so, the Court of Appeal noted the *"*exceptional complexity and importance*"* of this case and re-emphasised the narrow scope of its power (and the high hurdle that needs to be overcome) to reopen what would have otherwise been a final permission to appeal decision.

The claim is brought by over 200,000 people following the collapse of the Fundão dam in Brazil which devastated more than 400 miles of the Rio Doce. The High Court struck out the claim as an abuse of process, primarily on the basis that it was "irredeemably unmanageable." In the alternative, the judge would have stayed the claim on jurisdictional grounds.

In the usual way, a single Lord Justice considered permission to appeal on the papers and refused permission. However, the claimants made an application to reconsider that decision.

The Court of Appeal agreed with the claimants that the appellate judge had failed to address essential aspects of its application for permission to appeal against the first instance decision on abuse of process. The court was persuaded that the error was so serious that the integrity of the permission to appeal process had been undermined. The court also accepted that, had the appellate judge properly grappled with the claimants' grounds of appeal, there was a powerful probability that the outcome would have been different. The appeal is scheduled to be heard in April 2022.

Setting Aside a Judgment for Fraud

The Hight Court in ***Takhar v Gracefield Developments Ltd***[99] confirmed and applied the test for setting aside a judgment obtained by fraud.

The claimant had sought to set aside transfers of certain properties to the first defendant on a number of grounds, but the claim was dismissed after the defendants produced a profit-sharing agreement providing for the transfers and purportedly bearing the claimant's signature. Expert evidence adduced after judgment concluded that the signature was forged, and the claimant sought to have the original judgment set aside on the grounds that it had been procured by fraud.

The Supreme Court, in an earlier decision in these proceedings, had approved the relevant principles for setting aside a judgment for fraud, as stated in *Royal Bank of Scotland plc v Highland Financial Partners lp:*[100]

1. there is a "conscious and deliberate dishonesty," which is relevant to the judgment sought to be impugned; and

2. the relevant dishonesty is "material," i.e., an operative cause of the court's decision to give judgment in the way it did.

The question of materiality must be assessed by reference to its impact on the evidence supporting the original decision, not what the decision might be if the claim were retried on the basis of honest evidence.

On the facts, the requirement of materiality was satisfied—the forged document formed a key part of the contemporaneous evidence relied on by the trial judge.

The High Court dismissed as irrelevant the defendant's argument that the position would be the same at a second trial.

Costs

In ***Criterion Buildings Ltd v McKinsey & Company Inc (United Kingdom)***,[101] the court considered the meaning of a covenant to pay costs "properly incurred" in a lease.

The defendant tenant sought to rely on *Primeridge Ltd v Jean Muir Ltd*[102] which considered a covenant to pay "proper costs" and held that the word "proper" amounted to an entitlement to costs on the standard basis. The defendant suggested that "properly incurred" had effectively the same meaning.

Rejecting this argument, the court distinguished costs "properly incurred" from "proper costs" on the basis that while a cost may be "proper," in the sense that it would be appropriate in some circumstances to incur it, it could

[98] [2021] EWCA Civ 1156

[99] [2020] EWHC 2791 (Ch)

[100] [2013] 1 CLC 596, para 106

[101] [2021] EWHC 314 (Ch)

[102] [1992] EGLR 273

still be incurred improperly, if in the circumstances it was not reasonable to incur it.

In any event, the court suggested that *Primeridge Ltd* was wrongly decided and that the inclusion of the word "proper" was of no effect.

The judgment is pending appeal.

In ***Rowe v Ingenious Media Holdings plc***,[103] the court considered the circumstances in which a defendant seeking security for costs may be required to provide a cross-undertaking in damages as a condition of ordering security.

At first instance, the High Court had granted security for costs conditional on the provision of limited cross-undertakings to cover the "external" costs of providing security such as the cost of securing a bank guarantee.

On appeal, the Court of Appeal determined that no cross-undertaking should have been required. The requirement of a cross-undertaking in damages as a condition of ordering security for costs should be confined to "rare and exceptional" cases.

The court held that this was especially the case where, as here, the claimants are supported by litigation funding. In particular, commercial funders are not motivated by access to justice considerations, are expected to factor such costs into their business model and should be properly capitalised in order to cover the risk of an adverse costs order.

Litigation Funding Agreements

In a string of recent cases, the courts have also provided some helpful clarification on the fast-growing area of litigation funding.

In ***Paccar Inc v Road Haulage Association Ltd***,[104] the Court of Appeal found that a Litigation Funding Agreement (under which remuneration was fixed by reference to a share of any damages recovered) was not a damages-based agreement ("DBA") under the Legal Services Act 1990. The court held that a pure litigation funding agreement (i.e., one with a funder who has no role in managing the claims) did not fall within the definition of a DBA.

Where a litigation funder does take a role in managing the proceedings, however, they may face the risk of adverse costs orders. In ***Laser Trust v CFL Finance Ltd***,[105] the court confirmed that, while a pure funder will not generally be ordered to pay costs, such discretion "can, and will, be exercised against those persons who go beyond the mere funding of litigation."

In this case, where the funding agreement gave the funder an extensive degree of control over the proceedings (and the funder had failed to show that they had not in fact exercised such control) it was appropriate to make such an order. The level of control granted by the agreement was so great, in fact, that the Court disapplied the *Arkin* cap, which ordinarily limits the costs liability of a funder to the extent of the funding provided.

Discretion to Hand Down Judgment

In ***Beriwala v Woodstone Properties (Birmingham) Ltd***,[106] the High Court considered a request by the parties not to hand down judgment already received by the parties in draft, on the basis that they had agreed a settlement which was conditional on judgment not being handed down.

The court noted that even where the draft judgment had been provided to the parties, it retained discretion as to whether to hand down judgment, and had to weigh up both the private interests of the parties and any public interest in handing down the judgment.

Relevant public interest reasons include whether the judgment (1) raises a point of law of general interest, (2) involves some wrongdoing which should be made public, (3) concerns regulated entities, or (4) will serve to vindicate witnesses whose credibility has been called into question.

In the absence of contrary public interest in this case, the court held that it was appropriate not to hand down judgment.

Limitation

The Court of Appeal in ***OT Computers Limited v Infineon Technologies AG***[107] dismissed an appeal against the finding that a claim, arising from the DRAM cartel, was not time-barred under the Limitation Act 1980 (LA 1980).

The follow-on damages claim was brought by OT Computers and others just under six years after the

[103] [2021] EWCA Civ 29

[104] [2021] EWCA Civ 299

[105] [2021] EWHC 1404 (Ch)

[106] [2021] EWHC 609 (Ch)

[107] [2021] EWCA Civ 501

European Commission's 2010 decision to fine Infineon and other suppliers of computer memory (DRAM) for participating in cartel activity.

By way of a preliminary issue, the defendants argued that the claims were time-barred, on the grounds that enough information had been publicly available prior to the publication of the Commission's decision that time had begun to run for limitation purposes more than six years prior to the claimant's issuance of their claim (which was therefore time-barred).

The claimants argued that, under s32(1)(b) of the LA 1980, time did not begin to run until after the Commission's decision, and the claim was not therefore time-barred.

Under s32(1)(b) LA 1980, where any fact relevant to the claimant's right of action has been deliberately concealed, the period of limitation does not begin to run until the claimant has discovered the concealment, or could, with reasonable diligence, have discovered it. Under Section 32(2) LA 1980, deliberate commission of a "breach of duty" which is unlikely to be discovered for some time amounts to deliberate concealment under Section 32(1)(b).

At first instance, two of the claimants' claims had been found to be time-barred. However, OT Computers had been put into administration before any information about the cartel had become public, and the court held that a reasonably diligent administrator would not have become aware of the alleged wrongdoing prior to the Commission's decision.

The Court of Appeal, dismissing the defendant's appeal, held that the judge had been right to consider what the reasonably diligent administrator would have been able to discover, as opposed to treating all claimants in the same way. The court held that the objective nature of the test under s32(1)(b) did not prevent the status and characteristics of the claimants being taken into account when assessing what a reasonably diligent party in the claimant's position would have been able to discover.

In ***Canada Square Operations Ltd v Potter***[108]—a case we covered in last year's review at first instance—the Court of Appeal clarified a number of additional points relating to the interpretation of s32 of the LA 1980 in the context of deliberate concealment.

Finding that s32(1)(b) was engaged and the claim was not time-barred, the court confirmed that:

- s32(2) was to be given a broad meaning, covering legal wrongdoing of any kind. Where the failure to disclose had created an unfair relationship for the purposes of the Consumer Credit Act 1974, s32(2) was engaged notwithstanding that no breach of a specific rule or legal duty had occurred;

- s32(1)(b) was not limited to those cases where the breach had been "actively concealed"—withholding relevant information could be sufficient;

- s32(1)(b) did not require a freestanding legal duty to disclose—an obligation to disclose could arise from a combination of utility and morality;

- it was irrelevant for the purposes of s32(1)(b) whether the act of concealment and cause of action were separate or one and the same; and

- the requisite standard for determining if concealment had been deliberate was whether the defendant had known that the concealed conduct gave rise to a cause of action or had been reckless as to whether the concealed act constituted an actionable wrong.

The High Court in ***Bhattacharya v Oaksix Holdings Ltd***[109] has allowed an appeal against an earlier decision of a deputy master, regarding interpretation of the LA 1980 in the context of certain claims under the Financial Services and Markets Act 2000 (FSMA).

The deputy master had previously granted an application for summary judgment by the defendant on the basis that time began to run when payment under the relevant agreements had been made (being more than the limitation period before the claim was issued). The claim itself engaged a number of provisions of FSMA, including s26 (concerning agreements by unauthorised persons) and s28 (concerning agreements made unenforceable by s26).

Allowing an appeal against the summary judgment decision, the High Court clarified the limitation periods applicable in such cases:

- claims for declarations as to the enforceability of the agreements in this case under s26 FSMA fell under s8 LA 1980, concerning actions for a specialty—i.e., 12 years; and

- claims seeking repayment in respect of an agreement that is unenforceable under s28 FSMA

[108] [2021] EWCA Civ 339

[109] [2021] EWHC 1326 (Ch)

fell under s9 FSMA, concerning actions for sums recoverable by statute—i.e., six years.

An appeal in this case is due to be heard before November 2022.

In ***Dixon Coles & Gill v Baines***,[110] the Court of Appeal considered the status of co-trustees for the purpose of Section 21 LA 1980, which provides that no limitation period applies to actions by beneficiaries in respect of fraud or fraudulent breach of trust by a trustee.

After one of the partners in the defendants' law firm was found guilty of misappropriating funds from the firm's client account, the claimants sought to bring a claim against the remaining partners to account for the monies lost. As each of the partners was a trustee of the monies held in the client account, the claimant argued each was liable for the misappropriated funds.

Because the monies were transferred over a period of many years, the defendants argued that the claims in respect of transfers made more than six years before the claim was issued should be time barred. The claimants argued that the exception in s21 LA 1980 applied, so that the defendants could not rely on a limitation defence.

The Court of Appeal, allowing the defendants' appeal, held that a co-trustee was not to be treated as party or privy to the fraud of another trustee unless it could be shown that the co-trustee was implicated in the fraud, for example by participating in, having knowledge of and/or assenting to or ratifying the misappropriation of funds. On that basis, as it was accepted by both parties that the two remaining partners were innocent, the exception under s21 did not apply and claims arising more than six years prior to the claim being issued were time-barred.

In ***Claimants in the Royal Mail Group Litigation v Royal Mail Group Ltd***,[111] the Court of Appeal considered the application of Section 36(1) LA 1980 in the context of injunction claims.

Section 36(1) provides for certain limitation periods to be disapplied in claims for specific performance, injunctions or other equitable relief, unless the court would have applied such limits by analogy before the Limitation Act 1939 came into force.

The claimants had brought a claim in response to the defendant's failure to issue compliant VAT invoices, in alleged breach of its statutory duties. The claimants sought damages and an injunction requiring the defendant to issue new compliant invoices.

While the damages claim was subject to a six-year limitation period pursuant to s2 LA 1980, the claimants argued that their additional claim amounted to an injunction claim and that this was not time barred under s36(1).

In reaching its conclusion, although the court noted that appeared to be conflicting authority to the matter, the court held that it was bound by the most recent of these decisions—*The UB Tiger*[112]—which held that no limitation period could apply to a claim for specific performance, because the remedy is so different from that which can be granted under common law. There was no basis on which the court, despite expressing reservations as to its reasoning, could either distinguish or disapply the precedent.

The Court of Appeal therefore held that no limitation period applied to a claim for specific performance, even where that remedy was sought to enforce a right which arises at law and not in equity. Therefore, while the claimant's claim in damages was time-barred, the claim for an injunction was not subject to any limitation period. However, given the court's comments as to the correctness of UB Tiger, we may see the Supreme Court revisiting this issue in the future.

[110] [2021] EWCA Civ 1097

[111] [2021] EWCA Civ 1173

[112] [2006] EWCA Civ 1717

Privilege

Litigation Privilege

The Court of Appeal in ***Victorygame Ltd v Ahuja Investments Ltd***[113] recently confirmed that litigation privilege can apply to correspondence with a third party, even where the third party was misled as to its purpose. In doing so it has continued to take an expansive approach to the circumstances in which litigation privilege will apply.

The claimant had brought a claim in respect of misrepresentations allegedly made by the defendant (the "Misrepresentation Proceedings"). When the claimant had difficulty obtaining relevant documents from their then solicitors ("J") for the purpose of the Misrepresentation Proceedings, they sought an order for third-party disclosure from J.

Before applying for the order, the claimant sent J a letter before claim threatening separate professional negligence proceedings against J. The defendant sought disclosure of the letter in the Misrepresentation Proceedings, which the claimant claimed was protected by litigation privilege. Litigation privilege arises where materials passing between a client, a lawyer and/or a third party are produced for the dominant purpose of conducting litigation which is ongoing or reasonably contemplated.

The defendant argued that the letter had "crossed the line" between the claimant and J and was therefore not protected by litigation privilege.

The claimant argued that it had not actually issued the threatened negligence proceedings, had given no instructions to do so and had no intention of pursuing them—the letter before claim was simply intended to put pressure on J to comply with the disclosure request. The claimant therefore argued that the relevant proceedings in respect of which litigation privilege attached were the Misrepresentation Proceedings and that the letter was protected by privilege.

The Court of Appeal held that the dominant purpose of the communication must be identified objectively by reference only to the purpose of the instigator of the communication (in this case, the claimant), and not also (or instead) that of the recipient.

As the claimant had intended to send the letter before action for the purpose of obtaining information in connection with the Misrepresentation Proceedings, the dominant purpose test was satisfied.

While in certain authorities concerning similar facts the third party's understanding of the supposed privilege communication had been taken into account, in those cases the claimant had actively deceived the third parties, leading them to believe that meetings were being held for reasons other than to collect information from them. The present case could be distinguished on the basis that J was aware in the present case that the claimant was seeking the relevant information (even though J believed the information was sought for the purpose of the claimant's threatened negligence proceedings, rather than the Misrepresentation Proceedings).

The court concluded that, consistent with other authorities, there was no principle preventing a claim to litigation privilege in circumstances where the party claiming privilege acquires information it would not otherwise have obtained by concealing the purpose of the request.

As such, it seems that even where a party has been deceived as to the purpose for which information has been sought, litigation privilege may nonetheless arise. Where the third party has been deceived as to the very fact that information is sought at all, however, litigation privilege may not arise. The line between the two may not always be easy to discern.

Collateral Waiver

In ***PJSC Tatneft v Bogolyubov***,[114] the High Court considered the existence and scope of waivers of legal advice privilege in various communications.

Reliance on privileged materials (or parts thereof) by parties to litigation in the course of proceedings may give rise to a collateral waiver of any privilege in the entirety of those materials and other related documents.

[113] [2021] EWCA Civ 993

[114] [2020] EWHC 3225 (Comm)

The court reiterated the approach from *PCP Capital Partners LLP v Barclays Bank Plc*,[115] namely that the reference to the legal advice must be sufficient (e.g., sufficiently specific and more than a mere reference to the fact or subject matter of the advice), and the party waiving must be relying on that reference to support or advance its case on an issue the court has to decide. Whether there has been reliance is to be assessed on the facts with a focus on whether fairness requires full disclosure.

Notably, the Court in this case held that collateral waiver would not arise where a party merely references privileged materials in order to refute assertions made by another party as to their contents. In such circumstances, the disclosure is not voluntary, and no positive case is put forward.

However, caution should still be exercised—the line between responding to another party's assertion and making a positive case may not always be clear in practice.

In ***Scipharm Sarl v Moorfields Eye Hospital NHS Foundation Trust***,[116] the High Court held that the claimant's allusion to attendance notes with a potential witness was sufficient to waive privilege and bring the materials within the scope of CPR 31.14 (which entitles parties to inspect documents mentioned in, among other things, a witness statement).

The claimant's witness statement stated that the potential witness had confirmed certain matters to the claimant's solicitors, and the court drew an inference that such information had been derived from an attendance note, rather than mere memory, given the period of time that had subsequently passed.

The court held, first, that allusion to a document in this way constituted a "mention" for the purposes of CPR 31.14, and the defendant was therefore entitled to inspect the attendance note, subject to privilege.

Because the contents of the documents alluded to had been expressly relied upon by the claimants in the witness statement, rather than their existence being merely referred to in passing, any privilege in the attendance notes had been waived.

The court therefore exercised its discretion in ordering that the attendance notes be disclosed to the defendant.

Without Prejudice Privilege

The Court of Appeal in ***Motorola Solutions Inc v Hytera Communications Corp Ltd***[117] clarified that the test for the unambiguous impropriety exception to without prejudice (WP) privilege is simply whether the evidence establishes that the privilege is being used to shield unambiguous impropriety.

The unambiguous impropriety rule is one of a limited number of exceptions to the application of WP privilege (another of which is considered in *Berkeley Square Holdings* below).

The court rejected the formulation adopted at first instance which required only a "good arguable case" of unambiguous impropriety to render otherwise privileged statements admissible. Such a test was held to undermine the WP rule and policy of promoting settlement.

In ***Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd***,[118] the Court of Appeal considered the scope and application of the "fraud" exception to WP privilege, by which the privilege cannot be relied upon in respect of evidence of misrepresentation, fraud or undue influence.

The claimants sought to set aside a settlement on the grounds that their agent lacked authority to commit the claimant to the relevant agreement. The claimant argued that the defendants knew, or ought to have known, that the agent was acting in breach of their fiduciary duties in making certain fraudulent payments to the defendant, as a result of which the agent lacked actual or ostensible authority to commit the claimant to the settlement agreement to which the payments related.

A key question which arose was whether the claimant was aware of the fraudulent transactions prior to the settlement agreement being signed. The defendant claimed, by reference to mediation position papers it had prepared prior to the settlement, that the claimant had known about and affirmed the alleged fraudulent transactions before entering the agreement. The claimant sought to have these allegations struck out on

[115] [2020] EWHC 1393 (Comm)

[116] [2021] EWHC 2079 (Comm)

[117] [2021] EWCA Civ 11

[118] [2021] EWCA Civ 551

the basis that the mediation papers were subject to WP privilege.

Considering the list of established exceptions to WP privilege set out in *Unilever Plc v Procter & Gamble Co*,[119] the Court of Appeal held that evidence of the mediation papers was admissible.

The second of the established exceptions generally permits the admission of evidence of WP negotiations to show that an agreement between the parties should be set aside on the ground of misrepresentation, fraud or undue influence.

While this exception is typically relied upon by a party seeking to set aside an agreement, the court held that it could, in appropriate circumstances, also be relied upon by a party seeking to uphold an agreement.

Further, the references to misrepresentation, fraud and undue influence in previous authority were not intended to be exhaustive and could also apply where a party asserted that an agreement was entered without the necessary consent of the parties to it.

As such, where the claimant was asserting that its agent lacked authority to enter into an agreement, it could not rely on WP privilege to prevent the admission of evidence to the contrary.

Joint Privilege

The Court of Appeal in ***Travelers Insurance Company Ltd v Armstrong***[120] has reaffirmed the principles governing joint retainer privilege.

The claimants, represented by Hugh James, a firm of solicitors (H), brought claims against the defendant under a Group Litigation Order (GLO). Around a third of these claims were covered by the defendant's insurance. The defendant and its insurer jointly instructed their own solicitors in respect of both the insured and uninsured claims brought by the Claimants.

When the defendant subsequently went into administration, the claimants were left with significant costs in respect of the GLO. The defendant still had a number of professional negligence claims against their solicitors and counsel, which their administrators assigned to a legal services company owned by H. The administrators then sought to disclose the joint retainer files to the assignee, which was opposed by the insurer on the basis of joint retainer privilege.

Joint retainer privilege entitles parties who jointly instruct the same lawyer to prevent disclosure to a third party but cannot prevent disclosure to each other.

The question for the court was whether, when a claim protected by such privilege is assigned, the assignee has a right to disclosure of the privileged files, or whether the other party has the right to claim privilege against the assignee and prevent such disclosure.

The court held that the assignee was entitled to disclosure. As successor in title, the assignee was entitled to the same rights as the assignor in connection with those claims, which included an "unequivocal right" to see the privileged documents.

The insurer could not assert privilege against the assignee, who could not be treated as a third party for the purpose of such privilege. The potential conflict of interest that arose as a result of the assignee's relationship with H could not override the assignee's right to disclosure of the documents and could be dealt with through appropriate confidentiality safeguards. The court noted that practical or logistical difficulties were not a reason for disapplying a principle of law.

[119] [2000] 1 WLR 2436

[120] [2021] EWCA Civ 978

Looking Ahead

In this section we look ahead to important cases that are expected to go to trial next year and other developments that will have an impact on UK litigation in the months ahead.

Cases to Watch

- A Group Litigation Order was previously applied for against EasyJet in respect of the serious data breach it suffered in January 2020. It will be interesting to see how this litigation develops in contrast with the unsuccessful *Lloyd v Google* litigation.

- The High Court is also due to hear a claim brought against Andrew Thornhill QC concerning allegedly negligent advice in respect of certain tax liabilities. A key question will be the extent to which a barrister owes a duty to third parties who learn of and rely upon their advice. The decision may have wider implications for the potential liability of professional advisors.

- The appeal against the striking out of the *Município de Mariana v BHP Group plc* case (see page 47 above), which is scheduled to be heard in April 2022. The case itself may be the most important mass tort claim brought in the English Courts since the decision of the Supreme Court in *Vedanta v Lungowe*[121] (indeed, it is one of the largest claims of its type ever brought, being issued on behalf of over 200,000 individuals and numerous additional entities and communities).

- Next year, the Court of Appeal will also hear a number of challenges against decisions discussed earlier in this publication, including:

  - *Dwyer v Fredbar* (2022) – The decision appears to be the first time a court has found a breach of the Braganza Duty to be repudiatory, and if the decision is upheld on appeal, it may further highlight the potential risks facing parties in the exercise of contractual discretions.

  - *Brake v Guy* (February 2022) – The case established that a public interest defence was available in respect of claims for breach of confidence and/or privacy, even where the relevant information had been obtained unlawfully. How the Court of Appeal approaches this issue may therefore have wide-ranging implications.

  - *Philipp v Barclays Bank* (February 2022) – The High Court confirmed that the *Quincecare* duty does not require banks to second guess the direct instructions of individual clients. Should the Court of Appeal overturn that decision, it could lead to a significant expansion of a banks' duties to protect their customers from potential fraud.

COVID

The restrictions on statutory demands and winding up petitions which were introduced to protect businesses from the immediate financial impact of the pandemic expired on 30 September 2021. These restrictions made it much more difficult for creditors to wind up debtors, as they needed to show that the pandemic had no financial effect on the debtor or that the debtor would have been unable to pay its debts even if the pandemic had not occurred.

The restrictions were replaced on 1 October 2021 by new restrictions which make it significantly easier for creditors to issue a winding up petition.[122] As such, creditors may once again rely on an unpaid statutory demand to show that a debtor is unable to pay its debts, and may now present a winding up petition provided certain conditions are met.

Meanwhile, the suspension of landlords' rights to forfeit commercial leases for non-payment of rent was extended until 25 March 2022.[123] After this date, arrears which have accrued during the period subject to the suspension will be ringfenced, and landlords and tenants will be required to seek agreement on how the arrears should be shared and/or a schedule for repayment.

[121] [2019] UKSC 20

[122] The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) Regulations 2021– https://www.legislation.gov.uk/uksi/2021/1029/made/da ta.pdf

[123] Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No 2) Regulations 2021 (*SI 2021/732*)

Where no agreement can be reached, the government has indicated that a binding arbitration process will be introduced to settle such disputes.[124] The government has made clear that businesses able to pay their arrears must still do so.

As these COVID measures continue to be phased out, it is reasonable to expect a marked uptick in the number of restructuring and insolvency-related cases. *For further expert commentary on these issues, see posts from our Financial Restructuring & Insolvency team here.*

Court Hearings

Covid may yet leave what many may consider to be a positive legacy for English litigation. The Business and Property Courts recently released new guidance that confirms various Covid measures will remain in place until further notice.[125] These include:

- the use of video hearings by default for any matters requiring a hearing of less than half a day;
- continuing to encourage the use of fully remote and "hybrid" hearings where in the interests of justice. Parties will now be asked by the listing office to express a preference as to hearing format supported by reasons, with the format ultimately a matter of judicial discretion; and
- the default format for bundles will continue to be electronic for the foreseeable future. Hard copy bundles should not be lodged unless requested by the judge hearing the case.

BREXIT

One of the enduring questions for many legal practitioners following the end of the transition period on 31 December 2020 has been what, if anything, is likely to replace the Brussels/Lugano jurisdictional and enforcement framework. While not without its downsides, the predictability and workability of the former regime may well be missed by users of the English courts in time (if not already).

If the UK were to re-join the Lugano Convention, that would provide, once qgain, a very useful, single framework for addressing issues of jurisdiction and enforcement as between the courts of the UK, EU, Switzerland, Norway and Iceland.

However, at the time of writing and as mentioned in the Year In Review section above, the UK's accession to the convention looks to be in serious doubt. The necessary formal consent from all EU States has not been forthcoming and earlier in the year, the European Commission recommended that EU states reject the UK's application.

Should the UK not accede to Lugano, when it comes to jurisdiction and enforcement, users of the English courts will be left with the much more limited 2005 Hague Convention on Choice of Court Agreements and the common law, and perhaps also with a hope that a framework to replace Brussels/Lugano can be agreed as part of the ongoing negotiations between the UK and EU on their future relationship.

We, along with no doubt many others, will be monitoring closely the UK's progress on this issue and what it means for international litigation in England post-Brexit.

Law Reform

In October 2020, the Civil Justice Council (CJC) launched a review of the Pre-Action Protocols (PAPs).[126] The purpose of the review is to assess how effectively the PAPs are working in practice and consider what reforms may be needed. In response to an initial public consultation in December 2020, the CJC recently published an interim report, showing support amongst respondents for reform, particularly for the introduction of more consistent or even automatic sanctions for non-compliance.[127]

A further consultation, launched alongside the interim report, has sought further input on a range of possible reforms. While the CJC is not formally recommending any reforms at this stage, it is noteworthy that the possible reforms include:

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[124] https://www.gov.uk/government/publications/resolving-commercial-rent-arrears-accumulated-due-to-covid-19/supporting-businesses-with-commercial-rent-debts-policy-statement#binding-arbitration

[125] https://www.judiciary.uk/announcements/remote-hearings-guidance-to-help-the-business-and-property-courts/

[126] https://www.judiciary.uk/announcements/civil-justice-council-launches-review-of-pre-action-protocols/

[127] https://www.judiciary.uk/announcements/civil-justice-council-launches-consultation-on-pre-action-protocols/

- making the PAPs mandatory, outside of urgent matters which require immediate court intervention;
- a possible good-faith obligation on all parties to try to resolve or narrow the dispute at the PAP stage;
- summary costs procedure for disputes settled at the PAP stage;
- expanded enforcement powers to encourage compliance; and
- more prescriptive time frames and disclosure standards for the default PAP (which are applicable where no other PAP applies).

We expect the results to be released between now and next year, at which point we expect the CJC to publish more concrete proposals for reform.

Separately, the CJC also published its report in July 2021 on the legality and desirability of mandatory ADR in civil proceedings.[128] The CJC concluded that, provided it is not "disproportionately onerous" or does not "foreclose the parties' effective access to the court," such measures were compatible with the right to a fair trial under Article 6 of the European Convention Human Rights.

The CJC further concluded that the introduction of compulsory ADR could be an "extremely positive development." Responding to the report's findings, the Master of the Rolls, Sir Geoffrey Vos, suggested that the report had "opened the door to a significant shift towards earlier resolution" of disputes.

Both developments are indicative of a growing emphasis on the earlier and more cost-effective resolution of disputes, perhaps driven in part by the Court's growing caseload following the pandemic. We will be watching with interest in the coming year to see what, if any, proposals for legislative reform might arise in response to the CJC's consultations and whether we are heading towards a cultural shift in the use of ADR and pre-action processes in connection with English litigation.

[128] https://www.judiciary.uk/announcements/mandatory-alternative-dispute-resolution-is-lawful-and-should-be-encouraged/


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