THE CITY LITIGATOR'S YEARBOOK 2021 – WHAT YOU NEED TO KNOW

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Legal Briefings

Our much-vaunted disputes team look back on an eventful year for the commercial courts in England and Wales as we analyse key rulings on Covid-19, class actions, contracts and privilege.

Another year is drawing to a close, with life feeling much more normal than a year ago but with continued uncertainties as to what the Covid-19 pandemic might throw at us next. The Business and Property Courts have proved to be remarkably resilient in the face of the pandemic, with business continuing pretty much as usual - albeit remotely - throughout lockdown. There has since been a return to in-person hearings, but with continued use of remote or hybrid hearings in appropriate cases.

In this post, we look back at what 2021 has had in store from the perspective of the commercial litigator, and outline key developments relating to the topics listed below:

- Privilege
- Without prejudice
- Alternative Dispute Resolution (ADR)
- Costs and funding
- Other

If reading the full version of this post, you can click on the links above to jump straight to the topics of interest.

CLASS ACTIONS

This has been a big year for developments relating to class actions in many areas, with particularly significant decisions relating to insurance, transnational torts, competition and data class actions:

- In January, the Supreme Court handed down judgment in the Covid-19 Business Interruption insurance test case, determining issues of principle on policy coverage and causation under sample insurance wordings in the context of the significant business interruption losses suffered by businesses as a result of the Covid-19 pandemic. This was the first time the Financial Markets Test Case scheme was used, and the case was brought from issue of proceedings to Supreme Court judgment in less than seven months (see Supreme Court hands down judgment in FCA's Covid-19 Business Interruption Test Case).
- In February, the Supreme Court unanimously allowed the claimants' appeal in a high profile jurisdictional challenge relating to group claims brought against Royal Dutch Shell Plc and its Nigerian subsidiary in connection with alleged pollution in the Niger Delta. The decision is significant for UK domiciled holding companies, particularly those with businesses entailing environmental risks. The decision emphasises that, at the jurisdictional stage, the judge should not be drawn into a mini-trial to evaluate the factual evidence adduced - which presents obvious challenges for defendants seeking to contest jurisdiction on the basis that the parent company did not owe an arguable duty of care for the alleged acts and omissions of its subsidiaries abroad (see Okpabi v Shell: Supreme Court allows appeal in jurisdictional challenge relating to parent company duty of care).
- The Supreme Court's decision in the *Merricks* case - regarding the certification of an opt-out competition collective action seeking £14 billion in damages against Mastercard - was handed down just before the end of 2020, confirming a relatively liberal approach to the grant of certification for collective actions in the Competition Appeal Tribunal (CAT).

That paved the way for the CAT's decision in August this year to grant the application for a collective proceedings order (CPO) in that case - the first under the competition class action regime introduced in 2015 (see First competition CPO granted by the CAT in Merricks). Various other CPO applications were awaiting the Supreme Court decision in Mastercard and have now been able to progress, so further decisions are expected in the coming months.

- In November, the Supreme Court overturned the Court of Appeal's controversial decision in the *Lloyd v Google* case, which would have opened the floodgates for class actions for compensation for loss of control of personal data to be brought on behalf of very large numbers of individuals without identifying class members. The decision does not however close the door completely, as the Supreme Court recognised that data breach and other claims could potentially be brought using a "bifurcated process" in which the representative action procedure is used to determine common issues (such as whether there has been an actionable breach), leaving any individual issues to be dealt with subsequently (see Supreme Court finds claim for compensation under data protection legislation cannot proceed on "opt-out basis" in high profile Lloyd v Google case). The question for claimants, and their funders, will be whether it is economically viable for claims to be brought on that basis.

CONTRACT

The Covid-19 pandemic led to an increased focus on the question of when parties are able to avoid or delay performance when events take an unexpected turn. The focus has typically been on contractual force majeure clauses or, where there is no such clause, the common law doctrine of frustration, but arguments have also been made based on implied terms and failure of consideration. In the past year we have seen several decisions in which the English courts have considered these issues in the context of the pandemic:

- In April, the High Court rejected an argument that commercial leases were "temporarily frustrated" during periods when the tenants were prevented from opening for business as a result of the pandemic and related restrictions. The decision confirms that there is no such thing as temporary frustration, and (more generally) illustrates how high the bar is set to establish frustration (see High Court considers doctrine of frustration in Covid context and confirms there is no such thing as "temporary frustration").

- In May, the High Court found that, when exercising its discretion as to whether to designate a force majeure event under a franchise agreement due to the pandemic, the franchisor was in breach of duty in failing to consider the franchisee's need to self-isolate (see High Court considers operation of force majeure clause where party had to self-isolate for 12 weeks due to Covid-19 pandemic).

- In September, the High Court granted a landlord summary judgment for rent arrears due since the outbreak of the pandemic, rejecting the tenant's argument that its payment

obligations were suspended during those periods based on implied terms or a total failure of consideration, or "failure of basis" (see High Court grants summary judgment in claim for rent accrued during periods of Covid closure, rejecting defences based on implied terms and “failure of basis”).

A Supreme Court decision in June clarified the proper approach to determining the scope of a professional adviser's duty of care, whether in contract or in tort. The case is now the leading authority on the application of the so-called SAAMCO principle. The decision moves away from the traditional classification of such cases into "information" and "advice" cases. Instead, the court’s focus should be on the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given (see Supreme Court clarifies proper approach to determining scope of duty of care owed by a professional adviser).

A Supreme Court decision in July restored the orthodox interpretation of liquidated damages clauses in the event that a contract is terminated before works are complete, overturning the Court of Appeal's decision in the case. The Supreme Court held that, in such circumstances, liquidated damages accrue until the contract is terminated, after which the employer may be entitled to general damages arising from termination (see Supreme Court restores orthodox approach to liquidated damages for delay where work never completed).

Contractual notice provisions have continued to give rise to issues. In May, for example, the Court of Appeal found that a buyer’s notice of claim complied with contractual requirements, setting aside summary judgment in favour of the sellers. The court held in particular that, in considering what was “reasonable detail” for the purposes of the notice provision, the court could take into account whether the recipient already had knowledge of the underlying events (see Court of Appeal finds recipient’s prior knowledge should be taken into account when determining whether a claims notice contained “reasonable detail”).

Questions of contractual penalties have also given rise to a number of interesting High Court decisions. In March, a clause aimed at protecting IP rights was upheld, as the court found that it was not out of proportion to the claimants' legitimate interests in protecting those rights (see High Court finds clause imposing harsh consequences for breach of term aimed at protecting IP rights was not an unenforceable penalty). In August, in contrast, a default interest provision in a loan agreement was found to be penal where it provided for 12% interest per month, compounded monthly (see High Court draws adverse inferences from failure to call relevant witness, and finds default interest clause to be an unenforceable penalty). Also in August, an acceleration clause, which required immediate payment of all outstanding amounts in the event of a late payment, was found to be capable of falling within the penalty doctrine (see High Court finds acceleration clause is susceptible to rule on penalties, but declines to apply the rule as the amounts in question were payable in any event under a separate clause).

JURISDICTION AND ENFORCEMENT

Although the UK left the EU in January 2020, the real impact of Brexit was not felt until after the transition period established by the Withdrawal Agreement came to an end on 31 December last year. The key practical implications of Brexit for disputes and dispute resolution clauses were outlined in this post in January: Brexit: key practical implications for disputes and dispute resolution clauses.

At the time of publishing that post, it was not clear whether the EU would consent to the UK's accession to the Lugano Convention, which would to a great extent have restored the pre-Brexit regime for jurisdiction and enforcement of judgments between the UK and the EU/EFTA states. Since then it has become clear that the European Commission is set against the UK's membership of Lugano, which means that the UK is unlikely to be able to accede, at least in the short term (see European Commission notice to Lugano Depositary states EU not in a position to consent to UK accession).

The Commission's position is that the Hague Conventions provide the appropriate framework for matters relating to civil judicial cooperation with countries outside the internal market, including the UK. It is therefore significant that the Commission has adopted a proposal for the EU to accede to the 2019 Hague Judgments Convention, an international treaty which allows enforcement of judgments in much broader circumstances than the 2005 Hague Convention on Choice of Court Agreements (see Proposal for EU to join 2019 Hague Judgments Convention). If the EU accedes to the Convention, and assuming the UK also signs up in due course, it could significantly streamline the enforcement of judgments between the UK and the EU in the medium term.

Now that the UK is no longer subject to EU rules on jurisdiction and enforcement of judgments, the common law rules in this area are of even broader application than pre-Brexit. This year has seen a significant development in the circumstances in which those rules allow the English courts to take jurisdiction over an action in tort relating to a wrongful act committed abroad. In October the Supreme Court confirmed, in the context of a personal injury claim, that proceedings can be served out of the jurisdiction where actionable damage has been suffered within the jurisdiction (subject to also establishing that there is a real issue to be tried and the English court is the appropriate forum) - ie there is no requirement that "direct" damage was suffered in England and Wales (see Supreme Court confirms wide interpretation of "damage" for the purposes of the common law jurisdictional gateway for tort claims and clarifies when English law may apply to foreign law claims).

Also of interest is a High Court decision in July which found that the "necessary or proper party" common law gateway for service out of the jurisdiction does not apply when the anchor defendant has voluntarily submitted to the court's jurisdiction (see High Court finds common law "necessary or proper party" gateway for service out of the jurisdiction does not apply when the anchor defendant has voluntarily submitted to the court's jurisdiction).

WITNESS EVIDENCE

The big news this year relating to witness evidence has been the introduction of a new Practice Direction (PD 57AC) governing the preparation of trial witness statements in the Business and Property Courts signed on or after 6 April (see Witness evidence reforms: final versions now published and will apply from 6 April). The key aims of the reforms are to refocus witness evidence on the areas where it is actually needed, rather than as a vehicle for setting out a party's case by reference to the documents, and to reduce the potential for a witness's recollections to be influenced by the process of taking the statement itself. For more detailed discussion of the reforms, see our posts on Practical Law's Dispute Resolution blog here and here.

Several High Court decisions this year have considered the new requirements:

- In a decision in April, the court took the view that witnesses' failure to refresh their memories from contemporaneous documents meant their evidence was "far less likely to be reliable than it might otherwise have been". Although the statements had been signed before 6 April, it was clear that the judge did not consider the new requirements to affect his decision. The decision illustrates the difficult judgments that will need to be made in any given case as to whether a witness should be shown contemporaneous documents (see Commercial Court finds witness evidence less reliable where witnesses did not refresh memories from contemporaneous documents).

- A decision in July confirmed that the new PD did not change the law on admissibility of evidence, including the circumstances in which a witness of fact is permitted to give opinion evidence (see New regime for trial witness statements does not change law on admissibility).

- In two decisions in October and November, respectively, the court required certain passages to be redrafted or deleted from witness statements where they failed to comply with the rules – in particular by arguing the case or including irrelevant or unnecessary commentary or quotations from documents. The judges in both cases also expressed concerns about the potential for disputes over compliance with the new PD to lead to time-consuming and costly satellite litigation, and said they hoped that a more efficient and cost-effective way of dealing with such disputes would be developed as the PD beds in. (See High Court gives guidance on new requirements for trial witness statements and Further guidance on new requirements for trial witness statements under Practice Direction 57AC.)

EXPERT EVIDENCE

In July, the High Court ordered a party to disclose documents as a condition of granting permission to rely on an alternative expert. Requiring a waiver of privilege as the "price" of changing experts is nothing new, but this decision is of interest in suggesting that the power can be exercised at any point after the experts have engaged with one another for the purposes of litigation, whether or not as part of a formal pre-action protocol process (see Court orders party to disclose documentation generated at pre-action stage as condition of granting permission for change of expert).

In October, the Court of Appeal held that a court is not bound to accept the evidence of an expert witness, even if it has not been controverted by other expert or factual evidence and the expert was not cross-examined (see Court of Appeal finds court is not obliged to accept uncontroverted expert evidence).

DISCLOSURE

The Disclosure Pilot under PD 51U, which had been due to finish at the end of this year, has been extended to the end of 2022 and the rules have been streamlined to some extent, in particular as to the process for agreeing lists of issues for disclosure and associated disclosure models. There have also been amendments to introduce new flexibility for multi-party cases and a new regime for less complex claims (see Disclosure Pilot to be extended for a further year and the procedures streamlined).

We expect this is likely to be the last extension to the pilot, with a decision being taken before the end of next year as to the final version of the disclosure rules. In advance of that decision, we understand that there will be further consultation with the judiciary and with court users, including in order to assess whether and to what extent the pilot saves costs.

Another issue that has received a lot of attention this year is the extent to which documents held by a third party may be within a party's "control" for the purposes of disclosure - including, in a number of cases, work-related documents on the personal devices of employees or ex-employees. That is clearly an important issue, given the increasing prevalence of "bring your own device" policies. Interesting decisions on "control" during the year include:

- A Court of Appeal decision in February which upheld an order requiring the employer to request its employees and ex-employees to deliver up their devices for inspection by the employer's IT consultants (see Court of Appeal orders defendants to request their employees and ex-employees to produce personal devices for inspection to identify documents in defendants' control).

- A High Court decision in April which found that documents held by the claimants' parent companies, and individuals connected with those entities, were within the claimants' "control" - continuing a line of first instance decisions which have held that an arrangement or understanding giving a party practical control of documents is sufficient, even without an enforceable legal right to obtain the documents (see Parent companies'

documents found to be in subsidiaries' control for disclosure purposes).

- A High Court decision in April which found that the court had no jurisdiction to order a party to use its "best endeavours" to obtain data held on the mobile telephones of two of its ex-employees, where the data was not in the employer's control for disclosure purposes - though the decision suggests the data would likely have been in the employer's control if the employment relationships had been governed by English rather than Saudi law (see High Court finds there is no power to order a party to use its "best endeavours" to obtain and disclose documents that are not within its control).

PRIVILEGE

This year we launched our new legal privilege client tool, which is a web-based app designed to help in-house counsel quickly navigate the complexities in determining which documents are likely to be privileged, or not. The app can be accessed both on a mobile phone and via a desktop.

None of the decisions handed down this year have dramatically changed the law of privilege but, as ever, there have been a number of decisions worthy of note, including the following:

- In March the High Court held that the seller of certain companies could assert privilege against the buyer in respect of emails and documents in employees' email accounts, despite the buyer having received wholesale access to those accounts as a result of the underlying transaction - illustrating that, in some circumstances, privilege may not be lost despite an opponent in litigation having had access to the privileged material (see Privilege not lost despite opponent having wholesale access to email accounts containing the privileged material).

- In April the High Court found that a claimant had lost privilege in its lawyer's attendance notes of discussions with one of the defendant's employees, as the notes had been "impliedly mentioned" in the claimant's witness statement and their contents had been deployed in support of the claimant's case (see High Court orders disclosure of lawyer's attendance note alluded to in claimant's witness statement).

- In July the Court of Appeal held that a pre-action letter sent by the claimant to a third party, and the third party's response, were subject to litigation privilege as the claimant's true purpose in instigating the correspondence was to obtain information for the present proceedings - regardless of whether the third party was misled as to the true purpose of the correspondence (see Court of Appeal confirms litigation privilege available even if third party misled as to purpose of information request).

- Another Court of Appeal decision in July helpfully summarises the principles that apply where two parties jointly retain the same solicitor and are therefore entitled to joint privilege. On the unusual facts of the case, where one of the joint clients had assigned to

a third party its claims against the jointly retained solicitors, these principles meant that the assignee (and its solicitors) were entitled to access the joint retainer file in order to pursue those claims, regardless of the other joint privilege holder's objections (see Court of Appeal confirms one joint privilege holder could not prevent disclosure of privileged material to assignee of other joint client).

- And finally, a High Court decision in July took quite a hard line on the application of litigation privilege, ordering the disclosure of an accounting firm's investigation report and associated documents. The court found that, although various regulators were investigating the relevant matters by the time the accounting firm was instructed, there was little evidence that adversarial regulatory or civil proceedings were in contemplation at that point. And even if such proceedings were contemplated, the court found (perhaps surprisingly) that the dominant purpose of the report was not for that litigation, but rather to find the facts and satisfy the regulators (see High Court finds accountants' investigation report not protected by litigation privilege and considers requirements for obtaining disclosure under the Disclosure Pilot).

WITHOUT PREJUDICE

This year we've had two significant Court of Appeal decisions on the ambit of the exceptions to the without prejudice rule:

- A decision in January found that the "unambiguous impropriety" exception to the rule is to be applied only where there is clear evidence of impropriety. The decision means that the exception will rarely be applied where there is scope for dispute as to what was said, or more than one plausible interpretation (see Court of Appeal decision shows "unambiguous impropriety" exception to without prejudice rule will be applied only in clear cases).

- A decision in April confirmed that the "fraud" exception to the rule is not limited to where a party wishes to rely on WP material to show that a settlement agreement should be set aside on grounds of misrepresentation, fraud or undue influence. It will apply equally where a party wishes to rely on the material to rebut an allegation that the agreement is invalid on these or similar grounds (see Court of Appeal confirms fraud exception to without prejudice (WP) rule extends to cases where a party wishes to rely on WP statements to rebut allegations that a settlement agreement is invalid).

A High Court decision in August is also worth noting as a reminder to parties to settlement negotiations that they need to make it clear if they wish to move from "without prejudice" to "open" communications, so that the content of the negotiations can be relied on subsequently (see High Court confirms need for clear indication if shifting from "without prejudice" to "open" communications).

ALTERNATIVE DISPUTE RESOLUTION (ADR)

In a report published in July, the Civil Justice Council recommended a greater use of compulsory ADR within the civil courts, concluding that court-mandated ADR is not incompatible with Article 6 of the European Human Rights Convention (right to a fair trial) and is therefore lawful (see Civil Justice Council recommends court-compelled ADR).

This represents a clear shift away from the established position for over a decade, following the Court of Appeal's seminal judgment in *Halsey v Milton Keynes,* that the courts should encourage parties to engage in ADR (including by the threat of costs sanctions for unreasonable refusal to engage) but must stop short of compelling unwilling parties to do so.

The CJC's report was welcomed by the Master of the Rolls, who has repeatedly emphasised that there is nothing "alternative" about ADR.

COSTS AND FUNDING

January saw an important Court of Appeal decision on Damages-Based Agreements, or DBAs, which clarified that a DBA can include a clause providing for payment on some basis other than a share of recoveries (for example, hourly rates) if the DBA is terminated - a matter which had previously been unclear. The decision also appears to pave the way for at least some forms of "hybrid" DBA, which combine a percentage share of recoveries on success with some other form of payment, eg reduced hourly rates as the case proceeds (see Court of Appeal confirms regulations governing Damages-Based Agreements (DBAs) do not preclude terms providing for payment of time costs on termination, nor do they preclude hybrid arrangements).

Efforts to reform the much-criticised regulations governing DBAs appear to have stalled, however. Proposals were published in October 2019 (see this post published on Practical Law’s dispute resolution blog) and a supplementary report was expected, but to date it has not materialised.

Litigation funding has continued to be a major driver of English litigation, with funders particularly active in supporting class actions in various sectors, but there have not been a lot of legal developments relating to funding.

There was however an interesting Court of Appeal decision in January, which will make it difficult for claimants - and especially funders - to argue that a defendant should have to provide a cross-undertaking in damages as a condition of obtaining security for costs. The court indicated that cross-undertakings will be required only in “rare and exceptional cases” and, where the claimants are funded by a commercial litigation funder, “even rarer and more exceptional cases” (see Court of Appeal clarifies that cross-undertakings should rarely be required as a condition of security for costs).

OTHER

This year has also seen a number of significant decisions by the highest courts in other areas, including:

- A Supreme Court decision in February which held that the SFO cannot compel a foreign company to produce documents held outside the UK, overturning a 2018 Divisional Court decision in which the court had "read in" extraterritorial application to the SFO's powers under section 2(3) of the Criminal Justice Act 1987 provided that a "sufficient connection" could be drawn between the recipient of the notice and the UK (see Supreme Court judgment in the KBR v SFO appeal – limits to extraterritorial impact of the SFO's document compulsion powers).

- A Supreme Court decision in July which considered the proper ambit of the tort of causing loss by unlawful means, confirming that it is an essential element of the tort that the unlawful means deployed by the defendant have interfered with a third party's freedom to deal with the claimant (see Supreme Court confirms proper boundaries to tort of causing loss by unlawful means).

- A Supreme Court decision in August which clarified the requirements for establishing liability for the tort of lawful act economic duress. The court was unanimous on the basic elements, namely that: (i) the defendant's threat or pressure must have been illegitimate; (ii) it must have caused the claimant to enter the contract; and (iii) the claimant must have had no reasonable alternative to giving in to the threat or pressure. However, the majority held (in disagreement with Lord Burrows who dissented on the question) that a "bad faith requirement" is not sufficient to establish that a threat was illegitimate (see Supreme Court clarifies requirements for tort of lawful act economic duress).

- A Privy Council decision in August which confirmed that the so-called "reflective loss" principle falls to be assessed at the point when a claimant suffers loss and not when proceedings are brought - so that on the facts of the case a claimant's claims were not barred by the rule, in circumstances where the claimant had suffered loss before it became a shareholder in a company (see Privy Council confirms that the so-called "reflective loss" principle applies to ex-shareholders).

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If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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