HERBERT SMITH FREEHILLS

A LITIGATOR'S YEARBOOK: 2017 (ENGLAND AND WALES)

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Legal Briefings – By **Maura McIntosh**

As we see another year out, it’s a good time to look back at what 2017 has had in store. In this post we summarise some of the key developments from the perspective of the commercial litigator, covering topics such as privilege, contract law, jurisdiction and various aspects of court procedure. We hope you will find it a helpful reference.

PRIVILEGE

The difficulties for corporates wishing to take legal advice with the benefit of privilege have continued to multiply over the past year:

- In February, there was news that the Supreme Court would not be hearing an appeal against the High Court’s problematic decision in the *RBS Rights Issue Litigation*, namely that the “client” for the purposes of legal advice privilege was restricted to those who are authorised to seek and receive legal advice on behalf of a client corporation, and

(importantly) that authority to provide information to the lawyers is not sufficient for these purposes (see No appeal against controversial decision in RBS case applying narrow interpretation of "client" for purposes of legal advice privilege).

- Then, in the *SFO v ENRC* decision in May, the High Court not only endorsed the restrictive approach to legal advice privilege taken in *RBS*, but took a similarly narrow approach to the application of litigation privilege (see High Court decision takes restrictive approach to both litigation privilege and legal advice privilege). ENRC has been granted permission to appeal against that decision. The appeal has now been fixed for 3 July 2018.

There have, however, been some decisions that might be seen as more favourable from the perspective of those seeking to obtain (and retain) the benefit of privilege:

- In July, the Court of Appeal added a "modest gloss" to the principles on when the court will restrain use of a privileged document disclosed in error, on the basis that there has been an obvious mistake. In essence, the decision shows that what matters is what was (or should have been) obvious to the team rather than the individual reviewer (see Court of Appeal prevents use of privileged document disclosed in error where mistake obvious to second more senior solicitor).

- In November, the High Court applied a more liberal approach than previous case law had suggested to the question of when a document will be privileged on the basis that it "evidences" a privileged communication (see High Court finds privilege applies to documents from which the substance of legal advice can be inferred).

In relation to "without prejudice" protection, a High Court decision in May has potentially eroded the application of the rule – though that decision is to be appealed to the Court of Appeal in January (see High Court decision potentially extends exceptions to without prejudice rule).

DISCLOSURE

The big news this year is the publication of proposals for a completely new rule to govern disclosure, following a review by a working group chaired by Lady Justice Gloster. The proposals were published in November and are subject to consultation until 28 February, following which they will be considered by the Civil Procedure Rule Committee with a view to setting up a two-year pilot in the Business and Property Courts (see Working group proposes pilot of new rules for disclosure).

The group was set up last year to address concerns that, despite the Jackson reforms having removed the presumption in favour of "standard disclosure", it is still being treated as the default option, leading to unnecessarily wide disclosure and high costs. The proposals re-emphasise the need to focus on what disclosure is actually required in a given case, which is to be welcomed. There are, however, some points that could benefit from clarification, particularly relating to the disclosure of known adverse documents and a new duty to explain "with reasonable precision" the grounds on which a document is being withheld as privileged.

This year we have also seen two High Court decisions in which the courts took a very strict approach to the question of when the court's permission is needed to "use" documents disclosed by the opponent under CPR 31.22. The first decision, in February, found that "use" encompasses anything from the review of previously disclosed documents for relevance to other proceedings to the actual deployment of those documents in the subsequent proceedings (see High Court takes strict approach to when permission needed for collateral use of documents disclosed in proceedings). The second, in July, considered the position where disclosed documents reveal new causes of action, finding that permission would be needed if the new causes of action could not properly be brought in the existing proceedings (see High Court clarifies use of CPR 31.22: use of a document only for the purpose of the proceedings in which it is disclosed).

CONTRACT

In February, the High Court handed down one of the few decisions striking down a clause as penal since the Supreme Court substantially rewrote the law on penalties in 2015 (see our blog post on that decision here). The court held that a clause in a side letter, which allowed a landlord to terminate the side letter and insist on payment of the higher rent set out in the lease, was a penalty and therefore unenforceable (see High Court finds clause allowing landlord to terminate side letter and insist on payment of higher rent in lease falls foul of rule on penalties).

In March, the Supreme Court gave further guidance on the interpretation of contracts – while emphasising that it did not seek, once again, to reformulate the guidance given in previous cases. In essence, the court sought to reconcile the approaches in *Rainy Sky* and *Arnold v Britton*, which are often seen as pulling in opposite directions. In fact, the Supreme Court said, its decisions in these cases were saying the same thing – that is, that interpretation is a unitary exercise, in which a balance must be struck between the indications given by the language used, in both the clause under scrutiny and the remainder of the contract, and the implications of rival constructions, which is usually thought of as the business common sense approach (see Supreme Court on contractual interpretation: striking a balance between the language used and the commercial implications).

In relation to the interpretation of exclusion clauses, the courts have tended to move away from the traditional assumption that such clauses must be construed narrowly, at least where the clause is clear and unambiguous. In May, the Court of Appeal found that an exclusion clause in an engineering services contract was effective to exclude any liability on the part of the defendant engineers for identifying and reporting on asbestos on a development site. This was based on the clear wording of the clause and commercial common sense; traditional principles or canons of construction relating to exclusion clauses had no part to play (see Court of Appeal decision casts doubt on principles requiring narrow interpretation of exclusion clauses).

The courts have also continued to be sceptical of the suggestion that "good faith" principles have a role in relation to contractual termination. In March, the Court of Appeal upheld a decision granting summary judgment to a defendant in relation to an allegation that it had wrongfully terminated a distribution agreement, rejecting arguments based on contractual construction, implied variation and implied duties of good faith (see Court of Appeal considers implied variation and good faith in relation to contractual rights of termination).

In a decision in June, the Supreme Court gave important guidance on when a benefit enjoyed by an innocent party will be taken into account to reduce the damages payable following a breach of contract, or alternatively will be treated as a collateral benefit which is ignored for these purposes. The key question is whether the benefit was caused either by the breach or by the innocent party's act of mitigation, taking into account all the circumstances (see Supreme Court clarifies principles for determining when benefits enjoyed by a claimant following a breach of contract will be treated as collateral).

This year we have also continued our series of contract disputes practical guides, designed to provide clients with practical guidance on some key issues that feature in disputes relating to commercial contracts under English law. We have published two new editions, as listed below. These can be found on the home page for the series together with information on how to access the accompanying webinar for each edition.

- Terminating your contract: When can you call it quits?
- Getting your just deserts: Remedies for breach of contract

RELIEF FROM SANCTIONS

The implementation of the Jackson reforms in April 2013 introduced a new test for granting relief from sanctions for breaches of a court rule or order. Initially the test was applied very strictly, with the notorious *Mitchell* decision in November 2013 leading to a flood of satellite litigation and, in many cases, the imposition of harsh sanctions for relatively minor breaches. A more measured approach was prompted by the Court of Appeal's decision in *Denton* in July 2014 which "clarified" the *Mitchell* guidelines.

For the most part, *Denton* was effective in controlling the flood of contested applications for relief from sanctions, but since then we've continued to see a trickle of cases that take a very tough approach. That trickle appears to have strengthened over the course of the year – perhaps because some litigating parties had started to become a bit too complacent (see Recent decisions show continuing trend for tough approach to rule breaches).

Of course, on the other hand, there are decisions in which the courts have granted relief, and it is also clear that the courts are ready to penalise those who try to hold their opponents to what the courts see as an unreasonably hard line (see Parties should not "abuse" the court's tougher approach to relief from sanctions).

COURTS

From October, the business specialist courts across England and Wales were rebranded as the "Business and Property Courts of England and Wales". This umbrella term comprises the various courts operating out of the Rolls Building in London (the Commercial Court, Technology and Construction Court, and the courts of the Chancery Division) and in various centres outside London. The courts themselves will continue to operate in the same way as previously, applying the same practices and procedures as before and retaining their own procedural guides. However, the intention is that, over time, the new arrangements will allow for greater flexibility in cross-deployment of judges.

The Financial Markets Test Case pilot scheme, which was due to end in September, was also extended for a further three years and expanded so that it applies to any Financial List claims which raise issues of general importance in relation to which immediately relevant authoritative English law guidance is needed – not necessarily issues of importance to the financial markets specifically (see Financial Markets Test Case pilot scheme to be extended for three years and expanded).

COSTS AND FUNDING

In June the Court of Appeal delivered an important judgment on the relationship between the costs budgeting regime and the costs that are ultimately awarded to a successful party in litigation, finding that "good reason" is needed for any departure from an approved or agreed budget, whether upward or downward. The decision means that it should be easier than it would otherwise have been for a successful party to obtain full recovery of legal costs falling within an approved or agreed budget (see Court of Appeal confirms good reason required to depart (up or down) from costs budget).

Lord Justice Jackson's report on fixed recoverable costs was published in July. The key recommendation was to introduce a new intermediate track for claims between £25,000 and £100,000, which are of no more than modest complexity and could be tried in three days or less. The new track would have streamlined procedures and be subject to a grid of fixed recoverable costs – in broad terms, from around £19,000 for a straightforward £30,000 claim to around £68,000 for a £100,000 claim at the upper end of the scale of complexity (see Jackson LJ recommends fixed recoverable costs for claims up to £100,000). The government is considering the report and is expected to put any proposals out to public consultation.

In relation to litigation funding, in a decision in March in the *RBS Rights Issue Litigation*, the High Court made it clear that funders "stand in the front-line" for the purposes of adverse costs liability, particularly where they are funding group litigation where (as is usual in that context) each claimant is only liable for its individual proportion of the costs. In that case, the court ordered the claimants to reveal the identity of those funding the litigation, so that the defendants could consider whether to apply for security for costs against them (see High Court orders claimants to reveal identity of litigation funders who "stand in the front line" in group litigation). In a separate decision in May, the court ordered one of the funders to provide security (see High Court orders security for costs against third party funder supporting group litigation).

Also in May, the High Court held that an assignment of claims to a company, in return for an upfront fee or a share of any recoveries, was not invalid – potentially reflecting an increasingly relaxed approach to the principles of champerty and maintenance (the ancient rules against "trafficking" in litigation) in the context of assignments (see Consumer claims to recover allegedly unlawful charges were validly assigned to claimant company).

SETTLEMENT / ADR

In a judgment in March, the Court of Appeal clarified how the court should exercise its discretion to award enhanced interest at up to 10% above base rate where a claimant beats its own Part 36 offer, disagreeing with suggestions in previous case law that such an award should be purely compensatory (see Court of Appeal decision may mean higher awards of interest for claimants who make well-judged Part 36 offers).

The courts have also continued to encourage parties towards ADR. The Court of Appeal made it clear in a decision in April that the courts are ready to impose costs sanctions not only where a party unreasonably refuses mediation, but also where it "frustrates the process by delaying and dragging its feet for no good reason" (see Court of Appeal sends further message on mediation: Don't drag your heels in arranging it).

Another Court of Appeal decision, in May, underlined the need for caution where a party settles its claims with some but not all defendants, in particular where the terms of settlement are recorded in a consent order (see Court of Appeal decision reiterates need for care when settling with one of a number of defendants).

EXPERT EVIDENCE

The courts have again emphasised the importance of expert independence. In February, the Court of Appeal dismissed an appeal against a finding of clinical negligence based, in part, on the trial judge's approach to evaluating expert evidence where a close connection between the defendant and his expert witness had not been disclosed (see Court of Appeal confirms importance of frankly disclosing factors that could affect expert's independence). Then, in a decision in July, the High Court found that an expert's evidence was unreliable on the basis that he was not a properly independent witness, in part because he had too close a relationship with the party instructing him (see High Court finds expert unreliable and lacking independence).

In November, amended provisions for concurrent expert evidence or “hot-tubbing” were brought into force with the amendment of CPR Practice Direction 35. The changes implement a number of recommendations made in the Civil Justice Council’s August 2016 report on concurrent expert evidence (see Amended provisions for concurrent expert evidence or “hot-tubbing” now in force).

JURISDICTION AND CHOICE OF LAW

There has been some (if not much) further clarity about possible arrangements to govern choice of law, jurisdiction and enforcement of judgments post-Brexit, as a result of papers published by the EU Commission and the UK government in, respectively, June and August (see EU clarifies negotiating position on choice of law, jurisdiction and enforcement of judgments post-Brexit and UK clarifies negotiating position on choice of law, jurisdiction and enforcement of judgments post-Brexit). In broad summary:

- In relation to choice of law, there should be very little change. EU member state courts will continue to apply to current rules (under the Rome I and Rome II Regulations) to determine the applicable law, whether or not that is the law of an EU member state. The UK Government has stated its intention that Rome I and Rome II will be incorporated into UK domestic law at the point of exit, so UK courts will also continue to apply these rules.

- The position is more complicated in relation to jurisdiction and enforcement of judgments, where reciprocity is a key element. There are however some indications that a deal may be negotiated to ensure the continuation of the current rules, or something similar. The UK Government is hoping to reach an agreement with the EU that allows for close and comprehensive cross-border cooperation on a reciprocal basis “which reflects closely the substantive principles of cooperation under the current EU framework”, ie the recast Brussels Regulation. It has also indicated that it will seek to participate in the Lugano Convention, which applies to Norway, Switzerland and Iceland, and will participate in the Hague Convention on Choice of Court Agreements 2005, which sets out jurisdiction rules where there is an exclusive choice of court agreement.

- If no agreement is reached going forward, then both the UK and EU appear to agree that existing rules on jurisdiction should continue to apply where proceedings were instituted before the exit date or the choice of court was made before the exit date, and existing rules on enforcement of judgments should continue to apply where judgment was given before the exit date. The UK would go further, however, and apply current rules on enforcement where proceedings were instituted before the exit date or the choice of court was made before that date, even if judgment was given after the exit date.

The signatories to the Hague Convention on Choice of Court Agreements have continued to grow, with the China signing up in September (see PRC signs up to Hague Convention on Choice of Court Agreements) and Montenegro in October. The Convention provides greater certainty in cross-border litigation by increasing the effectiveness of exclusive jurisdiction clauses and making judgments obtained under those clauses easier to enforce. It currently applies as between the EU member states (other than Denmark), Mexico and Singapore, and (as noted above) the UK government has indicated its intention to sign up to the Convention post-Brexit. The US and the Ukraine are also signatories, but have yet to ratify the Convention.

In a decision in October, the Court of Appeal clarified the scope of article 24(2) of the recast Brussels Regulation, which gives exclusive jurisdiction to the EU member state of a company's seat where proceedings have as their object the validity of the company's constitution or the decisions of its organs. The decision confirms that the court must look at the proceedings as a whole and determine what is at the heart of the claim (see Court of Appeal clarifies approach to exclusive jurisdiction provisions of Brussels regime relating to validity of corporate decisions).

In relation to choice of law, two Court of Appeal decisions have clarified that, under relevant provisions of the Rome Convention and the Rome I Regulation, mandatory laws of another country will not override the law chosen by the parties where there is an international element to the contract. In both cases, defendants seeking to set aside interest rate swaps entered into under ISDA master agreements subject to English law were therefore unable to rely on mandatory rules in their home jurisdictions (see Court of Appeal clarifies that "mandatory rules" do not override chosen law in contracts with an international element).

COLLECTIVE ACTIONS

Claimants have not fared well so far in claims brought in the Competition Appeal Tribunal (CAT) under the "opt-out" regime for competition law cases introduced from October 2015 (as outlined here). There have to date been only two cases issued, and both have come to a premature end this year.

- The first, brought on behalf of consumer purchasers of Pride mobility scooters seeking damages of around £3 million, was abandoned in May in light of concerns that the costs of pursuing it would outweigh any damages.

- The second, brought against MasterCard on behalf of some 46.2 million UK consumers seeking around £14 billion in damages, was refused certification in July. This was principally on the basis that the CAT was not satisfied with the proposed methodology for calculating aggregate damages, and did not consider that there was any plausible way of reaching even a rough-and-ready approximation of the loss suffered by individual claimants (see Competition Appeal Tribunal refuses to certify £14 billion class action against MasterCard). The CAT refused permission to appeal, finding that it had no jurisdiction to grant permission. The claimants have reportedly applied direct to the

Court of Appeal for permission and have also brought an application for judicial review of the CAT's decision refusing certification.

OTHER

In March, the Court of Appeal clarified the test that must be met when seeking to set aside a judgment on the grounds that it was obtained by fraud. The decision confirms that the court must be satisfied that evidence of the fraud was not available to the innocent party at the time of trial and could not with reasonable diligence have been uncovered then, resolving the uncertainty that had arisen from conflicting lower court authority (see Court of Appeal clarifies test for setting aside judgment for fraud).

In September, the Court of Appeal handed down an important decision for the law of defamation, clarifying the meaning and effect of the requirement to show "serious harm" under the Defamation Act 2013 and departing from the approach adopted at first instance (see Court of Appeal clarifies guidance on "serious harm" requirement under Defamation Act 2013).

In a decision in October, the Supreme Court held that the correct test for dishonesty in criminal proceedings is whether or not the defendant's conduct is dishonest by the objective standards of ordinary reasonable and honest people. Albeit that the court did not need to rule on the point, the judgment would remove the second limb of the previous two-phase objective and subjective test for dishonesty as set out in *R v Ghosh* and align the tests for dishonesty in criminal and civil proceedings (see Supreme Court restates test for dishonesty in criminal proceedings).

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KEY CONTACTS

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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