BRIEFING

TRAVERS SMITH

Dispute Resolution round-up

June 2020

FOREWORD

Welcome to the inaugural edition of our new newsletter, which is intended to capture the key developments in the English disputes arena over the past three months. We hope that you will find it an interesting read, whether you are a litigator, either in private practice or in-house, or a generalist wanting to keep abreast of the goings on in this space. We also hope that you will pass it on to any of your colleagues who may find it useful.

The last three months have inevitably been dominated by the COVID-19 pandemic, and the seismic effect that it has had on the court system in this country, with remote hearings now the norm even in the most complex cases. We have also seen the spotlight fall firmly on the effect of the pandemic on commercial contracts, with the doctrines of frustration and force majeure coming into focus where parties find themselves unable to perform, and the FCA gearing up to bring a test case against business interruption insurers to confirm when their policies should pay out.

The thorny topic of Brexit, and the potential for the current transition period to end without the EU and the UK having agreed how their future relationship should look, also continues to rumble on in the background.

And there have been a number of interesting legal developments too, in amongst these unprecedented global events. These include two interesting and important Supreme Court decisions on the scope of an employer's liability for misconduct committed by its employees/ consultants. In one of those cases, the misconduct in question was in fact committed by an employee whilst at home, using a mobile phone that he had purchased personally, and so the outcome is particularly pertinent in this brave new world of home working in which we all find ourselves.

In any event, we hope that you are all keeping safe and well and enjoy keeping up to speed on the main developments in this area as we see them. Please don't hesitate to get in contact with either me, or any member of our Dispute Resolution team, if you would like to hear more about them.

Rob Fell
Head of Dispute Resolution

1 NEWS

COVID-19

NEW CORPORATE INSOLVENCY AND GOVERNANCE BILL

The government has recently introduced a new Corporate Insolvency and Governance Bill, which has now passed its first and second readings, and the committee stages, and moved to the House of Lords for consideration. The bill introduces a number of temporary measures in response to the COVID-19 pandemic, as well as new permanent reforms of the UK insolvency regime.

Importantly, the bill has introduced two new measures to reduce the threat of winding up petitions and statutory demands to companies during the COVID-19 period.

The first temporary measure prevents a creditor from presenting a petition for the winding up of a company on the basis of its inability to pay debts during the COVID-19 period unless the petitioner has reasonable grounds for believing that COVID-19 has not had a financial effect on the company, or that the ground for winding up would have applied even if COVID-19 had not had a financial effect on the company. This provision has retrospective effect from 27 April 2020 and will apply until the later of 30 June 2020 or one month after the bill coming into force.

The second temporary measure prevents the use of a statutory demand as a basis for issuing a winding-up petition against a company. The provision applies to all statutory demands served between 1 March 2020 and 30 June 2020 (or one month after the coming into force of the bill, if later) and prevents them from forming the basis of a winding-up petition presented after 27 April 2020.

There are also provisions to rectify the situations where a petition has been brought, or a winding-up order made, prior to the enactment of the new measures.

For further information, please read the note produced by our Restructuring and Insolvency team on the bill *here.*

CIVIL JUSTICE COUNCIL REPORT ON IMPACT ON COURT SYSTEM

Since the start of the COVID-19 pandemic, a huge number of changes have been made to the court system in this jurisdiction in an incredibly short space of time. A large number of civil hearings are now proceeding remotely, and new temporary rules and guidance have been brought in to facilitate this, including a new temporary Practice Direction enabling proceedings to be held in private or with a single journalist in attendance where access by the general public cannot be secured.

Given the speed of the changes, the Civil Justice Council has recently conducted a rapid consultation on them, and published its finding in *this report.*

The report essentially concludes that, for complex commercial litigation in the High Court, where the parties tend to be sophisticated, legally represented and to have deeper pockets, remote proceedings are working very well, and the flexibility they afford is enhancing the already strong reputation of our civil justice system internationally. Many participants hope that elements of them will be retained in a post-COVID world.

In the lower courts, however, where the volume of cases is much higher and there are many litigants in person, remote hearings have been much less successful, and a worrying backlog of postponed cases appears to be building up.

To read more on this topic, see *this article* by Lauren Clark-Hughes and *this article* by Imogen Nolan, both Associates in our team.

IMPACT ON COMMERCIAL CONTRACTS

Many predict a wave of litigation arising out of the current pandemic, as COVID-19 prevents parties from fulfilling their contractual obligations. The tools that the English courts have historically used to allocate risk between contractual counterparties in such situations – the doctrines of frustration and force majeure – are generally considered to be relatively inflexible and to result in a "winner takes all" outcome for one party or the other.

Since the pandemic started, jurisdictions across the globe have therefore been considering whether there are any measures that can be taken, temporary or otherwise, to ameliorate the situation and head off the predicted wave of disputes. In some, such as Singapore, the outcome has been legislation imposing a temporary moratorium on claims. Here, however, the government has taken a softer approach, and has simply issued non-binding *Cabinet Office guidance* to contractual counterparties urging them to behave fairly and responsibly in respect of COVID-19 related disputes, and to use ADR wherever possible, instead of the courts. It remains to be seen whether this more "softly softly" approach will, in reality, have any effect on parties' behaviour over the coming months.

The British Institute of International and Comparative Law has also published *two concept notes,* which consider how the English law doctrines of frustration, force majeure and unjust enrichment can be utilised in a more flexible manner in future in order to avoid unfair, "winner takes all" outcomes in contractual disputes. By way of example, one suggestion is that the English courts could imply terms into commercial contracts affording the parties "breathing space" (i.e. extra time) to perform their contractual obligations in light of the current situation. Given the English courts' long history of holding parties to their contractual bargain, and their historic reluctance to imply terms into contracts unless absolutely necessary, it remains to be seen whether they will be prepared to take these somewhat creative suggestions up, in order to ensure "fairer" outcomes for parties in the current, unprecedented circumstances.

To read more on this topic, see *this article* by our Commercial team, and *this article* by Andrew Pullar, an Associate in our team.

FCA BRINGS TEST CASE REGARDING BUSINESS INTERRUPTION INSURANCE

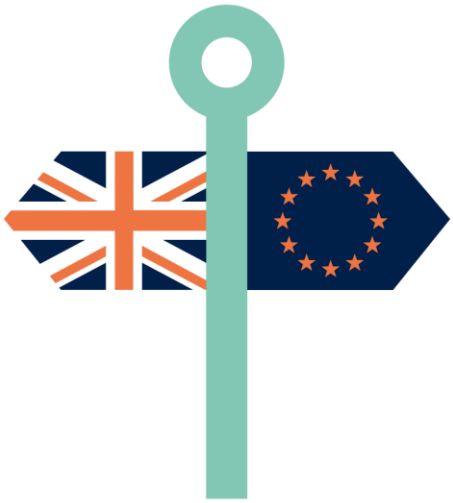
Many businesses are presently seeking to use their business interruption insurance to cover losses sustained as a result of COVID-19, and many insurers are, in response, taking a narrow view of the coverage such policies afford. We therefore expect this to be an area that generates significant litigation in the coming months.

Foreshadowing this, the FCA has recently brought a test case in the Financial List seeking clarity as to the way in which typical business interruption policies should be interpreted. It has identified 17 examples of policy wordings which it believes are broad enough to cover the vast majority of disputes which could arise in this area, issued by 16 different insurers.

Whilst the results of the test claim will only be legally binding on the insurers and in relation to the policy wordings directly involved in it, it is intended to provide guidance on the interpretation of similar wordings in other disputes in this area.

For further information, please see *here.*

BREXIT



UK APPLIES TO ACCEDE TO THE LUGANO CONVENTION

Allocation of jurisdiction and recognition and enforcement of judgments as between the EU and the UK is currently governed by the Recast Brussels Regulation, a piece of EU legislation which continues to apply to and in the UK until 31 December 2020, by virtue of the transition period.

The Recast Brussels Regulation ensures that courts across the EU (and during the transition period, courts in the UK) will recognise jurisdiction clauses in favour of each other, and also recognise and enforce each other's judgments. However, at the end of the transition period, it will cease to apply to and in the UK, and there remains an outstanding question as to what, if anything, will replace it.

To plug the gap, the UK has recently applied to accede in its own right to the Lugano Convention, an international agreement which governs allocation of jurisdiction and recognition and enforcement of judgments as between the EU (and, during the transition period, the UK), and Denmark, Norway, Switzerland and Iceland. The terms of the Lugano Convention are very similar to those of the Recast Brussels Regulation, and it would therefore provide a near like-for-like replacement for it.

However, each of the current parties to the Lugano Convention will have to agree to the UK's accession before it can take place. While Norway, Switzerland and Iceland have recently expressed their support, the EU and Denmark have, as at the time of writing, remained silent on the point, and it is not unlikely that they will use the requirement for their consent as a bargaining chip in the wider negotiations that are currently ongoing over the future EU-UK relationship.

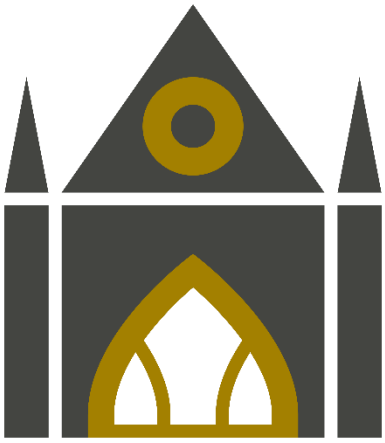
UPDATE ON UK-EU NEGOTIATIONS

As to how the wider negotiations mentioned above are going, the UK government has repeatedly indicated that it has no intention of seeking to extend the transition period beyond the end of this year. It has also recently published a suite of draft *legal texts* to accompany the *policy paper* it published in February regarding its ongoing negotiations with the EU over how the EU-UK relationship should look once that period concludes. These make clear that the UK is aiming for a Canada style Free Trade Agreement with the EU, with zero tariffs and zero quotas on goods and relatively weak level playing field provisions.

The EU's own position remains that there should be an overall governance framework in place between the EU and the UK, covering all areas of economic and security co-operation, with strong level playing field commitments, including in relation to state aid.

As a result, the negotiations seemingly continue to make little progress, and the risk of the transition period coming to an end on 31 December 2020 with no agreement in place as to the parties' future relationship persists. A recent meeting between Boris Johnson and the head of the European Commission, Ursula von der Leyen, may however have injected some fresh momentum, with the former calling on the parties to "*put a tiger in the tank*" in order to seal a deal as early as July.

COMPETITION LITIGATION



SUPREME COURT JUDGMENT HANDED DOWN IN INTERCHANGE LITIGATION

On 17 June 2020, the Supreme Court handed down its long awaited judgment in the cases of *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others* and *Sainsbury's Supermarkets Ltd and others v Mastercard Incorporated and others* [2020] UKSC 24. The appeal concerned whether historic MasterCard and Visa payment card schemes infringed EU and UK competition law.

The Supreme Court unanimously upheld the Court of Appeal's decision that the fees charged by MasterCard and Visa unlawfully restricted competition. However, it allowed one ground of appeal in relation to what it referred to as "the broad axe issue". The "broad axe issue" concerns the question of whether a defendant has to prove the exact amount of loss mitigated in order to reduce damages, and is therefore of particular interest to competition litigation practitioners.

In relation to the "broad axe issue", the Supreme Court concluded that the legal burden of proving that a claimant mitigated its loss by "passing on" any overcharge falls upon the defendant, but that once defendants have raised the issue of pass-on, there is a "heavy evidential burden" on claimants to provide evidence of how they have dealt with recovery of their costs in their business. The Court furthermore saw no reason why there should be a requirement for greater precision in the quantification of the amount of pass-on than is required in the quantification of an overcharge itself. The court should therefore be able to forego precision and rely on estimates in both calculations if the cost of achieving precision is disproportionate, i.e. quantification of both overcharge and pass-on of that overcharge should be quantified using the same breadth of axe.

The consequences of the Supreme Court's judgment on issues of pass-on are likely to be felt in many, if not all, of the follow-on damages claims currently proceeding through the English courts.

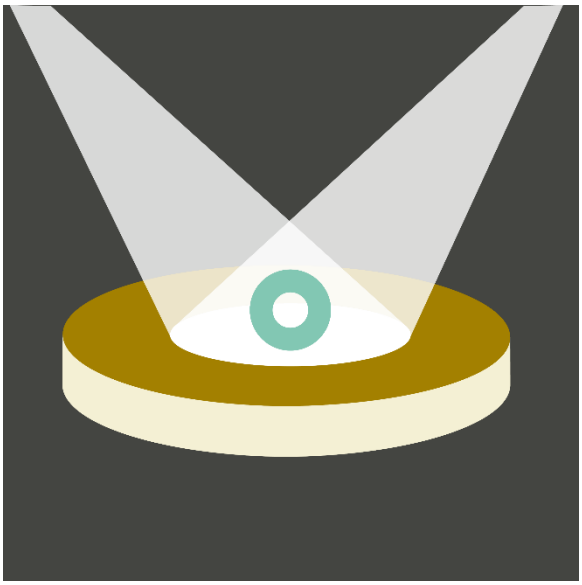
SUPREME COURT HEARS LANDMARK MASTERCARD CLAIM

On 13-14 May 2020, the Supreme Court heard a landmark dispute over whether a giant class action brought against Mastercard by former Ombudsman Walter Merricks on behalf of 46 million UK consumers should be allowed to proceed by way of a Collective Proceedings Order.

No judgment is expected until late 2020/early 2021 but, when one arrives, it is expected to shape the law in relation to competition class actions for years to come.

For further information, please see *here.*

2 CASES UNDER THE SPOTLIGHT



VICARIOUS LIABILITY

W M MORRISON SUPERMARKETS PLC V VARIOUS COMPLAINTS [2020] UKSC 12

In this decision, the Supreme Court dismissed a class action brought by Morrisons employees against the supermarket in relation to a data breach. In doing so, it conducted a detailed examination of the law of vicarious liability, ultimately concluding that Morrisons was not liable for the actions of a disgruntled employee, Andrew Skelton, who had deliberately stolen personal details relating to c.100,000 other Morrisons employees, and shared them with national newspapers.

To read the judgment, please click *here*.

BARCLAYS BANK V VARIOUS CLAIMANTS [2020] UKSC 13

In this decision, the Supreme Court held on the facts that an employer, Barclays, which had sent job applicants for a medical examination with a doctor, was not vicariously liable for torts committed by that doctor. This was on the basis that the doctor was an independent contractor carrying on business on his own account.

To read the judgment, please click *here*, and for a more detailed analysis of both cases by an Associate in our team, Charlotte Angwin, please click *here*.

COVID-19

RE BLACKFRIARS LTD [2020] EWHC 845 (CH)

In this decision, which is now being taken as the key authority on how to treat applications for adjournments during the COVID-19 pandemic, the court refused an application by the claimants to adjourn a five week trial listed for June 2020, on the basis of the COVID-19 pandemic. It instead ordered the parties to explore together the ways in which a remote trial might proceed.

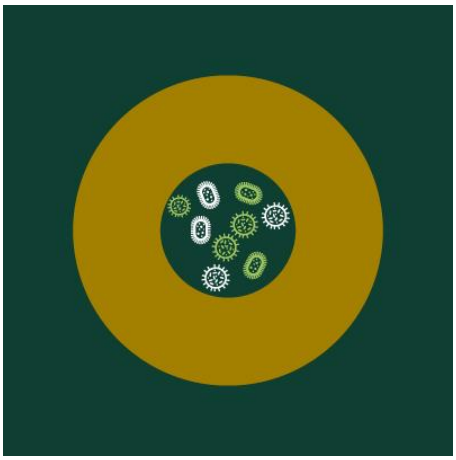
The decision makes clear that as many hearings as possible should continue remotely during this period, that co-operation and planning between parties are essential, and that the challenges and upsides of proceeding remotely will generally apply to all parties equally, such that there is no unfairness to any should a remote hearing go ahead.

To read the judgment, please click *here.*

MUNICIPO DE MARIANA & ORS V BHP GROUP PLC [2020] EWHC 928 (TCC)

In this decision, which is now being taken as the key authority on how to treat applications for extensions of time during the COVID-19 pandemic, the court granted an application to extend the deadline for service of the defendant's reply evidence by 5-6 weeks, and to push back a hearing date for a jurisdiction challenge accordingly. The defendant's experts were based in Brazil and the court accepted that the current travel ban in place between the UK and Brazil would inevitably make obtaining their evidence a lengthier process than would otherwise have been the case.

To read the judgment, please click *here.*



A COMPANY (INJUNCTION TO RESTRAIN PRESENTATION OF PETITION) [2020] EWHC 1406 (CH)

In this decision, the court granted an injunction restraining the presentation of a winding up petition against a company on the basis that it was highly likely that the petition would soon be caught by the government's forthcoming Corporate Insolvency and Governance Bill (discussed further above).

To read the judgment, please click here.

2 ENTERTAIN VIDEO LTD V SONY DADC EUROPE LTW [2020] EWHC 972 (TCC)

This decision concerns the interpretation of a force majeure clause in a contract between the defendant, Sony, and the claimant, 2 Entertain, and is thus very pertinent to the present circumstances.

In very brief summary, Sony owned a warehouse from which it provided storage and distribution facilities to 2 Entertain, pursuant to the relevant contract. The warehouse and its contents – over 20 million CDs and DVDs - were subsequently destroyed during an arson attack, as part of the riots which took place in London in 2011.

Sony sought to argue that the fire was an event which triggered the force majeure clause in the contract. That argument was, however, rejected by the court. It held that, although the riots and the fire were both "unforeseeable" (and were referred to expressly in the clause as potential force majeure events), Sony could and should have taken more steps to prevent the fire. In particular, the contract required Sony to ensure that adequate security measures were in place, and that the goods were kept in a secure location, but the warehouse security provided had in fact been insufficient. The primary cause of damage was therefore negligence on the part of Sony, rather than the fire.

The decision is therefore an important reminder that force majeure clauses won't generally protect businesses which could reasonably have taken action to avoid the type of problem or event set out in the relevant clause, but have failed to do so.

To read it, please click here, and for a more detailed case briefing from our Commercial team, please click here.

IN THE NEWS

BOYSE (INTERNATIONAL) LTD V NATWEST MARKETS PLC & ANOR [2020] EWHC 1264 (CH)

In this decision, the court struck out a LIBOR mis-selling claim against NatWest on limitation grounds. It concluded that the date of issuance of an FCA Final Notice against the bank was the date on which the limitation period in respect of the claim had started to run (being the date on which the claimant could with reasonable

diligence have discovered the facts on which the claim was based), and that the claim form had therefore been issued just after the limitation period had expired.

To read the judgment, please click here.

BURFORD CAPITAL LTD V LONDON STOCK EXCHANGE GROUP PLC [2020] EWHC 1183 (COMM)

In this decision, the court dismissed an application for a *Norwich Pharmacal* order brought by litigation funder Burford Capital against the London Stock Exchange, by which Burford sought disclosure of the identities of market participants involved in trading Burford's shares on two days in August 2019.

In doing so, the court declined to accept that Burford had a good arguable case that its share price had been unlawfully manipulated on the days in question, and also concluded that, regardless, it would not have been just and convenient to require the stock exchange to disclose to Burford the identities of all market participants trading on those days.

To read the judgment, please click here.

INTERPRETATION OF SPAS

TOWERGATE FINANCIAL (GROUP) LTD V HOPKINSON [2020] EWHC 984 (COMM)

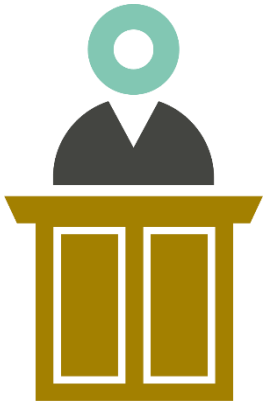
In this decision, the court considered the meaning of an indemnity in a Sale and Purchase Agreement. The buyer of the company had sought a declaration that it was entitled under the relevant provision to be indemnified against certain liabilities. The sellers contended that a requirement on the buyer to give notice of relevant matters *"as soon as possible and in any event prior to the seventh anniversary of the date of [the SPA]"* had not been met. The court held that the notice provision imposed two distinct requirements, being to ensure that notice was given: (i) as soon as possible; and (ii) within seven years. The buyers were found not to have complied with the first requirement, and their claim therefore failed.

To read the judgment, please click here.

GWYNT Y MOR OFTO PLC V GWYNT Y MOR OFFSHORE WIND FARM LTD & ORS [2020] EWHC 850 (COMM)

This decision also concerns the interpretation of an indemnity in a Sale and Purchase Agreement, and in particular the question of whether an indemnity expressed to cover pre-completion damage to assets should be construed as covering only damage occurring in the period between signing and completion or, as the court ultimately decided, any damage occurring at any time prior to completion. Although it does not make any new law, it contains useful guidance on how the courts tend to interpret such provisions.

To read the judgment, please click here.



CIVIL PROCEDURE

BES V CHESHIRE WEST [2020] EWHC 701 (QB)

This decision considers the thorny question of when one entity can be said to have control over documents held by a connected or related entity for the purposes of disclosure. It makes clear that this will always be judged on a case by case basis, taking into account a number of factors,

but that it will generally be easier to assert that such control exists where a parent-subsidiary relationship subsists between the two entities, and in particular where there can be said to be either an explicit "standing consent" to the effect that one entity is able to request documents from the other, or an implicit standing consent based on a history of such requests being made and acceded to.

To read the judgment, please click *here.*

WALES (T/S SELECTIVE INVESTMENT SERVICES) V CBRE MANAGED SERVICES LTD & ANOR [2020] EWHC 1050 (COMM)

In this decision, the court refused to allow a significant portion of a successful defendant's costs due to its repeated refusal to engage in mediation over the course of a dispute, emphasising once again that a failure to participate in ADR may have consequences even for a winning party.

To read the judgment, please click *here.*

3 TEAM NEWS

POLLY PROMOTED TO PARTNERSHIP

We are delighted to announce that litigator Polly Richard is one of five lawyers to be promoted to the Travers Smith partnership, with effect from 1 July 2020. Polly has a broad range of commercial litigation experience; most recently as part of the team acting for Hewlett Packard in the largest fraud claim ever levelled at individuals in the English Court.

Polly is the fourth female disputes lawyer to be promoted to the partnership in as many years. We are very proud that this now means we have a 50:50 male/female split in the department's leadership team.

To view the full press release covering the firm's recent partner promotions, please click *here*.

FOR FURTHER INFORMATION, PLEASE CONTACT

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