BRIEFING

TRAVERS SMITH

Dispute Resolution round-up

May 2021

FOREWORD

Welcome to the fourth edition of our quarterly disputes newsletter, which covers key developments in the dispute resolution sphere over the last three months or so.

A number of Covid-19 related cases are finally trickling through the system and reaching final judgment, as detailed in the "Cases" section below. At the start of the pandemic, some commentators considered that the English courts might begin to take a somewhat more creative or flexible approach to issues of contractual construction, implication of terms and frustration, in order to ensure "fairer" outcomes for contractual counterparties affected by the pandemic than the usual "winner takes all" approach. However, a clear pattern is emerging to the effect that it is business as usual in the English courts, and that some of the more creative arguments being put forward in Covid-19 related disputes are failing to find favour with judges.

On the Brexit front, practitioners continue to wait with bated breath for news of whether the UK will be permitted to join the Lugano Convention, ensuring that it is once again part of a consistent, pan-European regime for allocation of jurisdiction over cross-border civil and commercial disputes and for the recognition and enforcement of the judgments to which those disputes give rise. We have also seen continued, concerted efforts to demonstrate that England and Wales remains an attractive destination for the resolution of international disputes, with the Master of the Rolls setting out some truly innovative proposals for a more efficient, online justice system which harnesses the power of technology, and the UK Jurisdiction Taskforce publishing its innovative new Digital Dispute Resolution Rules.

In the meantime, the appeal courts in this jurisdiction have had a busy few months, handing down interesting judgments on matters as diverse as when illegally obtained evidence (in this case hacked emails) should be excluded from consideration by the courts, the extent to which executives' personal devices can be searched for the purposes of a disclosure exercise and the circumstances in which parent company liability may arise in this jurisdiction for corporations operating in emerging markets, or whose business pose particular operational hazards. We also have a recent Supreme Court decision on limitation and the age-old peril of waiting until the last possible moment to issue a claim form.

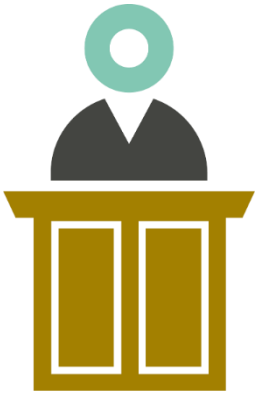
We hope that you continue to enjoy reading this round-up, whether a litigator by trade or a generalist, and whether in-house or in private practice, and that you will share it with any of your colleagues who may also find it useful. We also hope that you are all keeping well as the City starts to open up again, and stay safe.

Rob Fell

Head of Dispute Resolution

1 NEWS

NEW RULES FOR WITNESS EVIDENCE IN THE BUSINESS AND PROPERTY COURTS NOW IN FORCE



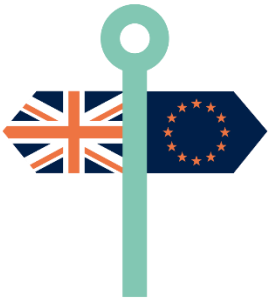
As we signposted in February's round-up, the long awaited and wide-ranging reforms to witness evidence in the Business and Property Courts, contained in a new Practice Direction 57AC, came into force on 6 April 2021 and now apply to all witness statements signed on or after that date.

The English courts have long been critical at the way witness statements are used in large commercial proceedings and these fundamental reforms are aimed at stripping back over-lengthy and "over-lawyered" witness statements. The key principle of the reforms is that the evidence set out in a witness statement should be limited to the evidence that a witness would give orally at trial, as their evidence in chief, and should avoid straying into argument, advocacy or "spin".

Witness statements now need to be prepared in accordance with a Statement of Best Practice, which sets out the proper content and purpose of witness statements and the process by which they should be prepared. Both witnesses and legal representatives will need to sign statements certifying compliance with the Practice Direction and the Statement of Best Practice. There are also new provisions concerning the documents that a witness may be shown in order to refresh their recollection, which will now need to be identified by list appended to the witness statement.

To read more about the reforms and the implications they have for witness evidence please click *here* for a detailed briefing by *Alex Thomson*, Knowledge Lawyer in our Dispute Resolution department.

UK'S PARTICIPATION IN LUGANO CONVENTION IN DOUBT



Since the post-Brexit transition period ended, on 31 December 2020, the UK is no longer part of the pan-European regime which: (i) governs how EU courts allocate jurisdiction between themselves over cross-border civil and commercial cases; and (ii) requires them to recognise and enforce each other's judgments.

To remedy this, the UK has applied to join the Lugano Convention. The Lugano Convention currently governs such matters as between EU courts and EFTA member state courts. It would, if the UK's application is permitted, also apply as between the English courts and both EU and EFTA member state courts. Most practitioners consider that this would be of real benefit to the UK, as it would then once again be part of a clear and consistent pan-European regime governing the allocation of jurisdiction over cross-border cases, and the recognition and enforcement of judgments emanating from such cases.

However, the European Commission has recently *recommended* that the UK's application to join

the Lugano Convention should be declined, on the basis that the Convention is intended to support the EU/EFTA internal market, of which the UK is no longer a part.

The matter has now passed to the European Council (i.e. effectively to the individual EU member states themselves) for a final decision. Some member states, such as the Netherlands, appear to favour allowing the UK's application, whereas others, such as France, have indicated that they oppose it. Either way, legal practitioners on both sides of the Channel await the final outcome with interest.

TEMPORARY COVID-19 INSOLVENCY MEASURES EXTENDED

Several measures, some time-limited, were introduced by the Corporate Insolvency and Governance Act 2020 to help businesses through the pandemic. The temporary measures include a suspension of the financial consequences of wrongful trading liability for the directors of certain companies, the exclusion of certain small suppliers from new rules invalidating termination clauses in supply contracts triggered by insolvency, and the restriction of winding-up orders where a company's financial position has worsened in consequence of, or for reasons relating to, COVID-19 (unless the grounds for making a winding-up order would have been met in any event).

In light of the ongoing economic difficulties caused by COVID-19, the abovementioned measures have been extended to 30 June 2021. The power under which these extensions were made has itself been extended to 29 April 2022, so the door remains open to further extensions should difficulties persist into the summer.

NEW DIGITAL DISPUTE RESOLUTION RULES

On 22 April 2021, the UK Jurisdiction Taskforce published its *Digital Dispute Resolution Rules*. The rules follow on from the group's 2019 legal statement on the status of cryptoassets and smart contracts, and are designed to be used for, and incorporated into, digital transactions. The stated purpose of the rules is to *"facilitate the rapid and cost-effective resolution of commercial disputes, particularly those involving novel digital technology such as cryptoassets, cryptocurrency, smart contracts, distributed ledger technology, and fintech applications."*

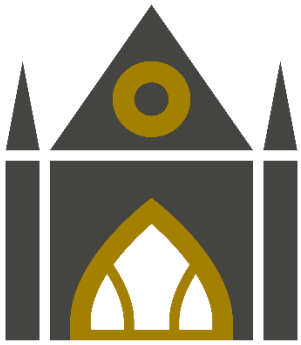
The chosen method of dispute resolution under the rules is an arbitration under the Arbitration Act 1996, although the parties can agree to use expert determination for particular issues. The rules take full advantage of the flexibility of arbitration to reflect the unique challenges and opportunities posed by digital assets and contracts. In particular:

- The Society for Computers and Law, an educational charity, is to be the appointing body for arbitrators.

- The tribunal shall use its best endeavours to resolve the dispute within 30 days of its appointment, unless another period is specified or agreed by the parties.
- The parties are able, if specified in the incorporating text or otherwise agreed, to remain anonymous to each other. Their details will be provided to the tribunal alone in this scenario.
- The tribunal shall have the power to implement its decisions directly on-chain, where able.

Time will tell whether parties will begin incorporating the rules into their digital contracts. The rules make provision for the publication of anonymised awards or decisions of general interest, provided the parties do not object, so it may not be long before these start filtering through.

MASTER OF THE ROLLS SETS OUT VISION FOR COURT SYSTEM OVERHAUL

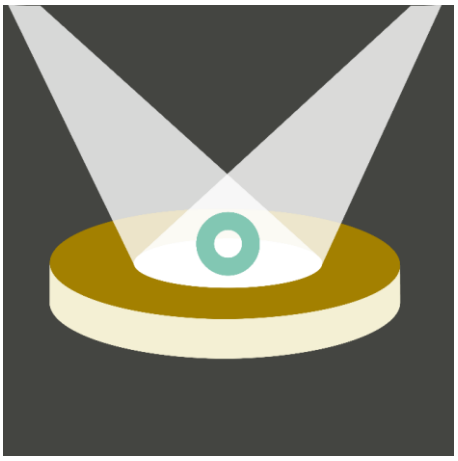


In a *recent speech* delivered at London International Disputes Week 2021, the Master of the Rolls, Sir Geoffrey Vos, outlined some relatively radical suggestions for an overhaul of the civil dispute resolution system in England and Wales. The impact of the Covid-19 pandemic was cited as both a driver of the proposals and evidence of the need for them.

Integral to the proposals was an entirely new, online dispute resolution system, which would integrate ADR mechanisms with the court process - the aim being for most cases to be resolved via ADR at an early stage, leaving only a few to enter the court system and ultimate judicial resolution where necessary. The new system would also aim to resolve issues on a rolling basis (rather than at a "*staged trial event*"), using innovative techniques such as decision trees and computer algorithms.

Sir Geoffrey noted that "*lawyers and the justice system have a reputation for being slow to accept new ideas*" and expressed a hope that the proposals would ensure that the courts in this jurisdiction are "*seen as leading the way by setting a good technological example internationally*". It remains to be seen how many of his ideas are ultimately taken up, and the extent to which they impact on complex/high value commercial litigation, which may be less amenable to some of the changes proposed.

2 CASES UNDER THE SPOTLIGHT



WITHOUT PREJUDICE PRIVILEGE

BERKELEY SQUARE HOLDINGS & ORS V LANCER PROPERTY ASSET MANAGEMENT LTD & ORS [2021] EWCA CIV 551

This Court of Appeal decision provides clarity on the (very limited) circumstances in which without prejudice privilege can be lifted, confirming in particular that without prejudice materials may be admitted to show that an apparent agreement between parties should be set aside on grounds of misrepresentation, fraud or undue influence.

To read the judgment, please click *here*.

SECURITY FOR COSTS

INFINITY DISTRIBUTION LTD (IN ADMINISTRATION) V KHAN PARTNERSHIP LLP [2021] EWCA CIV 565

In this Court of Appeal decision the defendant's appeal against an order that a deed of indemnity from an after-the-event ("ATE") insurer was an acceptable form of security for costs was allowed, and the claimant was instead ordered to make a payment into court. ATE insurance premiums are not usually recoverable from litigation opponents, however, because of a statutory insolvency exception the £315,000 premium in this case, which would have to be paid to cover the proposed security, might have been recoverable from the defendant in the event that the claim succeeded.

At first instance the court had held that this additional potential liability for the defendant was irrelevant to the acceptability of the deed and that it was adequate security. This represented a less than satisfactory outcome for the defendant, who had, in seeking security for their costs, effectively just increased their potential liability for costs by the same amount. The Court of Appeal, however, found that the potential recoverability of the premium was, in fact, highly relevant in considering whether it was an adequate security and failing to consider it would lead to an overall unjust result. The Court of Appeal therefore re-exercised its discretion regarding the form of the security and ordered that a payment into court should be made in place of the deed of indemnity.

Whilst the facts of this case are unusual the principle established, that the court must take into account consequences for both parties when exercising its discretion over security for costs applications, has wider implications and will prove useful guidance for parties making or resisting an application for security for costs.

To read the judgment, please click *here*.

PARENT COMPANY LIABILITY

OKPABI & ORS V ROYAL DUTCH SHELL PLC & ANOR [2021] UKSC 3

This long-awaited judgment of the Supreme Court is of particular interest to corporations which operate in emerging markets, or whose business pose particular operational hazards, and provides guidance as to the circumstances in which parent company liability may arise.

For further information, please read a detailed briefing by *Doug Bryden*, our Head of Operational Risk and Regulatory, and *Heather*

Gagen, *Barney Stannard* and *Anthony O'Driscoll* of our Dispute Resolution team, *here*.

To read the judgment, please click *here*.

CIVIL PROCEDURE

MATTHEW & ORS V SEDMAN & ORS [2021] UKSC 19

In this decision, the Supreme Court confirmed that if a cause of action accrues at midnight, the day which follows counts towards the calculation of the limitation period for the purposes of the Limitation Act 1980.

To read the judgment, please click *here*.

PHONES 4U LTD (IN ADMINISTRATION) V EE LTD & ORS [2021] EWCA CIV 116

In this decision, the Court of Appeal upheld a disclosure order requiring the defendants to request their senior executives to hand over personal devices so that they could be searched by independent IT consultants for documents relevant to the case.

The judgment illustrates how the courts will balance the need to ensure disclosure of relevant documents in court proceedings against individuals' rights to privacy (with the former consideration effectively winning out here). It also emphasises the considerable latitude that the courts have in crafting orders for disclosure.

For further information, please read a detailed briefing by *Alyce Lynch* and *Hannah Hartley* of our Dispute Resolution team, *here*.

To read the judgment, please click *here*.

RAS AL KHAIMAH INVESTMENT AUTHORITY V AZIMA [2021] EWCA CIV 349

In this decision, the Court of Appeal confirmed that evidence which is relevant to a case, but which has been unlawfully obtained (in this case via the hacking of the defendant's emails), will not automatically be excluded from consideration by the court. The courts retain a discretion as to how such evidence should be dealt with, and will balance the need to achieve justice in the particular case at hand (which will generally militate in favour of the evidence being included) against encouraging compliance with the law (which will militate in favour of it being excluded).

In this particular case, the hacked emails were not excluded, on the basis that: (i) they should have been included in the defendant's disclosure in any event (save to the extent that they were privileged); and (ii) to exclude them would effectively have enabled the defendant to benefit from his own fraud. The Court of Appeal noted that there were other, less draconian, ways in which a court could express its disapproval of a party who has procured evidence by unlawful means, beyond simply excluding the relevant evidence, including imposing penalties in costs and/or refusing to grant interest on any damages awarded.

To read the judgment, please click *here*.

COVID-19

PGH INVESTMENTS LTD V EWING [2021] EWHC 533 (CH)

In this decision, the court considered, albeit obiter, the evidential burden for a company attempting to take advantage of the moratorium against winding up petitions in paragraph 5 of Schedule 10 to the Corporate Insolvency and Governance Act 2020. The court dismissed the winding-up petition on the ground that the company was not liable to pay the relevant debt. However, with the benefit of full argument on the issue, the court went on to consider whether, if it was wrong, the evidential burden had been discharged by the company.

It has previously been established that the burden is on the company to establish a prima

facie case that COVID-19 has had a financial effect on the company before presentation of the petition, which is a low threshold (see *Re A Company* [2020] EWHC 1551 (Ch)). In the present case, the company's liability arose under a guarantee, which it said arose from the direct financial effect of COVID-19 on the principal debtor. The court accepted that an indirect financial effect on a company could be sufficient to engage the moratorium. However, the court would not, on the evidence provided, have held that the company had suffered a financial effect from COVID-19. Unsupported assertions about various general matters, including reduced liquidity worldwide would not have been sufficient, and some evidence would need to have been produced showing the purported financial effect on the company.

To read the judgment, please click here.

COMMERZ REAL INVESTMENTGESELLSCHAFT MBH V TFS STORES LTD [2021] EWHC 863 (CH)

In this decision, the court granted summary judgment on a commercial landlord's claim against a retail tenant for rent and service charge arrears relating to a period in which the tenant was unable to trade from the relevant premises as a result of the Covid-19 pandemic. The court considered whether the relevant sums had fallen due under the parties' lease agreement, applying the usual rules on contractual construction and implication of terms in so doing. The outcome of the case is therefore in many ways unsurprising. It does, however, emphasise that the courts will continue to apply established contract law principles in the face of Covid-related claims, and refuse to be swayed by creative arguments which arguably allocate losses attributable to the pandemic more "fairly" as between contractual counterparties than the strict wording of the relevant contract allows. It also demonstrates that the courts are prepared to "grasp the nettle" and deal with issues arising out of the pandemic on a summary basis where appropriate.

To read the judgment, please click here.

BANK OF NEW YORK MELLON (INTERNATIONAL) LTD V CINE-UK LTD [2021] EWHC 1013 (QB)

This decision granting summary judgment to three commercial landlords in respect of unpaid rent considers similar issues to those considered by the judge in the Commerz case above, and reaches similar conclusions. It is, however, of additional interest because, as well as considering matters of contractual construction and implication of terms, it also considers whether the commercial leases in question could be said to have been frustrated, whether temporarily or permanently, by the Covid-19 pandemic and resulting regulations.

Frustration is a doctrine that provides that where a wholly unexpected event has occurred, which the parties have not provided for in their contract, and which negates or "frustrates" the contract's purpose, the contract will be discharged. The court here accepted that the pandemic and resulting regulations could in principle constitute a frustrating event, but did not consider that to be the case on the particular facts. In reaching its conclusion, it emphasised that these were long-term leases which all had relatively significant periods left to run, and that the periods during which the commercial tenants had been forced to close their businesses had been relatively short. The court also rejected the idea of a new doctrine of "temporary" frustration.

To read the judgment, please click here.

REGULATORY

R (ON THE APPLICATION OF KBR INC) V DIRECTOR OF THE SERIOUS FRAUD OFFICE [2021] UKSC 2

In this decision, the Supreme Court confirmed that "section 2 notices" issued by the Serious Fraud Office (i.e. notices requiring the

production of documents relevant to a Serious Fraud Office investigation) do not have extra-territorial effect. In particular, any notice which is issued to a non-UK company, with no business or presence in the UK, requiring it to produce documents which are held outside the UK, will be ineffective.

For further information, please read a detailed briefing by *Michele Cheng* and *Victoria Green* of our Dispute Resolution team, *here*.

To read the judgment, please click *here*.

3 TEAM NEWS

NEW PARTNERS ELECTED

We are delighted to announce that *Alice Childs*, *Rachel Kitchman* and *Barney Stannard* are three of seven lawyers to be promoted to the Travers Smith partnership, with effect from 1 July 2021. Their promotion means that our DR partner group will be made up of 13 individuals, with a 6:7 male/female split.

Their endorsement from the wider partnership is not only a show of faith in their talent, but also in the future of our dispute resolution practice, which continues to grow year-on-year.

We are delighted for each of them, and are sure that they will contribute significantly to the practice and firm's future successes.

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

Alice Childs

Rachel Kitchman

Barney Stannard

FOR FURTHER INFORMATION, PLEASE CONTACT

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