BRIEFING

TRAVERS SMITH

Dispute Resolution round-up

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1 Introduction

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

The last quarter has seen a raft of interesting developments across the areas in which we operate. We are likely soon to see reforms to the Arbitration Act 1996 come into force, aimed at ensuring that this jurisdiction remains an attractive choice of arbitral seat. We also continue to see the consequences of the Supreme Court's recent decision in PACCAR on the enforceability of certain litigation funding arrangements (on which our firm acted), play out in the lower courts. Interesting decisions continue to bubble up in the world of corporate disputes, with the raft of section 90A and/or Schedule 10A of FSMA decisions currently before the courts throwing up a challenge to the longstanding principle that a company can only assert privilege against its shareholders in limited circumstances. And finally, the long tail of Italian swaps cases continues to play out in the financial markets disputes arena, generating an important Court of Appeal decision this month.

Closer to home, this edition also represents my last as Head of Dispute Resolution, before I hand over the baton to Heather Gagen in the new year. Both Heather and I 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 send you our best wishes for the holiday season, and a very happy new year.

Rob Fell

Head of Dispute Resolution

2 News

UK to join Hague Convention 2019

On 23 November 2023, the UK government concluded that the UK should join the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign

Judgments in Civil or Commercial Matters ("**the 2019 Hague Convention**").

The 2019 Hague Convention requires contracting states to recognise and enforce civil and commercial judgments which fall within its broad scope, according to a set of common rules.

The UK now needs to sign and ratify the convention, which will then enter into force 12 months after ratification (so most likely in the course of 2025). It will then apply to the enforcement of relevant judgments between the UK and other contracting states (including at least Ukraine, Uruguay, and all EU member states except Denmark), in proceedings issued after that date.

This represents welcome news. Since the end of the post-Brexit transition period in 2021 there has been no comprehensive reciprocal regime in place between the UK and EU member states for the enforcement of each other's civil and commercial judgments. The 2019 Hague Convention will go a long way to filling that gap, and to ensuring that English civil and commercial judgments can be quickly and easily enforced in both the EU and, as other states join the convention, around the world.

Reform of the Arbitration Act

The Law Commission has published its final report and draft bill in relation to reform of the Arbitration Act 1996, with a view to ensuring that the Act remains fit for purpose and continues to promote England and Wales as a leading destination for commercial arbitration. The bill has subsequently been included in the King's Speech and should, if this Parliament runs its course, become law in the relatively near future.

Amongst other things, the bill provides for: (1) codification of the statutory duty of disclosure applicable to arbitrators; (2) introduction of arbitrator immunity from liability caused by their resignation (unless that resignation was unreasonable), and introduction of arbitrator immunity from costs arising from applications for their removal (unless the arbitrator has acted in bad faith during the application proceedings); (3) introduction of a power to make an arbitral award on a summary basis; (4) an improved framework for challenges to arbitral awards under section 67 of the Act; (5) a new test for determining the law applicable to an arbitration agreement; and (6) clarification of certain court powers in support of arbitrations. While the expected impact of these reforms is not drastic, the amendments improve the existing legislation and should safeguard the reputation of England and Wales as a seat of choice for international arbitration.

Civil Justice Council recommends changes to Pre-action Protocol Regime

The Civil Justice Council ("**CJC**") has published part one of its two-part report recommending substantial changes to the current regime of pre-action protocols ("**PAPs**") that the courts will normally expect potential parties to litigation in England and Wales to comply with before a claim is issued.

Key proposals include:

- Emphasising the role of PAPs by adding to the Overriding Objective in CPR Part 1 a reference to the need for PAPs to be followed and enforced.
- Making compliance with PAPs mandatory, except in urgent cases, and providing for meaningful sanctions (including for example, the forfeiture of interest on awards of damages) where there is a sufficiently serious breach without good reason.
- Replacing the current Practice Direction – Pre-Action Conduct with a new "General PAP" (as a Practice Direction to CPR Part 1), applicable to all cases not covered by a separate area-specific PAP. The

proposed General PAP would mandate a number of sequential steps to be taken by the parties before proceedings are commenced, including:

- Engaging in some form of dispute resolution process, which may be chosen by the parties but with a default requirement of a confidential pre-action meeting; and
- Jointly preparing a "stocktake" report summarising the parties' positions on the issues in dispute and the status of pre-action disclosure.

The current compliance with PAPs is, in practice, patchy, and parties often deviate from them substantially without incurring any sanction from the courts. The proposals, if implemented and actively enforced by the courts, will strengthen the role of PAPs and may lead to more claims settling before proceedings are issued, and to greater narrowing of the issues in those claims which are issued. One of the likely costs of the new approach, if adopted, will be an increase in satellite litigation around compliance issues, a concern recognised by the report.

3 Cases

Corporate disputes

***VARIOUS CLAIMANTS V G4S PLC* [2023] EWHC 2863 (Ch)**

This interesting decision concerns the rule that a company cannot assert privilege against its shareholders unless the documents at issue came into existence in the context of a dispute with the relevant shareholder. This so-called "shareholder principle" is an issue in several claims brought by investors against companies under section 90A and/or Schedule 10A of FSMA which are currently being litigated in the courts of England and Wales, including the claim against G4S which generated this decision.

As a starting point, the court questioned the shareholder principle's foundations – noting that it had originally been brought about in the context of partnership law and by analogy with the relationship between trustee and beneficiary – which it considered now seemed "*shaky*" in the shareholder-company context. Nevertheless, the court accepted that the principle was "*well-recognised in the authorities*" such that it was bound to apply it.

Having reached that conclusion, the court when on to consider the principle's scope, concluding that it:

- should not be expanded beyond the category of registered shareholders recognised by the "*old authorities*", i.e. it only applies to registered shareholders and cannot apply to those who hold shares indirectly via custodians through CREST or other depositary systems;
- applies only to those who were shareholders at the time the relevant document(s) came into existence; and
- applies to legal advice privilege and litigation privilege, but does not apply to without prejudice privilege.

As a result, the Defendant, G4S, was not able to assert privilege against three of the ninety claimants in the instant litigation. However, the court nevertheless dismissed the application of those three claimants for disclosure of the relevant material – which crucially was made at a late stage in the proceedings – on case management grounds. It held that disclosure only to the three claimants would have been "*impossible to manage and potentially highly disruptive to the imminent trial*".

Read the judgment here.

***DECISION INC HOLDINGS PROPRIETARY LTD V GARBETT* [2023] EWCA CIV 1284**

This is yet another decision considering the effectiveness of a notice of breach of warranty under a contract – this time from the Court of Appeal. The case concerned several claims for breach of warranties contained within a share purchase agreement. At first instance, the High Court held, among other things, that i) there had been a breach of one of the warranties, namely that there had been a "material adverse change in the… prospects" of the company; and ii) the contractual notice of that breach was effective, despite providing an omnibus figure for the amount claimed in respect of all of the alleged breaches rather than separate amounts for each individual breach. The provision in question required a notice "summarising the nature of the Claim… and, as far as is reasonably practicable, the amount claimed".

The Court of Appeal disagreed, overturning the finding of a breach of warranty and – notably – deciding that the notice had been defective. While the interpretation of a notice clause will always depend on the facts, the Court of Appeal here took a narrow approach. Among other things, it rejected the submission that "Claim", when interpreted in accordance with an interpretation clause contained in the relevant contract (i.e., words in the singular are deemed to include the plural), was helpful to the respondent, both on a literal basis (because then "amount" should also be pluralised) and a contextual basis. The Court of Appeal also accepted the "commercial logic" that a "recipient might wish to settle a strong claim but to fight a weaker one" and so would need to know the individual amount claimed for each "Claim" rather than an omnibus sum.

The stakes are high – if a notice provision is not complied with, often a claim can be knocked out entirely (as it was in this case). Ensuring compliance with the notice provisions is an obvious step once a dispute is in prospect, but this is often easier said than done, as this case illustrates. Here the claimants acted on an interpretation of the notice provision that was consistent with the analysis of a High Court judge, which might well be seen in normal circumstances as a good litmus test for compliance. As a substantial purpose of notice clauses is to provide certainty to the parties in handling disputes, the litany of cases on notice clauses suggests that the real solution is likely to be found at the transactional stage, where lawyers should utilise more express and unequivocal language, even at the cost of some economy of expression.

Read the judgment here.

Tax disputes

***SKATTEFORVALTNINGEN v SOLO CAPITAL PARTNERS LLP & ORS* [2023] UKSC 40**

This unanimous decision of the Supreme Court, allowing fraud claims by the Danish tax authority, Skatteforvaltningen ("**SKAT**"), to proceed in the English courts, is a significant one given the size and high-profile nature of the litigation. The Appellants had sought to knock out SKAT's claims by relying on the well-established principle that the courts of one country will not enforce the tax law of another country. The Supreme Court declined to apply that principle on the basis that SKAT's claims are not for unpaid tax but instead claims that it was defrauded by various entities to obtain refunds to which the entities were never entitled. The underlying litigation – involving claims of around £1.5 billion by SKAT to recover those fraudulently induced tax refunds – will now proceed to a full trial in the English Commercial Court.

Read the judgment here. Read Rob Fell's comments on the case in the Financial Times here.

Competition disputes

***UMBRELLA INTERCHANGE LITIGATION* [2023] CAT 49**

In this decision, the Competition Appeal Tribunal ("**CAT**") considered the applicability of the European Court of Justice's ("**CJEU's**") decision on limitation in Volvo AB and DAF Trucks NV v RM (Case C-267/20) ("**The Volvo Decision**") to the claims brought in both the "Umbrella Interchange Fee Litigation" and the "Merricks Collective Proceedings" (both sets of follow-on damages proceedings against Mastercard and Visa in respect of multilateral interchange fee overcharges). The CAT ultimately concluded that it is not bound by post-Brexit CJEU decisions on limitation periods in competition follow-on damages claims.

The decision, alongside others such as *Gemalto Holding BV & Ors v Infineon Technologies AG & Ors* [2022] EWCA Civ 782, *and OT Computers v Infineon Technologies* [2021] EWCA Civ 501, illustrates a trend of the English judiciary situating their approach to limitation periods in competition damages litigation within the wider policy framework of the general English law of limitation, and being reluctant to extend limitation periods in these claims, in apparent contrast to the CJEU. It should be noted that both this decision and Gemalto are only of relevance to damages actions in relation to competition infringements that ceased prior to 9 March 2017. After that date, Schedule 8A of the Competition Act 1998 – which implements the Damages Directive – applies and limitation periods will be suspended during an investigation by a competition authority. These decisions, therefore, apply only to the "legacy" claims currently making their way through the courts. However, there is a substantial body of such claims, and these recent decisions indicate that the courts will not assist claimants who have delayed in bringing their claims by bridging the gap between the existing law of limitation and the new provisions of Schedule 8A. Should the CJEU in *Heureka v Google* (Case C-605/21) follow the opinion of AG Kokott (see here), this decision of the CAT will also represent a clear fork in the road between the UK and EU's approach to limitation in these legacy claims.

The decision is also of wider significance in that it dismisses any notion of "accrued EU law rights" which would develop separately with EU law, creating a schism of applicable law where claims under EU law arose but were not asserted prior to Implementation Period Completion Day, the point at which the transitional period of Brexit ended. The CAT held that the litigation of claims arising under provisions of EU law, including those claims accruing and asserted before IP Completion Day, must reflect the reality of the UK's transition from a member state to a third country.

Finally, the decision is a noteworthy early example of where the English courts may be prepared to diverge from EU case law developments post-Brexit. Based on the decision, it appears that such a divergence may be more likely where EU law decisions represent a marked change to an already well-established position taken by the English courts, as opposed to, for example, a gradual development of the existing position.

Read the judgment here. To read our longer briefing on this case click here.

ESG disputes

MCGAUGHEY & ANOR V UNIVERSITIES SUPERANNUATION SCHEME LIMITED [2023] EWCA CIV 873

This case is the second attempt in England to use company law procedures designed to protect the interests of members, as tools to force companies to shift towards prioritising climate change concerns as part of their overall business strategies. In both cases these attempts have largely failed, suggesting that English courts might be reluctant to follow the example of the Dutch courts in the famous *Milieudefensie v Royal Dutch Shell* case in refashioning traditional legal concepts in order to take an active role to promote climate change mitigation policies.

A derivative action was brought against the directors of the corporate trustee of the Universities Superannuation Scheme ("USS"). The claimants were two academics, members of the USS, who alleged, inter alia, that the directors had breached their statutory duties by failing to create a credible divestment plan for fossil fuel investment. The claimants argued, inter alia, that this constituted a breach of the directors' duty to act for proper purposes, including making investments that avoid significant risk of financial detriment to the scheme, the beneficiaries and the company, and promoting the success of the company having regard to its long-term interests.

The High Court had refused permission for the derivative action to proceed in May 2022 on the basis that the claimants had not been able to make out a prima facie case that the trustee company had suffered or would suffer an immediate financial loss as a consequence of the directors' alleged failures.

The Court of Appeal heard an appeal of that decision in June 2023 and resoundingly rejected permission to appeal on all grounds, describing the claim as one that was "bound to fail". Fundamentally, the Court of Appeal found that the judge at first instance was correct to determine that there was no loss and that as a result the claim was not a derivative action (because there was no harm for which a remedy was being sought).

The Court seemingly sought to shut the door on potential copycat claims against pension trustees, by stating in terms that the fact that the claimants were scheme members did not place them in a position which is analogous to the position of a shareholder in a company derivative action. In particular, the judgment noted that the action amounted to the claimants "seeking to interfere with the decision making" of the trustee company whilst attempting to "challenge [its] management and investment decisions…without any ground upon which to do so".

Read the judgment here.

***LIMBU & 23 OTHERS V DYSON LTD* [2023] EWHC 2592 (KB)**

In this notable decision, the High Court declined jurisdiction over an ESG supply chain claim brought by a group of Malaysian migrant workers against three companies in the Dyson group, two of which are domiciled in England and the third in Malaysia.

Prior to Brexit, such challenges were determined in accordance with the Brussels (Recast) Regulation, which limited the ability of the English courts to refuse jurisdiction in respect of English-domiciled defendants. Following Brexit, the courts are free to determine such questions in accordance with common law principles. This is the first significant decision in which the High Court has applied those principles in declining jurisdiction over a defendant, providing an insight into how similar cases may be determined in future.

The case concerned claims by 24 migrant workers employed at factory facilities in Malaysia that manufactured products and components for Dyson-branded products. The claimants alleged that they had been subjected to highly exploitative and abusive conditions while living and working in those facilities. Dyson did not own the facilities or employ the claimants, but was alleged to be liable for various torts and by way of unjust enrichment as a result of the high degree of control it was said to exercise over manufacturing operations and working conditions. Dyson challenged the jurisdiction of the English Courts to decide the claims.

Given that, post-Brexit, the Brussels (Recast) Regulation no longer applies, the Court applied common law principles in determining that: (1) England was not the natural or appropriate forum for the claims, and Malaysia is another available forum which is clearly and distinctly more appropriate; and (2) there were no special circumstances such that justice required the claims to proceed in England.

The decision provides useful guidance on the approach the English courts will take to questions of jurisdiction in transnational tort cases such as this one.

Read the judgment here.

Financial markets disputes

***BANCA INTESA SANPAOLO SPA & ANOR V COMUNE DI VENEZIA* [2023] EWCA CIV 1482**

The Court of Appeal has handed down the latest decision in the long running Italian swaps saga, which has spawned many cases in both this jurisdiction and in Italy in which Italian municipalities seek to unpick English law-governed swaps transactions entered into with banks where they are out of the money.

The municipality here, Comune di Venezia, had argued that it had no capacity to enter into certain swaps concluded with two Italian banks, Banca Intesa Sanpaolo and Dexia. The swaps themselves were governed by English law but the question of Venezia's capacity was governed by Italian law. The Commercial Court concluded that, as a matter of Italian law, it was correct that Venezia had no capacity to enter into them, based primarily on its interpretation of a relatively recent Italian Supreme Court decision known as Cattolica. The swaps were therefore void and unenforceable and, in principle, Venezia was entitled to restitution of the net amounts paid under them.

In a decision that will be welcomed by the banking community, the Court of Appeal overturned the Commercial Court's finding in this regard. It held that Venezia did have capacity to enter into the swaps as a matter of Italian law, and that they were as a result valid and enforceable, even taking into account the Cattolica decision.

In further good news for banks, the Court of Appeal did endorse, on an obiter basis, the Commercial Court's finding that, if the swaps had been void and unenforceable, such that the banks faced a restitution claim from Venezia, they would in principle have been able to rely on a change of position defence to that claim on the basis that they had entered into back-to-back hedging transactions.

Read the judgment here.

***LORELEY FINANCING (JERSEY) NO 30 LTD V CREDIT SUISSE (SECURITIES) EUROPE LTD & ORS* [2023] EWHC 2759 (COMM)**

In this decision, the High Court ruled in favour of Credit Suisse in a claim over $100 million of notes linked to residential mortgage-backed securities issued prior to the 2008 financial crisis.

The claimant, Loreley Financing, argued that Credit Suisse had made false representations (either deliberately or negligently) in relation to the notes, which had a triple-A rating. By 2010, the value of the notes had reduced to zero. Cockerill J held that the claims failed at every level, including because they were time-barred; none of the alleged representations had in fact been made; and even if they had, they were not relied upon. On this latter point, Cockerill J provided clarification on the link between representation and reliance, noting the material distinction between an "assumption" as to a state of affairs and an active consideration of them by the representee.

To read the judgment, click here.

Arbitration

***REPUBLIC OF MOZAMBIQUE V PRIVINVEST SHIPBUILDING SAL (HOLDING)* [2023] UKSC 32**

This judgment of the Supreme Court contains helpful discussion of s. 9 of the Arbitration Act 1996. In particular, how to ascertain whether a dispute is in respect of a "matter" which is within the scope of an arbitration agreement, such that there may be a stay of court proceedings. Lord Hodge considered there to be a "general international consensus among the leading jurisdictions involved in international arbitration in the common law world which are signatories of the New York Convention" on this point, which he summarised at paragraphs 72 to 82. In short:

1. There is a two-stage process – first, "the court must determine what the matters are which the parties have raised or foreseeably will raise in the court proceedings, and, secondly, the court must determine in relation to each such matter whether it falls within the scope of the arbitration agreement." The court must ascertain the substance of the dispute and not be overly respectful to pleadings "*which may be aimed at avoiding a reference to arbitration by artificial means*."
2. The "matter" need not encompass the whole of the dispute between the parties.
3. A "matter" is "a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute." A "matter" does not "extend to an issue that is peripheral or tangential to the subject matter of the legal proceedings."
4. The "judicial evaluation of the substance and relevance of the "matter" entails a question of judgment and the application of common sense rather than a mechanistic exercise. It is not sufficient merely to identify that an issue is capable of constituting a dispute or difference within the scope of an arbitration agreement without carrying out an evaluation of whether the issue is reasonably substantial and whether it is relevant to the outcome of the legal proceedings of which a party seeks a stay."

Lord Hodge added that when turning to the second stage of the two-stage process, "the court must have regard not only to the true nature of the matter but also to the context in which the matter arises in the legal proceedings.". He noted that there may not yet be a consensus on this view, but that existing jurisprudence and common sense lend support to it.

This summary will be a helpful checklist when considering whether a dispute is caught by an arbitration agreement.

Civil procedure and privilege

***CHURCHILL v MERTHYR TYDFIL CBC* [2023] EWCA Civ 1416**

The Court of Appeal held in this case that the courts may lawfully compel parties to engage in an alternative dispute resolution process, such as mediation, provided that such an order does not impinge upon a party's right to a fair trial and is a proportionate manner of settling the dispute fairly, quickly and at reasonable cost. The previous leading decision on compulsory ADR, *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, has often been cited as authority that courts cannot impose mediation upon parties. However, the Court of Appeal determined that statements to this effect in Halsey were obiter, and therefore not binding upon it. The Court declined to set out a checklist or create any fixed principles as to when an order for mandatory ADR should be made, stating that judges in individual cases are well-qualified to decide whether such an order is appropriate in the circumstances.

Read the judgment here.

***EURASIAN NATURAL RESOURCES CORPORATION LTD V THE DIRECTOR OF THE SERIOUS FRAUD OFFICE & ORS* [2023] EWHC 2488**

This case centres on the much covered – and heavily litigated - criminal investigation launched by the Serious Fraud Office ("**SFO**") into Eurasian Natural Resources Corporation Ltd ("**ENRC**"), which was closed in August of this year. ENRC alleged that sensitive information about the investigation was leaked by SFO officers and staff to journalists and others. A report, described as the "Byrne report", outlined the conclusions of an internal misconduct investigation which found there was a "case to answer" on the part of a senior investigator within the SFO in respect of suspected leaking of confidential information. In this specific decision, the court found that redactions made by the SFO to the report should not be lifted, due to the "public interest in protecting the identity of confidential sources".

In reaching its decision, the court considered various challenges to the relevant redactions on grounds of privilege, irrelevance, and public interest immunity ("**PII**"), as well as the question of when privilege will be lost by referring to a document in open court and/or in a party's statements of case. The decision provides a useful case study on the law surrounding the use of redactions in disclosed material, in particular regarding the application of PII to confidential sources. It confirms that the test for asserting PII is outlined in *R v Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274: (1) is the information relevant and material to an issue in the proceedings?; (2) if it is relevant and material, is there a real risk that disclosure of the information in question will cause substantial harm to a public interest?; and (3) even where a real risk of substantial harm can legitimately be said to arise, is the public interest in withholding inspection nonetheless outweighed by the public interest in the fair administration of justice? In applying this test, the court concluded that there was a real risk that lifting the relevant redactions would cause substantial harm to the public interest, outweighing the public interest in the fair administration of justice.

Read the judgment here.

***JONES V TRACEY* [2023] EWHC 2256 (CH)**

Practitioners are often asked whether certain correspondence is better as "open" or "without prejudice", which can raise questions of both form and substance. In this decision, an inter-partes letter was held not to be covered by without prejudice privilege, despite being marked as such. The letter concerned entering into ADR but did not contain an offer to settle or relate to communications about a specific offer. The decision outlines that while ADR processes will generally be conducted on a without prejudice basis, the same is not necessarily true for correspondence about the possibility of engaging in ADR.

The court made the following points:

(1) The starting point for the court is the manner in which a communication was drafted. Usually, the writer of a letter can be taken to have intended to mark a letter in a particular way or otherwise to have intended to write an open letter. However, if it is clear from the context that a letter was intended to be open, or without prejudice or without prejudice as to costs, it will be treated as such.

(2) In some cases, the true nature of the letter will be obvious, such as a letter that falls within a chain of communications of a particular type. Commonly a letter which is not marked "without prejudice" that falls within a chain of communications in the context of settlement negotiations will be treated as being without prejudice unless the opposite intention is obvious. The converse may also be true

(3) The true nature of the communication must be established objectively without regard to evidence of subjective intention and the right approach is to consider how a reasonably minded recipient would regard the communication.

(4) Where a communication does not contain an offer and does not relate to communications about a specific offer, but instead relates more broadly to ADR, that communication would normally not be understood to be "without prejudice" by the reasonably minded recipient.

Read the judgment here.

Litigation funding

***THERIUM LITIGATION FUNDING v BUGSBY PROPERTY LLC* [2023] *EWHC 2627 (COMM)* and *ALEX NEILL CLASS REPRESENTATIVE LTD v SONY INTERACTIVE ENTERTAINMENT EUROPE LTD* [2023] CAT 73**

These two decisions show the fallout from the Supreme Court's recent decision in *PACCAR Inc v Road Haulage Association* [2023] UKSC 28 (as discussed in our previous edition), which rendered most commercial litigation funding agreements ("LFAs") currently in use unenforceable.

The decision in Therium is the first in what may emerge as a rich vein of cases on the enforceability of the large number of LFAs which, following *PACCAR*, are classified as Damages Based Agreements ("**DBAs**") and therefore must comply with the relevant regulatory regime to be enforceable. Therium, a litigation funder, sought a proprietary injunction against Bugsby, a party whose claim they had funded. The terms of the LFA provided for a waterfall of payments out of any damages received. Bugsby's claim succeeded but it was awarded substantially less in damages than it had claimed, meaning that the majority of the claim proceeds were distributed in the waterfall before reaching Bugsby, leaving it with little to show for the litigation. Bugsby, resisting the application for an injunction, said there was no serious issue to be tried, because the decision in *PACCAR* had rendered the LFA with Therium unenforceable, as it was a DBA that did not comply with the regulations. Therium accepted that the provisions of the LFA which related to their fee being calculated by reference to a percentage of the damages won were unenforceable as a DBA *post-PACCAR*, but said that there was, at the least, a serious issue to be tried in relation to the enforceability of the remainder of the agreement, under which they would be entitled to recover the amount of funding provided plus a multiple of that funding. The High Court, although it did not reach a conclusion on the overall enforceability of the LFA in question, considered that there was a serious issue to be tried and that the matter should proceed. It seems likely that other similar claims will come before the courts soon, and this decision provides a solid basis for funders to resist attempts by funded parties to avoid the consequences of their LFAs in the light of the *PACCAR* decision.

More recently, the Competition Appeal Tribunal, in the context of an application for opt-out Collective Proceedings Order in the Sony PlayStation class action, has held that an amended LFA which provided for a funders' fee calculated as a multiple of the contractually committed funding did not constitute a DBA, even though the LFA in question also contained a contingency provision which would allow for payment of a percentages of damages in the event that DBAs in opt-out collective proceedings become lawful. Although the government has recently introduced draft legislation to allow DBAs to be used in opt-out proceedings, currently they are still not permitted. Sony, defending the application, argued that the amended LFA still amounted to a DBA and therefore remained unenforceable.

Further, Sony, advanced an argument that *PACCAR* had materially changed the legal context for assessing DBAs, and mandated a broad approach to assessing whether funding agreements were DBAs, effectively imposing a requirement to assess the proportionality of returns to funders which were "DBAs in disguise". The CAT, however, held that *PACCAR* was primarily a black-letter decision, based on statutory interpretation, and expressed no concerns regarding public policy issues in litigation funding.

Although in Therium the court was not making a final determination, together these two cases suggest that the litigation funding industry may find workarounds to the decision in *PACCAR*, although how these solutions will play out in practice, particularly in the appellate courts, remains to be seen.

Read the judgments here and here.

Limitation

***CANADA SQUARE OPERATIONS LTD v POTTER* [2023] UKSC 41**

In a significant judgment on the law of limitation, the Supreme Court has provided helpful clarification on the meaning of the terms "deliberate" and "conceal" in section 32 of the Limitation Act 1980 ("**the Act**"). The Act sets out the time limits (limitation periods) for bringing different kinds of legal claims. Section 32(1)(b) postpones the commencement of the ordinary limitation period where any fact relevant to the claimant's right of action has been "deliberately concealed" by the defendant. Section 32(2) provides that, for the purposes of section 32(1), "deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty".

The Supreme Court held that all that is required to make out 'deliberate concealment' is that the defendant deliberately ensured (by taking active steps, or by failing to disclose) that the claimant did not know about the fact in question and so could not bring proceedings within the ordinary time limit. The Supreme Court thereby overturned previous Court of Appeal authority which suggested that the claimant needed to establish that the defendant was under a legal, moral or social duty to disclose the fact, and that the defendant knew the fact was relevant to the claimant's right of action. The Supreme Court also held that the defendant's deliberate commission of a breach of duty and their deliberate concealment of a relevant fact will be deliberate only if intentional, rejecting the Court of Appeal's finding that "deliberately" can also mean "recklessly" in this context.

In delivering this judgment, the Supreme Court has returned to the simplicity of the ordinary meaning of the words in the Act. In holding that these terms should be given their ordinary meaning, it has potentially widened the scope for claims to be brought more than six years after the cause of action arose, albeit making the task of proving deliberate concealment more challenging.

Read the judgment here.

Sanctions

***MINTS & ORS V PJSC NATIONAL BANK TRUST & ANOR* [2023] EWCA CIV 1132**

In this decision, the Court of Appeal considered various issues relating to the effect of sanctions on the ability of a sanctioned person to pursue litigation before the English courts.

The litigation arose out of claims by the claimant banks for US$850m based on allegations that certain of the defendants conspired with representatives of the claimant banks to enter into uncommercial transactions with companies connected to the relevant defendants, whereby loans were replaced with what the claimants contend were worthless or near worthless bonds.

The Court of Appeal confirmed that UK sanctions do not preclude the entry of judgments in favour of Russian sanctioned parties. The court also confirmed that the Office of Financial Sanctions Implementation is entitled to licence: (i) a sanctioned party to pay an adverse costs order, security for costs or damages on a cross-undertaking in damages; and (ii) payment of a costs order in favour of a sanctioned party. The court also considered on an obiter basis the test for when an entity can be said to be under the ownership and control of a designated person, such that sanctions must be treated as applying to it, as well as to that person.

Read the judgment here.

4 Department News

Heather Gagen appointed Head of Dispute Resolution

We are delighted to announce that Heather Gagen will become Head of Dispute Resolution, effective 1 January 2024. Heather succeeds Rob Fell who has come to the end of his maximum term heading up the practice. Rob commented: *"The team is very fortunate indeed to have Heather as its next Head. Beyond being a superlative litigator and leader, she has a sense of humour that remains intact under the most intense of pressures, and, above all, a deep and abiding love for this team and this firm."* Heather commented: *"I am very proud and excited to become Head of our market leading and innovative Dispute Resolution practice. Our disputes team is a wonderful and supportive group of partners, lawyers and business professionals, and we are part of a very special firm."*

Awards for Travers Smith Dispute Resolution

We are delighted that the Travers Smith Dispute Resolution team has been awarded "Innovation in Disputes" and the Travers Smith Artificial Intelligence team were awarded "Innovation in Digital Solutions" at the Financial Times Innovative Lawyers Europe Awards 2023. The firm was ranked as the 12th "Most Innovative Law Firm in Europe. Additionally, Travers Smith Competition Partner Stephen Whitfield was listed as a "commended individual" and our ESG and Sustainable Finance Academy was "highly commended" in the "Skills Development" category.

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