BRIEFING

Dispute Resolution round-up

June 2022

FOREWORD

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

The team here has been heavily involved in this month's London International Disputes Week ("**LIDW**"), which provided a perfect showcase for the depth and breadth of legal expertise in this jurisdiction. Notwithstanding the twin impacts of Brexit and COVID, the English courts remain extremely busy with both domestic and international disputes, as the Commercial Court's recent annual report amply demonstrates. As to the subject matter of those disputes, the impact on data breach claims of the Supreme Court's decision last year in *Lloyd v Google* continues to be felt, and disputes relating to crypto-assets also continue to generate interesting – and novel – case law, as covered by my colleague John Lee in his recent LIDW speaker slot. We also report below on an important Court of Appeal decision on the interpretation of exclusion clauses, which for anyone involved in the drafting of such clauses is a must-read.

This month has also seen publication of Mr. Justice Hildyard's full judgment in the long-running, multi-billion dollar litigation arising out of HP's 2011 acquisition of the FTSE 100 software company Autonomy, in which our firm acted for the HP claimants. In a comprehensive victory for our clients, the judge ruled that they had "*substantially succeeded in their claims*" against two of Autonomy's former directors, Dr. Michael Lynch (the ex-CEO) and Mr. Sushovan Hussain (the ex-CFO), in doing so considering for the first time some knotty questions concerning the liability of issuers of securities for published statements under Schedule 10A of the Financial Services and Markets Act 2000. This analysis will be of particular interest to shareholders looking for a remedy in circumstances where they have acquired shares in a listed company on the basis of information in interim and annual reports and other trading updates that turns out to be untrue or misleading, or where important information that would have been relevant to the investment decision was omitted. You can read more about the judgment in the "Cases" section below, and in this detailed briefing.

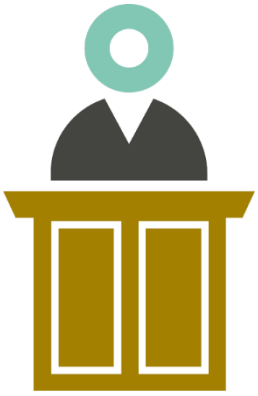
We hope that you continue to enjoy reading this round-up, whether a litigator by trade or a generalist, and whether in-house or in private practice, and that you will share it with any of your colleagues who may also find it useful.

Rob Fell

Head of Dispute Resolution

1 NEWS

COMMERCIAL COURT REPORT 2020-2021



The Commercial Court has published its annual report, which aims to give a high level overview of what the court does and its work over the last year. The report makes clear that Brexit and the COVID-19 pandemic have had a smaller impact on the workings of the court than might have been expected, with the court continuing to deal with many significant international commercial disputes, as well as complex disputes arising in a domestic context. Some COVID-related disputes have emerged, the most significant of which have been expedited for trial. There have also been some impacts from Brexit, particularly in terms of service out of the jurisdiction, but the wave of supply chain disputes that some foresaw has not materialised. Overall, the court has remained very busy, with more trial days in 2020-2021 than in 2019-2020 and unprecedented demand for one-day hearings.

STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

On 17 March 2022, the Deputy Prime Minister, Dominic Raab, launched a Call for Evidence in response to the emerging challenges and concerns presented by the increased use of strategic lawsuits against public participation ("SLAPPs"). Although there is no legal or statutory definition of the term, SLAPPs are most often described as a form of retaliatory litigation intended to deter freedom of expression. The government's stated concern is the use of litigation brought by powerful entities such a lobby groups, corporations and state organs to target acts of public participation which are of social importance, with a view to preventing information which is in the public interest from being published. There is particular focus upon the deployment of SLAPPs against watchdogs, journalists, human rights defenders and civil society organisations to inhibit them from performing their functions in the protection of democracy and the rule of law. Their purpose is to censor, intimidate and silence critics by burdening them with the pressure and costs of litigation. The Call for Evidence is focused on establishing evidence about the use of SLAPPs in England and Wales with a view to, amongst other things, potentially reforming the law of defamation as the primary vehicle for SLAPP cases.

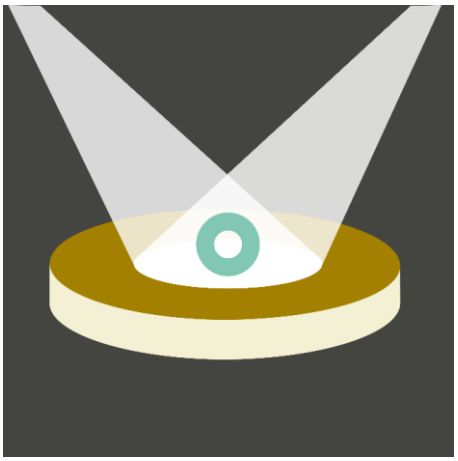
For more information on the Ministry of Justice's Call for Evidence, see here.

In addition, on 27 April 2022 the European Commission published a proposal for a Directive on protecting natural and legal persons who engage in public participation from SLAPPs. The proposal aims to protect SLAPP recipients by developing a common EU-wide understanding of the phenomenon and by introducing procedural safeguards which provide: (i) courts with effective means to deal with SLAPPs; and (ii) SLAPP recipients with measures to defend themselves. The Directive is intended to apply to any type of legal claim of a civil or commercial nature with cross-border implications irrespective of the court or tribunal (including civil claims brought in criminal proceedings). The proposed safeguarding measures also apply

in all EU cross-border cases but do not extend to SLAPPs initiated in third countries.

For more information on the European Commission's proposal, see here.

2 CASES UNDER THE SPOTLIGHT



FRAUD

AUTONOMY & ORS V LYNCH & ANOR [2022] EWHC 1178 (CH)

In this decision, our clients, the HP claimants, succeeded in various fraud and breach of fiduciary duty claims against the former CEO and CFO of Autonomy, a listed software company that HP had acquired in late 2011 for approximately USD 11.1 billion. The nub of HP's fraud claims was that HP was induced into acquiring Autonomy by dishonest statements and omissions in Autonomy's published information, and related representations made personally by the defendant directors during due diligence / the negotiations for the acquisition. Amongst many other things, the judgment considers for the first time the operation and applicability of Schedule 10A (and its predecessor, section 90A) of the Financial Services and Markets Act 2000, which makes provision in certain circumstances for issuers of securities to pay compensation to persons who have suffered loss as a result of an untrue or misleading statement, or the omission of a matter required to be included, in "published information" relating to the securities. It will be of particular interest to shareholders looking for a remedy in circumstances where they have acquired shares in a listed company on the basis of information in interim and annual reports and other trading updates that turns out to be untrue or misleading, or where important information that would have been relevant to the investment decision was omitted. A separate quantum judgment will be published at a later date.

To view our detailed briefing on the case, please click *here*. To read the judgment, please click *here*.

PRIVILEGE

KYLA SHIPPING CO. LTD. V FREIGHT TRADING LTD [2022] EWHC 376 (COMM)

This decision, delivered by Charles Hollander QC sitting as a deputy judge, contains a useful summary of the law relating to both litigation privilege and waiver of privilege, confirming in the process that the question of whether litigation privilege will apply in the early stages of a dispute or investigation is always highly fact sensitive.

The first question before the judge was whether an expert report could be protected by litigation privilege in circumstances where the expert had been instructed to review certain transactions to determine whether there was anything in the way that they had been conducted which was untoward and could therefore provide "ballast" in inter-party correspondence in a separate dispute (and before there was any reason to believe that the transactions had in fact been mismanaged). The judge held that in those circumstances litigation privilege would not apply to the expert report and the claimants' solicitor was therefore ordered to reassess the claims to privilege that had been made over both the report and related materials.

The second question before the judge was whether any privilege subsisting in the expert report (and certain other materials) had been waived as a result of the claimants making reference in an application for service out to the process leading to the discovery of the alleged mismanagement of the relevant transactions, including the instruction of the expert to look into those transactions. The judge rejected the allegation of waiver on the basis that the references in the application were intended to explain the circumstances surrounding the instruction of the expert in general terms, and there was not in any sense a reliance by the claimants on any particular document such that privilege in that document should be waived. This part of the judgment is notable as a judicial statement on a notoriously difficult area of law by one of the leading experts in the field.

To read the judgment, please click *here.*

CANDEY LTD V BOSHEH [2021] EWHC 3409 (COMM)

This High Court decision confirms the narrow scope of the "iniquity exception" to legal professional privilege, which prevents a party from asserting privilege in relation to documents brought into existence for the purpose of furthering a crime or fraud.

Candey Ltd, a London-based law firm, had acted for Mr Bosheh and his son on a conditional fee arrangement **("CFA")** in a fraud claim brought against both the Boshehs and another solicitor, Mr Salfiti. The Boshehs settled the claim shortly before trial, but not on the basis Candey claimed to have negotiated for them. Instead, the settlement meant that Candey could not recover fees for a successful outcome of the action. The law firm brought its own claim against Mr Bosheh and Mr Salfiti, claiming the Boshehs had falsely represented that they would act in their best interests only (i.e. not also in the interests of a third party – here, their co-defendant), and that they had engaged in an unlawful conspiracy with Mr Salfiti. The defendants applied to have the case struck out on the basis that Candey was relying on privileged documents acquired during the course of the underlying retainer, and other confidential documents - bank statements belonging to the Boshehs received by the firm after the conclusion of its retainer. In response, Candey sought to rely on the iniquity exception.

The High Court held that Candey could not use the Boshehs' privileged documents in their claim. The iniquity exception did not apply: the alleged false statements in relation to which Candey sought to invoke the iniquity exception were in essence the same alleged fraud in relation to which Mr Bosheh had engaged Candey to advise. Dishonesty in this respect would not take the matter outside the ordinary professional business of advising a client and taking instructions, which is required for the iniquity exception to apply. It made no difference that Candey was acting on a CFA and had therefore assumed a higher degree of risk in relation to its retainer. The Court struck out as inadmissible the privileged material contained in Candey's witness statements, exhibits and Particulars of Claim. The High Court also dismissed Candey's argument that a duty of good faith by a client towards their solicitor could be implied into the terms of the retainer, and held that Candey was unable to use confidential material it had received after the conclusion of its retainer.

To view our detailed briefing on the case, please click *here*. To read the judgment, please click *here*.

SUPPIPAT V SIAM BANK [2022] EWHC 381 (COMM)

In this decision, the High Court confirmed that, where documents obtained in foreign proceedings are sought to be put in use by a party to English proceedings, English law, as the *lex fori*, will determine any questions of both loss of privilege and confidentiality.

This was an application in relation to the use of documents in a high profile claim worth USD2bn concerning an alleged fraud by Thai businessman

Nop Narongdei and several others, including Thailand's third largest commercial bank, Siam Commercial Bank **("SCB")**. The claim arises out of the sale of Thailand's largest wind energy company by its founder, Mr. Nopporn Suppipat, who was charged with various alleged offences in Thailand, including insulting the King and Queen of Thailand. Mr. Suppipat claimed political asylum in France and commenced proceedings in England in which he alleges that he has been unlawfully deprived of his interest in his renewable energy businesses. The trial is listed for 17 weeks in the Commercial Court beginning in October 2022.

Following the commencement of related proceedings in Thailand, certain of the claimants in the English proceedings sought disclosure of documents belonging to SCB via an application for a subpoena against a claimant in the Thai proceedings. SCB was not party to the Thai proceedings and was not given notice of the application for the subpoena. SCB applied to the High Court for an order prohibiting use of the documents in the English proceedings. The claimants submitted that the documents were no longer privileged or confidential as between the claimants and SCB, primarily because the claimants held copies of the documents lawfully pursuant to the Thai subpoenas. The Court confirmed, following a line of cases which ran back to the nineteenth century, that the question of privilege was a matter of English law, as the *lex fori*. It was plain that the majority of the documents (comprising principally a legal opinion and various documents referenced therein) were covered by legal professional privilege. The next issue to consider was the effect of the lawful release of the documents to the Claimants pursuant to the Thai subpoenas (which as a matter of Thai law imposed no restriction on their use). The Court held, following *Rochester Resources Limited v Lebedev* [2014] EWHC 2185 (Comm), that "*the fact that under foreign law the document is not privileged or that the privilege that existed is deemed to have been waived is irrelevant. The crucial consideration is whether the document and its information remain confidential in the sense that it is not properly available for use. If it is, then privilege in this country can be claimed and that claim, if properly made, will be enforced.*" The fact that the Thai courts had determined the documents not to be privileged did not prevent the English court determining that they retained their privilege in England.

The question of the loss of confidentiality (as distinct from the question of whether the documents had originally been privileged) led on to a conflict of laws question as to which country's law of confidence should be applied, Thai law or (as retained EU legislation) Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations **("Rome II")**. Pelling J determined that it would be artificial for the question of the existence of legal professional privilege – a creature of English public policy – to be resolved by reference to another system of law which determines the continued existence of the confidence requisite for the existence of the English privilege. Applying English law, confidentiality had not been lost simply by reason of the documents having been disclosed to the claimants pursuant to the Thai subpoenas. The documents belonged to SCB, which had provided them in circumstances of implied confidence. SCB was not party to the Thai proceedings and had been given no notice of the subpoena application (and therefore no opportunity to apply for an injunction to prevent disclosure of its confidential documents).

The decision confirms that documents obtained lawfully abroad in circumstances where the foreign court does not consider them to be privileged will not necessarily lose the protection of privilege for the purpose of English proceedings. It takes a highly purposive approach to conflict of laws on the question of which country's law of confidence should apply, determining that it would defeat English public policy to apply the law of a second country to the question of confidentiality when that issue arises in the context of English legal professional privilege.

To view our detailed briefing on the case, please click here. To read the judgment, please click here.

BANKING AND FINANCIAL SERVICES

PHILLIP V BARCLAYS BANK UK PLC & ANOR [2022] EWCA CIV 318

This decision by the Court of Appeal has clarified the scope of the *Quincecare* duty (under which banks owe a duty to their customers to exercise reasonable skill and care in and about executing the customer's orders), and how that duty interacts with a bank's duty promptly to execute a customer's instructions.

Mrs. Philipp and her husband were deceived out of the bulk of their life savings by a fraudster. On the basis of the fraudster's advice, Mrs Philipp transferred £700,000 into an account at Barclays in her name and, shortly thereafter, in two transactions, transferred that money to separate bank accounts in the United Arab Emirates. Mrs. Philipp brought a claim against Barclays on the basis that the bank had breached the *Quincecare* duty, as she claimed the circumstances of the transactions would have put the ordinary prudent banker on notice of potential fraud. The High Court granted summary judgment in the bank's favour, accepting the bank's argument that the *Quincecare* duty only applied when the bank acted on fraudulent instructions from the customer's agent, and did not apply when the instructions came from the customer themselves.

The Court of Appeal reversed the summary judgment order. It held that, as a matter of law, the *Quincecare* duty does not depend on the fact the bank is instructed to transfer money by an agent of the bank's customer. It was at least possible in principle that a relevant duty of care could arise in the case of a customer instructing their bank to make a payment when the customer is the victim of a fraud. The duty to execute customers' instructions is qualified by the duty to take reasonable care and skill. The Court of Appeal also rejected the High Court's findings, made without hearing evidence on the matter, that a duty in these circumstances would be unworkable and onerous. What systems the bank should have had in place to prevent fraud of this kind was a question that could only be determined on the evidence at trial.

To read our more detailed briefing on the case, please click here. To read the judgment, please click here.

CRYPTOCURRENCIES

TULIP TRADING LIMITED V BITCOIN ASSOCIATION FOR BSV & ORS [2022] EWHC 667 (CH)

In this decision, the High Court summarily rejected an attempt to impose novel duties on developers of Bitcoin, pursuant to which the developers would have been bound to assist Bitcoin holders to regain control of their assets when lost due to fraud by third parties.

The claimant – an entity owned by the self-proclaimed inventor of Bitcoin Dr. Craig Wright – claimed to have held over £3 billion in Bitcoin, accessed via private keys stored on a computer system at Dr. Wright's home in Surrey. Following an alleged hack, the private keys were stolen and the claimant left unable to access its Bitcoins. The claimant argued that the defendants, who were Bitcoin software developers, owed it tortious and fiduciary duties in respect of the assets, and sought orders requiring the defendants to help the claimant regain control of them (or, in the alternative, equitable compensation or damages).

Falk J held that no tortious or fiduciary duty arose in these circumstances. However, in her judgment, she did address possible alternative scenarios where a duty might be owed – for instance, where developers make software changes which have an impact on the interests of users. It follows that – despite the self-professed absence of control exerted over many "decentralised" distributed ledger technologies by their developers, and the absence paucity of legislation and regulation in this arena - such

developers may not always find themselves entirely off the hook.

To read the judgment, please click *here*.

COLLECTIVE PROCEEDINGS

JUSTIN LE PATOUREL V BT GROUP PLC & ANOR [2022] EWCA CIV 598

In this decision, the Court of Appeal rejected BT's challenge to the decision of the Competition Appeal Tribunal ("**CAT**") granting a Collective Proceedings Order ("**CPO**") to Justin Le Patourel. Mr Le Patourel's claim alleged that BT had abused its market position by charging excessive prices to c.2.31 million customers supplied with certain residential landline services.

At first instance, the CAT considered whether the claims were eligible for inclusion in collective proceedings. It concluded that the small value of each individual claim, low likelihood of any class member bringing a claim on an individual basis, and availability of a credible methodology for calculating damages outweighed the relatively high cost of the proceedings as compared to the level of damages sought. On that basis, it was satisfied that it the claims were suitable to be brought on an "opt-out" basis, and made a CPO accordingly. The effect of the CPO was to allow Mr Le Patourel to seek compensation on behalf of the entire class of 2.31 million individuals, with no requirement that they take any active steps to join the proceedings or even be aware of their existence.

BT appealed to the Court of Appeal. It did not seek to challenge the CAT's central finding that the claims were eligible for inclusion in collective proceedings. Instead, it argued that the CAT had erred in finding that the claims were suitable to be brought on an "opt-out" rather than "opt-in" basis. In particular, it argued that the Tribunal erred by failing to take into account the general preference for proceedings to be certified on an "opt-in" basis that was said to be expressed in the CAT Guide to Proceedings.

The Court of Appeal rejected that argument. It found that the statutory framework which underpins the CPO regime is neutral as to whether proceedings should be certified on an opt-in or opt-out basis. Instead, the power to order opt-in or opt-out proceedings is one for the Tribunal after considering all the circumstances of the case. Although a general preference for either opt-in or opt-out proceedings may ultimately emerge, that would be as a result of experience gained by the CAT over time rather than any legislative predisposition. Accordingly, the CAT did not err by failing to take into account any alleged "preference" for opt-in proceedings.

The Court of Appeal rejected a number of further arguments on the basis that they involved factual conclusions which lay within the CAT's broad margin of judgment. Accordingly, it concluded that there was no basis in law on which it could properly interfere with the CAT's decision.

To read the full judgment, please click *here*.

REPRESENTATIVE ACTIONS

SMO (A CHILD) V TIKTOK INC [2022] EWHC 489

In this decision, the High Court considered an alternative basis for bringing a representative claim under the CPR 19.6 regime for loss of control of data under the General Data Protection Regulation ("**GDPR**") and the Data Protection Act 2018, following the Supreme Court's decision last year in *Lloyd v Google* not to allow a similar claim to proceed.

The claim was brought by Anne Longfield, the former Children's Commissioner for England, on behalf of all children in the UK and EEA who used the TikTok app after May 2018. Ms. Longfield alleged that six defendant Tik Tok entities had violated the GDPR and the Data Protection Act 2018 by processing the personal data of children and by invading their privacy and misusing the children's private information.

Ms. Longfield applied for permission to serve the claim form on TikTok entities out of the

jurisdiction. One of the factors that the court had to consider was whether she could demonstrate that there was a serious issue to be tried, or whether, in light of the decision *Lloyd v Google*, which comprehensively dismissed Mr Lloyd's representative action against Google, her own representative claim was no better than fanciful.

Ms. Longfield argued that the remedy she sought under Article 82(1) of the GDPR was materially different from the remedy sought under section 13 of the Data Protection Act 1998 in *Lloyd v Google*. She pointed to a specific reference to "*non-material damage*" in Article 82(1) and Recital 85, where "*loss of control over a subject's personal data*" is cited as an example of non-material damage. This wording is different from the equivalent under section 13 of the Data Protection Act 1998, which only refers to "*damage*" without further qualification.

Ms. Longfield also sought to distinguish *Lloyd v Google* on the grounds that it involved the actual use of the TikTok platform by children and consequently (unlike *Lloyd*), each claimant in the representative class would readily pass any *de minimis* threshold that may be applied because of the scale of data processing undertaken by TikTok in respect of each of its users.

The court held that there was a serious issue to be tried but did so with caution, noting that it had only heard submissions from Ms. Longfield on the relevant issues and that, to reach an alternative conclusion, it would effectively have had to make the defendants' case for them.

This is the first case considered by the courts since the Supreme Court judgment in *Lloyd* in which claimants have sought to maintain representative actions. Crucially, it has not determined whether loss of control of data can constitute "*non-material damage*" equating to a potential remedy under the GDPR. That question will be considered at a summary judgment hearing in June, when TikTok's counsel will have an opportunity to set out their arguments for the first time.

To read our more detailed briefing on the case, please click *here*. To read the judgment, please click *here*.

CONTRACT LAW

MUR SHIPPING BV V RTI LTD [2022] EWHC 467 (COMM)

In this case, the High Court found that a force majeure clause applied, even though an alternative form of performance had been offered.

The dispute at issue concerned the carriage of bauxite from Guinea to Ukraine pursuant to a contract of affreightment between the ship owners, MUR Shipping, and the charterers, RTI. Under the terms of the contract, the amount of freight due was defined by reference to a price per metric tonne in USD.

In 2018, the US applied sanctions to RTI's parent company. MUR Shipping subsequently sought to invoke a force majeure clause in the contract to excuse it from further performance, on the basis (amongst others) that the contract required RTI to make payments to it in USD, these could not in practice be made as almost all such payments would need to pass through the US banking system, and MUR Shipping could not be expected to continue performance without the required payment.

In response, RTI denied that there was any Force Majeure Event. One of the arguments it made was that, since a Force Majeure Event was defined as one which "*cannot be overcome by reasonable endeavors from the Party affected*", the force majeure clause simply could not be invoked here. In particular, RTI noted that it had offered a form of alternative performance (payment in EUR, bearing any costs of conversion) and argued that, if MUR Shipping had exercised its "*reasonable endeavors*", it would have accepted this and the impact of the sanctions could therefore have been overcome.

The Commercial Court (dealing with the matter as part of an appeal of an arbitral award in RTI's

favour) held that the force majeure clause could be invoked by MUR Shipping in the circumstances at hand. On its true construction, the contract required payment to be made in USD, and USD and EUR payments were not functionally equivalent. Further, the "*reasonable endeavors*" obligation on MUR Shipping did not extend to requiring it to accept non-contractual performance.

To read our more detailed briefing on the case, please click *here*. To read the judgment, please click *here*.

SK SHIPPING EUROPE LTD V CAPITAL VLCC 3 CORP (C CHALLENGER) [2022] EWCA CIV 231

In this decision, the Court of Appeal clarified several points in the law of misrepresentation, including the circumstances in which a representation of fact will be implied from an offer of a contractual term.

The dispute at issue arose from a charterparty between a shipowner, SK Shipping, and a charterer, Capital, for the vessel "C Challenger". Prior to entering into the charterparty, the shipowner had circulated inaccurate data to the charterer concerning C Challenger's historic fuel consumption and speed, both on a standalone basis, and through an offer during negotiations to include a guarantee in the charterparty as to the vessel's future fuel consumption and speed, based on the inaccurate historic data. The guarantee was ultimately included in the charterparty, alongside detailed provision about what was to happen if the vessel failed to perform in accordance with it.

During the course of the charterparty, the vessel failed to meet the standards set out in the inaccurate data and the guarantee. The charterer therefore sought to rescind the contract on the basis of misrepresentation, or alternatively to terminate the charterparty for repudiatory breach.

At first instance, the Commercial Court dismissed the charterer's claim and held that it had not been induced to enter into the charterparty by the various representations in relation to the vessel's fuel consumption and speed (despite finding that a reasonable person would have been influenced by them): in this case, the charterparty would have been concluded on the same terms if the representations had not been made.

The Court of Appeal upheld the decision of the court below. On the question of when a representation of fact could be implied from an offer of a contractual term (here, the offer to include the guarantee), it emphasised that "*in the absence of words of representation, the mere offer of contractual terms will not amount to any representation.*" However, the Court did accept that there are some circumstances where an offer to contract on certain terms carries with it an implied representation as to a party's honesty in relation to the proposed transaction. In this case, the shipowner was acquitted of any dishonesty, and the representations it had made concerning the vessel's fuel consumption and speed were considered negligent rather than fraudulent. Had the shipowner known that the data it put forward was inaccurate, the position may have been different. The Court was also swayed by the fact that the guarantee contained detailed provision about what was to happen if the vessel failed to perform in accordance with it. It emphasised that these were words of obligation and not of representation, and that they expressly contemplated the possibility of over-consumption. In those circumstances, the mere offer of the guarantee should not of itself be held to involve an implied representation as to the vessel's current or recent performance.

The decision also contains useful commentary on the effect of a reservation of rights on an alleged affirmation of a contract, and the operation of section 2(2) of the Misrepresentation Act 1967 concerning damages in lieu of rescission.

To read our more detailed briefing on the case, please click *here*. To read the judgment, please click *here*.

SOTERIA INSURANCE LTD (FORMERLY CIS GENERAL INSURANCE LTD) V IBM UNITED KINGDOM LTD [2022] EWCA CIV 440

This Court of Appeal decision considers an important point on the interpretation of exclusion clauses. It arose from a claim by CIS General ("**CIS**"), a provider of home and motor insurance, against the technology company, IBM, for breach of a contract for the provision of a major new IT system. The new system suffered from repeated delays and was ultimately described by the trial judge as "*a failure*" which offered "*little or no value*" to CIS. Rather than claiming for lost profits flowing from IBM's breach, CIS instead framed its breach of contract claim on a wasted expenditure basis, seeking to recoup the c.£120m of costs it had paid out in relation to the failed project. One of the questions before the court was whether some or all of the claim for wasted expenditure fell within an exclusion clause within the contract which was expressed to cover "*loss of profit, revenue [and] savings (including anticipated savings)*".

The trial judge held that IBM was in repudiatory breach of the contract. However, she also held that the vast majority of CIS General's claim for wasted expenditure fell within the scope of the exclusion clause. The judge's reasoning appeared to be that, because a claim for wasted expenditure was merely an alternative to a "classic" contract damages claim based on lost profits, it was excluded by the reference in the exclusion clause to "*loss of profits*".

The Court of Appeal disagreed and, critically, disclaimed the trial judge's view that the phrase "*loss of profits*" effectively meant the same thing as "*wasted expenditure*", merely because the latter can be used as an alternative way of framing a claim for contract damages. It noted that the ability to bring a claim on the wasted expenditure basis is a very valuable right (especially where the contract states that the ability to claim for lost profits is excluded). If IBM had wanted to exclude such a valuable right completely, then it should have spelled this out much more clearly in the contract. More generally, the Court of Appeal noted that if CIS could not bring a claim for wasted expenditure, then almost all its claim for loss of bargain would be excluded – and IBM would have almost no liability for serious under-performance. It did not think that the parties could have intended such an outcome.

To read our more detailed briefing on the case, please click *here*. To read the judgment, please click *here*.

CIVIL PROCEDURE

JSC COMMERCIAL BANK PRIVATBANK V KOLOMOISKY [2022] EWHC 868 (CH)

This High Court decision serves as a reminder that solicitors must ensure that redactions to disclosed documents are made with appropriate consideration of the relevance of the subject matter to "*any issue in the proceedings*". Trower J held that the approach taken by the defendant's solicitors, which resulted in the disclosure of heavily redacted WhatsApp chats, was too narrow.

The relevant test is whether the content is relevant to "*any issue in the proceedings*", rather than relevant to the Issues for Disclosure. Trower J clarified that Issues for Disclosure are a means to identify whether a document should be disclosed, rather than a framework to consider whether redactions should be applied.

Trower J ordered a further review of the WhatsApp chats to be undertaken, and for a schedule to be prepared providing a generic description of any redactions sought to be maintained. A re-review was deemed reasonable and proportionate in the circumstances of this case.

To read the judgment, please click *here.*

3 TEAM NEWS

NEW PARTNERS ELECTED

We are delighted to announce that John Lee and Joseph Moore are two of the eleven lawyers to be promoted to the Travers Smith partnership, with effect from 1 July 2022. 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 success. To view the full press release covering the firm's recent partner promotions, please click here.

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