BRIEFING

TRAVERS SMITH

Dispute Resolution Round-Up

August 2023

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 interesting developments across a range of areas in which we operate, including notable decisions in two large pieces of ESG-related litigation, a warning to corporates to ensure that they structure their internal investigations carefully should they wish to preserve privilege, and an interesting decision in the context of a crypto fraud which may in future lead victims of such frauds to recast the tools they deploy against the cryptocurrency exchanges that they suspect hold their misappropriated assets. We have also seen continued attempts to use the representative action route under CPR 19.8 to get mass claims off the ground, with varying degrees of success. Finally, two notable Supreme Court decisions were handed down in July, the first a much-anticipated clarification of the application of the so-called "*Quincecare*" duty upon banks to prevent certain types of fraud. The second Supreme Court decision, in which Travers Smith acted for the successful appellants, has significant implications for the third-party litigation funding market, determining that most current litigation funding agreements which provide for funders to receive a cut of damages awarded are likely to be unenforceable.

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

2 News

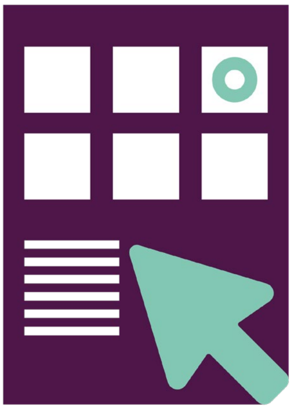
UK SIGNS SINGAPORE CONVENTION

On 3 May 2023, the UK signed the Singapore Convention on Mediation (the "**Convention**"). The Convention provides an international framework for the enforcement of settlement agreements drawn up following a successful mediation. Broadly speaking, the Convention will apply where the agreement in question resolves a commercial dispute which is international in nature. It puts in place an enforcement regime where previously parties had to bring court proceedings for breach of contract.

For the Convention to become effective in the UK, it needs to be ratified by Parliament and an instrument of ratification must then be delivered to the United Nations. The steps required for ratification, including adjustments required to the domestic legal framework, are currently being progressed and it is expected that ratification will take place in early 2024. The Convention becomes effective 6 months after ratification.

Presently, there are 56 signatories to the Convention, of which 11 have completed ratification. It is worth noting that the Convention is not reciprocal, meaning that member states will have to enforce settlement agreements arising from mediations anywhere in the world as opposed to only those from other member states.

NEW UK MEASURES TO ADDRESS SLAPPS



On 13 June 2023, the UK government announced plans to introduce new measures to address Strategic Lawsuits Against Public Participation ("**SLAPPs**") through amendments to the Economic Crime and Corporate Transparency Bill. There is currently no legal or statutory definition of a SLAPP, but the term is most often used to describe a form of retaliatory litigation intended to deter freedom of expression. This type of litigation tends to be brought by powerful individuals or entities to target acts of public participation which are of social importance, for example, oppressive litigation brought in order to prevent the publication of information which is in the public interest. The proposed measures will only address SLAPPs relating to economic crime and corruption.

Under the new measures, defendants will be able to use an "early dismissal mechanism" to avoid meritless or abusive claims that aim to prevent the publication of information where it is in the public interest to do so. This will require the satisfaction of two tests – firstly that the claim meets the definition of a "SLAPP", and secondly a consideration of whether the claim has a reasonable chance of success. The exact wording of the mechanism is yet to be published, although some commentary on what will constitute a SLAPP for the purpose of the new measures has been published in a press release.

It remains to be seen how the new measures will achieve the desired outcome of providing defendants with greater protection over and above the present approach available, which is to apply for a strike-out, particularly where the process under the proposed measures appears to be largely similar to that of such an application.

It is also unclear when the government will tackle SLAPPs outside of the economic crime and corruption arena, although it is noted that it will "*introduce comprehensive anti-SLAPP measures as soon as parliamentary time allows*". The justification for tackling this area first seems to be that around 70% of cases considered by the government in a report about SLAPPs published in April 2022 were connected to financial crime and corruption.

Read our detailed article [here.]

NEW CORPORATE FAILURE TO PREVENT FRAUD OFFENCE ANNOUNCED

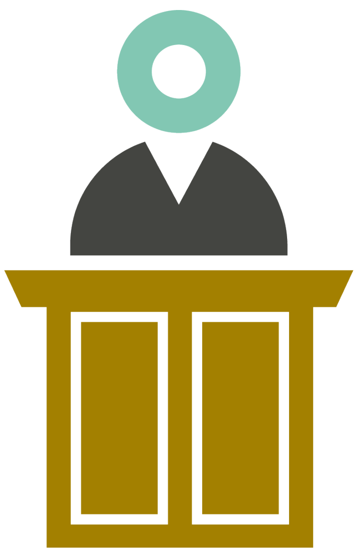
In April 2023, the UK government announced its intention to introduce a new failure to prevent fraud offence through amendments to the Economic Crime and Corporate Transparency Bill. The same legislation also tackles the prevention of false accounting and money laundering. The scope of application in relation to money laundering appears to be limited to a list of types of organisations, whereas in the case of fraud and false accounting, the legislation is intended to apply to large organisations (defined as organisations meeting two out of three of the following criteria: more than 250 employees, more than £36 million turnover, and more than £18 million in total assets).

Similar offences exist under the Bribery Act 2010 and the Criminal Finances Act 2017 with regard to the prevention of bribery and tax evasion respectively. The current threshold for holding an organisation liable for fraud requires that a "*directing mind and will*" was directly involved, which has proved a high bar to reach.

The proposed new offence is intended to make it much easier to hold an organisation liable if they benefit from fraud committed by their employees and agents and do not have "*reasonable fraud prevention procedures*" in place. It is expected that the government will publish further guidance on what will constitute "*reasonable procedures*" in due course.

Read our detailed article [here.]

GOVERNMENT MAKES PARTIAL U-TURN ON RETAINED EU LAW REFORM – BUT UNCERTAINTY REMAINS



On 11 May 2023, the UK government announced a partial U-turn on the Retained

EU Law (Revocation and Reform) Act (Royal Assent received on 29 June 2023), which was scheduled to abolish the majority of retained EU legislation unless specifically saved by the end of the 2023. Instead, some 600 named pieces of retained EU law will be specifically repealed. Whilst this change of approach is welcome (as the original "sunsetting" proposal had been very widely criticised), businesses should note the following:

- With the disapplication of other EU law principles such as supremacy and proportionality, there is a concern that the Act will result in uncertainty as to the interpretation of retained EU law or worse an unintentional change in the effect of the same. Further, it gives domestic legislation supremacy over any retained direct EU legislation (e.g. the post-Brexit UK versions of EU Regulations, such as GDPR or Rome I) from the end of 2023, which is the opposite of the current position whereby retained EU legislation takes precedence over any pre-2021 domestic legislation where there is a conflict.
- The Act gives the Government broad powers to change retained EU legislation on a fast-track basis, in many cases with limited Parliamentary scrutiny.
- The Act also removes the applicability of all "retained EU law rights" such as those derived from EU Treaty Articles, for example the right contained in Article 157 on equal pay for equal work between men and women.
- There will be change in terminology; after the end of 2023, retained EU law is to be known as "assimilated law". Whilst "retained EU law" may well remain in common use, formal documents such as pleadings will need to use the new term.

3 CASES

LITIGATION FUNDING – COLLECTIVE PROCEEDINGS – *R (ON THE APPLICATION OF PACCAR INC. & ORS) V CAT & ORS [2023] UKSC 28*

On 26 July 2023, the Supreme Court delivered its decision in this case, in which Travers Smith acted for the successful appellants. The appeal concerned a challenge to the litigation funding arrangements (LFAs) of two applicants for a collective proceedings order (CPO) in the Competition Appeal Tribunal (CAT). A CPO enables a proposed class representative (PCR) to seek compensation on behalf of a group of persons seeking redress for competition law infringements.

The issue in this appeal was whether LFAs pursuant to which the funder is entitled to receive a percentage of any damages ultimately recovered constitute "damages-based agreements" (DBAs), within the relevant scheme of regulation. If DBAs do not comply with this regulatory regime, they are unenforceable.

The Supreme Court agreed with the appellants that the LFAs in this case were DBAs within the meaning of the applicable regulatory framework and as such were unenforceable as they failed to comply with regulatory requirements (which it was common ground between the parties they did not). The CPO applicants would therefore need to obtain alternative funding arrangements that comply with the regulations if their applications are to be proceed.

As to its broader effect, most existing third-party LFAs currently provide for damages-based remuneration for funders, and will likely now be unenforceable as a result of this decision, which is likely to have significant implications for the UK litigation funding industry.

FINANCIAL MARKETS – QUINCECARE DUTY – *PHILLIP V BARCLAY BANK UK PLC [2023]* UKSC 25

On 12 July 2023, the Supreme Court handed down its eagerly awaited judgment in the above case, which turned on whether the "*Quincecare"* duty (which prevents a bank from executing payment instructions, given by an agent purportedly on the customer's behalf, which the bank has reasonable grounds to believe are fraudulent) applies to "authorised push payment" (APP) fraud. APP fraud occurs where the victim themself is induced by fraudulent means to authorise their bank to send a payment to a bank account controlled by the fraudster.

Mrs Philipp and her husband Dr Philipp were deceived by a fraudster, JW, out of the bulk of their life savings. JW instructed them to transfer £700,000 into an account in Mrs Philipp's name with the Bank. Acting on JW's suggestion, Mrs Philipp went in person to a Barclays Bank (the "**Bank**") branch and instructed the Bank to transfer £400,000 of that money to a bank account in the United Arab Emirates ("**UAE**"). Shortly after, she went in person to a different branch of the Bank and instructed them to transfer the remaining £300,000 to another bank account in the UAE. On each occasion, before making the transfer, the Bank telephoned Mrs Philipp to seek her confirmation that she had made the transfer request and wished to proceed with it, and she provided such confirmations. The Philipps came to realise they had been victims of a fraud. Mrs Philipp notified the Bank of this and the Bank made unsuccessful attempts to recall the funds which had been transferred to the UAE. Mrs Philipp brought a claim against the Bank in respect of her loss.

The Bank applied to have Mrs Philipp's claim summarily dismissed on the grounds that, as a matter of law, it did not owe Mrs Philipp a duty not to execute her own payment instructions. The High Court agreed with this submission and granted summary judgment in favour of the Bank. Mrs Philipp appealed. The Court of Appeal allowed the appeal, setting aside summary judgment. The Bank subsequently appealed this decision to the Supreme Court. As many had anticipated, the Supreme Court overturned the Court of Appeal's decision – granting summary judgment in favour of the Bank – holding that the Bank did not owe a duty to Mrs Philipp in respect of her own payment instructions. The Supreme Court did, however, permit Mrs Philipp to proceed with her alternative claim based on the Bank's alleged failure to act promptly to try to recall the payments after the fraud was discovered.

The Supreme Court held that the *Quincecare* duty does not extend to APP fraud. Pursuant to first principles of banking law, it is a basic duty under a bank's contract with a customer to make payments from the credited account in compliance with the customer's instructions. The bank must carry out the customer's instruction if the customer itself has authorised and instructed the bank to make payment; *"[i]t is not for the bank to concern itself with the wisdom or risks of its customer's payment decisions*". However, where a bank is put on inquiry that a payment instruction, given by an agent purportedly on behalf of the customer, is an attempt to defraud the customer, the bank's duty is to refrain from executing the instruction without first making inquiries to verify that the instruction has in fact been authorised by the customer. This principle is now commonly referred to as the *Quincecare* duty. The Supreme Court found that this principle cannot extend to a customer who is a victim of APP fraud, since the validity of the instruction is not in doubt.

Click here for the judgment. To read our detailed article click here.

FINANCIAL MARKETS – CRYPTO - *PIROOZZADEH V PERSONS UNKNOWN & ORS [2023] EWHC 1024 (CH)*

This decision is notable because it appears to be the first time that the High Court has discharged an interim proprietary injunction obtained without notice against a crypto exchange. Such injunctions typically prevent the exchange from dealing with specific cryptocurrency which is alleged to have been misappropriated from an individual by fraudsters, and then to have made its way into wallets operated by the exchange. Prior to this decision, they had appeared to be one of the tools available to victims of crypto fraud when seeking redress before the English courts.

Here, in discharging the interim injunction at the return hearing, the Court noted that the lawyers representing the defrauded individual had failed to comply with their duty of fair presentation when they had obtained it (being their duty fairly to represent the position of the exchange to the court in its absence from the without notice hearing). The cause of action underpinning the injunction was a proprietary claim against the exchange by the defrauded individual, based on an argument that the exchange sat in the position of constructive trustee as regards his cryptocurrency. The Court found that the lawyers had, amongst other things, failed to draw the Court's attention to the possibility that, even if the crypto exchange was a constructive trustee, such that a proprietary claim could be made out against it, the crypto exchange could potentially avail itself of a *bona fide* purchaser defence in order to defeat that claim.

The fact that this injunction has successfully been challenged will give victims of crypto fraud pause for thought as to how they proceed against crypto exchanges in future. The Court here suggested that a better route for the defrauded individual would have been to obtain an injunction against the owners of the relevant wallets, and then to serve that injunction on the exchange, rather than proceeding directly against the exchange itself. It is also noteworthy that, although the judge did not express a concluded view on the prospects of success of the underlying proprietary claim against the exchange (on which the initial interim injunction was founded), leaving that point to be determined on another day, he did suggest that an application to strike it out or dismiss it by way of reverse summary judgment could potentially succeed.

Click here for the judgment.

CIVIL PROCEDURE - REPRESENTATIVE ACTIONS - *COMMISSION RECOVERY V MARKS & CLERK [2023] EWHC 398 (COMM)*

In one of the first decisions on the point since the Supreme Court's 2021 decision in *Lloyd v Google*, the Commercial Court has allowed a representative action to proceed under CPR 19.6 (now 19.8, following a recent update to the CPR). CPR 19.6 (now 19.8) contains a mechanism for a claim to be brought on a representative basis on behalf of a group of persons where those persons have "the same interest" in the claim. In *Lloyd v Google*, the Supreme Court refused to allow the relevant representative action to proceed on that basis that the proposed claimants did not share "the same interest" as required by CPR 19.6 (now 19.8), specifically that the proof of material damage or distress required would have to be individually assessed for each claimant.

However, in this case, which concerns a claim against a firm for secret commissions on behalf of all clients and former clients for whom a commission was received, the Commercial Court appears to take a more pragmatic approach as to what represents "the same interest". The court seemed to accept that certain elements of the claim may differ depending on the individual circumstances of each class member, and that separate decisions may be required at a later point to resolve these issues, but that this should not prevent the representative action procedure from being used so long as there are no actual conflict of interests between the members of the relevant group.

The decision appears to liberalise the requirement of "the same interest" in representative actions and, if it is not overturned on appeal, will pave the way for more such claims to be brought under the CPR 19.6 (now 19.8) mechanism.

The Court of Appeal is due to hear an appeal of the decision in November 2023.

Click here for the judgment.

CIVIL PROCEDURE - REPRESENTATIVE ACTIONS – *PRISMALL V GOOGLE UK LTD & ANOR [2023] EWHC 1169 (KB)*

Handed down only a few weeks after the decision in *Marks & Clerk* (see above), this decision follows more closely the restrictive approach to the "same interest" requirement of CPR 19.8 set out by the Supreme Court in *Lloyd v Google*. The claim sought damages for the alleged misuse of private information, namely the transfer of patient-identifiable medical records by an NHS trust to a company involved in the development of a medical technology app. The High Court struck out the case on the basis that the action was being pursued, representatively, on the "*lowest common denominator*" for the whole class, which would lead to unfairness where some individuals had a stronger or more viable claim, vitiating the "same interest" requirement required in CPR 19.8. While the judge in *Prismall* did distinguish *Marks & Clerk* on the facts, the two decisions still appear to take conflicting approaches to the interpretation and application of the "same interest" requirement in CPR 19.8. Permission to appeal has been sought, but as at publication, has not yet been granted.

Click here for the judgment.

JURISDICTION – TIERED CLAUSES – *KAJIMA CONSTRUCTION EUROPE (UK) LTD v CHILDREN'S ARK PARTNERSHIP LTD [2023] EWCA CIV 292*

This Court of Appeal decision provides useful clarity as to the circumstances in which a tiered dispute resolution clause (i.e. a clause that requires the parties to complete certain compulsory steps, usually ADR-related, before they can proceed to court proceedings) will be treated as unenforceable. It also confirms the steps the courts will take when a party fails to comply with such a clause.

Here, the Court found that the process the parties were required to follow prior to starting proceedings, which had unwisely been imported from a head contract into a subcontract without ironing out certain wrinkles as to how it could properly work in the subcontract context, was insufficiently certain to be enforceable. In doing so, it blessed a number of earlier decisions which confirm that any ADR steps in dispute resolution clauses which are intended as compulsory precursors to the commencement of court proceedings need to be precise and certain, or the courts will not enforce them.

Having found the process to be unenforceable, the Court was no longer required to consider the steps it would have taken upon its breach. However, it went on to confirm that, although a stay of the proceedings is not the only option for the courts in such circumstances, it is the most usual one. The Court also confirmed that a stay would have been appropriate here even though it would effectively have operated to deprive one of the parties, which had instead sought a strike out, of a limitation defence.

Click here for the judgment.

CONTRACT - DURESS – *UKRAINE V LAW DEBENTURE TRUST CORP [2023] UKSC 11*

This decision concerned a summary judgment application made by the Law Debenture Trust Corporation (the "**Trustee**"), acting as independent trustee on behalf of the Russian Federation, in relation to the default of payment of the principal amount and the final interest payment on Eurobonds with a nominal value of US$ 3 billion issued by Ukraine to the Russian Federation.

Ukraine defended the application on the grounds that: (1) there was a lack of capacity to contract under Ukrainian law; (2) the Ukrainian Minister of Finance did not have authority to enter into the transaction; (3) the contract was voidable due to duress; (4) the contract included implied terms that it would be unenforceable if its performance was hindered by the counterparty to the contract (i.e. the Russian Federation); and (5) Ukraine could rely on the doctrine of countermeasures.

The Supreme Court, considering issues (1), (2) and (5), held that Ukraine had no arguable case that it lacked capacity to issue the notes, that the notes were issued without authority or that it was entitled to withhold payment as a lawful countermeasure. With regard to capacity, the Court distinguished between the position under international law and that under English law. As to the former, it noted that a sovereign state "*enjoys the fullest capacity afforded by international law*". As to the latter, the question of whether a particular state is recognised by the UK government would be determinative in establishing legal personality and, as a result, capacity to contract.

In relation to Ukraine's submission that the Russian Federation had put Ukraine under both economic and physical duress, "*including threats to its territorial integrity and threats of the use of unlawful violence*", the Court rejected Ukraine's economic duress arguments, but accepted that the conduct of the Russian Federation could be a contributing factor towards physical duress. The summary judgment application ultimately failed on the basis that Ukraine's defence of duress could not be determined without a trial.

Click here for the judgment.

VICARIOUS LIABILITY - *TRUSTEES OF THE BARRY CONGREGATION OF JEHOVAH'S WITNESSES V BXB [2023] UKSC 15*

In this decision, in a move away from the widening of the principle of vicarious liability in recent cases and overturning the decision of both the first instance court and the Court of Appeal, the Supreme Court held that the Trustees of the Barry Congregation of Jehovah's witnesses could not be held to be vicariously liable for a rape committed against Mrs B, a member of the organisation, by Mr Sewell, who was an Elder within the organisation.

In considering stage one of the two stage test for vicarious liability, the court concluded that the role of an Elder was sufficient to establish a relationship akin to employment between Mr Sewell and the organisation. The relevant factors contributing to this conclusion included that Mr Sewell was carrying out work on behalf of the organisation that was integral to achieving the aims and objectives of the organisation.

However, the Supreme Court held that the lower courts had erred in determining that the second limb of the test was satisfied. This required the courts to consider whether there was a sufficiently close connection between the rape and Mr Sewell's usual and authorised activities in his role as Elder. It was noted that the correct test to apply was that from the *Dubai Aluminium* House of Lords decision and held that the lower courts had placed too much importance on background factors and too much prominence on the "but for" causation test. In re-applying the close connection test, the Supreme Court noted (amongst other relevant factors) that at the time of the rape, Mr Sewell was not undertaking any of his duties as Elder and further that the situation of him being alone with Mrs B was created by their close personal friendship and not because he had control over her as an Elder.

Click here for the judgment.

ESG - DERIVATIVE CLAIMS – *CLIENTEARTH V SHELL & ORS* [2023] EWHC 1897 (CH)

The backdrop to this decision was that the activist group ClientEarth, which held a small shareholding in Shell plc, had sought permission from the court to bring a derivative action against Shell's directors. A derivative action is essentially a claim brought by a shareholder against a company's directors on behalf of a company, and the court's permission is required as an initial step before such an action can proceed. The basis of the ClientEarth action was that Shell's directors failed to properly manage Shell's exposure to climate change risk and that they had accordingly breached their duty to Shell to act with reasonable care, skill and diligence and promote the success of the company under the UK Companies Act 2006. The remedies sought were both a declaration that these duties had been breached and a mandatory injunction to require the directors to adopt a strategy to manage climate risk and to comply with an order of the Dutch Court which required Shell to reduce its emissions by 45% by 2030.

In rejecting ClientEarth's application for permission, the High Court confirmed that decisions regarding company strategy are a matter for the directors and not for the court. When making such decisions, the duties on directors in sections 172 and 174 of the Companies Act apply as general duties. The Court disagreed with the arguments made by ClientEarth that climate obligations include more specific, incidental duties, including for example: (a) a duty to make judgments regarding climate risk based on a reasonable consensus of scientific opinions; and (b) a duty to implement reasonable measures to mitigate the risks of long-term financial profitability in the transition to alignment with the Paris Agreement.

Click here for the judgment.

ESG – LIMITATION - *JALLA & ANOR V SHELL INTERNATIONAL, TRADING AND SHIPPING CO LTD & ANOR* [2023] UKSC 16

This high-profile ESG claim concerned a large oil spill that occurred in 2011 at a Shell-operated facility off the coast of Nigeria, with oil reaching the mainland several days later. The claimants, some 28,000 inhabitants of the affected coastline, alleged that the oil caused significant environmental damage including harm to farming, fishing, the mangrove forest and drinking supplies. The claim was issued in 2017, shortly before the expiry of the six-year limitation period.

The claim has had a long and difficult history, with three separate procedural challenges reaching the Court of Appeal. In particular, the claim has been beset by limitation issues from the outset. In this decision, the Supreme Court was asked to consider whether the spill amounted to a continuing, as opposed to a one-off, nuisance. The determination of this preliminary issue was to have significant implications in the case, due to its effect on the limitation period i.e. certain elements of the claim would be time-barred if the spill was held to be a one-off nuisance. A key element was that one of the defendant companies, which the claimants would need to establish their case against as the "anchor" defendant in the UK, was not added to the claim until after the expiry of the limitation period.

The claimants argued that there was a fresh cause of action in nuisance every day that the oil remained on their land. However, the Supreme Court held, unanimously, that the oil spill, which lasted around six hours, could not be a continuing nuisance. A continuing nuisance was characterised by "*a series of continuing acts or omissions or a repetition of an original act or omission*", such as repeated discharge of sewage into a river, or the encroachment of tree roots, noise or smoke. By contrast, the act in this case had been remedied by the turning off of the pipeline within six hours of the leak becoming apparent, and the pipeline was then repaired before it was reopened. The Court rejected the claimants' argument that the nuisance continued until the oil had been cleaned up; if that was accepted, it would effectively allow a limitation period to run indefinitely until the affected land was restored to normal, with defendants facing claims from a one-off event decades later. This would undermine the law of limitation.

Click here for the judgment.

INVESTIGATIONS – PRIVILEGE – *THE UNIVERSITY OF DUNDEE V CHAKRABORTY [2023] CSIH 22*

This decision of the Scottish Court of Session, which is binding on all UK Employment tribunals, confirms both the circumstances in which an internal investigation report will be protected by legal advice and litigation privilege and the risks of a corporate sharing legal advice it has obtained with an internal investigator during the course of an investigation.

An internal body within the University of Dundee had prepared an internal investigation report following the raising of a grievance by one of the University's employees. The University of Dundee subsequently received legal advice which was shared with the internal body. The internal body amended the investigation report, which in its final form included a footnote to the effect that it had been "*amended and reissued on 23.06.2022 following independent legal advice*". The final version of the report was shared in Employment Tribunal proceedings brought by the employee. The employee sought disclosure of the original, unamended report, of which he was aware as a result of the footnote. The University resisted on the basis that a comparison of the original report with the final report would betray the tenor of the legal advice obtained by the University, which was protected by privilege.

The Court held that the original report met neither the test for legal advice nor litigation privilege at the time of its inception, and so could not subsequently become cloaked with privilege at a later point even if a comparison between it and the final version could enable inferences to be drawn as the legal advice the University had received. It also held that privilege in the underlying advice that the University had obtained was likely waived at the point at which it was revealed to the internal body carrying out the investigation, and was certainly waived at the point at which the footnote was added to the report. It would have been obvious to the University when it disclosed the final report that it would have been subject to scrutiny in the Employment Tribunal proceedings, and that if some of its contents were based on legal advice, that advice would have to be revealed in the interests of fairness and understanding.

Click here for the judgment. To read our detailed article click here.

PROFESSIONAL NEGLIGENCE - *MCCLEAN & ORS V ANDREW THORNHILL* [2023] EWCA CIV 446

In this decision, the Court of Appeal found that a leading tax silk, Mr Thornhill KC, appointed to advise the promoter of three tax avoidance schemes (together the "**Scheme**"), did not owe a duty of care to investors, notwithstanding that Mr Thornhill KC had consented to his advice being shared with the investors. Applying the principles established by the Supreme Court in 2018 in *NRAM v Steel*, the Court held that it was neither objectively reasonable for the investors to rely on Mr Thornhill KC's advice as if it was advice given to them, nor foreseeable that they would do so. The specific factual circumstances of the case – in particular, that the claimants and the Scheme's promoter were "*commercial counterparties*" on opposite sides of an arm's length transaction, and that the investors were wealthy and sophisticated and were required to warrant that they had consulted independent tax advisers – were highly relevant to the Court's conclusion that Mr Thornhill KC did not owe a duty of care to the investors. The Court also considered, *obiter*, issues of breach and causation, and held that whilst Mr Thornhill KC's advice fell below the standard of a '*reasonably competent tax silk*', the claimants were unable to establish that they would have acted differently had Mr Thornhill KC's advice not been negligent.

Whilst the Claimants were ultimately unsuccessful in their claim against Mr Thornhill KC, the Court of Appeal's decision emphasises the importance of a careful enquiry into the reasonableness of the reliance by the third party on the defendant's advice. Accordingly, where advice is not accompanied by a recommendation that third parties should obtain separate independent advice, particularly where the third parties in question are inexperienced or lack knowledge of the subject matter, claimants are likely to have better prospects of establishing the requisite duty of care in negligence for economic loss. This is also true of scenarios in which professional advice is communicated directly to third parties, particularly in non-arm's length transactions, and where the advice is unequivocal or presented as having been verified for accuracy or completeness.

Click here for the judgment.

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