Civil Litigation Review: 2020

6 January 2021

We will probably all be glad to see the back of 2020. Nevertheless, and whilst the difficulties of the past year will mean that, for most, it will be one to forget, its impact on litigation cannot be ignored.

Below we consider some of last year's key developments on everything from company and contract law to the Civil Procedure Rules. Although we have resisted the urge to mention Brexit, we could not review 2020 without mentioning the Covid-19 Pandemic. It has had a profound effect on how we use the English Courts, and it seems likely that many of those changes are here to stay.

Company Law

Reflective Loss

***Sevilleja (Respondent) v Marex Financial Ltd* [2020] UKSC 31**

The "rule against reflective loss" provides that a shareholder cannot claim for damages merely because the company in which they hold shares has suffered damage. In particular, a shareholder cannot claim for a diminution in the market value of their shares, which is merely a "reflection" of the loss suffered by the company (because the proper claimant in that scenario is the company itself).

Over time, the scope of the application of the rule has broadened significantly to prevent claims by creditors who are also shareholders and even to prevent claims by creditors who are not shareholders.

In a unanimous decision handed down on 15 July 2020, the UK Supreme Court rejected that expansion, confirming that the reflective loss principle should be applied narrowly and that it has no application to claims by creditors against a company, regardless of whether they are also shareholders. Whilst the majority held that the principle does retain a place in English law, it should be confined to claims brought by shareholders in

respect of losses suffered in their capacity as shareholders only. A minority concluded that the rule ought to be rejected in its entirety.

Our full analysis of the decision can be found here.

Directors' Duties

Davies v Ford & Ors [2020] EWHC 686 (Ch)

One of the issues for consideration by the High Court in *Davies v Ford* was whether, in circumstances where a company had been dissolved and restored to the company register, the duties of its directors could be deemed to have continued over the intervening period.

The claim was brought by the dissolved company's former shareholder, who claimed that its directors had, in breach of their duties, diverted its business to a new entity.

Sections 1028(1) and 1032(1) of the Companies Act 2006 deem a restored company to have "*continued in existence as if it had not been dissolved.*" The Court noted that these provisions ordinarily extended to "*acts undertaken vis-à-vis the company, which are called into question by reason of its striking out.*" The Court held that these provisions do not extend to third parties associated with the company, including its directors.

In reaching its view, the Court considered several factors, including the following:

- the imposition of duties on a director is linked to that director having certain statutory powers, and it would therefore make little sense to impose duties in circumstances where directors were not able to exercise their powers;

- fiduciaries need to know with certainty at any given time if they are subject to fiduciary obligations;

- section 170(2) of the Companies Act expressly provides for continuation of certain director's duties (*viz*: the duty to avoid conflicts of interest and the duty not to accept benefits from third parties) where a person has ceased to be a director, which in turn limits the risk of a director seeking to escape liability for breach of duty by causing the company to be dissolved; and

- if any given circumstances required the deeming effect to be broadened, this could be achieved by the Registrar or the Court giving directions under section 1028(3) or section 1032(3) of the Companies Act, which empowers any direction or provision to be made to place the company "*and all other persons*" in the same position as if the company had not been dissolved or struck off.

Re System Building Services Group Ltd (in liquidation) [2020] EWHC 54 (Ch)

On a related note, the Court held in *Re Systems Building Services* that a director's duties to a company could and did survive insolvency, despite the director's powers ceasing on appointment of a liquidator.

The claims made against the director included a claim relating to the director's purchase of a residential property from the company at a time when it was already in liquidation, which was alleged to have been at an undervalue, and without regard for the interests of the company's creditors as a whole. A second head of claim concerned a number of payments paid out of the company's bank account shortly after its entry into administration, which were unaccounted for and alleged to have been paid in breach of the director's fiduciary duties.

The director argued that he had ceased to be subject to his director's duties at the point when the Insolvency Act 1986 took effect, except to the extent that certain duties were preserved or permitted by that Act.

The Court rejected this argument, finding that, whilst the director held office, he "*continues to owe the company the duties laid down in sections 171 to 177 [of the Companies Act 2006].*" Crucially, the Judge also found that the application of the Insolvency Act 1986 upon the company's entry into administration or liquidation, which imposes a series of "*additional specific duties on the part of a director and limiting his managerial powers…does not… operate so as to extinguish the fundamental duties owed by a director of a company to the company as reflected in ss.171 to 177 [of the Companies Act 2006].*"

The Court therefore found that the director was in breach of the duties he owed the company, despite the company's going into insolvency. The duties of a liquidator or administrator, the Court found, existed in parallel to and independently of director's duties.

The Corporate Insolvency and Governance Act 2020

The UK government's introduction of the Corporate Insolvency and Governance Act 2020 in light of the Covid-19 Pandemic made a number of amendments, in particular, to the United Kingdom's insolvency framework. Specifically, s12(2)(b) of the Act provided for a "*suspension of liability*" for directors for wrongful trading. The UK government recently extended the suspension until 30 April 2021.

Our analysis of the wrongful trading suspension rules can be found here.

For a full overview of the effects of the Act, please click here.

Contract Cases

Third-Party Rights

Filatona Trading v Navigator Equities [2020] EWCA Civ 109

The Court of Appeal in *Filatona Trading* considered whether a non-signing party was entitled to enforce rights under a shareholders' agreement (including the right to arbitrate) on the basis that an agent had entered into the agreement on its behalf.

The issue arose in a challenge to an LCIA arbitration award on the grounds of jurisdiction and serious irregularity (under sections 67 and 68 of the Arbitration Act 1996, respectively). The Court of Appeal upheld the High Court's decision that the undisclosed principal was entitled to sue directly on the shareholders agreement in question, notwithstanding that the agreement described the agent as the beneficial owner of the relevant shares. On that basis, the principal was able to enforce the agreement, and the LCIA arbitration that the principal had initiated was validly commenced.

The judgment offers important guidance on the factors that may determine when an undisclosed principal is entitled to intervene in a contract made by their agent.

Interpretation

Hancock v Promontoria (Chestnut) Ltd [2020] EWCA Civ 907

The Court of Appeal considered whether a statutory demand requiring payment of a debt of several million that the respondent, Promontoria, served on the appellant, Mr Hancock, should be set aside. The alleged debt represented the unsecured balance due under loans originally made to Mr Hancock by a third-party bank under a series of facility letters dated between November 2006 and December 2011. Promontoria's case was that it had acquired title to the loans by a deed of assignment, and it was also the registered assignee of 21 legal charges over residential properties, which Mr Hancock had originally granted to the bank as security for the loans. Mr Hancock's case was that there was a triable issue as to whether Promontoria had title to the underlying debt.

Promontoria adduced the "commercially sensitive and confidential" deed of assignment in heavily redacted form. Its solicitor gave a witness statement that he had read the whole deed, the unredacted parts established the existence of an effective assignment and the redacted parts were irrelevant. Mr Hancock argued that the redactions meant that it was not possible to interpret the deed of assignment as passing title to the bank's rights against Mr Hancock to Promontoria.

The Court of Appeal dismissed the appeal, finding that the redactions did not cast serious doubt on Promontoria's title because, insofar as there was any doubt about the redactions to the deed of assignment, they had been adequately addressed by the witness statement of Promontoria's solicitor. The Court of Appeal gave guidance on the proper approach to redaction of documents where the Court is being asked to interpret their meaning or effect, drawing a distinction between the rules applicable to redactions when parties are disclosing documents and those applicable to redactions where the Court is asked to deal with a matter of interpretation.

Duty of Good Faith

Cathay Pacific Airways Ltd v Lufthansa [2020] EWHC 1789

The High Court considered whether the exercise of contractual rights may be constrained by the implication of terms, including as to "good faith" and/or whether they may be subject to considerations to act rationally. The dispute concerned the operation of certain provisions in an agreement for aircraft engine maintenance, repair and overhaul services. The claimant, Cathay Pacific, had entered into the agreement with the defendant, Lufthansa, under which Lufthansa was to provide MRO services to Cathay Pacific for certain aircraft engines. At the end of the agreement, Lufthansa sought payment of around USD 36m from Cathay Pacific as 'end of term' charges. Cathay Pacific agreed that Lufthansa was entitled to this sum, but argued that the sum was "*set-off*" as a result of two sums due to be paid by Cathay Pacific in accordance with the terms of the agreement. Following that set-off, Cathay Pacific argued that a payment was due from Lufthansa. In relation to the first sum, the agreement provided that Cathay Pacific may "*at its option*" remove aircraft engines from the scope of a specific service provided by Lufthansa under the agreement prior to the end of the agreement, which would allow a financial reconciliation to be made regarding the fees payable under the agreement by Cathay Pacific to Lufthansa.

Lufthansa argued, *inter alia*, that (i) there was an implied "rationality" term in the option which prevented it from being exercised in an arbitrary and/or unreasonable manner, and (ii) the option was subject to a "good faith" obligation, as the agreement was a "relational contract", so the option could only be exercised in a way that would be objectively regarded by reasonable and honest people as commercially acceptable.

The Court held that the option was not qualified by way of implication, whether by way of additional wording that had not been included in the clause or an implied term restraining one party from acting in an arbitrary and/or unreasonable manner and/or requiring it to act in good faith. The Court applied the general principles on contractual interpretation and considered the main cases in relation to the implication of good faith obligations in commercial contracts. Whilst acknowledging that the law on relational

contracts has not "*yet reached a stage of settled clarity*", the Court summarised the current position as follows:

- A term of good faith may be implied in a relational contract as a matter of law where the nature of the contract implicitly requires treating it as involving an obligation of good faith, subject to any contrary express term.

- The test for whether a contract will be characterised as a relational contract is whether the contract is a long-term contract that requires the parties to collaborate in future ways that respect the spirit and the objectives of their relationship but which have not been specified in detail. In addition, the contract must also involve trust and confidence that each party will act with integrity and cooperatively.

- A good faith term may be implied in a relational contract as a matter of fact, but there is no special rule for incorporation. Each term must be considered against the usual test for implication (*viz*: whether a reasonable reader would consider the term to be so obvious as to go without saying, or the term is necessary for business efficacy).

- The overall character of the contract is an important consideration. The Court listed a number of considerations in determining the character of a contract including, *inter alia*, that there must be no express terms that prevent a duty of good faith being implied and that the contract will involve a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and expectations of loyalty.

- The implication of a good faith term as a matter of fact is possible even in the case of long, complex and sophisticated contracts expressed in writing.

Mass Tort Claims

Abuse of Process

Municipio de Mariana v BHP Group plc and BHP Group Ltd [2020] EWHC 2930 (TCC)

The Court considered an application to strike out, as an abuse of process, mass tort claims arising out of the collapse of the Fundão Dam in Brazil or alternatively to stay those claims by reference to ongoing parallel proceedings.

The claim related to the collapse of a dam near Mariana, Brazil, which had resulted in severe flooding, caused the deaths of 19 people, destroyed a number of downstream villages and spread polluting waste. It was brought by 202,600 individual, corporate and community claimants affected by the collapse against the ultimate owners of one of the joint venture parties which owned the dam.

Multiple sets of parallel proceedings had been commenced in Brazil, both by way of individual claims and via CPAs, that being the procedural mechanism in Brazil for group litigation. The defendants contended that, for all of the claimants in the English proceedings, the combination of available remedies "*provide[d] a satisfactory means of redress which render[ed] the claimants' involvement in litigation in England pointless*."

The Court struck out all claims against the Defendants as an abuse of process, and in the alternative held that, had the claim not been struck out, the proceedings fell to be stayed on jurisdictional grounds under (as regards BHP Group plc) Article 34 and (as regards BHP Ltd) *forum non conveniens*.

The Court adopted the definition of abuse of process set out in *A-G v Barker* [2000] 1 FLR 759, that being "*a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*" Once a court has found that an abuse had been "*clearly proved*", then it must "*exercise its discretion in determining what, if any, procedural consequences should follow.*" In reaching its decision, the Court considered several factors, including:

- The practical difficulties associated with managing a Group Litigation Order in England and the fact that those difficulties would be exacerbated by the simultaneous progress of the Brazilian proceedings; and

- The acute risk of irreconcilable judgments, in particular with regard to whether the claimants owed a duty of care or the Brazilian law equivalent thereto.

The task facing the managing judge in the English proceedings would, the Court predicted, "*be akin to trying to build a house of cards in a wind tunnel.*" In the circumstances, the Court found, the claims would be "*not merely challenging but irredeemably unmanageable if allowed to proceed.*"

In circumstances where, the Court found, the claimants had taken a "*tactical decision*" to progress closely related damages claims in both jurisdictions, and where the English proceedings brought no "*realistic promise of substantive advantage to the claimants*" and the likelihood of massive expenditure on the part of the defendants, it was "*difficult to conceive of any way to exercise the discretion of the court other than to bring about the immediate curtailment of the proceedings*". On that basis, the Court struck out the claims.

Representative Actions

Jalla & Ors v Shell International Trading and Shipping Company Ltd [2020] EWHC 2211 (TCC)

In *Jalla v Shell*, the Court considered the defendants' application to strike out the representative aspect of the claim, *inter alia,* on the basis that the action had not been properly constituted as a representative action.

The proceedings were brought by two lead claimants on their own behalf and on behalf of thousands of individuals and communities in Nigeria who claimed to have been affected by a historic oil spill off the Nigerian coast. The lead claimants sought to bring the proceedings as a representative action pursuant to CPR 19.6(1), which provides that, in order for a representative action to be validly constituted, the lead claimants and those they purport to represent must have the "*same interest*".

The Court, in delivering its judgment, provided a fulsome summary of the applicable principles and authorities in the area. Specifically, it reiterated that, whilst the purpose of the representative action is to accommodate multiple parties with the same interest "*in such a way as to go as far as possible towards justice*", it is not sufficient to establish that "*multiple claimants wish to bring claims which have some common question of fact or law*". Instead, the representative parties and represented persons must have a "*common interest, based upon a common grievance, in the obtaining of relief that is beneficial to all represented parties*." The claims of all represented persons need not be congruent, but should, in effect, be the same "*for all practical purposes*." The existence of individual claims in addition to the claims in which the represented persons had the same interest would be a relevant factor in the Court's decision, as would the existence of potential defences affecting some claims but not others.

In cases where the "same interest" test is satisfied, the Court held that its discretion should be exercised with regard to the overriding objective and should not "*be used as an unnecessary technical tripwire.*"

The Court also noted that it must, in such cases, be possible to identify the members of the represented class "*at all stages of the proceedings… and that the represented cohort must be defined with a sufficient degree of certainty.*"

In considering the facts of the case, the Court found that, whilst the claims clearly raised some common issues of law and fact (particularly in relation to duty and breach thereof), and there was no conflict between the claimants which would render representative proceedings inapplicable or inappropriate, the proceedings were ultimately made up of a large number individual claims. In particular, each claimant (or small group thereof) needed to "*go further*" and prove certain individual circumstances

in order to establish a complete cause of action. The matters in which the claimants had a common interest were not, therefore, "*sufficient to enable the court to try the right*". Whilst the existence of individual claims does not, in itself, prevent the valid constitution of representative proceedings, the question is whether the individual claims can be regarded as "*subsidiary*" to the main issue forming the subject of the proceedings. In the circumstances, the Court found that they could not. Rather, they were "*just as critical… to any prospects of any success or relief at all*" and were "*an integral part of the overall issues that [were] raised*".

On that basis, the Court struck out the representative elements of the proceedings, leaving only the personal claims of the two lead claimants. The Court stated, *obiter*, that, had it decided that representative proceedings were available, it would not have struck them out on the basis of failure to ascertain the class. The individual and community claimants had been listed in schedules to the Particulars of Claim.

The claimants have been granted permission to appeal the decision, with the hearing fixed for July 2021.

Arbitration

Determining the Law of an Arbitration Agreement

Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors [2020] UKSC 38

In *Enka v Chubb*, the UK Supreme Court held that, where an arbitration agreement does not specify a governing law, the law chosen by the parties to govern the main contract will ordinarily also govern the arbitration agreement. Where the parties have not chosen a law to govern the main contract, the court must determine the law with which the arbitration agreement is most closely connected. As a general rule, the Court held that this would be the law of the jurisdiction in which the arbitration is seated.

Our full analysis of the decision can be found here.

Arbitrator Bias

Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd [2020] UKSC 48

The issue before the Supreme Court was the extent to which English law required arbitrators to disclose to parties related prior and/or subsequent appointments where there was an overlap in parties and subject matter.

The Supreme Court confirmed that English law requires arbitrators to disclose such appointments. In assessing whether an arbitrator has breached their duty of disclosure, the Court will have regard to the facts and circumstances as at and from the time the duty arose. Though a failure to disclose relevant matters will not necessarily result in a finding of bias, such failure is a factor that the Court will take into account in assessing whether there is a real possibility of bias. In the circumstances, while the chair of the tribunal had breached his duty of disclosure, his impartiality was not called into question.

In assessing whether there is a real possibility that an arbitrator is biased, the Court will have regard to the facts and circumstances known at the time of the hearing to remove the arbitrator. The Court will apply an objective test in determining whether there is a real possibility of bias, having regard to the particular characteristics of international arbitration (including the private nature of most arbitrations) and applicable international standards, such as the IBA Guidelines on Conflicts of Interest in International Arbitration. The fact that an arbitrator is repeatedly appointed by one party is unlikely— on its own—to support a finding of bias.

Our analysis of the Supreme Court's decision can be found here.

Privilege

Legal Advice Privilege

R (Jet2.com Ltd) v Civil Aviation Authority [2020] EWCA Civ 35

In a landmark decision handed down in January, the Court of Appeal held that the "dominant purpose" test now applies to legal advice privilege.

The Dominant Purpose Test

The test for the application of legal advice privilege adopted by the Court was that set out in the well-known Three Rivers (No 6) decision that it would apply to "*all communications made in confidence between solicitors and their clients for the purpose of giving or obtaining legal advice even at a stage when litigation is not in contemplation.*"

The focus of the appeal in this case was whether, as is well established in relation to litigation privilege, the giving or receiving of legal advice needed to be the dominant purpose of the communication.

Whilst the Court concluded that it was not "*formally bound*" by previous authority which, it was submitted, supported the contention that legal advice privilege would be

subject to a dominant purpose test, it did "*not consider that there [was] any good ground for not following the preponderance of authority which supported the inclusion of a dominant purpose criterion.*" The Court also considered there to be good grounds for including such a criterion, namely that:

- Both litigation privilege and legal advice privilege are limbs of legal professional privilege, and there was no "*compelling rationale*" for differentiating between those limbs; and

- Whilst the position was not uniform, other common law jurisdictions, including Australia and Hong Kong, had incorporated a dominant purpose test into legal advice privilege.

Guidance on Multi-Addressee Communications

Having reached its view on that issue, the Court went on to consider the application of legal advice privilege in circumstances where a communication was sent to both lawyers and non-lawyers. In particular, the Court gave the following guidance:

- The dominant purpose test should be applied such that, if the dominant purpose of a communication was to give or seek commercial views, that communication would not be privileged, even if it was also sent to a lawyer for the purpose of receiving legal advice. Conversely, communication sent with the dominant purpose of receiving legal advice would be privileged, even if it was also sent to a non-lawyer for commercial views.

- A response from a lawyer containing legal advice would "*almost certainly*" be privileged, even if addressed to more than one recipient. Whilst the dominant purpose test applied, the wide scope of the "*continuum of communications*" would mean that a court should be extremely reluctant to engage in the exercise of determining whether, in respect of a specific document or communication, the dominant purpose was the provision of legal advice.

- Multi-addressee communications should be considered as separate communications between the sender and each recipient.

Application of Privilege to Foreign In-House Lawyers

PJSC Tatneft v Bogolyubov & Ors [2020] EWHC 2437 (Comm)

In a decision that has important implications for foreign litigants, the Commercial Court confirmed that legal advice privilege can be claimed over the work of foreign in-house lawyers, so long as those in-house lawyers are performing the functions of a

lawyer, without regard to the qualification requirements or regulatory regimes applicable to lawyers in that jurisdiction.

The second defendant had sought to argue that communications with the claimant's in-house legal advisors could not be subject to legal professional privilege on the basis that the closest equivalent to it under Russian law was the concept of "advocates' secrecy". "Advocates' secrecy" was incapable of applying to lawyers who were not advocates (i.e., admitted to the bar and self-employed). It was argued that because "advocates' secrecy" could not apply to communications with in-house lawyers or to many lawyers in private practice (who, by definition, cannot be advocates), the communications could not be privileged under English law. This argument was rejected.

The decision confirms that advice from foreign lawyers, including foreign in-house lawyers, will be privileged as a matter of English law, insofar as the lawyer is acting in his/her professional capacity in connection with the provision of legal advice.

Our full analysis of the decision can be found here.

Waiver

PCP Capital Partners LLP v Barclays Bank plc [2020] EWHC 1393

Two key issues arose for consideration by the High Court in the determination of a specific disclosure application brought by PCP Capital Partners LLP for disclosure of certain contemporaneous documents which had been withheld by Barclays on the grounds of privilege:

- Whether there had been a waiver of privilege over documents containing legal advice relating to certain advisory service agreements as a result of references to that legal advice being contained in Barclays' opening submissions and factual witness evidence; and

- Whether, as a result of that waiver, privilege had been waived over all other privileged documents relating to the same advisory service agreements.

In its judgment, the Court highlighted the difficulty in locating a "*succinct and clear definition*" of what would constitute waiver. It did, however, provide two examples of what could not constitute waiver, those being (1) a purely narrative reference to the giving of legal advice, in circumstances where there is no reliance upon it in relation to an issue in the case, and (2) "*a mere reference to the fact of legal advice*".

On the facts of this case, the Court found that there had been a waiver of privilege over the legal advice, despite reference having only been made to the effect, and not the

content, of the advice. This was because the advice had been relied on in the sense that it went to the state of mind of the witnesses and the "*proper characterisation*" of the advisory services agreements. In other words, the inference was that, if advice had been received, it would have confirmed that the agreements were lawful and, as such, "*it [was] less likely that they were or should be regarded as shams*." In relation to references to the advice which were contained in the openings, the Court again found that "*the only reason to make those assertions [was] to assist Barclays on the merits of its case about the legitimacy of the [advisory services agreements]*." In the circumstances, the judge found it "*plain that waiver [had] occurred*".

As for whether there had been a broader waiver, the Court found that the references in the opening submissions did amount to collateral waiver of privilege over all correspondence with the lawyers relating to the transaction in question, which it defined as *"legal advice in relation to the ASAs."* It therefore ordered disclosure of all of those privileged documents.

Without Prejudice Correspondence

The Unambiguous Impropriety Exception

Motorola Solutions Inc v Hytera Communications Corporation Ltd [2020] EWHC 980 (Comm)

In *Motorola Solutions,* the claimants sought to rely on statements made in "without prejudice" settlement discussions as evidence in support of an application for a domestic freezing order and an order for provision of information about the respondents' assets. Specifically, during the course of those meetings, the CFO of the First Respondent had argued that its intention was to remove assets from jurisdictions which may be amenable to enforcement so as to frustrate the enforcement of any judgment against them. In the context of an application for a freezing order, such statements would provide clear evidence of a real risk of dissipation of assets. The respondents asserted that the evidence in question was inadmissible on the basis that it was protected by without prejudice privilege. In response, the claimants asserted that the "unambiguous impropriety" exception applied.

The Court found that, whilst the "*exception is a narrow one which is to be applied only in the clearest cases of abuse of a privileged occasion*", the nature of the threat made on this occasion "*unambiguously exceeds what is permissible in the settlement of hard fought commercial litigation*" and would "*fall outside the scope of the protection of without prejudice privilege*". The statements in question were therefore admissible and, on the facts of the case, justified the conclusion that there was a real risk of dissipation of assets.

The Fraud Exception

Berkeley Square Holdings & Ors v Lancer Property Asset Management Ltd [2020] EWHC 1015 (Ch)

In *Berkeley Square Holdings*, the Court found that statements made in a without prejudice mediation paper were admissible for the purposes of rebutting allegations of fraud made by the claimants.

The underlying claim was one of fraud in relation to a management fee arrangement. One of the defences raised by the defendants was that the claimants had been aware of the relevant payments, and had gone so far as to affirm them, some five years earlier when they were referred to in the defendants' position paper for the mediation. The claimants applied for strike out of references to the without prejudice statements on the basis that they were inadmissible.

Whilst it was common ground that both sides' position statements were subject to without prejudice privilege, the issue was whether the statements fell within an exception to the privilege, which allows evidence of without prejudice negotiations to be admitted for the purpose of showing that an agreement concluded during those negotiations should be set aside on the ground of misrepresentation, fraud or undue influence.

The Court held that it would be "*contrary to principle*" for parties to be able to rely on this exception to admit such material into evidence where necessary to prove misrepresentation, fraud or undue influence but not to allow the admission of such material as a defence to the same allegations.

The material was therefore admissible under the established exception or, the Court found, a "*small and principled extension to it*". The Court found that there was a "*serious risk that if the material [was] not admitted, the court at the trial [would] be misled*".

The Disclosure Pilot Scheme

The Disclosure Pilot Scheme (the "DPS"), contained in CPR Practice Direction 51U, was introduced in the Business and Property Courts in 2019 with the aim of addressing concerns which had been raised over the costs, complexity and scale of undertaking associated with giving standard disclosure under CPR 31. The amendments to the disclosure process were designed to encourage a change in culture, focusing on proportionality, reasonableness and co-operation.

As a result of feedback received from practitioners, which was set out in the Judicial Update on the Operation of the Disclosure Pilot Scheme dated 22 September 2020, a number of amendments to the DPS have been introduced, and it has been extended so that it will continue to apply to the end of 2021. Further guidance has been given by the courts in a number of decisions handed down over the past 12 months, details of which are set out below.

McParland & Partners Ltd v Whitehead [2020] EWHC 298

In a leading judgment on the DPS, Sir Geoffrey Vos, Chancellor of the High Court and one of the key proponents of the scheme, provided guidance on how the scheme is intended to work:

- **Identification of issues for disclosure:** The Court highlighted that identification of the issues for disclosure will "*in every case be driven by the documentation that is or is likely to be in each party's possession*" and which is relevant to the contested issues before the Court. Further, the issues for disclosure should not be identified as a result of "*going through the pleadings to identify issues that will arise at trial for determination*", because there should be a clear distinction between issues for disclosure and issues for trial, with the former being defined as "*issues to which undisclosed documentation… is likely to be relevant and important for the fair resolution of the claim*".

- **The approach to choosing between disclosure models:** The focus of the guidance given on choice of disclosure models was that parties should be careful not to over-complicate the process in circumstances where it could be said that multiple models may be suitable and where the DPS "*does not require compliance to be time-consuming or costly*".

- **Co-operation between the parties:** The judgment emphasises the need for "*a high level of co-operation between the parties and their representatives in agreeing the issues for disclosure and completing the [Disclosure Review Document]*" and confirms that the scheme should not be treated as a "*stick with which to beat… opponents*". Such conduct, it says, is entirely unacceptable and likely to result in an immediately payable adverse costs order.

"Known Adverse Documents"

Castle Water Ltd v Thames Water Utilities Ltd [2020] EWHC 1374

Parties to proceedings which operate under the DPS are subject to an ongoing duty to disclose known adverse documents, regardless of any other disclosure order which is made.

In *Castle Water*, the High Court provided some much-needed clarification as to the scope and nature of that obligation and, specifically, as to what the obligation of a party may be to discover whether it has any "known adverse documents" that would fall within its disclosure duties.

Though paragraph 2.9 of the Practice Direction provides that "*it is… necessary to take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the company or organisation*", no further guidance is set out in the Practice Direction as to what has to be done to amount to "*reasonable steps*", which will of course always be fact and context sensitive. In that respect, the Court noted that the following would not be sufficient:

- "*A generalised question that fails to identify the issues to which the question and any adverse documents may relate*"; and
- Questions which are simply asked of the leaders or controlling mind of an organisation, "*unless the issue in question is irrelevant to others*".

The Court also held that, whilst a known adverse document is defined at paragraph 2.8 of the Practice Direction as a document of which a party is aware without undertaking any further search for documents, that requirement would be "*emasculated*" if there was no obligation at all to look for documents of which the party was aware.

The Court concluded that in light of the "*Practice Direction's touchstone of what is 'reasonable and proportionate'… a party must undertake reasonable and proportionate checks to see if it has or has had known adverse documents and… if it has or has had known adverse documents, it must undertake reasonable and proportionate steps to locate them*".

Initial Disclosure

Breitenbach & Ors v Canaccord Genuity Financial Planning Ltd [2020] EWHC 1355

Initial disclosure under the Disclosure Pilot Scheme requires a party to provide, alongside its statement of case, (1) the key documents on which it has relied and (2) the key documents which are necessary to enable the other party to understand the case it has to meet.

In *Breitenbach*, the claimants sought initial disclosure in relation to certain documents which they claimed fell into the second limb of the Initial Disclosure requirement. The Court refused that request on the basis that the defence was "clear" and that what the claimants were actually seeking was more akin to the evidence which was being relied upon to prove the defence. It found that the documents sought were "*certainly necessary*

to evaluate and weigh the prospect of success of Canaccord's Defence, but they [were] not necessary in order to understand the defence."

Witness Evidence

Witness Statements

Skatteforvaltningen (The Danish Customs and Tax Administration) v *Solo Capital* Partners & Ors [2020] EWHC 1624 (Comm)

In considering an application for summary judgment, Baker J provided litigants with substantial guidance on the correct approach to be taken to the preparation of solicitors' witness statements in the context of interim applications. In particular:

- The content and length of the solicitors' witness statements was such that they were "*to a substantial extent, not witness evidence, but argument.*" This was especially problematic where the parties had then gone on to reproduce those arguments in the form of "*lengthy and detailed skeleton arguments*", which had clearly resulted in the parties expending significant cost and effort. Specifically, one such witness statement:
  - included an eight-page summary setting out how the solicitor understood the pleadings; and
  - included six pages of propositions on why no duty of care was owed, all of which were "*self-evidently matters of argument, not fact*".
- Reference to contemporaneous documents and submissions as to what should be inferred from them was again a "*matter for argument, not for witness evidence.*" If contemporaneous documents were to be relied upon, they should be "*naturally and conveniently exhibited and identified through a main witness statement.*" Whilst the Court recognised that "*limited indications*" of what will be submitted to the Court in relation to certain documents may have their place, it found that the rule here should be "*less is more*".

The Judge requested that further copies of the witness statements be provided with the passages to be relied on as factual evidence highlighted.

These reflect the comments that had been made by Waksman J a few months earlier in relation to factual witness statements in his judgment in *PCP Capital Partners LLP v Barclays Bank plc* [2020] EWHC 646, summarised above. In that case, the Court ordered the parties to amend their statements so as to remove the offending paragraphs.

Meanwhile, the Witness Evidence Working Group, chaired by Baker J, produced a proposed draft Practice Direction 57AC and Appendix, which would apply to **trial** witness statements. Paragraph 3.1 of that draft provides that the content of witness statements should be limited to evidence of:

- facts that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial; and

- such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, in evidence in chief if they were called to give oral evidence at trial and rule 32.5(2) did not apply.

The draft Practice Direction also provides that witness statements should comply with the Statement of Best Practice contained in its Appendix, as well as with any relevant Court guide.

The draft also envisages a further enhanced statement of truth and a certificate of compliance to be signed by a legal representative. Paragraph 6.2 of the draft also makes express provision for the Court's power to strike out or withdraw permission to rely upon a statement, to order that the statement be redrafted or to order that a witness give evidence in chief orally.

The draft Practice Direction can be found here.

The Practice Direction has been approved by the Business and Property Courts Board and approved in principle by the Civil Procedure Rule Committee. Subject to some drafting points still under consideration, final approval is expected in January 2021, with the practice direction due to come into force on 6 April 2021.

Statements of Truth

The 113th Update to the Civil Procedure Rules came into force on 6 April 2020 and introduced a new Statement of Truth which includes wording emphasising the risk of proceedings for contempt of Court being brought against anyone making, or causing to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

That wording is set out in full at CPR Practice Direction 22, paragraph 2.1. This amendment has been reflected in the Statement of Truth for Witness Statements, at paragraph 2.2, and additional requirements have been introduced for witness statements in foreign languages (see CPR Practice Direction 32 para 23.2, and para 18.1-18.5).

The Statement of Truth for Expert Reports has been amended in line with the Statement of Truth for Witness Statements (see CPR Practice Direction 35, paragraph 3.3).

Hearsay

Punjab National Bank (International) Ltd v Techtrek India Ltd [2020] EWHC 539

In *Punjab National Bank*, the Court gave guidance on the level of detail required to be provided in relation to hearsay evidence referred to in a solicitor's witness statement.

The Court noted that "*it is a matter of considerable convenience that a legal representative is able to provide hearsay evidence for hearings… based on instructions*". Nevertheless, it found that CPR Practice Direction 32, paragraph 18, was not adequately complied with by stating that the source of a solicitor's information was an entity or officer thereof. Rather, the Court found, where the source of evidence was a person (and not documents), the person or persons "*must be identified and named.*" A failure to do so would mean that the Court has to consider whether to place any weight on that evidence.

Expert's Duties

A Company v X [2020] EWHC 809

The matter before the Court in *A Company v X* was whether an interim injunction which restrained the defendants from acting as experts for a third party in ICC arbitration proceedings against the claimant should be continued.

The claimant sought to continue the injunction on the basis that provision of services to the third party was a breach of the rule that "*a party owing a duty of loyalty to a client must not, absent informed consent, agree to act … for a second client in a manner which is inconsistent with the interests of the first.*"

The defendants opposed this primarily on the basis that experts owed no fiduciary duty of loyalty to clients, and there was therefore no conflict of interest. This was premised on the argument that to impose a fiduciary duty would be inconsistent with the independent role of the expert.

The Court found that, whilst an expert's paramount duty would be to the Court or tribunal, this was not inconsistent with an additional duty of loyalty to the client. In the circumstances, the Court found that "*a clear relationship of trust and confidence arose, such as to give rise to a fiduciary duty of loyalty*". On the facts, that duty applied to the whole of the defendant group and, the Court held, the duty had been breached.

Alternative Dispute Resolution

Early Neutral Evaluation

Lomax v Lomax [2019] EWCA Civ 1467

Whilst the Court's case management powers have, since 2015, extended to ordering parties to submit their case to an Early Neutral Evaluation, the High Court had, in the decision of *Lomax v Lomax* [2019] EWHC 1267 (Fam), held that the Court only had the power to make such an order (pursuant to CPR 3.1(2)(m)) in circumstances where the parties had consented to it. That decision was, in part, predicated on the Court of Appeal's ruling in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 that the Court did not have the power to order parties to refer a dispute to mediation, on the basis that it would pose an "*unacceptable obstruction on their right of access to the court*".

The Court of Appeal overturned the High Court's decision in August, finding that there was no reason to imply into the CPR provision "*any limitation on the court's power to order an ENE hearing to the effect that the agreement or consent of the parties is required*" because such an interpretation would be "*inconsistent with elements of the overriding objective*".

It remains to be seen whether this decision will form the basis for future reform in the context of mediation and other alternative dispute resolution processes. In the preface to the most recent edition of the White Book, Sir Geoffrey Vos has stated that:

"Lomax lays the basis for a principled and overdue reconsideration of the court's approach to mediation. As a matter of principle, it is difficult to see how, in the light of Lomax, Halsey can continue to be relied upon as justifying a rejection by the court of judge-led mediation….There is an increasing emphasis on ADR generally."

That increasing emphasis on ADR generally has been demonstrated in a number of further decisions.

Telecom Centre v Thomas Sanderson [2020] EWHC 368 (QB)

In *Telecom Centre v Thomas Sanderson*, for example, the Court produced a template order for parties ordered to submit to an Early Neutral Evaluation.

The Order provides for exchange of skeleton arguments and written evidence and for a core bundle of documents to be lodged. It further provides that the non-binding opinion of the judge is to be provided in such form as the judge decides, with that judge having no further involvement with the case unless the parties decide otherwise. It may be that this forms the basis for any future Early Neutral Evaluation orders.

Costs Consequences of Failure to Settle

The focus on encouraging parties to engage in alternative dispute resolution has also manifested itself in a number of costs decisions.

DSN v *Blackpool FC* [2020] EWHC 670

In *DSN v Blackpool FC*, a successful claimant sought indemnity costs, both pursuant to CPR 36.17(4), in relation to a Part 36 Offer which the claimant had bettered at trial, and pursuant to the Court's general costs discretion as a result of the defendant's conduct and, specifically, its refusal to participate in alternative dispute resolution.

The defendant had failed to respond to multiple Part 36 Settlement Offers and had failed to give reasons for its refusal to engage in a mediation, contrary to the specific terms of an order requiring it to "*consider settling this litigation by any means of Alternative Dispute Resolution*" and providing that, if it did fail to engage, it would have to give reasons for that failure. The Court found that the reasons given had been inadequate and amounted to no more than the defendant stating that it had a strong defence. The Court found that "*no defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution*".

In the circumstances, the Court ordered the defendant to pay costs on an indemnity basis for an additional one-year period prior to the making of the relevant Part 36 Offer.

BXB v *Watch Tower and Bible Tract Society of Pennsylvannia* & Anor [2020] EWHC 656 (Admin)

The Court reached a similar decision in *BXB v Watch Tower*. In that case, the defendant had failed to follow a Court direction requiring the parties to consider alternative resolution at all stages of the proceedings and had refused to attend a joint settlement meeting without having provided any reason for its refusal. On that basis, indemnity costs were ordered from the date on which the defendant had unreasonably refused to engage in alternative dispute resolution.

Wales (t/a Selective Investment Services) v CBRE Managed Services Ltd & Anor [2020] EWHC 1050 (Comm)

In *Wales v CBRE Managed Services,* the claimant had made an offer to engage in mediation prior to the issue of proceedings and again a month before trial. The Court considered that mediation would have offered a reasonable prospect of success and, on that basis, the first defendant's refusal to engage was unreasonable, even though the defendants were ultimately successful at trial. CBRE was, as a result, deprived of 50% of its costs in the proceedings up to the date on which it had made an offer to withdraw the claim. At that point, it had become "*incumbent*" upon the claimant to explore

available settlement options, and it was therefore liable for all of the defendants' costs up to the point at which the claimant had made another offer to mediate. From that point onwards, the claimant would only pay 80% of the defendants' costs.

Part 36 Offers

Burgess & Anor v Lejonvarn [2020] EWCA Civ 114

The Court considered the circumstances in which it should grant indemnity costs to a defendant for making an early Part 36 offer. Whilst, unlike a claimant, a defendant was not "*automatically entitled to indemnity costs when he beat his own Part 36 offer at trial*", a defendant could seek an order for indemnity costs on the basis that the claimant's refusal to accept that offer was so unreasonable as to be "*out of the norm*". This would be especially so if the offer to settle was made against the backdrop of a "*speculative, weak, opportunistic or thin claim*".

On the facts before it, the Court found that the claimants' failure to accept and to beat the defendant's offer having issued a "*speculative and weak claim*" was conduct which was "*out of the norm*" and which therefore justified an award of indemnity costs against the claimant.

Specifically, the claimants should have realised, within a month of hand down of a related judgment, that the claims it had remaining were "*very likely to fail*" and should not be pursued further. Moreover, the defendant having beaten its Part 36 offer was clearly a matter to be taken into account in the exercise of the Court's discretion under CPR Part 44, and the claimant's failure to accept it was a "*separate and stand-alone element of their conduct*" which would have justified an award of indemnity costs.

Campbell v Ministry of Defence [2020] Costs LR 13

The Court in *Campbell v Ministry of Defence* considered the appropriate costs order in a claim which had settled by way of the claimant's late acceptance of a defendant's Part 36 offer.

In doing so, the Court gave helpful guidance to practitioners on the approach to be taken to Part 36 offers received at a point where evidence was incomplete. In this case, the claimant sought to displace the usual costs order on the basis that the claimant was not able, during the relevant period, to quantify the claim in full (because it included a claim for loss of earnings which was dependent on the outcome of another application).

The Court found that the usual costs order should be made. Whilst the evidence was, during the relevant period, incomplete, it was the "*job of the claimant's advisors to weigh up the merits of the Part 36 offer*". If the advisors had concluded that quantification of the claim was not possible, the appropriate course of action would have been to have applied for the action to be stayed.

Essex County Council v UBB Waste [2020] EWHC 2387 (TCC)

In *Essex County Council v UBB Waste*, the successful claimant was awarded indemnity costs as a result of the defendant's conduct throughout the case. In particular, the defendant had:

- Made widespread allegations of a lack of good faith against the claimant and its officers, with no "proper foundation";
- Attempted to build "*a very substantial counterclaim*" which was in fact "*speculative, weak, opportunistic and thin*"*;* and
- Had knowingly called an expert who was "*obviously and seriously conflicted*", without declaring such conflict.

The Court also provided guidance on the approach to be taken where a Part 36 offer had been served after 4:30pm, such that the 21-day relevant period set out therein was reduced by a day as a result of the offer being deemed served a day later. Despite the Court's traditionally strict approach to Part 36 offers not meeting the requirements set out in CPR Part 36, the judge here found that "*a reasonable person having all the background knowledge available to the parties* would have known that the letter was intended to be a Part 36 offer and it was, in the circumstances, effective.

Relief from Sanctions

Wolf Rock (Cornwall) Ltd v Langhelle [2020] EWHC 2500 (Ch)

In *WolfRock v Langhelle*, the Court held that an application to admit late witness evidence should be treated like an application for relief from sanctions under CPR 3.9 and that the criteria established in *Denton v TH White Ltd* [2014] EWCA Civ 906 should therefore be applied by the Court in reaching its determination as to whether to admit the evidence in question.

The Court found that the "*obvious inference*" from an order that evidence be filed and served by a fixed deadline was that a failure to do so would result in that evidence not

being admitted without the Court's permission, even though the Order did not contain any express sanction.

Manning & Napier Fund, Inc & Anor v Tesco Plc [2020] EWHC 2106 (Ch)

A similar approach was taken to late service of supplemental witness statements in *Manning & Napier Fund*. In that case, which was a split trial, the claimants had only appreciated after the deadline for service of witness statements that certain issues were to be dealt with in the first trial and had sought to remedy this by way of service of supplemental witness statements.

The Denton relief from sanctions criteria therefore applied in considering whether permission should be granted to rely on that evidence. The Court described this as a "*considerable hurdle to surmount so late in the day*", and found that the application should be refused unless the Court could be satisfied that the parties would be able to comply with certain disclosure orders within a fixed time frame.

The Court refused to make an order for relief from sanctions until the parties had been able to comply with the disclosure orders and to make further written submissions on the evidence being permitted.

Covid-19

The Covid-19 Pandemic has had an unprecedented effect on the way in which litigation is being conducted in the United Kingdom. Whilst the long-term effect of the pandemic on the Court's caseload remains to be seen, significant progress has been made in the Court's approach to remote justice with the acceptance of electronic filings where that previously had not been the case and the adoption of remote hearings as the standard approach.

Guidance on Remote Hearings

The Court's protocol for remote hearings was updated on 26 March 2020, urging parties to be "*sympathetic*" to the technological and other difficulties experienced by others and giving guidance on the circumstances in which a hearing can be held in private and what steps should be taken for the hearing to be recorded. At the same time, a new Practice Direction 51Y entitled "*Video or Audio Hearings During Coronavirus Pandemic*" came into force.

The protocol also provides guidance for the approach to be followed by parties once a hearing has been listed and permits parties to make written submissions on the

appropriate format for the hearing in the event they do not agree with the Court's proposal. It also provides for a "*short remote case management conference*" to be held where necessary, for directions to be made for the conduct of the hearing and the technology to be used. The protocol also gives guidance on the use of electronic bundles.

The Court's guidance can be found here.

Civil Procedure Rule Amendments

The CPR has also been subject to a number of updates introduced to deal with the effects of the pandemic, including the introduction of **Practice Direction 51ZA**. Specifically, this included a temporary amendment to the rules concerning extensions of time, permitting parties to agree extensions to 56 days without the Court's permission and requiring the Court to take the pandemic into account in considering applications for extensions of time beyond the 56 days.

Future Reform?

Despite some initial teething problems with the adoption of remote hearings, responses have, by and large, been positive. The Lord Chief Justice's Report 2020, laid before Parliament on 3 November 2020, noted the impact of the pandemic and, whilst acknowledging that audio and video hearings may not always be suitable, noted that "*remote technology has been very effective, demonstrating the widespread benefits to be gained from modernisation*".

The response from practitioners has, on the whole, been positive. The Civil Justice Council's Report and Recommendations on the impact of Covid-19 measures on the civil justice system, following a "rapid review", found that 71.5% of participants had found their experience of remote hearings to be positive or very positive, though the majority found remote hearings to be less satisfactory due to issues such as difficulties communicating, a less fluent dialogue and some technical issues. In its first virtual seminar, held on 7 September 2020, the Commercial Court provided statistics on users' responses to virtual and hybrid cases, with 81% of respondents being of the view that procedural hearings of under 0.5 days should be remote by default and 58% saying substantial interlocutory applications should remain remote in some form.

Our full Covid-19 Resource Centre can be found here.

* * *

Please do not hesitate to contact us with any questions.

LONDON

Christopher Boyne
cboyne@debevoise.com

Emily Lodge
elodge@debevoise.com

Georgina Petrova
gpetrova@debevoise.com